NORTHERN IRELAND

LEGAL QUARTERLY

Joint Enterprise and Secondary Liability *(Sir John Smith)*

The Commodity of Justice in States of Emergency
(Clive Walker)

Making Private Violence Public *(John Murphy)*

Full table of contents inside

Vol. 50. No. 2 **Summer 1999**

NORTHERN IRELAND LEGAL QUARTERLY

Vol 50, No. 2 **Summer 1999**

CONTENTS

Joint Enterprise and Secondary Liability *(Sir John Smith)* 153

The Commodity of Justice in States of Emergency *(Clive Walker)* 164

Making Private Violence Public *(John Murphy)* 186

Punishment and Public Relations *(John E Stannard)* 204

The Principle of the Effective Protection of the Individual in EC Law and the Dialectic of European Integration Theory (*Constantin Stefanou and Helen Xanthaki)* 212

Surrendering to Trust *(Alison Dunn)* 234

The Brussels Convention: A Still Born Child *(Maria O'Neill)* 243

REVIEW ARTICLE

Susan Edwards: Sex and Gender in the Legal Process (Caroline Fennell) 254

BOOK REVIEWS

D.A. Cabana: *Death at Midnight* 272
J. Benedict: *Public Heroes, Private Felons* 276
A. Mayss & A Reed: *European Business Litigation* 278
J. Angel & I. Walden: *Telecommunications Law Handbook* 279

Published four times yearly by SLS Legal Publications (NI), School of Law, The Queen's University of Belfast, Belfast BT7 1NN, Northern Ireland.

ISSN 0029-3105

JOINT ENTERPRISE AND SECONDARY LIABILITY[1]

Professor Sir John Smith CBE, QC, FBA:

Emeritus Professor in Residence, University of Nottingham

There are two ways in which a person may be guilty of a crime. Either -

(i) he committed it; or

(ii) he aided, abetted, counselled or procured another to commit it.

The criminal is either a principal or he is "a secondary party" - a term coined by Glanville Williams in the first edition of his *Criminal Law: The General Part* in 1953, to comprehend aiders, abettors, counsellors and procurers.

Generally it does not matter which he is because, if he is a secondary party, he may, under section 8 of the Accessories and Abettors Act 1861 (or its Northern Irish equivalent), be indicted, tried and punished as a principal offender.

Principals

A principal is one who, by his own act or unlawful omission, causes the *actus reus* of the offence. For this purpose, A who procures B to commit the crime does not cause it. The man who engages a contract killer to murder his wife is a secondary party, not the principal offender. The reason is that a fully voluntary intervening act by a responsible person - in this case, the contract killer - breaks the chain of causation. For this reason, I have great difficulty with a recent case, *Kennedy*.[2] Kennedy [K] handed to Bosque [B] a syringe which K had prepared containing heroin and water. B, being aware of the contents of the syringe, injected himself and consequently died. It was held that K was guilty of manslaughter because he "assisted or encouraged" B to do the fatal act. But it was B's own act which caused his death. Death was not, in law, caused by K. B killed himself. There was a crime of self-murder - *felo de se* - at common law ; and a person could be guilty of murder by abetting suicide; but there has never been an offence of self-manslaughter. Assisting and encouraging another to commit a crime is secondary participation; but the act which K assisted B to commit was certainly not the crime of manslaughter, and probably not a crime at all. The court saw no reason why K should not have been convicted of administering a noxious thing to, or causing it to be taken by, another, contrary to section 23 of the Offences against the Person Act 1861. 1 see a very good reason why he should not be so convicted - simply that K did not administer the noxious thing to another, or cause it to be taken by him, as the Act requires. B administered it to himself and that was not the offence.

Joint principals

There may be more than one cause of an *actus reus* and more than one causer. Each causer is a principal. A and B both stab X who dies from the combined effect of the wounds A and B together plant a bomb which goes off and kills X. Each is liable for his own act, not only because he has

---

[1] The Annual Address for 1999 to the judiciary of Northern Ireland, February 16, 1999.

[2] [1999] Crim LR 65

aided and abetted the act of another, though he may have done that as well. Each is liable in accordance with the *mens rea* with which he caused the *actus reus.* To take a hypothetical case based on *McPhillips*[3] (a conspiracy case), suppose that, in the bomb example, B intends (and believes that A intends) that ample warning will be given to allow the area to be cleared, but A intends that no warning be given. The bomb goes off prematurely and kills V. A is prima facie guilty of murder, B of manslaughter. There is only one act of planting the bomb, but each of them does that act; and does it with a *mens rea* different from that of his co-actor. There is one death; but there are two principals and two distinct offences of homicide.

Parties to a joint enterprise who are present: are they principals?

Recently a theory has emerged that all parties to a joint enterprise who are present at the commission of the crime are, in the old terminology of felonies, all principals in the first degree, not secondary parties or accessories. This notion, though not expressed, probably lies at the root of a Law Commission recommendation that the whole law of aiding, abetting, counselling and procuring be abolished - section 8 of the 1861 Act would be repealed - and replaced by two substantive offences of assisting and encouraging crime, while - possibly, at least - leaving the common law of joint enterprise intact. Joint enterprise liability, according to this view, is something different from secondary liability. The Law Commission's opinion seemed to me to be misconceived. I do not believe it is possible to abolish secondary participation and leave the law of joint enterprise in existence. But the Commission's opinion seems to have been impliedly endorsed by Hobhouse LJ, now Lord Hobhouse, on more than one occasion. As a similar view has recently been taken by the greatly respected High Court of Australia in *Osland v R*[4] it is a matter which I will pursue a little further.

In Osland a woman and her son, David, agreed to kill her husband, the boy's stepfather. They dug a grave in preparation. They administered sedatives to the woman's husband and, when he was asleep, David, in her presence, killed him by a blow with an iron pipe . That seems a very clear case of murder by the son, aided and abetted by his mother. The jury convicted her of murder but they disagreed about David. We do not know why , of course, but both defendants had raised, what seem to me, very optimistic defences of provocation and self-defence. So the difficulty was that there was no proven murder for the woman to aid and abet. The conviction was upheld by a majority of five to two. McHugh LJ said that the law was accurately stated in an Australian text book, *Brett, Waller and Williams:*[5]

> "[Even] if only one participant performed the acts constituting the crime, each will be guilty *as principals [sic] in the first degree* [McHugh J's emphasis] if the acts were performed in the presence of all and pursuant to

---

[3] [1990] BNIL, Smith and Hogan, *Cases and Materials* (6th ed, 1996) 353.

[4] [1998] 73 ALJR 173.

[5] 8th ed, 1997, p 467. The authority cited is a summing-up to a jury by Smith J: *Lowery and King* (No 2) [1972]VR 560. It is, with respect, an excellent summing up, telling the jury just what they need to know in such a case. But it does not purport to be a complete exposition of the law. All that the learned judge said was that the parties were all equally guilty. Of course they were, as are all secondary parties. He did not say that parties acting in concert were "principals in the first degree".

> a preconceived plan. In that case, the parties are said to be acting in concert."

Alternatively it was suggested that the woman had contributed to causing the death, by her participation, particularly administering the sedative - something done by the woman to the deceased, which directly contributed to his death. I would have no difficulty with the second reason.[6] It is the first which concerns me because it appears to, say, be similar to that of Lord Hobhouse in *Stewart and Schofield.* (1995).[7] The appellants and Lambert [L] set out to rob a shopkeeper. L was armed with a scaffolding bar. He and Stewart went into the shop while Schofield kept watch outside. L killed the shopkeeper by blows with the bar. He was convicted of murder and the appellants of manslaughter. In the light of the summing-up, the verdicts imply that the appellants foresaw that L might cause *some* injury but did *not* foresee that the bar would, or might, be used with intent to cause *serious* injury. They relied, *inter alia,* on *Dunbar*.[8] There, the prosecution's case (which was not accepted by the jury)was that Dunbar hired X to kill Y. X killed Y and the jury convicted X of murder, but acquitted Dunbar of murder and convicted her of manslaughter. As the Court of Appeal said, the jury must have found that Dunbar contemplated the use by X of violence short of grievous bodily harm but that X went beyond that, and acted with intent to cause at least grievous bodily harm. Dunbar's conviction of manslaughter was quashed. If she was a party only to an agreement to inflict some harm less than grievous bodily harm, the killing with intent to do *grievous* bodily harm was not within the ambit of the agreement and she was guilty of neither murder nor manslaughter. She was not responsible for that unforeseen act. In *Stewart and Schofield* Hobhouse LJ, dismissing the appeals and disapproving of a passage in *Smith and Hogan* and two of my notes in the Criminal Law Review, said that *Dunbar* probably should not be categorised as a case of joint enterprise at all. He distinguished a party to a joint enterprise from, as he put it, a "mere aider and abettor, etc.," or secondary party:

> "In contrast where the allegation is joint enterprise, the allegation is that one party participated in the criminal act of another."

I criticised that ruling, asking how do you "participate in the criminal act of another" except by assisting or encouraging that act? - that is, by aiding, abetting, counselling or procuring it. Suppose that A, B and C agree, and set out, to rape V. A and B hold her down while C has intercourse with her. How can A and B participate in the act of sexual intercourse except by assisting or encouraging C to do it? Of course they are all guilty - equally guilty - of rape; but are we really required to pretend that A and B had intercourse? It is no different in principle if A, B and C set out to kill and C fires the fatal shot. How do you participate in the act of pointing the gun and pulling the trigger - except by assisting or encouraging another to do it?

It seems there is only one possible ground of distinction between *Dunbar* and *Stewart* - Dunbar was not present, Stewart was. But the Court of Appeal had already decided in *Rook*[9] that the same principles apply to an absent secondary party as to one who is present. *Rook* was not cited to the Court in *Stewart and Schofield* and I ventured to suggest that Hobhouse LJ

---

6 *Cf S v Masilela* 1968 (2) SA (AD)
7 [1995] 3 All ER 159.
8 [1988] Crim LR 693.
9 [1993] 2 All ER 955.

would have decided differently if *Rook* had been cited. I was wrong again.

Hobhouse LJ returned to the subject in a civil action - *Generale Bank Nederland NV v Export Credits Guarantee Department*[10] [1998] 1 Lloyd's Rep at pp 42-44. He relied particularly on *Macklin*[11] (1838) where a group of persons attacked a constable, some with sticks, some by throwing stones and some with their fists. Alderson B directed the jury that it is a principle of law that: "...if several persons act together in pursuance of a common intent, every act in furtherance of such intent by each of them is, in law done by all." This formulation of the law goes back at least to the early 17th century. Hale, *Pleas of the Crown*, 1, 463 refers to a case where one of a number of rioters killed a constable's assistant and it was unanimously agreed at the King's Bench -

> "That, altho the indictment were, that B gave the stroke, and the rest were present aiding and abetting, tho in truth C gave the stroke, or that it did not appear on the evidence which of them gave the stroke, but only that it was given by one of the rioters, yet the evidence was sufficient to maintain the indictment, for in law it was the stroke of all that party according to the resolution in Mackally's case. 9 Co Rep 67 b."

Hobhouse LJ went on

> "Thus persons who participate in a criminal joint enterprise are, through *the attribution to them of the actus reus*,[12] in reality joint principals with the primary actor. However since the primary actor has himself committed a criminal offence, there is a tendency to treat him alone as the principal and all the others as mere accessories."

This is not merely "a tendency." It is ancient law. Parties who were present at the commission of a felony were originally described as "accessories at the fact." Only the actual perpetrator was the principal. The rest were accessories, before, at, or after the fact, as the case may be. The later change of name to principal in the second degree made no difference of substance.[13] The liability of the aider and abettor present at the commission of the crime continued to derive from that of the principal it was in the nature of accessory, or, as Glanville Williams has it, secondary, liability. There is abundant and consistent authority for this in the writers of authority. I cite only the great Fitzjames Stephen writing, in the last edition under his own hand (1886), of his *Digest of the Criminal Law*, Art 38, headed "Common Purpose."

> "When several persons take part in the execution of a common criminal purpose, each is a principal in the *second* degree, in respect of every crime committed by any one of them in the execution of that purpose."

---

[10] 1 Lloyd's Rep at 42-44.

[11] (1838) 2 Lewin CC 225; 168 ER 1136.

[12] Author's italics.

[13] "Where two or more are brought to justice for the same felony, they are considered in the light of principals in the first degree, *as having actually and with their own hands committed the fact;* or of principals in the second degree, as having been present aiding and abetting at the commission of it; or of accessories before or after the fact: Foster, *Crown Law*, 3rd ed. 1809, 347. (My italics). See to the same effect *Russell on Crime* (3rd ed., 1843) 26.

Hobhouse LJ's "attribution" to A and B of the actus reus, in fact committed only by C, seems to mean that we have to pretend that A and B killed V, which they did not.[14] It is another way of saying, as the High Court of Australia did in *Osland*, that they are all principals in the first degree. This is a fiction and fictions should have, and I believe do not have, any place in modern criminal law. Of course, *responsibility* for the victim's death is attributed to A and B - because they "aided, abetted counselled or procured it" - but that is entirely different and quite proper. That is the simple law which, in my opinion, was applied in *Macklin*.

In *DPP for Northern Ireland v Maxwell*[15] the House of Lords reminded lawyers that the stroke of one is not in fact, or in law, the stroke of all the parties to an offence, and that, whenever possible, the actual mode of participation of each should be specified in the indictment.[16]

The true position in cases like *Macklin*, it is submitted, was recently expounded by Beldam LJ:[17] when a group of persons make an attack on another, the only reasonable inference may be that they have the common purpose of harming him. Each encourages or assists the others by his participation. If an injury is caused, anyone who caused it is liable, but all of them, whether principals or not, are liable to conviction because each assisted or encouraged the others. Some may be both principals and accessories, some only accessories. It does not matter. So long as the jury are satisfied that a particular defendant was one or the other, they must convict him. No fictitious "attribution" is involved or needed.

Attribution to a party of the actus reus, or responsibility for the actus reus?

Does it matter whether the act, or only responsibility for the act, is attributed to a party in a joint enterprise? It may, where A has caused the *actus reus* with an intent materially different from, and more serious than, any foreseen by B. B is not liable for that more serious offence because he lacks the necessary *mens rea.* But, if B were to be deemed to have committed the *actus reus,* to have done the act with his own hand, then he might be convicted as a principal of the lesser offence for which he had the *mens rea.* In addition to the undesirability of fictions, a powerful objection to this theory is that, because P acted with a fundamentally different intent, the act itself is fundamentally different. The facts of *Murtagh and Kennedy*[18] provide a useful illustration. M and K, engaged in a feud with another gang, were charged with murder by running down X in a car in which M was the driver and K the passenger. The jury were properly directed that driving a car at a person with intent to kill him or cause him serious injury would be murder but that, if the intent was to drive near to X, so as to terrorise him, it would be manslaughter. The jury convicted M of murder and K of manslaughter. Both convictions were

---

[14] In *DuCros v Lambourne* (1906) 21 Cox CC 311, 316 Darling J is reported to have said of the owner of a car sitting beside the driver who was exceeding the speed limit, "It seems to me a misuse of language to say he was not driving the motor-car." But he wisely had second thoughts and this sentence does not appear in his revised judgment in [1907] KB 40, 46. The gross misuse of language would be to describe the passenger as the driver.

[15] [1978] 3 All ER 1140.

[16] This advice has been "universally ignored," according to the Court of Appeal in *Taylor* [1998] Crim LR 582.

[17] *Greatrex and Bates* [1999] 1 Cr App R 126. Beldam LJ made a similar analysis in *Uddin* [1999] 2 All ER 744 at 751.

[18] (1955) 39 Cr App R 72.

quashed on other grounds which are irrelevant for present purposes. The verdicts, however, implied that M, the driver, intended to run X down but that K intended only that the car be driven close so as to frighten him. Surely these are fundamentally different acts. M and K were clearly engaged in an unlawful joint enterprise in a feud with V; but how can we attribute M's act of running V down to K in view of the implicit finding that K did not intend and no finding that he foresaw any such act?[19] In the bizarre South African case of *Robinson,*[20] X had agreed with A and B that he must die, apparently murdered, in order to solve their pressing financial problems by getting the insurance monies. A was to shoot X in the back of the head. A and B had the common purpose of committing murder. At the last minute, X withdrew his consent to die. A, in B's, absence shot him in the back of the head. B, in the opinion of the majority of the court, was not liable for a killing which was fundamentally different from that contemplated.

Lord Hobhouse's theory and the decision in *Osland* are, I suggest, objectionable on two grounds. First, they involve a fiction, and fictions should have no place in modern criminal law; and, second, they would re-introduce the distinction between presence and absence which I thought we had got rid of in 1967, with the abolition of the law relating to felonies. It is a primitive distinction, with no moral content, which we can well do without.

The theory is more plausible (but equally unsound) where the physical act done by A is that contemplated by B but A has the *mens rea* of a more serious offence, perhaps because he knows more about the circumstances than B. A and B agree to inflict a slight wound to V. A knows, but B does not, that V is a haemophiliac. A inflicts the slight wound and V bleeds to death. But even here, scratching a haemophiliac is a fundamentally different act from scratching a person not so afflicted. Shooting a consenting person in the back of the head is fundamentally different from shooting a non-consenting person.[21] Similarly, it is submitted, if B supplies A with a substance for administration to V, believing that it will cause V minor discomfort and A administers it, knowing that it is a deadly poison. The substance is the same, but the administration of an emetic is fundamentally different from the administration of a deadly poison.[22] In determining the nature of the act, the physical movements cannot be divorced from the circumstances in which they are done.

Stephen's Art 38 which I quoted earlier as saying that a party taking part in the execution of a common criminal purpose is a principal in the second degree in respect of every crime committed by any of the parties in the execution of the common purpose, goes on:

> "If any of the offenders commits a crime foreign to the common criminal purpose, the others are neither principals in the second degree nor accessories unless they actually instigate or assist in its commission."

But what is a crime "foreign to the common criminal purpose"? It has always been the law that secondary parties were liable for some acts going

---

[19] Today a full direction would have told the jury to consider whether, if K did not intend M deliberately to run down V, he knew there was a real risk that he would do so.

[20] *S v Robinson 1968* (1) SA 666.

[21] *S v Robinson,* supra.

[22] 1n the converse situation B is guilty of murder and A of manslaughter. A is a "semi innocent agent" and both are principals: *Burke* [1986] 1 All ER 833 at 839-40, Smith and Hogan, *Criminal Law* (8th ed, 1996), 153-155.

beyond the common purpose. Foster wrote in his authoritative *Crown Law*[23] in 1792, ".... whenever the principal goes beyond the terms of the solicitation, if in the event the felony committed was *a probable consequence* of what was ordered or advised, the person giving such orders or advice will be an accessory to that felony."

Stephen in Art 41 stated the law in similar terms and so did contemporary editions of *Russell on Crime,* applying the same rule to principals in the second degree. But, since the decision of the Privy Council in 1984 in *Chan Wing-siu* it has become clear that the law is less strict. It is not sufficient that the crime in question was a probable consequence of the crime intended - an objective test. It must be proved that the alleged secondary party foresaw that it might be committed by the principal. In two appeals heard together *Powell and another* and *English,*[24] the House of Lords confirmed the principles of secondary liability, applicable in crimes generally, as stated in *Chan Wing-siu.* The characteristic of a joint enterprise is that the parties have a common purpose to commit an offence. It is not merely that each intends to commit the same offence; each is aware and supportive of the intention of the others. Proof of a common purpose imports that intention to assist or encourage the actual perpetrator which is the essence of secondary participation. No further evidence is necessary. It is appropriate to consider such cases separately.

(a) Where the parties have a common purpose to commit an offence (crime X) -

(i) B is liable for the commission by A of that crime (X) and

(ii) B is also liable for a crime (Y) which it was not their common purpose to commit if B knew that A *might* do - there was a real risk that he would do - an act of the kind which he did, and which resulted in crime (Y), while committing the crime (X) which it was their common purpose to commit. In a recent article,[25] simply to facilitate discussion, I have called the former "basic accessory liability" and the latter "parasitic accessory liability." A and B have the common purpose of committing burglary and B knows that there is a real risk that, in the course of committing the burglary envisaged, A might do an act with intent to cause grievous bodily harm. A does an act of the kind foreseen and kills. There was no common purpose to commit grievous bodily harm, but B, whether present or absent, is guilty of murder. If B knows that, in the course of committing the burglary, A may act with intent to kill and A does so, both are guilty of attempted murder though there is no common purpose to commit murder.[26]

(iii) B is not liable for a crime (Z) committed by A in the course of committing crime (X) if the relevant act done by A was of a materially different kind from any act foreseen by B. In *English* A and B both armed themselves with stakes to attack a constable. B knew that A might intentionally cause grievous bodily harm with a stake. If A had done so, B would have been liable to conviction under section 18 of the Offences against the Person Act 1861 and, if the constable had died, of murder. But A killed the officer with a knife which B did not know he had. In those circumstances, B was not guilty of murder, or of manslaughter, unless the jury was satisfied that the act causing death was not fundamentally

---

[23] 3rd ed. 1809, 370.
[24] [1997] 4 All ER A5, [1998] Crim LR 48.
[25] "Criminal Liability of Accessories: Law and Law Reform" (1997) 110 LQR, 453, 454-5
[26] O'Brien [1995] Crim LR 734.

different from any act which he envisaged when engaging or taking part in the joint enterprise. English's conviction was quashed because it was not left to the jury to decide. Both a stake and a knife may be used to cause grievous bodily harm; but a jury might think there is a fundamental difference, because a knife is so much more likely to kill. A person may well agree to take part in a joint enterprise involving the use of one, but not the use of the other.

The question whether B knew that A had a knife was of crucial importance in *English* as it has been in many similar cases. If B did not know that, he could hardly have foreseen an act of the kind that was done. But the fact that B knows that A has a particular weapon should not be regarded as conclusive of guilt when that weapon is used. Lord Hutton delivering the principal speech in *English*, applying the decision of Carswell J, as the Lord Chief Justice then was, in *Gamble*,[27] accepted that, if A and B set out with the common purpose of "kneecapping" V with a shotgun (an act which will certainly amount to grievous bodily harm but is unlikely to cause death) and A produces a knife, which B did not know he had, and cuts V's throat, B is not liable for that unforeseen and fundamentally different act. But other decisions and *dicta* approved by the House suggest that if A were to use the shotgun, not to kneecap V, but to blow his brains out, B would be liable because he contemplated the use of a shotgun. The fact that the use of a particular weapon is contemplated may be a very important factor, but it should be no more than a factor, in deciding whether the act done is fundamentally different from any act contemplated by B; and, for example, the act of frightening, even with a loaded gun, is surely fundamentally different from firing the gun intending to kill.

Some cases decided before *English* must now, I think, be regarded as of doubtful authority. *Stewart and Schofield* is one. In *Li and others*[28] five members of a Triad gang set out to take action against a man, E. Four of the gang intended to murder him by shooting but the fifth, S, we must take it, believed that E was only to be frightened; but frightened by the firing of a loaded gun. E was murdered. S was convicted of manslaughter. The jury, having been properly directed on the law of murder, were not satisfied that he foresaw a real risk that the gun would be fired with intent to kill or cause grievous bodily harm. His conviction of manslaughter was upheld because he knew that a loaded gun might be fired. Shooting to kill was not, thought the court, a complete departure from the enterprise; but should not, at least, that have been left to the jury to decide? And could a jury reasonably find that shooting to kill is not fundamentally different from shooting to frighten? There is all the difference in the world from the point of view of the person at the wrong end of the gun.

English was valuably interpreted by the Court of Appeal in *Uddin*[29] and in *Greatrex*.[30] To take three of the important points.

(1) If the weapon used by A was different from, but as dangerous as, the weapon contemplated by B, B should not escape liability on that ground. In *Greatrex* it was held that it should have been left to the jury to decide whether kicking with "a shod foot," which was contemplated by B, was fundamentally different from striking with a bar or spanner, which was what happened and was not contemplated by him.

---

[27] [1989] NI 268.
[28] (96/5461/W3, 25 /7/97, Crim App Office index supp., C-20).

[29] [1998] 2 All ER 744.
[30] [1999] 1 Cr App R 126.

(2) If the injury inflicted by A was of *an entirely different type* from any contemplated by B, B was not liable. That seems to cover the case where B contemplates the use of the shotgun to kneecap V but A uses it to blow V's brains out.

(3) If the fatal act done by A was fundamentally different from any foreseen by B, B is not liable for murder *or manslaughter*. This point has been confirmed by *Mitchell and King*.[31] Some critics disagree, and it means that several cases which have not been formally overruled are wrongly decided as in *Li's case* which I have discussed; but, in my opinion, it is right in principle. B cannot be guilty of homicide unless he was *responsible for the act causing death,* either by doing it or being an accessory to it.

(b) Where there is no common purpose.

The application of parasitic liability has been considered so far only in relation to joint enterprise cases - cases where there is a common purpose, whether planned or formed on the spur of the moment. Probably most accessory liability depends on the existence of a common purpose, but not all. B may give assistance or encouragement to A to commit an offence without in any way sharing his purpose to commit it. B may sell A equipment, knowing that A intends to use it to commit burglary, or a gun, knowing that A intends to use it to kill, being completely indifferent what A does and interested only in the profit to be made on the sale.[32] Or B may give assistance to A of which A is unaware. Coming by chance upon A assaulting a constable, B trips up a second constable who was running to the aid of the first. Or, being told by A that he is going to commit a certain crime, B encourages him: "Good. Do that."[33] In all of these cases, B is liable for the crime which he knows A intends to and does commit. What if he knows that there is a real risk that, in the course of committing the intended crime, P will commit - and he does commit - some other more serious offence? A recent case suggests parasitic liability applies, at least to the aider.

In *Reardon*[34] A shot two men, X and Y, in the bar of a public house and carried them, both dying, into the garden. He returned to the bar, said to B that one of them was still alive and asked B for the loan of his knife. B handed A a knife with a six inch blade which A took into the garden. Medical evidence established that both men would have died from the gunshot wounds but both in fact died from stab wounds inflicted with B's knife. B appealed against his conviction on two counts of murder. He argued that he had loaned the knife to kill only the one person whom he believed to be still alive. He relied on a passage in *Smith and Hogan*:[35]

> "If [B] aids, abets, counsels or procures [A] to commit a crime against a particular person,... [B] is not liable if A intentionally commits an offence of the same type against some other person..."

The court did not dispute this proposition but held there was a further question (the *Chan Wing-siu/English* question):

---

[31] No 9705605, 24/7/98.

[32] *National Coal Board v Gamble* [1958] 3 All ER 203 at 209, per Devlin J.

[33] This is enough, according to *Giannetto* [1997] 1 Cr App R 1 at 13, [1996] Crim LR 722.

[34] No 9601499 Z4, 19 Feb 1998 (Beldam LJ, Johnson and Rix JJ)

[35] *Criminal Law* (8th ed, 1996) 142.

> "Did [B] foresee at least the strong possibility that if [A] found that the other deceased was still breathing and alive, he might use the knife in the same way, and if he did so was that an act by [A] of a type which this appellant foresaw but did not necessarily intend?"

This was a jury question which, in the court's opinion, had been answered in the affirmative. If the jury had answered the question, no, there then would have been great force in B's submission[36] that he could be convicted of neither murder. Certainly it was a case of both or neither, for there was no way of distinguishing between the victims. B did not know which murder he was aiding. If A had said, "X is still alive," B would certainly have been guilty of the murder of X, but not guilty of the murder of Y, unless the *Chan Wing-siu* question were answered in the affirmative. There is no suggestion of common purpose between A and B to kill either X or Y. So the case decides that parasitic liability applies to the aider, even where there is no common purpose. The parasitic offence here was of the same gravity as the intended offence, but the principle is the same. If B had loaned A the knife for the purpose of threatening V, knowing there was a real risk that A would use it to kill V, and he did, it must follow logically that B would be guilty of murder.

If B, when he trips up the officer coming to the aid of his colleague, A, knows that A habitually carries a knife which he is likely to use against a policeman, B would seem to be liable for the wounding which follows - and for murder if he knew there was risk that A would intentionally cause serious injury with the knife. It is at least possible then that parasitic liability is not confined to joint enterprise or common purpose cases but extends across the whole range of accessory liability.

There is a strongly held view that, even before *Reardon,* the law relating to the liability of the accessory stretched too far. This is a matter which will certainly engage the attention of the Law Commission when it returns to the subject. But reform of the law is a problem for another day.

---

[36] Per Mr J Perry QC.

THE COMMODITY OF JUSTICE IN STATES OF EMERGENCY

Professor Clive Walker, Director of the Centre for Criminal Justice Studies, University of Leeds.

Emergency cases arise from extraordinary circumstances and extraordinary laws. Their very existence may be marked by derogation under international law,[1] while in national law they are quarantined under such labels as "Temporary Provisions" and "Emergency Provisions"[2] and are widely viewed as "Draconian"[3] or even "extremely Draconian".[4] How then to achieve justice in such foreboding circumstances? One answer[5] is that justice cannot be achieved by traditional means alone, and so there has to be an augmentation of justice both by lawyers exploring non-traditional fields and equally by non-lawyers entering the legal fray. Our aim must be to achieve "constitutional governance",[6] a term I have explained elsewhere as including a rights audit, democratic accountability and constitutionalism.[7] So, the remainder of this article will show how these abnormal forms of intervention are developing, and how they may be viewed, at least in the context of emergency situations, as perhaps inevitable and possibly beneficial.

THE LIMITS OF ADJUDICATION

The first step in the argument is that legal justice by way of traditional adjudication cannot respond adequately to emergency cases. There may be several reasons for this. They certainly include the difficulties of fact-finding and fact-establishment in such cases, as when public interest immunity certificates are issued[8] or when investigators are met with "walls of silence" by cohesive units of security forces.[9] The sensitive nature of the information in emergency cases has been cited by many reviewers

---

1 For those pertaining to the UK, see especially Human Rights Act 1998 sched.2.

2 See Prevention of Terrorism (Temporary Provisions) Act 1989; Northern Ireland (Emergency Provisions) Act 1996.

3 H.C. Debs. Vol. 882 col. 35, 25 November 1974, Mr Roy Jenkins.

4 This description was applied by the Taoiseach, Bertie Ahern, to the Offences against the State (Amendment) Act 1998: *The Times* 20 August 1998 p.1.

5 Others include of course a redesign of the provisions or even their abolition. See C.P. Walker, "Anti-terrorism laws for the future" (1996) 146 *New Law Journal* 586, 657.

6 Compare: C. Walker, *The Prevention of Terrorism in British Law* (2nd ed., Manchester: Manchester University Press, 1992) pp.21-22; J.A. Tapia Valdes, "A typology of national security policies" (1982) 9 *Yale J. of World Public Order* 10 at pp 35, 36.

7 C.P. Walker, "Constitutional governance and special powers against terrorism" (1997) 35 *Columbia Journal of Transnational Law* 1.

8 See C.P. Walker, with G. Robertson, "Public interest immunity and criminal justice" in C.P. Walker and K. Starmer, *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) chap.8.

9 See *McCann* v *UK*, App. no.18984/91, Ser A no.324, (1996) 21 EHRR 97. One response from the Strasbourg institutions has been to alter the burden of proof in such cases: *Tomasi* v *France*, App. no.12850/87, Ser. A no. 241-A para.110; *Ribitsch* v *Austria*, App. no.18896/91, Ser. A no. 336, para. 34; *Aksoy* v *Turkey*, App.no 21987/93, Reports 1996-VI, para.61.

(and by many judges[10]) as an obstacle which blocks more effective judicial intervention:[11]

> "It is intelligence information, whose disclosure may involve unacceptable risks. Information which is specific about a person's participation in an act of terrorism may be known to only two or three people. It could, without difficulty, be traced back to its source if it became known to the subject of the exclusion order or to a wider circle of his associates and friends. From this might follow the death of the informant. The flow of information which can lead, and in many cases has led, to convictions in the courts would be endangered."

Next, there may be intimidation - both of individuals who wish to complain or have complained to the legal authorities and of their lawyers. The intimidation may emanate from non-state actors, such as paramilitary groups,[12] or from state agents. As regards the latter, intimidation is said to have arisen through allegations of intentional collusion between lawyer and paramilitary suspect. No evidence of such collusion has ever been put before a court, nor has any lawyer ever been charged or disciplined as a result of such misconduct. Nevertheless, a Home Office Minister (Douglas Hogg) once hinted at it,[13] and it is alleged that the police often explicitly denigrate specific solicitors to their potential detainee clients so as to deny or defer effective access to independent legal advice and redress. Some of the consequences have allegedly included the murder of two prominent defence solicitors, Pat Finucane, by the Ulster Freedom Fighters in 1989,[14] and Rosemary Nelson, by the Red Hand Defenders in 1999.[15] Next, there is the difficulty of recognising the bigger picture - in other words, systematic patterns of wrongdoing rather than individual lapses. Finally, the special passion and sensitivity of terrorist cases brings extra problems, including a disinclination on the part of the judges to challenge the executive. Not only are they dealing with national security, but it is national security in a time of perceived crisis. So, the tendency is towards terse, assertive judgments which are deferential to security concerns.[16]

---

[10] But see *R* v *Secretary of State for the Home Department, ex p, McQuillan* [1995] 4 All E.R. 400.

[11] Review of the Operation of the PTA 1974 and 1976 ("Shackleton Report"), (London: Cmnd.7324, H.M.S.O., 1978) para. 52, quoted with approval in *R* v *Secretary of State for Home Affairs, ex parte Stitt The Times* 3 February, (1987) (Q.B.D.). See also: L. Lustgarten, and I. Leigh, *In From the Cold* (Oxford: Clarendon Press, 1994) chap.12.

[12] See L. Kennedy, (ed.), *Crime and Punishment in West Belfast* (Belfast: The Summer School, 1995); M. Matassa, "Rough justice" (1997) *29 Criminal Justice Matters* 24-25.

[13] HC Debs. Standing Committee B col.508, 17 January 1989.

[14] See the Pat Finucane Centre web pages (http://www.serve.com/pfc/); Lawyers' Committee for Human Rights, Human Rights and Legal Defence in Northern Ireland (New York, 1993) chap.2; Report of the International Human Rights Working Party of the Law Society of England and Wales, Northern Ireland: An Emergency Ended? (1995) pp.23-33; ; Report on the Mission of the Special Rapporteur to the United Kingdom of Great Britain and Northern Ireland (E/CN.4/1988/39/Add.4, Geneva, 1998) paras.62-74.

[15] *The Times* 16 March 1999 p.1

[16] See: S. Livingstone, "The House of Lords and the Northern Ireland Conflict" (1994) 57 *Modern Law Review* 333.

As well as these particular problems endemic to security situations, there are other difficulties which may be held in common with other attempts to litigate civil liberties issues in the United Kingdom courts by the use of administrative law - at least until the Human Rights Act 1998 comes into full swing.[17] These include the fact that litigants are forced to pitch their cases around inappropriately hostile, narrowly technical and irrelevant sites, rather than being able to confront the rights issues head on.[18] Next, no special weight is accorded as such to the right which is under threat. It may be part of English common law, but it certainly does not gain any sanctity by being domesticated in this way and often will seemingly be outweighed by more specific and quantifiable interests in national security.[19] Next, the courts can only speak about rights reactively and in response to litigation which is "largely a matter of chance."[20] Another problem is that the procedures and remedies in domestic litigation are more geared towards property claims than autonomy claims. As for remedies, "treat me with respect" involves much more imagination on the part of courts than "return my goods" or "compensate me for my injury."

Clearly, domestic judicial review, at least as currently constituted, is unlikely to pick up anything other than the isolated and fairly blatant abuse. The cases are manageable in that they involve an individual and inquiry about that individual, but the judges have not been effective rights auditors. In any event, no matter how adventurous the judges may wish to become, court-rooms have very limited possibilities in English law as the venue for democratic accountability or even the broader aspects of constitutionalism.

Despite all these shortcomings, the focus of a majority of legal commentators for many years has been upon cases arising via traditional adjudication. We would read the judicial runes and pick over their judgments for textual correctness and for signs of liberal or repressive tendencies. Probably the leading analyst of the performance of the Northern Ireland judiciary is Professor Brice Dickson. He has given us some excellent insights into the small and necessarily insulated world of the Northern Ireland judiciary through his books on the legal system in that jurisdiction.[21] Furthermore, in an important paper in 1992, he analysed the role and performance of the Northern Ireland judges during "The Troubles".[22] He found a mixed record, with rather permissive

---

[17] See C. Baker, *Human Rights Act 1998* (London: Sweet & Maxwell, 1999); P. Duffy, S. Grosz, J. Beatson, *A Guide to the Human Rights Act 1998* (London: Sweet & Maxwell, 1999); J. Wadham, and H. Mountfield, *Blackstone's Guide to the Human Rights Act 1998* (London: Blackstone Press, 1999). For the first indications of a more robust judicial attitude based on human rights, see *R* v *D.P.P., ex p. Kebilene* (1999) *The Times* 31 March.

[18] The relevant procedural rules are set out at: Rules of the Supreme Court Order 53 (1977) S.I. No. 1955; 1980 S.I. No. 2000); Supreme Court Act 1981 s.31.

[19] *R* v *SSHD, ex p. Brind* [1991] 1 AC 696.

[20] Lord McCluskey, *Law, Justice and Democracy* (London: Sweet and Maxwell, 1986) p 5.

[21] See B. Dickson, *The Legal System of Northern Ireland* (3rd ed., Belfast: SLS, 1993) chap.1. See also "Northern Ireland's legal system - an evaluation" (1992) 43 *Northern Ireland Legal Quarterly* 315.

[22] B. Dickson, "Northern Ireland's Troubles and the Judges" in B. Hadfield, (ed.), *Northern Ireland: Politics and the Constitution* (Buckingham: Open University Press, 1992). See also S. Livingstone, "Policing, Criminal Justice and the Rule of Law" in J. Hayes, and P. O'Higgins, (eds.), *Lessons from Northern Ireland* (Belfast: SLS, 1990) p 87.

interpretations in regard to police powers (to arrest or to apply force) but more assertive rulings once the person is in custody and especially where matters of admissibility impact upon the nature of trials and therefore the public's perceptions of judges (for example, confession and "supergrass" evidence).[23] In summary, the Northern Ireland judges are found to be "pro-Establishment" but that is rightly suggested to be a characteristic shared almost universally by judges and is found to be less pronounced than in the performance of the House of Lords when hearing cases from the Province.[24] A similar mixed record was the conclusion of a paper by Charles Hill and Simon Lee for the Standing Advisory Commission for Human Rights around the same time.[25] Taking further the comparison of Northern Ireland and House of Lords judges, Stephen Livingstone, in a paper in 1994,[26] dissected the performance of the House of Lords and complains of rather short, technical judgments which simply adopt the world view of the security forces.[27] More recently, Brice Dickson has launched another probe into the judicial firmament by asking, perhaps as an indicator of pro-Establishment fixity, to what extent have the Northern Ireland judiciary been influenced by the European Convention and how they have used it in their judgments.[28] Here, the picture is less dynamic, and he feels that they have been less adventurous than their uninspiring English counterparts.

To summarise, adjudication has continuing importance as central to the role of the judiciary in emergency cases. It inherently recognises the importance of individuality and determines its rightful place in our society. Additionally, the judges, unlike politicians, have to give a dispositive answer to the litigants appearing before them, and the result is to accord human interest and drama to their decisions which bring with them attention and respect. On another level, the courts can also be used as an important forum, alternative to the usual political channels, for challenging the priorities and discretions of the government and its agents. At the same time, the critics have pointed to a failure to exploit this position of authority on behalf of the individual against the state, and so they have tended to doubt the transformative impact of the hundreds of judgments from Northern Ireland over nearly three decades of security-based disputes. So, Stephen Livingstone sees the judges as at best "potential assistants rather than essential guardians of ...rights."[29]

---

[23] See also G. Hogan, and C.P. Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989); S. Greer, *Supergrasses* (Oxford: Clarendon Press, 1995), J. Jackson and S. Doran, *Judge without Jury* (Oxford: Clarendon Press, 1995).

[24] B. Dickson, "Northern Ireland's Troubles and the Judges" in B. Hadfield, (ed.), *Northern Ireland: Politics and the Constitution* (Buckingham: Open University Press, 1992) pp 136, 144.

[25] "Without fear or favour? Judges and human rights in Northern Ireland" in SACHR, 18th Report (1992-93 H.C. 739) Annex B.

[26] S. Livingstone, "The House of Lords and the Northern Ireland Conflict" (1994) 57 *Modern Law Review* 333.

[27] *Ibid* at p.350. For the latest case, see *O'Hara* v *Chief Constable of the RUC* [1997] 1 Cr App R 447.

[28] "The European Convention in Northern Ireland Courts" [1996] *European Human Rights Law Review* 496. For the performance of English judges, see M. Hunt, *Using Human Rights in English Courts* (Oxford: Hart Publishing, 1997)

[29] S. Livingstone, "The House of Lords and the Northern Ireland Conflict" (1994) 57 *Modern Law Review* 333 at p.360.

Yet, it would be misleading to think that the judges have achieved nothing of significance. They have positively secured some important changes, such as the opening up of access to solicitors,[30] though one can always think of some equally negative series of cases such as those on coroners' powers.[31] And there is undoubtedly a failure to respond to a larger picture, such as when the Northern Ireland Court of Appeal solemnly sat through case after case in 1976 and thereafter in which confessions were disputed but without any wider inquiry into what was happening at the Castlereagh Holding Centre, the eventual investigation into which was far more attributable to investigative journalism than inquisitorial judicialism.[32] They also failed to act with sufficient robustness to prevent the changes to the "right to silence" in 1988,[33] but ironically did block the use of judicial officers to review detentions under section 14 of the Prevention of Terrorism Act, an outcome which would arguably have safeguarded liberty and avoided a more permissive derogation in international law.[34] In sum, all of the problems outlined earlier have applied here and have tended towards the marginalisation of judicial adjudication as a force for change or constitutional governance in emergency cases.

AN AUGMENTATION OF JUSTICE BY LAWYERS

Can lawyers compensate for the limits on traditional adjudication by the utilisation of more varied techniques to achieve justice? This phenomenon in its widest sense is marked by the number of lawyers in the House of Commons - more than ever and more prominent than ever. Undoubtedly, the personal and professional backgrounds of legislators and politicians is of significance, but what this paper seeks to explore is the choice and deployment of lawyers on tasks directly relating to legal justice but which have significant political elements to them and are far removed from traditional litigation.

EXTRA-CURIAL INQUIRIES INTO JUSTICE ISSUES

Official commissions which involve taking lawyers outside the court-room are nothing new, and Northern Ireland has always been an especially fertile ground for judge-based inquiries, albeit by judges from other British jurisdictions. The trend was established early in the history of the "Troubles" with the Cameron Report[35] and then the Scarman Report,[36] both of which were very wide-ranging inquiries into the origins of violence and responsibilities for it. Subsequent exercises have tended to

---

30 See *R.* v *Harper* [1990] 4 N.I.J.B. 75; *Re Duffy* [1991] 7 NIJB 62; *Re McKenna* (1992) 3 BNIL n.54; *R* v *Chambers* [1994] 2 BNIL n.58; *In re Russell* [1996] 9 BNIL n33; *In re Begley* (1996) 5 BNIL n39; *John Murray* v *UK*, Appl. no. 18731/91, Ser.A vol. 300-A, (1996) 22 EHRR 29.

31 *McKerr* v *Armagh Coroner* [1990] 1 All ER 865.

32 P. Taylor, *Beating the Terrorists*? (London: Penguin, 1980).

33 Criminal Evidence (N.I.) Order 1988 S.I. 1987. See: J.D. Jackson, "Curtailing the right to silence" [1991] *Criminal Law Review* 404, "Inferences from silence" (1993) 44 *Northern Ireland Legal Quarterly* 103; "Interpreting the silence provisions" [1995] *Criminal Law Review* 587; *John Murray v UK*, Appl. no. 18731/91, Ser.A vol. 300-A, (1996) 22 EHRR 29.

34 See C. Walker, *The Prevention of Terrorism in British Law* (2nd ed., Manchester: Manchester University Press, 1992) chap.8.

35 Disturbances in Northern Ireland. Report of the Commission appointed by the Governor of Northern Ireland (Belfast: Cmd. 532, 1969).

36 Government of Northern Ireland. Violence and Civil Disturbance in Northern Ireland in 1969. Report of a Tribunal of Inquiry (Belfast: Cmd. 566, 1972).

be more specific and justice-related, as the writing of political history by judges was not only disputed but also lacked impact. So, later inquiries were generally narrower, but they were not necessarily any less controversial. These include, for example, Lord Widgery's inquiry into Bloody Sunday[37] and the inquiries by Lord Parker and Judge Harry Bennett's inquiry into army and police interrogation practices.[38] But most have been about the design of the emergency provisions themselves, ranging from the seminal Diplock Report,[39] to the latest blue-print for a more permanent code by another Lord of Appeal in Ordinary, Lord Lloyd.[40] In between times, a regular succession of inquires, all by lawyers, have been published.[41]

By comparison, the Northern Ireland judiciary have performed such tasks relatively infrequently. Instances include Lord Justice McDermott who chaired the Working Party on Public Prosecutions in 1971.[42] In addition, Lord Chief Justice Lowry was part of the Anglo-Irish Law Enforcement Commission looking into matters of extradition and cross-border justice in 1974.[43] However, it is clear that the British experience described above is not out of line with overseas experience,[44] and so one might infer some

---

[37] Report of the Tribunal appointed to inquire into the events on Sunday 30 January 1972 which led to loss of life in connection with the procession in Londonderry on that day (1971-72 H.C. 220).

[38] Report of the Committee of Privy Counsellors appointed to consider authorised procedures for the interrogation of persons suspected of terrorism ("Parker Report") (London: Cmnd. 4901, H.M.S.O., 1972); Report of the Committee of Inquiry into Police Interrogation Procedures in Northern Ireland ("Bennett Report") (London: Cmnd. 9497, H.M.S.O., 1979).

[39] Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland (London: Cmnd. 5185, H.M.S.O., 1972).

[40] Inquiry into Legislation against Terrorism (London: Cm. 3420, H.M.S.O., 1996).

[41] See "Gardiner Report": Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland (London: Cmnd. 5847, H.M.S.O., 1975); "Baker Report": Review of the Operation of the Northern Ireland (Emergency Provisions) Act 1978 (London: Cmnd. 9222, H.M.S.O., 1984); "Colville Report": Review of the Operation of the Prevention of Terrorism (Temporary Provisions) Act 1984 (London: Cm. 264, H.M.S.O., 1987); "Colville Report": Review of the Northern Ireland (Emergency Provisions) Acts 1978 and 1987 (London: Cm.1115, H.M.S.O., 1990).

[42] Belfast: Cm. 554, 1971.

[43] See C. Campbell, "Extradition to Northern Ireland" (1989) 52 *Modern Law Review* 585; G. Hogan, and C. Walker, *Political Violence and the Law in Ireland* (Manchester: Manchester University Press, 1989) chaps. l4, 15; H. Delaney, and G. Hogan, "Anglo-Irish extradition viewed from an Irish perspective" [1993] *Public Law* 93; G. Gilbert, *Transnational Fugitive Offenders in International Law* (Martinus Nijhoff, The Hague, 1998) chap.6.

[44] See "Hope Report": *Royal Commission on Intelligence and Security* (4th Report PP. 249 (Cth), Canberra, 1977); "O'Brian Report": *Report of the Committee to recommend certain safeguards for persons in custody and for members of An Garda Siochana* (Prl. 7158, Dublin 1978); "McDonald Commission": *Report of the Commission of Inquiry concerning certain activities of the Royal Canadian Mounted Police, Freedom and Security* (2nd Report, Ottowa, 1981); "Rabie Report": *Report of the Commission of Inquiry into Security Legislation* (RP90/1981, Pretoria, 1981); "Landau Report": *Report*

reluctance on the part of Northern Ireland lawyers to accept such high-profile appointments from their already exposed position as public servants.[45] British judges seem less inhibited, and this characteristic continues with Lord Saville accepting a commission to reinquire into Bloody Sunday in 1998.[46]

STANDING INQUIRIES

This task of inquiring into the working of the law outside the context of litigation has also shaded into a potentially more substantial role - the standing inquiry. This may differ in at least two respects which relate to its continuous nature. First, there is a tendency to add a superintendence role - in this way, the inquirer is not simply pronouncing on past events but may be able to shape them as they happen. Second, the fact that the exercise is repeated allows for more dialogue and negotiation than with a once and for all pronouncement. This feature may allow for extra pressure to be exerted as earlier official objections to the reviewer's proposals are specifically traduced.

In the emergency legislation field, the longest-established standing inquiries are the periodical annual reviews which have been conducted since 1984 by Sir Cyril Philips (the sole non-lawyer in the list and also the person who had the shortest period in office), Viscount Colville and John Rowe. Doubts may be raised concerning the remit of these reviews[47] and even the personal competencies of the reviewers. Few have provided evidence of any deep thought to issues of principle or structural reform, but instead proceed with vague notions of balancing both security and rights. In addition, they almost always are handicapped with the assumption that special powers are necessary and thereby that normal laws are inadequate or cannot be adapted. Their evidence-gathering is far from perfect. When it is available, the most influential information arrives in secret from security forces and is not disclosed by the reviewer, so there is no open debate or exchange. And the manner of publication of the reviews is hardly calculated to capture public or Parliamentary attention. They have mainly delivered useful, though often rather technical, alterations, which should at least be credited in terms of an audit in protection of rights. For example, changes to the residence exemption period in respect of exclusion, which had been twenty years until reduced to just three years on the recommendation of the Jellicoe Report,[48] is certainly a worthy achievement. Only rarely have there been radical reforms and suggestions - including the abolition of exclusion.[49] And it is also noticeable that the focus of the reviews has mostly been in the direction of the treatment of individual rights, so the broader issues of democratic accountability and constitutionalism remain unattended.

---

of the Commission of Inquiry into the methods of investigation of the General Security Service regarding hostile terrorist activity (Jerusalem, 1987); Commission chaired by Judge Richard Goldstone (*The Independent*, 29 May 1992 p.12).

45 A list of deaths is provided at HC Debs. vol.331, col.52 10 May 1999.

46 *The Times*, 30 January 1998, p.1; http://www.bloody-sunday-inquiry.org.uk/. The other commissioners are Sir Edward Somers and William Hoyt.

47 C. Walker, *The Prevention of Terrorism in British Law* (2nd ed., Manchester: Manchester University Press, 1992) p.37.

48 Jellicoe Report, paras.181, 182.

49 See C.P. Walker, "Constitutional governance and special powers against terrorism" (1997) 35 *Columbia Journal of Transnational Law* 1.

As to what would be in outline an effective executive internal review system, some of the following features should be included. The first concerns the personnel conducting the review. There is a periodical need for an infusion of new blood into the process. Those who stay seem to become complacent or discouraged, while officially presented versions of reality tend eventually to become persuasive or at least immutable.[50] This feature might best be achieved by the appointment of a panel so that difficulties caused by inexperience of new members can equally be minimised but at the same time there is a constant influx of fresh thinking.

Secondly, the review must be principled. So as to encourage the widest discussion possible, the legislature should set the necessary standards on which each part of any special legislation can be judged as necessary and proportionate to the emergency.

Thirdly, the review must be adequately resourced. The codes dealing with political violence are now a multi-faceted legislation whose complexity and range have grown enormously over two decades. Effective review can only be achieved by individuals working full-time and continuously. Resourcing also entails express statutory powers of investigation, akin to those of the Parliamentary Commissioner for Administration.[51] Reviewers should be enabled to look behind the dossier of papers presented to the Home Secretary about a candidate for exclusion; they should have access to filing cabinets and databases and should be able to interrogate members of the police and security services and not just hapless excludees.

Fourthly, reviews must be more firmly tied to the legislature so as to encourage democratic accountability. This feature requires the clearer dissemination of information by the reviewers so as to facilitate reasoned debate and to engage its attention in a constructive manner. There is also a need for a more structured linkage between reviewers and Parliament. This relationship has been neglected by the legislative reviewers, who are effectively appointed by, and report back to, a Secretary of State - not even to the Lord Chancellor.[52]

A more recent example of a standing inquiry of this kind is the appointment of the Independent Commissioner for the Holding Centres.[53] The main functions of the Commissioner are to "observe, comment and

---

[50] One might consider by way of evidence the record of the main reveiws of the PTA. In the bodies of their reports,the Shackleton Report in 1978 managed 160 paragraphs of text (49 A5 pages), the Jellicoe Report in 1983 produced 233 paragraphs (96 A5 pp.), and the Colville Report in 1987 amounted to 214 paragraphs (59 A4 pp.). The depth of the last report is especially disappointing given that the PTA had grown considerably in length and complexity between 1978 and 1987, as had the case-law and practices surrounding it.

[51] See the Parliamentary Commissioner Act 1967 s.8.

[52] Despite its firmer statutory footing, a link with Parliament is not even a feature of the more independent and permanent Standing Advisory Commission on Human Rights, which was set up under the Northern Ireland Constitution Act 1973 in Northern Ireland. The political marginalisation of this body may be one result. See: P. Maguire, "The SACHR 1973-80" (1981) 32 *Northern Ireland Legal Quarterly* 31. The SACHR has now been replaced by the Northern Ireland Human Rights Commission (Northern Ireland Act 1998 ss.68, 72) which does have some institutional links to the Assembly.

[53] C. Walker, and B. Fitzpatrick, "The Independent Commissioner for the Holding Centres: a review" [1998] *Public Law* 106, "Holding centres in Northern Ireland, the Independent Commissioner and the rights of detainees" [1999] *European Human Rights Law Review* 27.

report upon the conditions under which persons are detained in Holding Centres" within Northern Ireland and to "provide further assurance to the Secretary of State that persons detained in Holding Centres are fairly treated and that both statutory and administrative safeguards are being properly applied".[54] His Annual Reports cover visits made by him and his Deputy to the Holding Centres. During the visits, interviews and discussions are conducted where possible and appropriate with detainees, medical staff, solicitors and with uniformed and non-uniformed officers and the ancillary staff. A concession made in 1994 was to allow the Commissioner to sit in on interviews, setting aside concerns that the Commissioner could later be called or cited as a witness to the process of interviewing by the police or that his presence might be off-putting to a suspect.[55] So, we see here the beginnings of some superintendence. But despite this concession, the work of the Commissioner is mainly policy-oriented and not concerned with the resolution of individual complaints or cases.

Amongst his achievements, the Commissioner has damned Castlereagh altogether on five occasions, with continuing vigour, and, one senses from the Reports, mounting exasperation.[56] In terms of setting the agenda, the Commissioner has been very successful in his campaign and far more vigorous and courageous than other national reviewers.[57] He has forced the issue to be considered seriously, and he has also succeeded in establishing the argument in principle that to treat suspects in this way is, at least in the 1990s, wholly unacceptable. More generally, the Commissioner does impart distinctive qualities of expertise and also experience and authority through presence and attention to detail. On balance, the concentration of oversight upon one vital element of the special criminalisation process has been very worthwhile, especially because of the remarkable inventiveness and fearless independence (from government, the police, and professional and established pressure groups in Northern Ireland) that Sir Louis Blom-Cooper has brought to the office. Nevertheless, criticisms can be voiced as to how the Commissioner has at times chosen to direct his fire. In the light of this overall assessment, there would seem to be a strong case for regularising[58] and extending the office - the most obvious candidates for extra scrutiny would be the principal detention facility of the Metropolitan Police's Anti-terrorist Branch, namely Paddington Green Police Station, and also the holding facilities at the main ports such as Liverpool and Stranraer. Finally, and more broadly, one might consider that as special regimes develop not only for suspect terrorists but also for other categories of serious criminality, such

---

[54] See Independent Commissioner for the Holding Centres, *First Annual Report* (1994) pp.3-4.

[55] *Second Annual Report* (1995) p.39, *Third Annual Report* (1996) p.39. This was advocated both by the Commissioner and the Standing Advisory Commission on Human Rights ("SACHR"), *19th Report* (1993-94 HC 495) chap. 2 para.29 and the Report to the UK Government on the Visit to Northern Ireland carried out by the European Commission for the Prevention of Torture etc 1993 (CPT/Inf (94) 17, 1994) para. 101.

[56] But the *Sixth Annual Report* (1999, p.4) accepts that there has been some physical improvement.

[57] An exception to the silence of others has been the SACHR, *20th Report* (1994-95 HC 506) chap 2 para.25, 21st Report (1995-96 HC 467) chap 3 para.20.

[58] A form of judicial appointment might also tie in with the decision to extend the detention: SACHR, *16th Report* (1990-91 HC 488) para. 2.15. Regularisation also entails express statutory powers of investigation, and formal ties to the legislature.

as serious fraud or sex offences, there may be an argument for independent expertise, not necessarily by one and the same Commissioner, to be applied in these other directions. A fragmenting criminal justice system, which especially builds upon police surveillance and intervention rather than community testimony and involvement, requires innovative forms of superintendence which neither the police nor the community can adequately supply.

Overall, a picture emerges whereby these forms of standing inquisition seem to provide an important model of judicial or at least lawyerly superintendence of problematic aspects of the emergency regime and indeed the criminal justice system. However, as is the British way, they are often characterised in terms of their constitution by "ad hocery" - none has been set up with any formality or with sustained thought as to objectives, relations and outcomes. Nevertheless, inspection is an important aspect of accountability, and one wonders whether more could be learnt from other jurisdictions in which this technique is longer and better established. One example is the US Federal Office of Inspector General which oversees the CIA under the National Security Act of 1947,[59] as well as the dozens of other Inspectors General set up in 1978 and thereafter.[60] Certainly the model of standing inspections in this way has proven far less controversial than the more occasional office of Independent Counsel under the Ethics in Government Act of 1978, as amended by the Independent Counsel Reauthorization Acts of 1987 and 1994 (collectively "the Ethics Act").[61] That legislation provides for the appointment, by a Special Division of the United States Court of Appeals for the District of Columbia Circuit on the application of the Attorney General, of Independent Counsels to investigate and, if appropriate, prosecute specified high-ranking government officials for violations of federal criminal laws. Under section 591(b), the Attorney General may request that an independent counsel be appointed when her preliminary investigation discloses that certain listed individuals in the executive branch of government may have violated the law. These individuals include the President and Vice President, the Director of Central Intelligence, Commission of Internal Revenue, and high-ranking Executive Office officials. The Act has certainly provided for the involvement of lawyers, the most prominent office-holder of recent times being Kenneth Starr,[62] in an inquisition of executive deeds and misdeeds,

---

[59] 50 USC s.403q (an amendment passed in 1988 to the original Act; the office came into being in 1990). See Boren, D.L., "The Winds of Change at the CIA" (1992) 101 *Yale Law Journal* 853.

[60] Inspector General Act 1978 (5 USC app.3). The Act set up Offices in 12 major federal agencies. The Act was later extended in 1988 to most federal and regulatory agencies. See W.S. Fields, and T.E. Robinson, "Legal and functional influences on the objectivity of the Inspector General audit process" (1993) 2 *George Mason Independent Law Review* 97.

[61] See generally 28 U.S.C. ss.591-599 (1994 & Supp. 1995). The legislation was held to be constitutional in *Morrison v. Olson*, 487 U.S. 654 (1988). See R.G. Solloway, "Note, The institutionalized wolf: an analysis of the unconstitutionality of the Independent Counsel provisions of the Ethics in Government Act of 1978" (1988) 21 *Indiana Law Review* 955.

[62] See *Referral to the United States House of Representatives pursuant to Title 28, United States Code, § 595(c) Submitted by the Office of the Independent Counsel*, (http://icreport.house.gov/icreport/, 1998). See further *In the matter of a charge of judicial misconduct or disability* (1994) 39 F.3d 374; *United States of America* v *Tucker, Marks and Haley* (1995) 898 F. Supp. 654; *United States of America* v *McDougal, Tucker and McDougal* (1995) 906 F. Supp. 499;

and it does secure the reduction of executive dominance over the nature and conduct of inquiries into its own affairs.[63] But it is arguable that a permanent inspector is more likely to achieve the institutionalisation of good ethical and legal observances. Conversely, investigations by Independent Counsel have been criticised as too wide-ranging both in scope and time and too often engulfed in a climate of politicisation; as a result, the legislation will not be extended beyond 30 June 1999.[64]

POLITICAL INQUISITION BY LAWYERS

It is the utilisation of lawyers as political actors or catalysts which is of interest here. Perhaps the finest example of the moment is the Lord Chancellor, Derry Irvine, whose *curriculum vitae* includes:

- membership of the executive. As head of the Lord Chancellor's Department, he deals with matters such as access to justice, law reform process, the appointment of virtually all the professional and lay judiciary, the supervision of the efficient and effective operation of the courts.[65] He is also a senior Cabinet minister and chairs the following Cabinet committees: Ministerial Sub-Committee on House of Lords Reform; Ministerial Sub-Committee on Freedom of Information;[66]
- membership of the legislature, acting as Speaker of the House of Lords as well as representing the government on legal matters in the House of Lords;
- judicial office. He is the head of the judiciary and can sit in the Appellate Committee of the House of Lords (and did so for the first time in April 1998).[67]

Turning back to Northern Ireland, who can possibly hope to match Lord Irvine in his accumulation of power? One rival might be George Mitchell, the chair of the Decommissioning Commission[68] and then of the peace

---

United States of America v *Hubbell* (1998) 11 F. Supp. 2d 25; *In the matter of a charge of judicial misconduct or disability* (1998) 141 F.3d 333.

63 See C. Levin, "The Independent Counsel Statute: A Matter of Public Confidence and Constitutional Balance" (1987) 16 *Hofstra Law Review* 11; J.M. Kelly, and J.P. McEntee, "The independent counsel law: is there life after death?" (1993) 8 *St. John's Journal of Legal Commentary* 561; P.W. Rodino, Jr., "The case for the independent counsel" (1994) 19 *Seton Hall Legislative Journal* 5.

64 For criticisms, see "The Independent Counsel process: is it broken and how should it be fixed?" (1997) 54 *Washington & Lee Law Review* 1515; K. Clark, "Toward More Ethical Government: An Inspector General for the White House" (1998) 49 *Mercer Law Review* 553; C.R. Sunstein, "Bad Incentives and Bad Institutions" (1998) 86 *Georgetown Law Journal* 2267; N. Bravin, "Is *Morrison* v *Olson* still good law?" (1998) 98 *Columbia Law Review* 1103; D.C. Smaltz, "The Independent Counsel: A View From Inside" (1998) 86 *Georgia Law Journal* 2307; J. Reno, Evidence to the House Judiciary Subcommittee (http://www.usdoj.gov/dag/ictestimonydag.htm, March 1999).

65 See http://www.open.gov.uk/lcd/lcd-defr.htm.

66 See http://www.open.gov.uk/co/cabcom/index.htm.

67 *Boddington v British Transport Police* [1998] 2 WLR 639.

68 See Report of the International Body on Decommissioning (http://britain-info.org/bis/nireland/mitchell.htm, 1996).

talks leading to the "Good Friday" Agreement,[69] though it is his capacity as ex-Senator and political friend of the United States President which have probably been the vital attributes favouring appointment rather than his legal training.[70] However, a good example of a relevant legal actor in connection with Northern Ireland concerns the involvement in terms of political justice of Lord Chief Justice Lowry. Robert Lowry, the ex-Unionist Government Attorney General, was Chief Justice between 1971 and 1989 and therefore by this accident of timing was arguably by far the most important ever Supreme Court judge in the history of Northern Ireland. But in addition to his normal judicial work, he chaired the Constitutional Convention which sat between 1975 and 1976[71] and, rather like Senator Mitchell, it is clear Lord Lowry was not simply a gavel-basher but did orchestrate to some extent the behind-the-scenes negotiations.[72]

AN AUGMENTATION OF JUSTICE BY NON-LAWYERS

There may be wider senses in which justice has been harmed in emergency situations than can be represented or even understood by lawyers. One response must be action by other branches of the state which "have the responsibility to ensure that our executive, legislative and judicial branches function responsibly."[73] But the response here in mind involves more than the full force of separate branches of government[74] and necessarily entails some interplay. As a result, just as lawyers are to take on hybrid legal/political tasks, so non-lawyers must engage with legal justice.

A leading example is the Truth and Reconciliation Commission of South Africa.[75] This principally comprised non-lawyers and has been chaired by

---

[69] British Irish Agreement reached in the multi-party negotiations (London: Cm.3883, Stationery Office, 1998).

[70] For his appointments to the Decommissioning Commission (see *Report of the International Body on Decommissioning* (1996)) and then the talks process discussing the frameworks for Northern Ireland (see Northern Ireland Office, *Frameworks for the Future* (London: Cm. 2964, H.M.S.O., 1995)), see *The Times*, 30 November, 1995 pp.1-3, (1996) *The Times*, 5 June, 1996 p.2, 13 June p.2.

[71] See the Northern Ireland Constitutional Convention (1975-76 HC 1).

[72] B. Dickson, "Northern Ireland's Troubles and the Judges" in B. Hadfield, (ed.), *Northern Ireland: Politics and the Constitution* (Buckingham: Open University Press, 1992) p.133.

[73] C. Blakesley, "Terrorism, Law and Our Constitutional Order" (1989) 60 *University of Colorado Law Review* 471 at p.501. See also: D.G. Barnum, J.L., Sullivan, and M. Sunkin, "Constitutional and Cultural Underpinnings of Political Freedom in Britain and the United States (1992) 12 *Oxford Journal of Legal Studies* 362.

[74] See C.P., Walker, "Constitutional Governance and Special Powers Against Terrorism" (1997) 35 *Columbia Journal of Transnational Law* 1.

[75] See Promotion of National Unity and Reconciliation Act 1995 (no.34); http://www.truth.org.za/. See *Azapa* v *President of RSA* 1996 8 BCLR 1015 (CC); I. Liebenberg, "The Truth and Reconciliation Commission in South Africa" (1996) 11 *SA Public Law* 123. Its final report has now been delivered (see http://www.truth.org.za/final/index.htm) amidst considerable controversy and litigation (see *The Times*, 30 October 1998 p.16). For examples in other jurisdictions, see: P.B. Hayner, "Fifteen Truth Commissions - 1974-1994" (1994) 16 *Human Rights Quarterly* 597.

the Archbishop Desmond Tutu, though its Committee on Amnesty consisted of members of the judiciary. Without going into the details of this complex foray into political and social reconstruction, which it is dangerous to deconstruct from its specific setting, it may be asked why a body of this kind was felt to be necessary. In short, it was needed in view not only of the difficulties likely to be encountered by traditional adjudication - especially in the form of prosecutions of ex-members of the security forces - but also because such a judicial based process cannot deliver holistic justice in emergency settings: "Reconciliation requires not only individual justice, but also social justice."[76] The argument is not that prosecutions are inimical to peace and have no part to play. They are often demanded by victims or families of victims who view truth and reconciliation as "an insult" and a poor substitute for a "proper court of justice".[77] Prosecutions do produce knowledge of events and apportion blame in a precise manner so as to separate collective guilt or innocence from individual guilt or innocence.[78] But the sole reliance upon this mechanism of the legal justice system fails to recognise the wider and more radical interests of restorative justice.[79]

Some of these wider issues have been addressed by the forms of inquiry conducted by the Truth and Reconciliation Committee. To give one example, the Reparation and Rehabilitation Committee took account of five distinct categories of reparation:[80]

> "Redress which is the right to fair and adequate compensation;
>
> Restitution which is the right to the re-establishment, as far as possible, of the situation that existed for the beneficiary prior to the violation;
>
> Rehabilitation which is the right to the provision of medical and psychological care and fulfilment of significant personal and community needs;
>
> Restoration of dignity which could include symbolic forms of reparation; and
>
> Reassurance of non-repetition which includes the creation of legislative and administrative measures, which contribute to the maintenance of a stable society and the prevention of the re-occurrence of human rights violations."

---

[76] *Final Report*, vol.1 chap.5 para.52.

[77] Statement by Ntsiki Biko, widow of Steve Biko, in "Wounded Nations, Broken Lives: Truth Commissions and War Tribunals (1996) 25 *Index on Censorship* Sept/Oct at p.68.

[78] J. Mendez, "Accountability for Past Abuses" (1997) 19 *Human Rights Quarterly* 255 at p.277.

[79] See W., Cragg, *Practice of Punishment : Towards a Theory of Restorative Justice* (London: Routledge, 1992); M. Wright, *Justice for Victims and Offenders : a restorative response to crime* (2nd ed, Winchester : Waterside Press, 1996).

[80] Truth and Reconciliation Commission, *Proposed Policy for UIR and Final Reparation* (1997) para.4.1. These were reduced to four headings (but covering much the same concepts) in the *Final Report*, vol.5 chap.5 paras.24-32: urgent interim reparation, individual reparation grants, symbolic reparation, community rehabilitation and institutional reform. Compare J. Mendez, "Accountability for Past Abuses" (1997) 19 *Human Rights Quarterly* 255 at p.261; JUSTICE, *Victims in Criminal Justice* (London, 1997).

Redress and restitution involving financial restitution for the wrongfully imprisoned or abused are at the core of the justice mechanisms that exist in the United Kingdom. However, there is no attempt at personal or social rehabilitation, while the process of dealing with claims almost seems counter-productive in achieving the restoration of dignity. It has certainly not included any grand gestures of apology or generosity when we think of the likes of the *Birmingham 6*.[81] Perhaps the greatest failure, however, is to secure a reassurance of non-repetition either in regard to miscarriages of justice in England or through a full inquiry into disputed events during the conflict in Northern Ireland since 1969. This ultimate goals of accounting for the past and signalling and securing change are at the heart of the South African Commission. According to the preamble of the parent Act:

> "...it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in future..."

These objectives are not only of importance as an aspect of reparation to the victim of a miscarriage but also, of course, to the strengthening of societal institutions as a whole.[82] Yet, the truth has never been established or even fully investigated in many of the major miscarriage cases in England, so it is difficult to see how one can be sure that the reforms which have taken place address the real problems. And prosecutions have been a particular failure in this respect, since no successful prosecution of abusive police officers has ever been brought, a record from which one can hardly draw deterrence or messages for the future. One cannot realistically now expect the Criminal Cases Review Commission to take on this separate agenda,[83] but one would hope that for the future the Commission will be prepared to make thematic inquiries and recommendations where it recognises patterns of abuse or error.

Equally, aside from the important inquiry currently being conducted by Lord Saville into Bloody Sunday, there are no plans either in the Good Friday Agreement of 1998 or elsewhere to reopen other incidents of disputed deaths or shootings in Northern Ireland. Towards the end of the period of open conflict, Sir Kenneth Bloomfield, appointed as "Victims Commissioner," did consider the possibility in his report, *We Will Remember Them*.[84] However, he resisted the idea of a commission on the South African model, fearing that "unhappily, 'truth' can be used as a

---

[81] Far from an apology, some prominent public figures have continued to cast doubt on the innocence of those released, including Lord Denning (see *The Times* 23 August 1990) and David Evans (see *The Times* 10 July 1998). For the forms of remedy available in English law , see N. Taylor and J. Wood, "Victims of miscarriages of justice" in C.P. Walker, and K. Starmer, *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) chap.12.

[82] See J. Zalaquett, "Balancing Ethical Imperatives and Political Constraints" (1992) 43 *Hastings Law Journal* 1430; J. Mendez, "Accountability for Past Abuses" (1997) 19 *Human Rights Quarterly* 255.

[83] The CCRC was established by the Criminal Appeals Act 1995. See C. Mullin, "Miscarriages of Justice in the UK" (1996) 2(2) *Journal of Legislative Studies* 8 at p.12.

[84] (Belfast: Northern Ireland Office, 1998). The Report notes (paras.2.4, 2.6) that there had been 3585 deaths attributable to the "Troubles" from 1 January 1970 to 3 December 1997 in Northern Ireland, plus 119 in England.

weapon as well as a shield"[85] and therefore suggesting that it would be appropriate only as part of a wide-ranging peace process which, at the time of his Report (published in May 1998) and indeed since that time, has yet to tackle the issue.[86] Indeed, the Good Friday Agreement looked towards the Victims Commissioner (and no other mechanism) to deliver the substantive ideas for reform,[87] though a few have subsequently emerged outside of his agenda.[88] The Bloomfield Report did contain some useful ideas, including: a review of the criminal injuries compensation system (which has since been established under Sir Kenneth Bloomfield himself);[89] a recognition of the need for advice and counselling as well as an official representative and a better coordinated approach within government[90] (satisfied by the appointment of one of the Northern Ireland Office team as Minister for Victims[91]); and action to deal with the disappeared, exiled and displaced,[92] since given shape by the Northern Ireland (Location of Victims' Remains) Act 1999. But a significant portion of the detail, and one senses enthusiasm, of the Report is directed towards appropriate monuments and commemorations of the dead – in other words, the bringing of solace rather than justice to the living.[93] Furthermore, there is little grounding in any kind of principle - the display

---

85 *We Will Remember Them* (Belfast: Northern Ireland Office, 1998) para.5.37.

86 But even after a comprehensive settlement, the limited healing power of reconciliation through truth may be illustrated by the attempts to extradite General Pinochet; see *R v Bow Street Stipendiary Magistrate, ex p. Pinochet Ugarte (No.3)* (1999) *The Times* 25 March.

87 See "Rights, Safeguards and Equality of Opportunity" paras.6.11-6.13. The short Northern Ireland Office paper, *Restorative Justice*, issued around the same time in 1998 does not consider the problems arising from political violence, though restorative justice is part of the agenda of the Criminal Justice Review Group (see: *Review of the Criminal Justice System in Northern Ireland*, http://www.nio.gov.uk/review.pdf, and *Progress Report*, 1999, p.6).

88 Tangible measures which have been taken include £5m allocated to the Victims Liaison Unit of the Northern Ireland Office (with £1m for the Northern Ireland Memorial Fund) (*The Times*, 13 August 1998 p.2), and the rights of victims to information in section 15 of the Northern Ireland (Sentence) Act 1998:
" (1) The Secretary of State shall provide a statement under this section about a person if he receives a written request to do so and he believes-
(a) that the person about whom the statement is sought is serving a sentence of imprisonment in Northern Ireland for a fixed term of at least five years or for life,
(b) that the sentence was passed in Northern Ireland for a qualifying offence, and
(c) that the person requesting the statement, or a member of his family, was a victim of the offence for which the sentence was passed."
Under the Northern Ireland (Location of Victims' Remains) Act 1999 s.5(2), relatives may be kept informed by the Independent Commission for the Location of Victims' Remains.

89 *We Will Remember Them* (Belfast: Northern Ireland Office, 1998) para.5.11. For the further study, see *The Times*, 1 October 1998 p.2.

90 *We Will Remember Them* (Belfast: Northern Ireland Office, 1998) paras.5.18, 5.28.

91 See *The Times*, 14 May 1998 p.1.

92 *We Will Remember Them* (Belfast: Northern Ireland Office, 1998) paras.5.38, 5.39.

93 *We Will Remember Them* (Belfast: Northern Ireland Office, 1998) chaps.4, 6, 7. Practical measures for live victims are set out in chapter 5.

of genuine compassion is evident enough, but there should also be recognition of the rights which remain violated and that priority must be given by a state to the redress of those who have suffered at the hands of official agents, as is required by Article 2 of the European Convention on Human Rights[94] and as is readily recognised by the South African Truth and Reconciliation Commission:[95]

> "...it must be said that those with the most power to abuse must carry the heaviest responsibility. It is a matter of the gravest concern when the state, which holds the monopoly on public force and is charged with protecting the rights of citizens, uses that force to violate those rights."

The responsibility of government for human rights abuses in Northern Ireland may not be on the scale of the former regimes in Chile or South Africa, but it is not negligible.

TOWARDS ANALYSIS

Governance

The first observation on all of these trends is that we seem to be placing ourselves within the best traditions of late modernity[96] by uncovering some familiar patterns. One is the pattern of fragmentation - the breaking down of traditional categories and boundaries, in this case judicial and non-judicial as well as legal and political. The second point is that these wider bounds of the application of justice take us into the realms of "governance" rather than government, as a wider array of techniques are applied in order to control and make accountable the state in time of emergency.:[97]

> "Governance signifies a change in the meaning of government, referring to a new process of governing; or a changed condition of ordered rule; or the new method by which society is governed."

Governance is concerned with a complex pattern of interrelationships between social institutions and individuals and the use of a wide array of public/private, local/national/international, institutional/informal responses which move away from hierarchically and juridico-politically

---

[94] See *McCann v UK*, App. no.18984/91, Ser A vol.324, (1996) 21 EHRR 97. States are under international obligations are placed on states to suppress terrorism, UN GA Res 40/61 (1985), but are not required to give the same guarantee of suppression as in relation to their own agents: *X v Ireland*, Appl. no.6040/73, (1973) 16 YB 388; *W v UK*, Appl. no.9348/81, (1983) 32 DR 190; *X v UK*, Appl. no.9825/82, (1985) 8 EHRR 49; *M v UK and Ireland*, Appl. no.9837/82, (1986) 47 DR 27.

[95] *Final Report*, vol.1 chap.4 para.80.

[96] A. Giddens, *The Consequences Of Modernity* (Cambridge: Polity Press, 1990).

[97] R.A.W. Rhodes, "The New Governance: Governing without Government," (1996) XLIV *Political Studies* 652 at 652-653. See also J. Kooiman, (ed.), *Modern Governance* (London: Sage, 1993); J. Hoffman, *Beyond the State* (Cambridge: Polity Press, 1995); P. Hirst, and G. Thompson, "Globalization and the Future of the Nation State" (1995) 24 (3) *Economy and Society* 408; G. Teubner, *Global Law without a State* (Aldershot: Dartmouth, 1997); R.A.W. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity, and Accountability* (Buckingham: Open University Press, 1997).

based models.[98] We seem to recognise some of these trends here, though perhaps more mutedly than with other areas of state activity, even other areas of policing, presumably because of the centrality of security to attributes such as authority, legitimacy and sovereignty.

Building upon these concepts, I argued in a paper in the *Columbia Journal of Transnational Law* that, when pursuing the principles of constitutional governance, that task can only be achieved by all branches of the state, judicial, executive and legislative in combination, whereas, to date, too much faith has been placed in judicial mechanisms and too little attention has been given to intervention by the legislature and other political mechanisms.[99] But what I am now contending is that the boundaries between these branches may be more fluid than previously pictured. On the one hand, non-lawyers have a significant role to play in the development of traditional legal business - the goal of justice between two parties. On the other hand, lawyers emerge as surprisingly important players in areas outside their traditional stamping grounds. It used to be possible to say that the presence of "policy" considerations effectively ruled out judges and lawyers. It is true that their presence tends to rule out court-based adjudication because of a number of factors. One is that it makes it difficult to formulate rules for their guidance. Another is that it renders participation by the parties less meaningful, since the adjudicator may have to base decisions on considerations of policy which have not been revealed to those affected. A second reason would be that the issues arising are so wide-ranging and polycentric that allowing them to be disputed would make litigation unmanageable. But the point of this paper is that traditional adjudication does not exhaust the involvement and values of lawyers, so they may still play a valuable role in issues which are indeed policy-oriented.

Feeling at home with governance

The next question is how should, on the one hand, lawyers, including judges, working in unfamiliar and politically fraught territory and, on the other hand, non-lawyers working within justice acquit themselves?

For the lawyers and judges, there are certainly dangers and difficulties. At one level, one might perhaps draw some lessons from the reflections of two decades ago on the development of public law litigation in the United States. For example, Professor Abram Chayes explained how this took the lawyers far away from the familiar territory of private adjudication and required such features as the activist shaping of the suit by the court and not just the parties, predictive and proactive fact-finding, and more dynamic and forward-looking relief.[100] In this way, "litigation becomes an explicitly political forum and the courts a visible area of the political process."[101] But this public law litigation should not make the judges indistinguishable from politicians, and so it is vital to reflect upon those techniques or attributes which comprise the core worth of the lawyerly

---

[98] B. Jessop, "The Regulation Approach, Governance and Post-Fordism: Alternative Perspectives on Economic and Political Change ?" (1995) 24 (3) *Economy and Society* 307 at p 317.

[99] C.P. Walker, "Constitutional Governance and Special Powers Against Terrorism" (1997) 35 *Columbia Journal of Transnational Law* 1.

[100] A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harvard Law Review* 1281. These developments can of course be related to the economic and social development of the state: M.J. Damaska, *The Faces of Justice and State Authority* (Yale: Universities Press, 1986).

[101] A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harvard Law Review* 1281 at p.1304.

way. These include: insulation from narrow political pressures; reflective and dispassionate analysis based on fact as well as increased consistency and certainty, since the judicial method is to proceed on the basis of established rules and precedents;[102] narrow rather than wide applications of policy, participation by those affected; and a clear and non-bureaucratic response to those affected.[103] Openness in process and result are also important. The lawyer should be able to explain in rational terms, whether based in precedent or some other form of relevant argument, what has been decided. The fear that candour might somehow inhibit the process of good decision-making, an excuse against transparency to which executives the world over fiercely cling,[104] should not infect the practices of lawyers who are asked to step into executive territory. So, openness should be reflected both in process, with the holding of inquiries in public and in the widest possible invitation to participate, and also in outcome, with fully argued and published findings.

The implications for the lawyers who are to be to some extent politically commodified when asked to become involved at some level in solving the problems of emergencies is that if their input is to remain distinct and valued, then they must retain lawyerly attributes. The point of using a lawyer is lost if they become true politicians like the Prime Minister, Tony Blair.[105] Therefore, reflection is needed upon legal techniques and ethics, not social science and politics. At the same time, this reinforcement of lawyerly attributes will not mask the political role, for in these kinds of tasks "technical virtuosity has never been a guarantee of acceptable performance".[106] Inevitably, there will be doubts about legitimacy and authority when non-elected lawyers are used in more political roles.

Another lesson which suggests itself is that lawyers should be aware of what is being asked and to realise that the tasks are not the same as court-based litigation. Clearly, to treat these more political tasks in the same way as private litigation would run into significant problems of justiciability. Of course, it is arguable that no issue is inherently justiciable and no authoritative test exists for isolating matters which should be placed before judges.[107] Therefore, one is again thrown back upon what advantages or difficulties flow from judicial scrutiny, as discussed earlier and whether any can still be relevant where it is impossible to translate a

---

[102] *Prentis* v. *Atlantic Coastline Co.* 211 U.S. 210 (1908) at pp.226-227.

[103] A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harvard Law Review* 1281 at pp.1307-1308.

[104] See Code of Practice on Access to Government Information (1994, http://www.open.gov.uk/m-of-g/codete.htm) Exemption 2 ("Internal discussion and advice") and *Your Right to Know: The Government's proposals for a Freedom of Information Act* (London: Cm 3818, Stationery Office, 1997) para.3.12.

[105] Prime Minister Blair read Law at Oxford University, was called to the Bar at Lincoln's Inn in 1976, and practised as a barrister until 1983; he entered Parliament in 1983 and became Labour Party leader in 1994: http://www.labour.org.uk/information/index.html.

[106] A. Chayes, "The Role of the Judge in Public Law Litigation" (1976) 89 *Harvard Law Review* 1281 at p.1315.

[107] See: G. Marshall, "Justiciability" in Guest, A.G. (ed.), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961); R.S. Summers, "Justiciability" (1963) 26 *Modern Law Review* 530; L.L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 *Harvard Law Review* 353; J.S. Bell, *Policy Arguments* (Oxford: Clarendon, 1983).

desired policy into "sufficiently clearly defined standards to operate the judicial process efficiently by keeping discretion within narrow limits."[108.]

There are also guidelines for the non-lawyers, and one might especially emphasise such lawyerly concerns as respect for rights and due process and attention to individual cases. As an example of how not to proceed, one might cite the case of the Runciman Commission, which, mainly consisting of non-lawyers, was asked to suggest reforms to avoid further miscarriages of justice. Its Report has been widely criticised, especially because it was not adequately grounded in researched history or, more seriously, principle.[109] This absence of principled argument was a wasted opportunity for civic education. Even more dangerous in the short-term, it left the field of reform fairly free for political choice. If the Report's findings were based on little more than either a sincerely held belief or a "contingent fact"[110] arising from a research study, it was always open to a politician to challenge them on an equally sincerely held belief or perhaps to trump them on the basis of further empirical research. Thus, the Commission left itself very open to being overruled or "cannibalized"[111] because of its mode of decision-making. This weakness was not an inherent design fault in either the personnel or terms of reference of the Commission which meant that the entire process was a charade or that recommendations unpalatable to the Home Office were out of bounds or could never conceivably be implemented. Nevertheless, the publication of the Report coincided with the advent of a period of attempted populist repression by the Home Office, which found the Report to be suitably malleable for its purposes to achieve its own agenda without having to snub the Commission.

Trends in governance and society

Turning to other possible implications of these trends in governance and society, the wider use of judges and lawyers in the resolution of the problems caused by political emergency should not develop into an exercise of the wholesale juridification of political issues. For example, the Good Friday Agreement was not an exegesis by Senator Mitchell on the orange and green shades of meanings of "self-determination" within the context of Northern Ireland.[112] That would be to apply purely legal solutions. Rather, the emphasis is upon legal skills not legal solutions - the political commodification of lawyering not law. Of course, juridification of political controversies in other contexts might happen to some extent through the Human Rights Act 1998 in due course. However, the Act has been designed in a decidedly conservative fashion (including the omission of Article 13 and limited judicial powers to strike down

---

[108] Stevens, R.B., "Justiciability - The Restrictive Practices Court Re-examined" [1964] *Public Law* 227 at p.237.

[109] See C.P. Walker, "Miscarriages of justice in principle and practice" in C.P. Walker, and K. Starmer, *Miscarriages of Justice: A Review of Justice in Error* (London: Blackstone Press, 1999) chap.2.

[110] A. Ashworth, *The Criminal Process: An Evaluative Study* (Oxford: Clarendon Press, 1994) at p.115.

[111] S. Field, and P.A. Thomas, (eds.), *Justice and Efficiency* (1994) *Journal of Law & Society* 21(1) (special issue, London: Blackwell,) at p.7

[112] British Irish Agreement reached in the multi-party negotiations (London: Cm.3883, Stationery Office, 1998). Indeed, the Agreement is almost entirely political in nature, since it cites no precedents or evidence for its conclusions and has a preamble (a "Declaration of Support") consisting of just six very short paragraphs.

legislation[113]). Conversely, Article 15 is expressly mentioned and is to allow the government to "derogate" from its obligations to respect rights. This provision is currently in use in Northern Ireland to allow the detention of terrorist suspects for seven days without any judicial authorisation and so perpetuates the response to the *Brogan* judgment.[114] The derogation will continue (it is designated under section 14 and Schedule 2) for a further five years without any need for interim review or renewal under the 1998 Act.

Perhaps a better explanation than juridification is that the spread of lawyering is part of a republican movement in society - a move to republican justice whereunder decision-making depends less on personal or institutional authority than on involvement and full citizenship.[115] Lawyers are well placed to organise and represent in achieving the constraint (of "parsimony") that the onus of proof is against state intervention and also the need to check established state power. This republican approach has several less palatable features propounded by at least some of its proponents,[116] including the exclusionary emphasis upon "citizenship" (or, on a more localised basis, "community"[117]) and the willingness to promote state intervention (often in the form of surveillance) to protect the ill-defined "province of others", which may encourage intervention on the basis of vague notions of "anti-social conduct" such as appear in the Crime and Disorder Act 1998. However, it does chime with some of the features found in relation to emergency situations and may be a policy now moving forward into local democracy, as signalled by a recent Department of the Environment paper.[118] Of course, the link between republicanism and legalism in these senses is not a new idea. More than a century and a half ago, de Tocqueville identified the strong links between lawyers and republican virtue:[119]

> "The profession of the law is the only aristocratic element which can be amalgamated without violence with the natural elements of democracy....I cannot believe that a republic could subsist if the influence of lawyers in public business did not increase in proportion to the power of the people."

---

[113] Human Rights Act 1998 s.4 ("Declarations of incompatibility"). See further Lord Irvine, "Judges and decision makers" 1996 *Public Law* 59.

[114] Application Nos. 11209/84, 11266/84, 11386/85, Ser.A. 145 B, (1989) 11 EHRR 117.

[115] J. Braithwaite, and P. Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990) p.9. See also J. Braithwaite, "Inequality and Republican Criminology" in J. Hagan and R.D. Peterson, (eds.), *Crime and Inequality* (Stanford University Press, 1995); N. Lacey, and L. Zedner, "Discourses of community in criminal justice" (1995) 22 *Journal of Law and Society* 301; J.W. Raine, and M.J. Wilson, "Beyond managerialism in criminal justice" (1997) 36 *Howard Journal* 80

[116] But other versions more reassuring depict communitarianism as not only consistent with the enjoyment of individual rights but as a necessary condition: A. Etzioni, *The Spirit of Community* (London: Fontana, 1995) pp.x, 15.

[117] A. Crawford, *The Local Governance of Crime* (Oxford: Clarendon Press, 1997) chaps.5, 8.

[118] *Modernising Local Government* (Department of the Environment, 1998). See further C. Walker, and Y. Akdeniz, "Virtual democracy" [1998] *Public Law* p 489.

[119] A. de Tocqueville, *De la Democratie en Amerique* (London: Saunders & Otley, 1835) vol.i chap.16.

It is perhaps ironic that as the ideals of law within the executive sphere seems to be gaining ground, their practice within the heartland of the legal system is coming under attack because of the cost to the public purse.[120] This inconsistency should serve as a useful reminder not to overtheorise British constitutional customs, which usually owe much more to happenstance than foggy French theorists.

---

[120] See Lord Chancellor's Department, *Striking the Balance: The Future of Legal Aid in England and Wales* (London: Cm 3305, Stationery Office, 1996) chap.3; D. Wall, "Legal aid, social policy and the architecture of criminal justice" (1996) 23 *Journal of Law & Society* 549; R. Young and D. Wall, *Access to Justice* (London: Blackstone Press, 1996); Lord Chancellor's Department, *Modernising Justice* (London: Cm.4155, Stationery Office, 1999).

MAKING PRIVATE VIOLENCE PUBLIC

John Murphy, Lecturer in Law, University of Manchester[*]

1. INTRODUCTION

Ever since the early 1970s, when Erin Pizzey first published her seminal book on the subject,[1] awareness of the prevalence and horror of domestic violence has steadily grown. Yet increased awareness has done little by itself to eradicate or even, seemingly, to curb the problem. Indeed, despite the enactment over many years of a range of statutes providing "tailor-made" civil law remedies for victims of such violence,[2] the number of reported incidents has remained alarmingly high,[3] with, according to the British Crime Survey of 1993, a national annual total of around 530,000 such occurrences.[4] And even this figure fails to represent the full extent of the problem. Partly, this is due to the fact that the police have traditionally been far from sedulous when it comes to recording such occurrences. As Edwards notes, "key policing deficiencies have been, *inter alia*, ineffective handling of cases at the scene, the predilection to decline charges, and a habituation of the practice of "`no-criming"".[5] The statistics are also under-representative because, for reasons of fear or embarrassment, some victims are dissuaded from reporting domestic assaults.[6] Against this background then, it is clear that the current law and

---

* Earlier versions of this article were presented as papers at All Souls' College, Oxford, Queensland University of Technology and Sydney University. It has benefited from the comments made by those who participated on those occasions and, in different ways, from the various forms of help supplied by John Dewar, Neil Duxbury, Marie Fox, Tom Gibbons, Joseph Jaconelli, Mike Redmayne, Brad Sherman and Martin Wasik. I am grateful to them all and to the anonymous referee for their help.

1 *Scream Quietly or the Neighbours Will Hear* (Harmondsworth: Penguin, 1974).

2 Prior to October 1997 the law was contained in the Domestic Violence and Matrimonial Proceedings Act 1976; the Domestic Proceedings and Magistrates Courts Act 1978, ss 16-18 and the Matrimonial Homes Act 1983, s 1. Since then, however, the law has been exclusively contained in Part IV of the Family Law Act 1996.

3 According to one study, there are about 60,000 cases of domestic violence reported annually to the Metropolitan Police alone: A Cretney and G Davis, "Prosecuting "Domestic" Assault" [1996] *Criminal Law Review* 162.

4 Figure quoted in S Grace, *Policing Domestic Violence in the 1990s*, Home Office Research Study 139 (London: HMSO, 1995) 1.

5 S Edwards, *Sex and Gender in the Legal Process* (London: Blackstone Press Ltd, 1996) 193. The same phenomenon exists in Australia: see S Hatty, "Policing and Male Violence in Australia" in Hanmer et al (eds), *Women, Policing and Male Violence: International Perspectives* (London: Routledge & Kegan Paul, 1989) 70.

6 See M Hough and P Mayhew, *Taking Account of Crime: Key Findings from the 1984 British Crime Survey*, Home Office Research Study 85 (London: HMSO, 1985) 19; House of Commons Home Affairs Committee, Third Report, *Domestic Violence* HC 245, para 9; J Pahl, "Introduction" in J Pahl (ed), *Private Violence and Public Policy* (London: Routledge & Kegan Paul, 1985) 4; A Ashworth, *Sentencing and Criminal Justice* (London: Weidenfeld & Nicholson,

institutional responses to domestic violence are both unsatisfactory and insufficient.

This article seeks is to identify what it is about the existing law, remedies and practice[7] that cause them to be so inefficacious and secondly to consider a range of strategies - some of which have never been tried in this country - that might be employed to better effect upon this long-standing[8] but seriously under-regulated[9] problem.

2. DEFICIENCIES IN CURRENT LAW AND PRACTICE

To appreciate the need for a new approach, it is necessary to provide a brief sketch of the limits of the statutory[10] and institutional[11] responses to domestic violence. To begin with, as regards the civil law, there are serious lacunae in the "designer" legislation which provides injunctive relief for victims of domestic violence. In relation to those orders which can be obtained to oust the violent individual from the domestic dwelling, for example, the criteria according to which such orders may be awarded tend to be restrictive in terms of those entitled to apply for them.[12] Similarly, the terms on which (hopefully deterrent) powers of arrest may be appended to protective orders typically require the complainant to show the prior use or threat of violence.[13] Moreover, even where an order is

---

1992) 17; H Kennedy, *Eve Was Framed: Women and British Justice* (London: Vintage, 1993) 82-8.

7 For a general criticism of the current law contained in Part IV of the Family Law Act 1996 see J Murphy, "Domestic Violence: the New Law" (1996) 59 *Modern Law Review* 845.

8 See M Doggett, Marriage, *Wife-beating and the Law in Victorian England* (London: Weidenfeld & Nicholson, 1992) and M Freeman, "Violence Against Women: Does the Legal System Provide the Solutions or Itself Constitute the Problem?" (1980) *7 British Journal of Law and Society* 169.

9 S Edwards, *op cit* n 5, pp 192-200.

10 For a fuller account of the statutory deficiencies than is provided here see (in relation to the former position) K McCann, "Battered Women and the Law: the Limits of the Legislation" in J Brophy and C Smart (eds), *Women in Law* (London: Routledge & Kegan Paul, 1985); and (in relation to Part IV of the Family Law Act 1996) J Murphy, *op cit* n 7.

11 See further S Grace, *op cit* n 4, ch 4; A Cretney and G Davis, *op cit* n 3; A Sanders, "Personal Violence and Public Order: the Prosecution of "Domestic" Violence in England and Wales" (1988) 16 *International Journal of the Sociology of Law* 359. For a useful comparative summary of the limits of the Australian legislation see Working Group of Commonwealth, State and Territory Officials, *Model Domestic Violence Law*s (Australian Capital Territory: Attorney General's Department, 1997).

12 Under the Family Law Act 1996, the right to apply for an occupation order is made dependant both upon the nature of the applicant's right (if any) to occupy the dwelling house and the nature of her relationship with the abuser. Where the abused woman has no occupational entitlement she may only obtain an order where she is the cohabitant, former cohabitant or former spouse of the abuser. This, at a stroke, rules out applications by women in same sex relationships, those who merely share premises with fellow tenants as well as others: see further J Murphy, *op cit* n 7.

13 Family Law Act 1996, s 47(2)(b).

granted - whether or not with a power of arrest appended - it provides no guarantee against recidivism.[14]

Perhaps the single greatest criticism of the civil law, however, is that it is reactive; it seeks to provide a remedy to a problem that has already arisen. By contrast, the criminal law is premised upon deterrence achieved by the threat of punishment. Yet the potential ideological impact of properly treating domestic assaults as criminal offences has, to some extent, been muted by the judiciary.[15] Indeed, their fondness for the use of the bindovers betrays further an attitude that fails to place domestic assaults on a par with those that occur in other settings.[16] Furthermore, this attitude spills over into the private law context where the courts always seem willing to accept undertakings (rather than investigate a case fully and award proper injunctive relief).[17]

Thirdly, the present system does not work adequately because of the prevailing ideology and received beliefs concerning domestic violence. This problem is not confined to the attitude displayed by judicial pronouncements about it being a "Draconian Step" to grant applicants ouster orders on something akin to the belief that an Englishman's home is his castle;[18] it is shared by the police. As two eminent scholars have explained: "[i]t has been a part of police culture to regard victims of domestic violence as vacillating women who, in the end, deserve what they get."[19] Thus, a not uncommon police view of female victims of

---

[14] See the accounts of the several interviewees in K McCann, *op cit* n 10, p 91. See also J Barron, *Not Worth the Paper? ... The Effectiveness of Legal Protection for Women and Children Experiencing Domestic Violence* (London: Women's Aid Federation, 1990). More thoroughgoing empirical studies which exhibit similar findings in the Australian context may be found in J Stubbs and D Powell, *The Effectiveness of Civil Protection Orders* (Sydney: New South Wales Bureau of Crime Statistics, 1984) and *Domestic Violence: The Impact of Legal Reform in New South Wales* (Sydney: Australian Bureau of Crime Statistics and Research, 1989).

[15] Most notably, not until 1992, in the milestone decision in *R* v *R* [1992] 1 AC 599, did the English courts recognise the possibility that a man could be guilty of raping his wife.

[16] See A Cretney and G Davis, *op cit* n 3, at 170-1.

[17] See A Kewley, "Pragmatism Before Principle: the Limitations of Civil Law Remedies for the Victims of Domestic Violence" [1996] *Journal of Social Welfare and Family Law* 1. Note also *Davis* v *Johnson* [1979] AC 264 where the Law Lords appeared to place a higher premium on property rights than on protecting a victim of domestic violence.

[18] See, *eg*, *Richards v Richards* [1984] AC 174; *Wiseman v Simpson* [1988] 1 All ER 245; *Summers v Summers* [1986] 1 FLR 343. Note also, the "victim unfriendly" decision in *C v C (Non-Molestation Order: Jurisdiction)* [1998] Fam Jo where a restrictive interpretation of "molestation" was applied to deny the victim a remedy under the 1996 Act. *Cf Spencer v Camacho* (1983) 127 *Sol Jo* 155, under the old law, where rooting through a handbag was held to amount to molestation.

[19] A Cretney and G Davis, *op cit* n 3, at 173-4. Dobash and Dobash have identified further that "[p]olice officers continue to see victims as fundamentally "unreliable and capricious", "inadequate people" who are worthy only of a police response [but not an arrest]." R Dobash and R Dobash, *Women, Violence and Social Change* (London: Routledge, 1992). And this comment was echoed in a more recent study by Tony Farragher who observed that "the police abrogate their protective role, for their judgment is heavily

domestic assault is succinctly captured in one Australian case documented by Hatty:

> "[A] Woman begged the police to arrest her husband. She lowered her jeans and lifted her top to show the officers her bruises... The officer declined to arrest, claiming the woman was exaggerating. However, he commented "Not bad legs though"."[20]

Furthermore, though not quite so extremely in this country, it is clear that despite government initiatives to improve police attitudes and responses to reports of domestic violence,[21] such non-interventionist stances remain commonplace. For example, it has been documented that it is common for an officer to fail to make an arrest or to record a domestic assault as a crime.[22] The prevailing ideology permeates the victims themselves, for a significantly higher proportion of domestic (as opposed to other) assault victims are minded, on reflection, to withdraw an initial complaint to the police.[23] This then means that prosecution rates are lower than they would otherwise be which, in turn, plays a part in perpetuating the myth that a battery behind closed doors is somehow a lesser species of that offence. In addition, the police, knowing that a prosecution is less likely in a domestic setting, themselves begin to trivialise or ignore domestic assaults. As McCann notes:

> "In spite of their role the police appear to be extremely reluctant to involve themselves. Although the police have always had the power to exercise their discretion to intervene in family disputes under the criminal law, the evidence is that they have consistently shown a reluctance to become involved, *and fail to define wife assault as a crime*."[24]

Perhaps because of a deep-seated faith in the rule of law, trust is generally placed in the law, legal personnel and the operation of the criminal justice system. Accordingly, when the courts and the legislature conspire, wittingly or otherwise, to create and nurture the image of domestic violence as a sub-species of offence - one that is less reprehensible than other forms of violence - the fiction that battering one's partner is

---

influenced by prognoses of the woman's reliability as a witness". T Farragher, "The Police Response to Violence against Women in the Home" in J Pahl (ed), *op cit* n 6, p 117. In similarly critical vein, see S Edwards, *op cit* n 5, ch 5 and A Cretney and G Davis, *Punishing Violence* (London: Routledge & Kegan Paul, 1985).

20 S Hatty, *op cit* n 5, p 70.

21 Home Office Circular (60/1990), *Domestic Violence* (London: Home Office, 1990)

22 S Edwards, *op cit* n 5, pp 196-7; Victim Support, *Domestic Violence: Report of a National Inter-Agency Working Party* (London: Victim Support, 1992) paras 2.3-2.19; House of Commons Home Affairs Committee, Third Report, *Domestic Violence* (London: HMSO, 1993)

23 As to discontinuance rates, see A Cretney and G Davis, *op cit* n 3, at 166-7.

24 K McCann, *op cit* n 10, p 89 (emphasis added). See also R Dobash and R Dobash, *Violence Against Wives: A Case against the Patriarchy* (London: Open Books, 1980).

permissible (or at least forgivable) is inevitably produced.[25] This image is then widely disseminated by police insouciance and inaction.[26]

Against this backdrop, any reform that concentrates merely upon civil law remedies must be seen in terms of a "double effect".[27] On the one hand, tinkering with the statutory framework might lead to a marginal improvement in the plight of a small number of hitherto unprotected individuals.[28] Yet, on the other hand, it will also re-affirm the notion that domestic violence is essentially a civil law (and hence, private) matter of less importance than other forms of assault in that it does not warrant state intervention. Viewed from this perspective, the case for a more "public" response seems irresistible. It is my concern, therefore, for much of the remainder of this article to consider several possible forms of "public" response. I shall do so in three stages. First, I shall consider the value of a "no-drop" policy (whereby the victim is forced or, at least "strongly encouraged", to participate in her abuser's prosecution). Secondly, I shall explore the possibility of the implementation of a pro-arrest policy (whereby the police are required presumptively to arrest anyone alleged to have perpetrated domestic violence). And finally, I shall consider a miscellany of other measures that may assist in curtailing the prevalence of domestic assaults. Before I set out what these strategies might entail and consider their suitability for adoption in this country, it is important to clarify the different ways in which domestic violence might be seen to have a "public" dimension. For, as I will seek to show, finding a suitable "public" response to domestic violence demands an understanding of the several levels on which it may be seen to possess a "public" dimension.

3. PRIVATE VIOLENCE AS A PUBLIC PHENOMENON

There are four inter-connected, but distinct, levels on which domestic violence may be perceived to be a public issue. First, and most obviously, the fact that a physical domestic attack constitutes a criminal assault[29] enables it to be viewed as an offence which the state has a legitimate interest to deter and punish. This is the crudest sense in which domestic violence has a public dimension. Secondly, the prosecution of such offences will often require the victim to make a court appearance in order to secure a conviction: the fact that the assault took place behind closed doors, and out of sight and earshot of any third party, often renders it crucial that the victim should provide evidence in court.[30] And court

---

[25] See M Freeman, *op cit* n 8, at 225-7.

[26] See T Farragher, "The Police Response to Violence against Women in the Home" in J Pahl (ed), *op cit* n 6. See also K McCann, *op cit* n 10 and S Grace, *op cit* n 4, ch 6.

[27] I have borrowed this term from applied philosophy. It is generally used in the contexts of euthanasia and abortion to describe a course of action that, unavoidably, has both positive and negative features. See, *eg*, J Harris, *The Value of Life* (London: Routledge & Kegan Paul, 1992) 43-4.

[28] The Family Law Act 1996, in making non-molestation orders available to a wider class of applicants than formerly, does this: see J Murphy, *op cit* n 7, at 850-4.

[29] There are several forms of assault, with varying degrees of gravity, contained in the Offences Against the Person Act 1861, ss 18, 20 and 47. There is also the offence of common assault and battery contained in the Criminal Justice Act 1988, s 39.

[30] This factor was recognised by the Criminal Law Revision Committee and led to its proposal that spouse X should become a compellable witness against spouse

appearances of this kind require victims *publicly* to air their domestic grievances. Thirdly, the fact that only a small proportion of domestic assaults ever get prosecuted[31] means that, given the rate of recidivism in this context,[32] there are significant public costs to be borne. These include the costs associated with re-arrest, a subsequent (not necessarily successful) prosecution, NHS treatment supplied to battered women and the time lost from work. Fourthly, the fact that domestic violence continues to flourish, largely unchecked, entails the final public aspect: the re-affirmation of the ideological notion that domestic violence is a lesser form of offence. Low prosecution and conviction rates, together with traditional police attitudes to the problem, continue to re-assert this familiar image not just to the offenders who escape and the victims who lay themselves open to further abuse, but also to the community as a whole.

All of the above public aspects of domestic violence must be borne in mind when attempting to devise appropriate law reform. To conceive of domestic violence as a public issue in only the first (and crudest) sense, can lure one into the trap of suggesting aggressive pro-arrest or no-drop policies[33] in order to maximise the conviction rate. But there is an important price for so doing which reverberates in the other senses in which domestic violence might also be considered to be a public issue. Thus, for example, the cost of forcing a potentially valuable witness[34] to give evidence in court against her abuser (which sometimes, and for very good reasons, she would prefer not to do) is her, and women's, re-victimisation:

> "for wherever the law seeks to strengthen its response in order to punish offenders and protect women from violent men, it lays itself open to the criticism that in so doing it is punishing the woman rather than her assailant."[35]

From this, it follows that the only point from which any acceptable programme of law reform may proceed is the assumption that the victim should be afforded the choice of whether to instigate or participate in the conviction of the abuser. The utilitarian argument that maximising conviction rates reduces recidivism (and is therefore a social good that outweighs the harm of denying the victim her autonomy) must accordingly be rejected.[36] With this in mind, then, I turn to consider whether no-drop and

---

Y in cases involving violence done by the latter to the former. For an account of this see A Keane, *The Modern Law of Evidence* (London: Butterworths, 1995) 90-1. See also A Cretney and G Davis, "The Significance of Compellability in the Prosecution of Domestic Assault" (1997) 37 *British Journal of Criminology* 75.

31 A Cretney and G Davis, *Punishing Violence*, *op cit* n 19, chs 6 and 7.

32 See R Morley and A Mullender, "Hype or Hope? The Importation of Pro-arrest Policies and Batterers' Programmes from North America to Britain as Key Measures for Preventing Violence Against Women in the Home" (1992) 6 *International Journal of Law and the Family* 265, 270.

33 See, *eg*, C Hanna, "No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions" (1996) 109 *Harvard Law Review* 1850.

34 See A Cretney and G Davis, *op cit* n 30, esp at 79-81.

35 *id*, at 76.

36 There are two reasons for this. First, the deterrent effect of higher conviction rates *per se* is unproven (see n 60, *infra*), for which reason they ought not to be pursued as a "self-evident good". More importantly, however, as Rawls comments in *Political Liberalism*: "liberties cannot be denied to certain social

pro-arrest policies (in one form or another) together with other, related strategies are in fact suitable for implementation in this country. More particularly, my aim is not so much to consider ways in which the law, *per se*, can be improved in *practical* terms, but rather to analyse various means by which an *ideological* change can be effected so that, in turn, deterrence from the commission of domestic violence may be augmented.

4. NO-DROP POLICIES IN BRITAIN?

In this section of the article I consider whether Britain ought to implement laws making it mandatory for victims of domestic violence to participate in the prosecution of their abusers. Before evaluating the various potential benefits and disadvantages of so doing, it is important to make clear the fact that there is no unitary concept of a no-drop policy.[37] Broadly, they are of two kinds: the "hard" and "soft" models. According to the former, the victim, on pain of prosecution for contempt of court,[38] is forced to testify against her abuser. In Duluth, Minnesota, where such a policy has been adopted:

> "Prosecutors can force people to "cooperate" by using their police powers, including the issuance of subpoenas and the filing of contempt charges. When victims participate under these circumstances, their "cooperation" may not be truly voluntary."[39]

Such a strategy, if deployed in the face of victim reluctance, plainly lays open the state to the claim that it is "re-victimising" the battered woman.[40] She may perceive herself merely to have been drawn from one sphere in which her conduct and compliance are obtained by compulsion, only to be placed in another. At all events, such aggressive endeavours to secure convictions appear wholly inconsistent with the protection of privacy and family life offered by Article 8 of the European Convention on Human Rights and Fundamental Freedoms which has all but been incorporated into national law by the Human Rights Act 1998.[41]

---

groups on the grounds that their having these liberties may enable them to block policies": J Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) 294-5. In our context this means the state's aggressive attempts to prosecute domestic violence should not take precedence over the victim's basic liberties such as the right to privacy, family life etc conferred by Article 8 of the European Convention on Human Rights and Fundamental Freedoms.

37 The most modern and thoroughgoing account of the various forms of the no-drop model is to be found in C Hanna, *op cit* n 33.

38 See I Brownlee, "Compellability and Contempt in Domestic Violence Cases" [1990] *Journal of Social Welfare Law* 107.

39 C Hanna, *op cit* n 33, at 1863. A slightly different variant exists in San Diego where the policy is "to pursue every provable felony case, regardless of the victim's wishes," and in the event of non-appearance "the prosecutor can request a bench warrant and a continuance when a victim fails to appear": *id*.

40 This term derives from M Asmus, T Ritmeester and E Pence, "Prosecuting Domestic Abuse Cases in Duluth: Developing Strategies from Understanding the Dynamics of Abusive Relationships" [1991] *Hamline Law Review* 115, 149-54.

41 Technically the Convention has not been incorporated into domestic law. Instead, the 1998 Act merely, so far as we are concerned, makes it unlawful for any public authority to act in a way which is incompatible with a "Convention right": see ss 6-8. Such public authorities expressly include courts of law: s

By contrast, soft no-drop policies entail a more moderate approach whereby "prosecutors do not force victims to participate in the criminal process; rather victims are provided with support services and encouraged to continue the process".[42] The model adopted in Brooklyn, New York, for example, involves compulsion of the victim only to the extent that she is required to undergo educative counselling before she may drop charges. The hope is that, "with enough understanding and encouragement, the battered woman will assess her situation realistically, start to unlearn her helplessness" and thus "help to assist the legal system as a witness against her [batterer]".[43]

Soft no-drop policies are clearly more flexible and victim-sensitive than are their hard alternatives. Indeed, so accommodating are they that it might even be argued that they are no-drop policies in name alone, the reality being that they are merely a procedural variant of the *status quo*. For this reason, it is tempting to reject them out of hand on the basis that they fail, ultimately, to secure mandatory victim participation in the prosecution process. A soft no-drop policy, it could be argued, is one which, paradoxically, allows the victim - whose plight it is designed to improve - to undermine its very *raison d'être*. It is largely for this reason that Cheryl Hanna, ultimately, declines to identify any value in the adoption of such a policy.[44] She claims that, instead, hard no-drop policies can *guarantee* more convictions[45] and convey the message to abusers, victims and the general public alike that domestic violence is a serious offence that the state will punish at all costs.[46] She justifies her position on the basis that "because domestic violence is a public crime, the state has a responsibility to intervene aggressively".[47] She also asserts that the adoption of a hard no-drop policy reduces the risk of future threats or acts of violence:

> "If participation is mandated, the state takes away the batterer's ability to influence the victim's actions. Basing prosecutorial decision-making on witness cooperation in domestic violence cases ultimately places the victim in more danger... Fear, intimidation, and imposition of guilt on the victim "work" if the case is dismissed."[48]

Both of these points are, of course, true. But they do not, as we noted earlier, tell the whole story. They are premised on only two of the four "public" conceptions of domestic violence. They overlook the fact that there is an equal, and countervailing, public concern that women should not be re-victimised by being forced against their wishes to supply evidence against their abusers. They also ride rough-shod over the woman's right to privacy and family life[49] and deny her freedom of choice. To overlook these aspects of the issue is to ignore the fact that there may be very good reasons why a woman may wish to avoid participation in the prosecution process. She may, for example, be concerned about the fact that her partner is the sole money earner in the home and may consider state benefits insufficient to maintain

---

6(3)(a). On the Act generally, see K Ewing, "The Human Rights Act and Parliamentary Democracy" (1999) 62 *Modern Law Review* 79.

42 C Hanna, *op cit* n 33, at 1863.

43 K Waits, "The Criminal Justice System's Response to Battering: Understanding the Problem, Forging the Solutions" (1985) 60 *Washington Law Review* 267, 307.

44 C Hanna, *op cit* n 33.

45 *id*, at 1863.

46 *id*, at 1864.

47 *id*, at 1865.

48 *id*, at 1891-2.

49 See n 36, *supra*.

her (and any children) adequately if her partner were to be incarcerated for his offence. She may simply consider it the lesser of two evils to allow her abuser to escape unpunished if it means she can avoid the perceived ordeal,[50] or sheer shame and humiliation[51] of giving evidence in court. Alternatively, she may simply be unwilling to testify because of a continuing affective bond, because of the threat of further violence from her partner, because of reasons associated with her racial heritage,[52] or because the incident was a one-off, never to be repeated. In addition, there are at least two further, pragmatic counter-arguments that may be mounted against the adoption of a hard no-drop policy in this country. First, the knowledge that participation in the prosecution process would be mandated may be enough to dissuade some women from telephoning the police in the first place. Without the compulsion to participate, a non-deterred phone call can be a useful way of averting or ending an imminent or current episode of domestic assault. Secondly, in some of Britain's inner cities, particularly among certain minority groups, victims who participate in the criminal process may be perceived by members of their local community to be guilty of collusion with the police, widely seen therein as the universal enemy. [53]

For all of these reasons, I cannot, unlike Hanna, conceive of the advantages of implementing a hard no-drop policy as adequate justification for its adoption. The counter-arguments are both too numerous and too weighty to be ignored or overridden. Thus, given my central thesis - that some form of public response is needed in view of the essentially private tack that has hitherto ineffectually been pursued - we are forced to consider more closely the merits of a softer version of "compulsory"victim participation.

Although soft no-drop policies do not carry any guarantee of higher prosecution rates, they cannot be dismissed as totally futile for, as we shall see, they can operate on other, less crude levels, to effect a valuable public response to domestic violence. Yet before considering these aspects of softer policies, it is important first to meet the powerful feminist argument that soft no-drop policies do nothing to unsettle the ideological *status quo* and in fact, on the contrary, do much to stabilise and reinforce it.[54] The reason we can reject such a stance is that there is an equally powerful and opposite feminist argument that the adoption of a hard no-drop policy deprives the victim of her autonomy.[55] Ultimately, then, recourse to

---

[50] On which, see A Cretney and G Davis, *op cit* n 3, at 171.

[51] Hanna in fact recognises this problem (*op cit* n 33, at 1871) but argues that its significance is diminished by the fact that in around 90% of cases plea-bargaining removes the need for the victim to testify.

[52] See, *eg*, C Cuneen and J Stubbs, *Violence Against Filipino Women*, (Sydney: Sydney University Institute of Criminology, 1996) and C Cuneen (ed), *Aboriginal Perspectives on Criminal Justice* (Sydney: Sydney University Institute of Criminology, 1992).

[53] See S Holdaway, "Recruitment, Race and the Police Subculture" and R Oakley, "The Police and Black People: The Training Response" in M Stevens and S Becker (eds), *Police Force, Police Service* (Basingstoke: Macmillan Press Ltd, 1994). *Cf* the attitude of some aboriginal and other NESB women to the uninvited involvement of the police documented in M Kaye, "Third-party Applications for Protection Orders: Opportunities, Ambiguities and Traps" [1997] *Journal of Social Welfare and Family Law* 403, 412-415.

[54] See J Zorza, "Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Police Domestic Violence Studies" (1994) 28 *New England Law Review* 929, 978-9 and M Freeman, *op cit* n 8.

[55] The tension between the public goal of punishing crime and the private concern of preserving the victim's autonomy is recognised by Hanna. Nonetheless, she

feminist arguments alone cannot supply an unequivocal solution to the problem of how best to co-ordinate a public response to the prevalence of domestic violence: any feminist rejection of a soft no-drop model can itself legitimately be dismissed on feminist grounds.

What, then, is the value of a soft no-drop policy on the lines of the Brooklyn model we saw earlier?[56] First and foremost, the Brooklyn policy stresses the importance of "educative counselling and support". Indeed, it is only the education and support for the victim that is truly mandatory under this soft policy. It enables a prosecution to be dropped in those cases, discussed earlier, where the victim genuinely has a greater interest in the aggressor's acquittal than in his conviction. Yet it also minimises the chance of her withdrawing on the basis of a false perception of a continuing affective bond or because she is suffering from battered woman syndrome.[57] Pursuing cases regardless of the victim's *informed* wishes lays open the criminal justice system to criticisms on two counts. Either it re-victimises the woman who refuses to testify by convicting her for contempt of court or it fails to convict large numbers of assailants where the victims decide to commit perjury in order to ensure their release. Neither outcome would foster a favourable public impression of the Crown Prosecution Service (CPS) or the criminal justice system generally. Indeed, the CPS is specifically charged with the task of being selective about those cases which it decides to prosecute in order to avoid such an image (as well as to save costs).[58] To this extent, we already enjoy a form of soft no-drop policy. Yet it is the commitment to education and support of the victim that specifically enhances the possibility of achieving the ideological change for which this article argues; and it is for this reason that current practice needs to be modified.

---

claims that "[i]n the domestic violence context the goal is to punish the batterer in order to protect potential victims. Although removing a woman's right to choose whether to prosecute may undermine her autonomy, such an infringement on her liberty is necessary to protect women overall." *op cit* n 33, at 1870. But this is both a paternalistic and patriarchal stance to adopt manifesting, as McGillivray puts it, a "consensus between [mainly male] reformers and the state that social interests are to take precedence over the immediate interests of the victim": A McGillivray, "Battered Women: Definition, Models and Prosecutorial Policy" (1987) 6 *Canadian Journal of Family Law* 15, 31. On notions of autonomy generally, see I Berlin, *Four Essays on Liberty*, (Oxford: Oxford University Press, 1969) 118-172; J Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) ch 10 and, more particularly, J Hardwig, "Should Women Think in Terms of Rights?" in C Sunstein (ed), *Feminism and Political Theory* (Chicago: University of Chicago Press, 1982).

56 See n 43, *supra*, and associated text.

57 For an interesting account of this phenomenon see M Fox, "Legal Responses to Battered Women who Kill" in J Bridgeman and S Millns (eds), *Law and Body Politics* (Aldershot: Dartmouth, 1996) 181-5. See also J Stubbs and J Tolmie, "Race, Gender and the Battered Woman Syndrome: an Australian Case Study" (1995) 8 *Canadian Journal of Women and the Law* 122. For a much fuller, though not wholly compelling, account see D Downs, *More Than Victims - Battered Women, The Syndrome Society and the Law* (Chicago: University of Chicago Press, 1996).

58 See A Cretney and G Davis, *Punishing Violence*, *op cit* n 19, pp 101-105. See also S Edwards, *op cit* n 5, pp 198-200.

Secondly, the sensitivity and flexibility of soft no-drop policies are advantages not lightly to be dismissed.[59] In some circumstances, they empower the victim to make the difficult choice between the risk of recidivism and almost certain family break-up (which latter she might elect to avoid for the sake of any children there may be); they avoid aggressive paternalistic interventionism in genuine one-off cases; they accommodate the genuine fear some women possess of giving evidence in court;[60] and they avoid the arguable breach of Article 8 of the European Convention on Human Rights and Fundamental Freedoms that we explored earlier.[61] Finally, some increase in the rate of prosecution and convictions leading to incarceration could, I think, still legitimately be expected. This, in turn, might prevent some assailants from battering the same woman, or a new partner, in the future. It would also, assuming the likelihood of recidivism,[62] save the public purse in terms of the costs of re-arrest, future health care, shelter and re-housing victims (in cases where the degree of violence escalates) and the loss to employers of members of their workforce for days at a time.

On balance, then, there seems a strong case for bringing current British practice more into line with the form of soft no-drop policy that exists in Brooklyn. The level of victim coercion would be confined to compulsory counselling prior to discontinuing her participation in a prosecution. Nonetheless, we could not expect such a policy to be a panacea. We need also to consider additional forms of public response for which I argue in this article. Let us, therefore, turn our focus to another strategy that has undergone widespread implementation in North America: the adoption of a presumptive-arrest policy.

5. PRESUMPTIVE ARREST IN BRITAIN?

Just as there is no single species of no-drop policy, so there are, equally, varying forms of pro-arrest policy.[63] Essentially, there are again broadly two options. First, that of making arrest mandatory, regardless of the victim's wishes (but dependent upon there being sufficient evidence to suggest that the initial complaint was genuine),[64] and secondly, a more sensitive model of presumptive arrest which, to an increasing extent, is already beginning to be adopted in this country.[65] Here, the emphasis is upon the creation of specialist police units that take "a more interventionist approach to policing

---

[59] Under Utah Code Ann. § 77-36-3(1)(e), for example, a domestic violence case can be dismissed if there is "reasonable cause" to believe that the victim would "benefit" from so doing. The fact that Code is concerned with the victim's welfare more than with securing a prosecution is, in my view, to be applauded.

[60] See C Hanna, *op cit* n 33, at 1878.

[61] See n 36, *supra*.

[62] Morley and Mullender supply disturbing evidence from North America which suggests that deterrence from recidivism tends only to be short-lived: R Morley and A Mullender, *op cit* n 32, at 270.

[63] The best, modern account of these variants is to be found in R Morley and A Mullender, *loc cit*.

[64] See *id*, at 267.

[65] The most comprehensive and up-to-date data available to me at the time of writing is available in S Grace, *op cit* n 4. But for useful academic critique of such measures see S Edwards and A Halpern, "Protection for the Victim of Domestic Violence: Time for Radical Revision" [1991] *Journal of Social Welfare and Family Law* 91. *Cf* the scepticism of R Morley and A Mullender, *op cit* n 33, at 276.

domestic violence,"[66] yet which also possess and deploy "a combination of counselling skills - compassion, being a good listener - and knowledge about legislation and procedures in domestic violence."[67] In this section of the article, I assess the relative merits of each form of pro-arrest policy and consider the appropriateness (or otherwise) of their *formal* introduction in this country.

The main supposed advantage of introducing a pro-arrest policy is the deterrent effect that it is likely to have. In North America, the wide-spread introduction of such policies followed closely on the heels of the experiment conducted in Minneapolis from March 1981 to September 1982 which disclosed such an effect. In their now famous account of that experiment - which compared first, the deterrent effects of a pro-arrest policy, secondly, ordering the abuser from the premises and thirdly, requiring the abuser to undergo counselling or engage in mediation with the victim - Sherman and Berk concluded that presumptive arrest was the most efficacious in terms of curbing recidivism.[68] Since that study, however, it has become widely known - particularly in the light of three subsequent studies conducted in North Carolina, Nebraska and Wisconsin - that the deterrent effect of adopting either mandatory or presumptive arrest policies tends only to be short-lived.[69] In addition, it has been pointed out that:

> "arrest may in fact endanger the victim's safety due to reprisals from an angry partner. Indeed, fear of reprisal appears to be a major reason why many women wish to withdraw charges against their assailants. And this fear may not be misplaced: in 1987 and 1988 more than 90 per cent of women killed by their partners in Minnesota were actively trying to separate from them or seeking help from an outside agency."[70]

The danger of reprisals is equally significant in the British context, for the overwhelming majority of abusers are never prosecuted.[71] In addition, the more offenders that go unprosecuted, the more the impression is created that the police are guilty of too heavy-handed an approach to law enforcement which, in ethnic minority circles at least, may appear as wanton police oppression.[72]

---

66 S Grace, *id*, at 1 (describing the recommendations contained in Home Office Circular 60/1990, *op cit* n 21.

67 *id*, at 18.

68 L Sherman and R Berk, "The Specific Deterrent Effects of Arrest for Domestic Assault" [1984] *American Sociological Review* 261. They concluded that while advice and separation interventions were of little to no value, there was clear evidence that "arrest and initial incarceration alone may produce a deterrent effect, regardless of how the courts treat such cases:" *id*, at 270.

69 According to one study, the deterrent effect lasts, in general, only for about six months: see E Stanko, "Policing Domestic Violence: Dilemmas and Contradictions" (1995) 28 *Australian and New Zealand Journal of Criminology* 31. For details of the findings in the three studies mentioned in the text see R Morley and A Mullender, *op cit* n 33, at 170.

70 *id*, at 171.

71 See A Cretney and G Davis, *op cit* n 3, at 165-7. The same is also true in Australia: see S Parker *et al*, *Australian Family Law in Context* (Sydney: Law Book Company, 1994) 367-368.

72 See J Stubbs, *Domestic Violence, Cultural Diversity and the Legal System* (Occasional Paper No 7) (Darwin: Office of Women's Policy, 1998).

Though arguments such as these clearly provide a solid foundation to Morley and Mullender's scepticism about the adoption of aggressive arrest policies,[73] this, of itself, ought not to dissuade us in absolute terms from adopting more interventionist policing of domestic violence. Recall that there are essentially two versions of such policies: the mandatory and presumptive arrest models. Though the counter-arguments just explored are indubitably pertinent in the context of the former, they do not necessarily ground an objection to the latter or to more interventionist policing more generally. A mandatory arrest policy is an extreme example of a public response to domestic violence. But, as I argued earlier, there are other public dimensions to domestic violence than simply the state's interest in prosecuting offenders; and, with these in mind, a more moderate form of pro-arrest policy might be viewed as a useful public response to domestic assault.

Morley and Mullender have gone as far as to argue that, at an ideological level, a policy predicated on the *presumption* of arrest[74] conveys "a clear message to the abuser and society" the substance of which is that "woman battering is crime unacceptable to the community which will therefore be fully prosecuted, a woman's right to equal protection is established and her sense of human dignity enhanced."[75] Though I have reservations about whether such an immediate impact could be expected, I nonetheless consider that, over time, such an effect (at least upon the police) could reasonably be expected; especially if an insistence upon interventionist policing were to be introduced into police training.

Equally, the fact that under a presumptive arrest policy the police exercise their discretion as to whether they should make an arrest partly by reference to the victim's views means that, in a sense, the victim is empowered by the adoption of such a policy because the batterer's immediate future is significantly determined by the victim's wishes.[76] Thus, there is much to commend a presumptive arrest policy. It should therefore be applauded that many of Britain's police forces have already informally introduced such a policy,[77] following the recommendation contained in a Home Office Circular of 1990 that "[t]he arrest and detention of an alleged assailant should, therefore, always be considered, even the though the final judgement may be that this is inappropriate in the particular case."[78] Even if the deterrent effect of presumptive arrest policies remains in question, the fact that victims are empowered, in the manner suggested above, and dealt with in a sympathetic and understanding way is valuable in itself.

---

[73] R Morley and A Mullender, *op cit* n 33.

[74] Sherman and Berk, in fact, argued for just such a pro-arrest policy. They claimed that "an arrest should be made unless there are good, clear reasons why an arrest would be counterproductive," and added "it is widely recognised that discretion is inherent in police work. Simply to impose a requirement of arrest, irrespective of the features of the immediate situation, is to invite circumvention [of the objective]." *op cit* n 68, at 270.

[75] R Morley and A Mullender, *op cit* n 33, at 271.

[76] See E Pence, *The Justice System's Response to Domestic Assault Cases: a Guide for Policy Development* (Duluth: Minnesota Programme Development Inc, 1989).

[77] Not only has there been widespread, informal implementation of this recommendation, at least five of Britain's 43 police forces have now established specialist domestic violence units which deal exclusively with incidents of domestic abuse with sensitivity and understanding: see S Grace, *op cit* n 4, p 5.

[78] *Op cit* n 21, at 6.

6. OTHER STRATEGIES?

In this penultimate section, I consider whether, in addition to the adoption of a soft no-drop policy, in tandem with a formalised version[79] of the presumptive arrest policy (which has been adopted on an informal basis by only some of Britain's police forces) there might not be other measures which ought to be introduced in this country in order to respond effectively to the unacceptable prevalence of domestic violence. Almost self-evidently, a web of strategies is a better way to address the problem than simply placing total reliance on the adoption of only scheme.[80]

I think that by three broad means, a much more effective public response to domestic violence might be achieved. First, a range of further improvements could be made to the standard police response to complaints about domestic violence.[81] Secondly, a rather different approach could be adopted by the Crown Prosecution Service, which all too frequently has been accused of `down criming' domestic assaults,[82] when deciding whether or not to prosecute an assailant. Finally, a re-appraisal of the use of plea-bargaining in the specific context of domestic violence appears warranted; for, though plea-bargaining in both its guises is generally widespread,[83] it has the capacity to mask the seriousness of domestic violence (the profile of which this article argues needs raising).[84]

As regards changing the policing of domestic violence, I would suggest that in addition to introducing specialist domestic violence units nationally,[85]

---

[79] The Home Office Circular that prompted the implementation of presumptive arrest policies (60/1990) does not carry the force of law. To achieve mandatory and universal application of such strategies, legislation would be required: see S Edwards, op cit n 5, pp 194-5.

[80] Regrettably, there is a suggestion of such an "all the eggs in one basket" approach in the Home Office Circular of 1990 (op cit n 21) which focuses (at 6) narrowly upon: "[e]xperience in other countries [which] suggests that the arrest of an alleged assailant may act as a powerful deterrent against his re-offending."

[81] Yet as Grace noted in 1995, despite it having been around for half a decade, "a third of operational officers had not heard of Circular 60/1990 at all and over half said that they had not received any new guidelines on domestic violence:" S Grace, *op cit* n 4, pp 53-54.

[82] See S Edwards, op cit n 5, pp 200-201; N Lowe and G Douglas, Bromley's Family Law (London: Butterworths, 1998) pp 188-189.

[83] Wasik *et al* identify two kinds of plea-bargain. The first, charge bargaining, involves certain charges being reduced or dropped in return for defendant's guilty plea. The second - sentence discounting - entails the defendant receiving a more lenient sentence in exchange for a guilty plea: See M Wasik, T Gibbons and M Redmayne: *Criminal Justice: Text and Materials* (London: Longman Press, 1998) pp 374-388.

[84] In the case of charge bargaining, where D is convicted of a lesser offence, there is a danger of conveying the message that domestic assaults are less serious than in fact they are. A similar problem arises in the case of sentence bargaining; for there, D may receive a lighter sentence than is warranted (if the profile of domestic violence is to be raised).

[85] The case for sensitive, specialist policing of domestic violence is beyond doubt when empirical studies consistently supply evidence of harsh policing such as the officer in Cretney and Davis' study who said to one woman who was being pressurised in to complaining formally: "Well don't expect us to help you if you

officers ought routinely to be more thorough in their response to domestic violence allegations by making full and complete notes at the premises to which the victim has called them,[86] and by questioning mature children, neighbours and perhaps even family doctors about past events. It might even be useful to note the physical state of the premises themselves, for the knowledge that a charge might also be brought for criminal damage could lend additional deterrent weight for the future. In addition, officers could record the victim's statement at the time of the initial response with a view to making more use of section 23 of the Criminal Justice Act 1988 which, in certain circumstances,[87] permits a person's recorded statement to be used as evidence of a fact if their oral statement of that fact would have been admissible.[88] The use of this provision could help to circumvent the problem of witnesses who are afraid generally to give evidence in court, or who are "warned" in the interim, by their abuser, not to do so.[89] At the very least, it is clear that the thoroughness of the police response should not continue to be dominated by the likelihood of obtaining a conviction. Aside from the pro-arrest strategies that have so far been introduced, police action has hitherto been determined, according to Cretney and Davis' research, by "[t]he distinction between reporting a crime and "making a complaint" (and thereby signifying commitment to the prosecution process)" for, they inform us, "this distinction is of central importance. They will seldom arrest and prepare a case file for the CPS unless they are confident that they have a victim who is prepared to "complain.""[90] In short, in the context of domestic violence, the police must cease to "measure their success in terms of convictions secured - as of course they are encouraged to do within the prevailing political climate."[91]

---

get murdered and don't expect us to come running to your assistance if this is your attitude:" A Cretney and G Davis, *op cit* n 31, at 81. See also the many cases documented by McCann (*op cit* n 10) and Hatty (*op cit* n 5).

86 Empirical research has revealed that "[t]he painstaking, well-ordered response to reported assault is the exception rather than the rule:" A Cretney and G Davis, *Punishing Violence*, *op cit* n 20, p 96. To take the attitude, upon arrival at the scene of a domestic assault - as one policeman interviewed by Hatty did - that "she's quite big enough to look after herself" self-evidently must be deplored and made unacceptable: see S Hatty *op cit* n 5, p 77. In addition, the knowledge that a charge might be brought in relation to criminal damage might add further deterrent weight.

87 See n 89, *infra*.

88 Section 23 must be read subject to section 25 under which provision, such a statement may be excluded if there are good reasons for such exclusion. It would seem that those responsible have interpreted "good reasons" to mean "virtually any reasons," for in a study of ninety cases in Bristol undertaken by Cretney and Davis, use of section 23 was made in only one instance: A Cretney and G Davis, *op cit* n 31. On the other hand, under s 26 of the Act, a trial judge is afforded an *inclusive* discretion to permit *any* statement which was prepared for the purposes of a criminal investigation or pending criminal proceedings.

89 It is an important restriction on the use of this provision that it may only be used where the complainant is absent because of fear or because of being kept out of the way. It is of no use, for example, where the complainant declines to co-operate in the prosecution of her partner for reasons of wishing to be reconciled with him or for the (mis)perceived sake of their children. For more detailed analysis of s 23, see Keane, *op cit* n 31, pp 270-84.

90 A Cretney and G Davis, *Punishing Violence*, *op cit* n 20, p 75.

91 *id*, at 82.

As regards CPS practice, two suggestions seem apposite. First, given my earlier rejection of the adoption of a hard no-drop policy in this country, it follows that section 80(3)(a) of the Police and Criminal Evidence Act - which makes a spouse a compellable witness against her husband where he has been charged with assaulting, injuring or threatening to injure her - should, contrary to the tenor of the Home Office Circular of 1990, continue to be used very sparingly, if at all.[92] It is one thing to be supportive of a victim, it is quite another to overlook two ineradicable problems associated with compelling the victim to give evidence against her spouse. Quite apart from the fact that common use of this provision may deter a battered wife from complaining in the first place, the subsection provides no guarantee against her committing perjury in order to secure her husband's acquittal in cases in which she would prefer charges to be dropped. In addition, the public interest in prosecuting violent crimes committed by one spouse upon the other runs counter to the ascendant social policy of preserving the integrity of marriage.[93]

Secondly, I would suggest that, while considerable emphasis should still be given to the general principle that the more serious the offence, the more it is in the public interest to secure a conviction, the CPS should be chary of seeking to convict if it is likely to result in breaking up the family. This is especially so where there are non-abused children and the incident complained of was an isolated event. Such an approach can easily be accommodated within the general discretion conferred upon the CPS when deciding whether or not to proceed with a prosecution.[94] Yet recent empirical evidence suggests that the CPS is becoming increasingly likely to attempt to convict in domestic assault cases.[95] My argument is not that the CPS should not attempt to convict where the victim is a willing witness, merely that she should not be put under undue pressure to become such a witness.

The final matter that I think needs to be addressed is the prevalence of plea-bargaining - especially in relation to offences against the person.[96] While Hanna, as we saw, sees the wide-spread use of plea-bargaining as a means of justifying the use of a hard no-drop policy, I take the contrary view that, in the context of domestic violence, the use of plea-bargaining has two significant negative effects which provide a basis on which to reject its use. If a plea of guilty is accepted in exchange for reducing a charge from, say, grievous bodily harm to actual bodily harm, there is a danger of trivialising in the minds of the victim, the abuser and society generally the severity of domestic assaults. Equally, the problem of assailant identification does not obtain in the context of domestic assaults though, of course, this is a major

---

92 The Circular in question (op cit n 21), noted, in connection with s 80(3)(a) that "[t]he power is used infrequently" because of the prospect of the victim not wishing to give evidence. Yet it went on to suggest that "[t]his underlines the need to give close support to the victim during the pre-trial period, so that she will feel sufficiently self-confident to give evidence:" para 24.

93 See Family Law Act 1996, s 1.

94 Prosecution of Offences Act 1985, s 23. This discretion is exercised by reference to two factors, evidential sufficiency and the public interest. For a useful account of what the public interest includes in this context, see S Edwards, *op cit* n 5, pp 199-200.

95 See A Cretney and G Davis *op cit* n 3, who revealed that in the first 10 months of 1993 in the Bristol area, 46% of assaults prosecuted in courts were "domestics" causing them to conclude of domestic violence that "this is a hidden crime no longer."

96 For a good overview of the various forms plea-bargaining takes, see M Wasik *et al*, *op cit* n 83, pp 370 ff.

obstacle to securing convictions for assaults committed elsewhere.[97] In those cases there is much greater need to make use of plea-bargaining yet so far as the virtues of plea-bargaining have been afforded statutory recognition, no such distinction along the lines argued for here has been made.[98]

7. CONCLUSION

It is clear that the annual number of incidents of domestic violence remain at an unacceptably high level. It is equally clear that the civil law remedies - awarded on the basis largely of cure rather than prevention - are inadequate to the tasks both of reducing these figures significantly and operating effectively.[99] And while there have been some developments in recent years with respect to the recognition of the seriousness of, and public dimension to, domestic violence, much remains to be done both in terms of broadening the bases of approach and formally institutionalising them.

There is, ultimately, and almost inevitably, no simple practical solution to the problem. Indeed, much of the battle against domestic violence must take place on an ideological level. To achieve this, the problem needs to be attacked on a number of fronts none of which, needs be, may be crude in nature. The simple adoption of a hard no-drop policy with a view to obtaining more convictions is insufficient. Equally, the implementation of an aggressive pro-arrest policy in the hope that it will operate as an important deterrent is similarly inadequate in the absence of any other co-existing strategy. Only once the message is widely conveyed, and then re-conveyed, that domestic violence *is* a serious, punishable offence against not just individual women, but also on an ideological level, against women generally, will we be likely to achieve a significant reduction in its incidence. It is sometimes argued that, instead of attempting to prosecute offenders, greater emphasis should be placed on educating *both* partners together - for example by counselling. Yet there is a danger with this approach: it tends to detract from the seriousness of the offence. Still worse, endeavours to counsel the aggressor alone might convey the message that being subjected to such "gentle advice" is the sum total of his punishment.

In this article I have considered a number of alternative ways in which the profile of domestic violence might be raised and the institutional responses to it might be modified and supplemented. At bottom my concern has not been simply to increase incarceration rates nor anything else so crude. Instead, I have argued for a series of means by which, in time, domestic violence might come more widely to be regarded as the dreadful crime that it is. If this paper has gone some way to achieving that goal, then it has served its purpose.

---

97 See A Cretney and G Davis, *Punishing Violence*, *op cit* n 20, p 83.

98 See Criminal Justice and Public Order Act 1994, s 48 (statutory endorsement of sentence bargaining).

99 See, *eg*, Michael Freeman's comment that domestic violence injunctions are "often of little more value than sticking plaster is to a broken leg:" *op cit* n 8, at 241.

PUNISHMENT AND PUBLIC RELATIONS

John E Stannard, Senior Lecturer in Law,

The Queen's University of Belfast*

One striking feature of the contemporary penal system in these islands is the intense public scrutiny given to the sentencing of notorious offenders, and the concern felt at the possibility that such offenders are not getting their just deserts.[1] In particular, there are several cases in the last few years which illustrate an important and highly influential factor in public opinion with regard to modern sentencing practice, namely anger and resentment felt at what is seen as 'inadequate' punishment meted out on those who bring about the death of others.[2] The place of public anger and the desire for revenge in the sentencing process is a topic which raises a great many issues for debate at a legal, philosophical and sociological level, but which has not really been discussed to any great extent in the courts. However, the House of Lords has now addressed this and other related issues in *R* v *Secretary of State for the Home Department, ex parte Venables* and *R* v *Secretary of State for the Home Department, ex parte Thompson*.[3] These cases are better known to members of the public as the James Bulger case.

The facts of the case are too well known to need extensive repetition. James Bulger, the victim of the crime, was a child of two years of age. Whilst out shopping with his mother he was enticed away by two boys of ten, Robert Thompson and Jon Venables, and then dragged unwillingly for a considerable distance to a railway line, where he was battered to death and his body placed on the track in the hope that a passing train would conceal the evidence of the crime. Thompson and Venables were subsequently convicted of murder in a trial which excited enormous public attention. In passing sentence on the two boys, Morland J described the killing as an act of 'unparalleled evil and barbarity',[4] and described the conduct of the accused as 'both cunning and very wicked'.[5]

---

* I would like to thank Orlagh McCann and Sean Doran for their help in preparing this case note.

1 It was concerns of this sort which led to the provision in section 36 of the Criminal Justice Act 1988 of a right of appeal by the prosecution in certain cases against an excessively lenient sentence.

2 One can cite in this connection the furore over the *Herald of Free Enterprise* disaster in 1987, with its calls for the company to be prosecuted for manslaughter, and the Stephen Owen case in 1991, in which the accused was convicted of the attempted murder of a reckless lorry driver who had killed his son and received a mere eighteen months for reckless driving. Northern Ireland readers will also remember the case of Penny McAllister in the same year, in which a sentence of five years passed on the accused for manslaughter on the grounds of diminished responsibility after a particularly brutal killing done for motives of jealousy was increased to nine years after a public outcry in the press: see *A-G's Reference (No. 2 of 1992)* [1993] 3 BNIL 113. This case is discussed further below at note 46.

3 [1997] 3 All ER 97.

4 Quoted at [1997] 3 All ER 100. Save where otherwise indicated, the facts and background to the case are taken from the opinion of Lord Goff.

5 *Ibid.*

Since the two defendants had been convicted of murder, there was only one sentence that the judge could pass, namely a sentence of indefinite detention 'during Her Majesty's Pleasure' under section 53(1) of the Children and Young Persons Act 1933. However, such a sentence could in theory lead to release after a very short time, which would not reflect the gravity of the offence committed. It was therefore the practice of the Home Office in such cases to follow the practice used in relation to sentences of life imprisonment,[6] and to ask the trial judge to submit a report giving a view as to the actual length of detention which would be necessary to meet the elements of retribution and general deterrence for the offence.[7] This element, the 'penal element' or the 'tariff', was set by the trial judge at eight years in the present case. After reviewing the recommendations of the trial judge, the Lord Chief Justice advised the Home Secretary that the 'tariff' period should be increased to ten years.[8]

In the meantime, the intense public interest shown in the crime had by no means been diminished by the conviction and sentencing of the two young perpetrators. There was a widespread feeling of anger and outrage at the thought that Thompson and Venables might be free to walk the streets within a comparatively short time, and there were calls in the popular press, and in the *Sun* newspaper in particular, for the two of them to be kept under lock and key for the rest of their days.[9] All of this gave rise to strong pressure on the Home Secretary to set a long tariff. In particular, over a quarter of a million people signed a petition organised by the Bulger family calling for Thompson and Venables to be detained for life, while some 4,400 letters were sent to the Home Secretary to the same effect. The MP for the constituency, Mr George Howarth, submitted another petition, this one signed by some 5,900 members of the public, calling for a minimum tariff of 25 years. Last but not least, 21,281 readers of the *Sun* signed and sent in a printed coupon bearing the following words:

> "Dear Home Secretary
>
> I agree with Ralph and Denise Bulger that the boys who killed their son James should stay in jail for LIFE."

Following these and other representations, the Home Secretary decided to increase the tariff for Thompson and Venables to 15 years. In announcing his decision to the defendants, it was stated that he had had regard to, among other considerations

> "the public concern about this case, which was evidenced by the petitions and other correspondence the substance of which were [*sic*] disclosed to your solicitors by our letter of 16 June 1994, and to the need to maintain confidence in the system of criminal justice."[10]

The two defendants now brought an application for judicial review, arguing that the 15 year tariff set by the Home Secretary was unlawful and ought to be quashed. Two broad arguments were presented to the

---

[6] See the statements made in the House of Commons on 30 November 1983 (49 HC Official Report (6th series) written answers cols 505-507) and 27 July 1993 (229 HC Official Report (6th series) written answers cols 861-864): [1997] 3 All ER at 109.

[7] [1997] 3 All ER at 101.

[8] *Ibid.*

[9] Thus one *Sun* headline read: '80,000 call TV to say Bulger killers must rot in jail'; [1997] 3 All ER at 146.

[10] Letter of 22 July 1994, quoted at [1997] 3 All ER 101.

Divisional Court. The first argument was that sentences of detention during Her Majesty's Pleasure under section 53(1) of the 1933 Act were not the same as sentences of life imprisonment for murder, and that it was consequently unlawful to apply in relation to the former the rigid punitive 'tariff' system appropriate to cases of the latter. The second argument was that, even if the setting of a tariff was allowed in cases of this sort, the process of calculation in the present case had been vitiated by a number of procedural irregularities.[11]

The Divisional Court held in favour of the applicants on the first issue, and it was therefore not necessary to consider the allegations of procedural irregularity.[12] The Home Secretary then appealed to the Court of Appeal.[13] It was at this stage that the applicants raised what is the most important argument for the purposes of this note.[14] They claimed that in exercising his discretion with regard to the setting of the tariff the Home Secretary had taken irrelevant matters into account, namely the public clamour for a severe sentence in the present case.[15] The Court of Appeal by a majority of two to one[16] agreed with the Home Secretary on the issue of whether he was entitled to set a tariff in principle, but found for the applicants on the ground that in doing so he had taken irrelevant matters into account, namely the public petition and media campaign.[17] The Home Secretary now appealed to the House of Lords on the latter issue, and the applicants cross-appealed on the former.[18]

The House of Lords therefore had two questions to decide. Most of the five opinions delivered, which take up over 40 pages of the All England Law Reports, are devoted to the issue raised by the cross-appeal: that of the relationship between sentences of mandatory life imprisonment and sentences of detention during Her Majesty's Pleasure, and the legality of setting a punitive tariff in relation to the latter. More important from our point of view, and arguably also from the standpoint of penal practice, are the comments of their Lordships as to the appropriateness of allowing public anger and outrage to impinge on the sentencing process.

On the first issue, it was decided by a majority of three to two[19] that the approach of the Home Secretary to the setting of the tariff in the present case was fundamentally flawed. The House of Lords was at one with the Court of Appeal in rejecting the notion that considerations of punishment should play no part in detention under section 53(1),[20] and it was said that there was nothing wrong in principle even in setting some sort of provisional 'tariff' to be served by the person detained.[21] What was wrong in the present case was the *rigidity* of the tariff. It was pointed out that under the order made by the Home Secretary the applicants' case would not be considered by the Parole Board until twelve years had elapsed, by

---

11 [1997] 3 All ER at 101-102.
12 *Ibid* at 102.
13 *Ibid.*
14 *Ibid* at 138. Lord Lloyd makes it clear that this issue did not form any part of the applicants'original petition for relief.
15 *Ibid* at 113-114.
16 [1997] 1 All ER 327 (Hobhouse and Morritt LJJ, Lord Woolf MR dissenting).
17 *Ibid.*
18 [1997] 3 All ER at 103.
19 *Ibid* at 98 (Lord Browne-Wilkinson, Lord Steyn and Lord Hope; Lord Goff and Lord Lloyd dissenting).
20 *Ibid* at 106 (Lord Goff), 131 (Lord Lloyd), 141 (Lord Steyn) and 151 (Lord Hope).
21 *Ibid* at 119 (Lord Browne-Wilkinson) and 141 (Lord Steyn).

which time they would have passed from boyhood through adolescence to adulthood.[22] Moreover, while it was clear that the Home Secretary might review the tariff in exceptional circumstances, these circumstances did not include any evidence of progress by or rehabilitation of the two applicants.[23] Whilst this might be appropriate in relation to sentences of life imprisonment for murder, it was certainly not appropriate for the very different considerations which applied to sentences of detention during Her Majesty's Pleasure under section 53(1) of the 1933 Act.[24] Here the very words 'during Her Majesty's Pleasure' implied an obligation to keep the detention under constant review,[25] and the sentence was subject to the overriding principle enshrined in section 44(1) of the 1933 Act and in the United Nations Convention on the Rights of the Child that in cases of this sort the best interests of the child should be a primary consideration.[26] Moreover, the adoption of a rigid tariff acted as an unlawful fetter on the discretion of the Home Secretary under Part II of the Criminal Justice Act 1991 to order release on licence in appropriate cases.[27] For these reasons the fifteen year tariff ordered by the Home Secretary in the present case could not stand.

This was enough to dispose of the case, but what of the 'public relations' issue? Here once more there was a divergence of opinion among their Lordships. Dissenting from the majority on this point, Lord Lloyd adopted the reasoning of Morritt LJ in the Court of Appeal, who drew a distinction in this context between a judge passing sentence and the Home Secretary, who was obliged to take into account the need to maintain public confidence in the criminal justice system.[28] The public representations taken into account by the Home Secretary in the present case might be criticised as illogical, prejudiced and ill-informed, but they nevertheless served to indicate a level of genuine public concern about the case to which he was entitled to have regard. If he were to ignore such genuine concern, and nobody had suggested that the petitions and the correspondence were not genuine, it would have a direct impact on public confidence for the future.[29] Lord Browne-Wilkinson expressed no concluded opinion on the matter, whilst saying that the courts should be slow to impose judicial procedures and constraints on what was a purely executive function.[30] The others, however, did not mince their words. Whilst it was only natural that the family of the murdered child should want to express their concern about the level of the sentence, the same could not be said about the other public representations relied on by the Home Secretary in the present case, which were described by Lord Goff and Lord Steyn as discreditable, ill-informed and worthless.[31] The functions of the Home Secretary in the present case were akin to those of a

---

22 *Ibid* at 119 (Lord Browne-Wilkinson) and 155 (Lord Hope).
23 *Ibid* at 119 (Lord Browne-Wilkinson) and 155 (Lord Hope).
24 *Ibid* at 122 (Lord Browne-Wilkinson), 140 (Lord Steyn) and 155 (Lord Hope).
25 *Ibid* at 122 (Lord Browne-Wilkinson), 144 (Lord Steyn) and 155 (Lord Hope).
26 *Ibid* at 122-123 (Lord Browne-Wilkinson). There is surely a strange irony here, given the nature of the crime committed.
27 *Ibid* at 123 (Lord Browne-Wilkinson) and 155-156 (Lord Hope).
28 [1997] 1 All ER 327 at 376, quoted at [1997] 3 All ER at 139. However, Lord Lloyd pointed out that even judges took account of public concern over sentencing levels, citing in this connection the increase in the previous twenty years in the tariff for causing death by dangerous driving: [1997] 3 All ER, *loc cit.*
29 *Ibid.*
30 *Ibid* at 126.
31 *Ibid* at 114 (Lord Goff) and 147 (Lord Steyn).

sentencing judge,[32] who was obliged to maintain a detached and dispassionate attitude. For him to take into account public clamour as to the appropriate level of sentence to be imposed in a particular case[33] was to take into account an irrelevant matter which rendered the exercise of his discretion unlawful.

In the present case the House of Lords were, of course, referring to the functions of the Home Secretary in relation to a sentence already passed by the courts: the functions of the judge in passing a sentence were not directly in issue. However, it is clear that what was said in the case with regard to public pressure was thought to apply with even greater force to judges in their sentencing role. Whilst Lord Lloyd was prepared to concede that public concern over the level of sentencing might have a legitimate part to play in influencing a judge's decision as to sentence,[34] Lord Goff said that it would be quite illegitimate for any sentencing authority to take into account public clamour to the effect that a particular offender should be dealt with severely.[35] According to Lord Hope, the requirements of natural justice were that such considerations should be dismissed as 'irrelevant to the judicial exercise'[36], whilst Lord Steyn roundly declared that it would be an 'abdication of the rule of law' for a judge to take such matters into account.[37] Even Lord Browne-Wilkinson, who as we have seen was prepared to concede a fairly broad leeway to the Home Secretary in a case such as the present, did so by dint of categorising his function as non-judicial, saying that 'judicial procedures and attitudes' should not be imposed on what Parliament had decided should be an executive function.[38] Obviously to his mind at least, much stricter considerations applied to the sentencing judge.[39]

At the level of broad sentencing policy, the approach of the House of Lords in the present case raises many fundamental questions which cannot be dealt with adequately in the space of a note of this sort. In general, there is widespread disagreement among philosophers and penal theorists as to whether notions of retaliation should play any part in the penal process,[40] but a distinction can surely be drawn in this context between

---

[32] *Ibid* at 115 (Lord Goff), 147 (Lord Steyn) and 157 (Lord Hope). Here their Lordships were in disagreement with Lord Lloyd (at 139-140) and Lord Browne -Wilkinson (at 126), who were prepared to draw a distinction between the functions of a sentencing judge and those of the Home Secretary in setting a 'tariff' in cases such as the present. See however *Doody* v *Secretary of State for the Home Dept* [1993] 3 All ER 92 at 103, *per* Lord Mustill.

[33] Both Lord Goff and Lord Steyn adopted a distinction drawn by Staughton LJ in *Doody* v *Secretary of State for the Home Dept* [1993] 1 All ER 151 at 178-179 between public pressure as to penal policy in general, or in cases of a particular type, which could lawfully be taken into consideration, and public pressure directed towards a particular case, which could not: see [1997] 3 All ER at 115 (Lord Goff) and 147 (Lord Steyn). Lord Lloyd, however (at 139), doubted whether this distinction was workable.

[34] *Ibid.*

[35] *Ibid* at 115.

[36] *Ibid* at 157.

[37] *Ibid* at 147.

[38] *Ibid* at 126.

[39] This was also the opinion of Morritt LJ in the Court of Appeal: [1997] 1 All ER 327 at 376.

[40] The field of debate on this subject is truly enormous, and there is obviously not the space within a note of this sort to attempt even a broad overview of the literature. Perhaps the most uncompromising advocate of retaliation in the

pressure brought by the victims of crime and pressure brought by newspaper editors and other outsiders. In the former case, there is a large body of opinion which calls for much more account to be taken of victims of crime[41] in coming to decisions as to sentence; either indirectly through 'victim impact statements' and the like,[42] or even by allowing victims to make direct representations as to sentence.[43] It is certainly at least arguable that where the victims of a crime are anxious to see a heavy sentence passed,[44] this should form a factor, though of course not a decisive factor, in the court's decision. But the same cannot be said of outside media pressure of the sort seen in the James Bulger case, which many would denounce as a highly dangerous basis for influencing sentencing decisions.[45] At a time when newspapers and the TV are filled on a daily basis with strident and frequently ill-informed calls for 'tough' sentences on the perpetrators of particular crimes, it is refreshing to see a commitment by the highest court in the land to the values of objective and dispassionate sentencing. The very notion of the rule of law, as Lord Steyn so rightly says, is inimical to allowing sentences to be passed on the basis of public hysteria or private revenge.[46] There is no room for the blood feud in civilised systems of law.[47]

---

criminal process was Sir James Fitzjames Stephen, who declared that "the criminal law stands to the passion of revenge in much the same relation as marriage to the sexual appetite:" see *General View of the Criminal Law of England*, page 99. See also Kant, *Philosophy of Law* (translation by W Hastie (1887)) at page 196; Hegel, *Philosophy of Rights*, para 101. Others would allow for some degree of retaliation in the criminal process, not as an end in itself, but in order to express society's abhorrence of the crime, or to satisfy the public emotion of resentment against the wrongdoer: see Feinberg, "The Expressive Function in Punishment," in Gross and von Hirsch, *Sentencing* (1981). For further discussion of this issue see Hart, *Punishment and Responsibility* (1968); Honderich, *Punishment, The Supposed Justifications* (1984); Duff, *Trials and Punishments* (1986); Lacey, *State Punishment: Political Principles and Community Values* (1988); Duff and Garland, *A Reader on Punishment* (1994); Wallace, 'Wild Justice' (1995) 70 *Philosophy* 363.

41 This term can be used to include not only those directly injured by the crime, but bereaved families and other relatives: McCullagh, *Study of Crime in Ireland* (1996), pp 334-335.

42 See Ashworth, [1993] *Crim LR* 498; Joutsen, (1994) 3 *International Review of Victimology* 57.

43 As is done in some of the United States jurisdictions: Erez, (1994) 3 *International Review of Victimology* 17 at 18.

44 Which may not necessarily be the case; see Erez, *op cit*, p 21.

45 See Page, *The Sentence of the Court* (1948), pages 41-42; Kleinig, *Punishment and Desert* (1973), at page 125.

46 One must be careful in this context to draw the distinction between *revenge* (the desire of the injured party for vengeance on the wrongdoer) and *retribution* (defined by Hart as "the application of the pains of punishment to an offender who is morally guilty" (*Punishment and Responsibility* (1968) at page 9)). Retribution or "just deserts" is a perfectly respectable factor in sentencing.

47 Indeed, primitive systems of law often indicate a move away from revenge and the blood feud to a more impartial and measured response to wrongdoing: see for instance Seagle, *The Quest for Law* (1941), chapter 3; Kocourek and Wigmore, *Primitive and Ancient Legal Institutions* (1915), chapter 4; Diamond, *Primitive Law Past and Present* (1971), page 222 *et seq.*

However, as a result of the present case judges are now in an impossible position, caught as they are between the rock of the House of Lords and the hard place of media criticism. What is the judge to do in the next high-profile case where the hounds of public outrage are baying for a severe sentence to be passed? For the judge to allow these pressures to have any influence on the sentence would be, in the words of Lord Steyn, an 'abdication of the rule of law'.[48] Yet if the judge stands firm, and passes the sentence which he or she decides is appropriate to the case, there will not only be the gauntlet of media outrage to run, but the real possibility of an Attorney-General's Reference and a reversal in the Court of Appeal.[49]

For the appellate courts to ignore public pressure brought in connection with an Attorney-General's Reference requires both determination and a thick skin on the part of the judges. But if the House of Lords are serious about keeping public pressure out of the sentencing process, they will have to take the bull by the horns, and do for judges what they did for the Home Secretary in the Bulger case. Next time there is a high-profile case involving a supposedly lenient sentence which is then appealed, they must make it clear that the public pressures which may have led to the appeal being made in the first place[50] had and must have no influence whatever on the sentencing decision at the end of the day. This will not be an easy task. The genie of sentencing by the media has been let out of the bottle by the Criminal Justice Act 1988; it will take more than a single House of Lords decision to put it back again.

---

[48] Above at note 37.

[49] It would be naive to suppose that the passing of section 36 of the Criminal Justice Act 1988, which allows for an appeal against unduly lenient sentences, was not itself largely prompted by media pressure. Anyone who takes the trouble to read the Parliamentary debates on the 1988 Act will see that the proposals under discussion were at least in part made in response to public outrage at supposedly lenient sentences passed in a number of notorious cases, including the Ealing Vicarage rape case: see 113 HC Official Report (6th series) cols 1028-1049; 489 HL Official Report (5th series) cols 314-355.

[50] It is hard to imagine that public pressure has no part to play in influencing the bringing of an Attorney-General's Reference in cases of this sort. In the Northern Ireland case of *Christie* in 1992 the wife of an Army captain had her throat slit by the defendant, who was her husband's lover. At the trial, following evidence of mental disorder, the jury brought in a verdict of manslaughter on the grounds of diminished responsibility, and the defendant was sentenced to five years' imprisonment. Following an immense outcry in the press, much of it predicated on the assumption that this was really a case of murder, an appeal was brought and the sentence increased to nine years by the Northern Ireland Court of Appeal: see *A-G's Reference (No. 2 of 1992)* [1993] 3 BNIL 113.

THE PRINCIPLE OF THE EFFECTIVE PROTECTION OF THE INDIVIDUAL IN EC LAW AND THE DIALECTIC OF EUROPEAN INTEGRATION THEORY

Constantin Stefanou,Centre for European Research, Thames Valley University, London and

Helen Xanthaki,Research Fellow, Centre for Legislative Studies, Institute of Advanced Legal Studies, University of London

INTRODUCTION

By now the link between the political and legal aspects of the European integration process is firmly established and understood by both political scientists and legal experts. Yet, while this link is obvious at the *macro* level, for example, the well documented pro-integrationist stance of the European Court of Justice (the ECJ) in the 1970s and 1980s,[1] we are still far from establishing this link at the *micro* level or, as Burley and Mattli put it, the theoretical "microfoundations" of legal integration.[2] A lot of work is still needed to identify such links with reference to specific principles of EC law established by the ECJ or interpretations of specific articles of the Treaty by the ECJ.

The aims of this paper are twofold: first, to explore an original, alternative remedy for the effective protection of the individual in EC law; and second, to delve into the micro level by examining the theoretical repercussions of the principle of the effective protection of the individual in EC law as it has developed through a series of Court rulings. In particular this article examines the theoretical implications of two competing hypotheses about the development of the effective protection of the individual in EC law. The first hypothesis is that the effective judicial protection of the individual can be achieved through legal actions before the national Courts (indirect actions), following the *Francovich* state liability scenario. The second hypothesis is that the effective judicial protection of the individual can only be guaranteed through direct actions before the European Courts.

Although seemingly a procedural matter of minor importance, these two hypotheses encapsulate the fundamental dialectic of integration between the forces traditionally labelled *pro-* or *anti-*European or, in political science jargon, what O'Neil called the supranational and statecentric paradigms.[3] Essentially this is a dialectic between functionalist, neofunctionalist and federal perspectives against realist or intergovernmentalist perspectives. The need to return to the original dialectic of integration has been a feature of both theoretical and empirical research in recent years.[4] If anything, after three revisions of the Treaties

---

[1] See for example H. Rasmussen, "Between self restraint and Activism: A Judicial Policy for the European Court", (1988) 13 *E.L.Rev.* pp.28-38.

[2] See A-M. Burley and W. Mattli, "Europe Before the Court: A Political Theory of Legal Integration", *International Organization*, Vol.47, No.1, 1993, p.41.

[3] See M. O'Neil, *The Politics of European Integration: A Reader*, Routledge, London, 1996.

[4] See for example D. O'Reilly, "Testing Integration Theories: The Development of a European Air Transport Policy", Paper delivered at *2nd UACES Research*

in the space of 10 years, this dialectic would appear to be the single most persistent and most easily recognisable theme covering most aspects of the integration process.

With reference to the effective protection of the individual this dialectic is intensified by the ECJ's rulings on cases such as *Francovich*,[5] *Factortame I* [6] and *Dillenkoffer*,[7] which have brought to the fore the debate about the ECJ's activist or minimalist role.[8] In recent years, activism has been seen in terms of its integrative potential while minimalism as a pillar of the statecentric paradigm. At the epicentre of these two hypotheses lies the oldest point of contention with reference to the European integration process: national sovereignty.

Before we proceed to look at this dialectic with reference to Art 215(2) let us first briefly look at the two theoretical paradigms behind them. Space does not allow us to look at the different supranational and statecentric theories so we shall focus on two fundamental paradigms which stand at opposite ends of the *pro*- and *anti*-European spectrum: functionalism and intergovernmentalism.

THE THEORETICAL CONTEXT

Functionalism

Much of the functionalist approach to international relations has been formulated by David Mitrany in his book *A Working Peace System.* As the title of Mitrany's influential work suggests, the ultimate aim of the functionalist thesis is the preservation of world peace which, he proposes, can be achieved by seeking to link "authority to a specific activity [in order] to break away from the traditional link between authority and a defined territory".[9]

Central to the functionalist theory is the belief that national sovereignty is the root of international conflict due to the rivalry which exists between self-centred nation-states. Based on the assumption that community is "the sum of functions carried out by its members"[10] Mitrany maintained that people have a sense of loyalty towards their nation-state because they can satisfy their welfare needs. If their needs are satisfied efficiently at a transnational level there would, inevitably, follow a shift of loyalties from the national to the transnational level.

Although Mitrany is not very specific in his use of "welfare needs" other functionalists, very much in the same vein of thought, have made a distinction between basic welfare needs such as health or housing and the

---

Conference, University of Loughborough, Sept. 1997; also see C. Stefanou, "European Integration Theory: *Macro-Micro* Themes, Spheres of Focus and Synthetic Theories", Paper delivered at *UACES Biannual Research Conference*, University of Birmingham, Sept. 1995.

5 See Joined cases C-6/90 and C-9/90 *Francovich v Italian Republic* [1991] ECR 5357

6 See case C-213/89 *Factortame and Others* [1990] ECR 2433.

7 See Joined cases C-178, 179, 188, 189 and 190/94 *Dillenkoffer and others* v *Commission* [1996] 3 CMLR 469.

8 See C. Stefanou and H. Xanthaki, *A Legal and Political Interpretation of Articles 224 and 225 of the Treaty of Rome: The FYROM Cases*, Ashgate/Dartmouth, 1997, pp.120-127.

9 D. Mitrany, *A Working Peace System*, Quadrangle, Chicago, 1966, p.27.

10 J.P. Sewell, *Functionalism and World Politics*, Princeton University Press, Massachusetts, 1966, p.17.

need to have values such as national pride or defence of the realm. It is argued that both inspire loyalty but that individuals have been misdirected in placing more importance on the need for "patriotic values" rather than the efficient satisfaction of their basic welfare needs. Because functionalism addresses the latter, rather than narrow notions of national interest, individuals would have to be "drawn into the co-operative ethos"[11] so that a sense of "Community" is established between them. The functionalist type of community is akin to Tönnies' *Gemeinschaft*[12] as the required shift of loyalties could not be achieved "…by a written act of faith but through active organic involvement"[13]. Thus, the functionalist school of thought does not place emphasis on written constitutions, relying instead on the gradual loss of nation-state power and authority through the development of international *Gesellschaft.*

Mitrany's approach tries to avoid, or ignore, politics altogether. He implies that the essence of functionally specific international institutions is that they are not politically determined and are rather free of ideological contemplation. His argument is that by creating transnational agencies to deal with specific "common needs that are evident", for example, transport, frontiers will eventually become obsolete as people will realise that their interests no longer lie solely with the nation-state. Thus, every time a transnational agency is created to deal with a specific welfare need, "…a slice of sovereignty is transferred from the old authority to the new".[14] As authority would slowly slip out of the grip of the national governments to these institutions which transcend the nation-state a "socio-psychological" community, at the international level, would attract the loyalties of individuals. The underlying syllogism is that the more welfare needs are satisfied at the transnational level the fewer areas are left for rivalry between nation-states and therefore the risk of conflict is minimised.

This utilitarian approach assumes that individuals are constantly making rational calculations about their interests based on economic variables. This approach is very typical of the period during which Mitrany produced his functional thesis (as well as the immediate post-war period) as solutions to most national and international problems were sought in the field of economics which by that time had been established as the major discipline in the field of social sciences.

It is somehow ironic that functionalism is used within the theoretical framework of European integration because functionalism opposes the notion of international regional integration. As Mitrany put it: "There is little promise of peace in the mere change from the rivalry of Powers to the rivalry of whole continents, tightly organised and capable of achieving a high degree of, if not actual, self sufficiency".[15] The link between functionalism and European integration is Jean Monnet's role in the creation of the European Coal and Steel Community (ECSC). Although it would be incorrect to label Monnet as a functionalist (Monnet never acknowledged Mitrany's influence) his plan shared some aspects of the functionalist theory. The gradual transfer of loyalties and authority from

---

[11] P. Taylor, *The Limits of European Integration,* Croom Helm, London, 1983, p.4.

[12] Tönnies argued that while *Gesellschaft* is competitive and characterised by contractual relationships *Gemeinschaft* involves some kind of loyalty or kinship or common values. See: F. Tönnies, *Fundamental concepts of Sociology: Gemeinschaft and Gesellschaft,* New York, 1940.

[13] Mitrany, *op.cit.,* p.31.

[14] *Ibid.*

[15] Mitrany, *op.cit.,* p.45.

the national to the international (regional in this case) level *via* the allocation of a specific task to an international agency, the ECSC, so that a community transcending the nation-state would emerge, as well as the technocratic character of the High Authority, are notions which can easily be traced to functionalism. However, Monnet's approach differed fundamentally from functionalism on some key points.

Monnet's efforts were directed specifically to the creation of an international regional organisation, the ultimate aim of which was the creation of Europe as a single political, economic and social entity, based on a written Act. Monnet's view was that this process should start with salient areas of the economy (for example, steel production) and, unlike the functionalist viewpoint, Monnet's approach did not rely solely on the existence of a *Gesellschaft*, placing importance in the role of political elites, as well as leadership. Monnet's approach was more akin to the Federalist notions of the 1950s; however, because the basic notion has some resemblance with the functionalist thesis, Monnet's approach has been labelled "federalism/functionalism".

Intergovernmentalism

Intergovernmentalism refers to a theory which in its strict interpretation is "a method of designating international organisations according to their decision making capacity".[16] It refers particularly to those organisations where the member states retain the right to *veto*, thus not accepting formal limitations of their sovereignty against their wishes.

Within the context of European integration intergovernmentalism (the word has often been used interchangeably with the "realist approach") usually describes political processes which have evolved in spite of Treaty agreements and provisions.[17] In this sense intergovernmentalism is not an integration theory in the same manner as functionalism because it does not represent, or offer, an alternative theory of international or regional integration. Rather it has come to represent a body of thought which stresses the role of national governments as the dominant actors in Community politics. National governments, as opposed to central Community institutions, are seen as the only legitimate and effective agents of the aspirations of their people, having a monopoly in the management of external as well as internal relations.

The "billiard ball" analogy, offered as an answer to the neofunctionalist "cobweb model", is typical of the intergovernmental approach. National governments are seen as monolithic, trying to protect their hard shells against penetration from international organisations, such as the EU, and having the satisfaction of their domestic imperatives as their sole purpose.[18] The EU is seen as the forum where this continuous struggle for the satisfaction of strictly national priorities and requirements takes place. Obviously, the issue of national sovereignty becomes central to the inter-governmental argument, especially when juxtaposed to the neofunctionalist logic of functional spillover.

---

[16] C. Webb, "Theoretical Perspectives and Problems" in H. Wallace, W. Wallace and C. Webb (eds), *Policy Making in the European Community*, John Wiley and Sons, Chichester, 2nd edition, 1983, p.22.

[17] *Ibid.*

[18] See, W.J. Feld, *West Germany and the European Community-Changing Interests and Competing Policy Objectives*, Praeger, New York, 1981, pp.22-25; also see W. Hager, "Public Interest and the Market: The European Perspective of 1992", in P. Kazakos (ed), "The evolution of the Internal Market in Europe and Greece", Ionian Bank, Athens, 1989, pp.435-469.

Stanley Hoffmann one of the leading advocates of the realist approach, has argued that neofunctionalists failed to recognise the still dominant role of national governments in Community policy making because they failed to draw a distinction between "high" and "low" politics.[19] High politics included issues vital to the existence of the nation-state, such as national security, economic policy and foreign policy while low politics included less controversial, largely administrative issues. Hoffmann maintained that agreement on issues of low politics was easier than agreement on matters of high politics because national governments felt less threatened and were, therefore, able to make some concessions which facilitated agreements. Hoffmann has subsequently modified his position, not least because practice showed that the distinction between high and low politics is not at all clear; less controversial issues can, and do, become salient where national sovereignty is not jeopardised. His approach, though, is typical of the intergovernmental emphasis on the nation-state and national sovereignty.

Having briefly looked at two integration theories, representative of the two opposing points of view, let us now turn our attention to the effective protection of the individual.

ARTICLE 215 (2) EC: THE INDIVIDUAL FIGHTS BACK

The effective protection of the individual is not only a lawful right for natural and legal persons, citizens of the EU,[20] but also a general principle[21] of EC law "which underlines the constitutional traditions common to Member States and has been enshrined in Article 6 and 13 ECHR".[22] The principle was traditionally interpreted to entail the obligation of all national authorities to refrain from passing and/or applying any domestic law which could prevent the effective judicial protection of individuals.[23] After *Factortame I* and *Francovich*[24] the

---

[19] Stanley Hoffmann "Reflections on the Nation-State in Western Europe Today", in: Tsoukalis, L. (ed), *The European Community Past, Present and Future*, Basil Blackwell, Oxford, 1983, pp.21-38.

[20] See A. Barav, "La repetition de l'indu dans la jurisprudence de la Cour de Justice des Communautes Européenes" [1981] *Cahiers de droit européen*, p.509; also see the Opinion of Advocate General Leger delivered on 20 June 1995 in case C-5/94 *R* v *Ministry of Agriculture, Fisheries and Food, ex parte Hedley Thomas (Ireland) Ltd* [1996] ECR I-2553, cons.67.

[21] W. van Gerven notes that "...it appears that the guarantee of effective judicial protection is a general principle of Community law". See W. van Gerven, "Non-contractual liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a view to a common law for Europe" [1994] 1 *Maastricht Journal of European and Comparative Law*, p.11.

[22] See Case 222/86 *UNECTEF* v *Heylens* [1987] ECR 4097, par.14; also see cases 222/84 *Johnston* v *Chief Constable of the RUC* [1986] ECR 1651, par.18; Opinion of Advocate General Van Gerven in case C-128/92 *H.J. Banks* v *British Coal Corporation* [1994] ECR I-1209, at I-1253.

[23] See case 33/76 *Rewe* v *Landwirtschaftskammer für das Saarland* [1976] ECR. 1997, cons. 5; also see cases 45/76 *Comet* v *Produktschap voor Siergewassen* [1976] ECR. 2053, const. 12-17; 106/77 *Amministrazione delle Finanze dello Stato* v *Simmenthal* [1978] ECR. 629, cons. 22; 199/82 *Amministrazione delle Finanze dello Stato* v *San Giorgio* [1983] ECR. 3595; 222/84 *Johnston* v *Chief Constable of RUC* [1986] ECR. 1651 cons. 17-20. For a detailed analysis on the development of the principle of effective judicial protection see R. Caranta, "Judicial protection against Member States: A new *ius commune* takes shape" [1995] 32 CMLR, pp. 703-726.

principle is defined as the positive obligation of national authorities to create the legal and administrative environment that would allow the assertion of EU rights before the national courts.[25] So far the principle has been applied on national authorities. However, as a recognised general principle of EC law, which forms part of the law of the Union,[26] it is binding not only on national but also on EU authorities. Thus, it is the duty of both national and EU authorities to ensure that individuals have a realistic opportunity to achieve compensation for damages caused by the failure of Member States to comply with their EU obligations.[27]

The question arising at this point is, which is the optimum legal route for the successful realisation of the principle of the effective protection of the individual in those cases, where the latter suffers damage due to Member States' violations of EC law. After the extraordinary advances of the state liability doctrine in the recent case-law of the ECJ, some EU specialists have turned to remedies before national courts.[28] Thus, it is argued that for his/her effective protection the individual must follow the state liability scenario, in other words s/he must initiate restitution proceedings for damages suffered due to Member States' violations of EC law before his/her national courts. Since one of the preconditions for awarding compensation is the establishment of the violation in question, the national judge will have to assess whether a breach of EC law has indeed taken place. For this assessment, a preliminary ruling by the ECJ will be desirable or necessary, depending on the nature of the national court involved. On the basis of the interpretation of the relevant legal provisions provided by the ECJ in its preliminary ruling, the national judge will then decide whether and to what extent compensation will be awarded in the particular case brought before him/her.

The main advantage of such a remedy lies in the enforcement of EC law before the individual's national courts and through proceedings conducted under the national rules of civil procedure.[29] However, inevitably, any remedy discussed in the courts of fifteen different jurisdictions presents inherent problems, such as inequalities in *locus standi* and time-limit requirements, in the availability and extent of legal aid, in the compensation awarded and in the payment and rate of interest.[30] When

---

[24] See case C-213/89 *op.cit.*; also see A.P. Tash, "Remedies for European Community Law claims in Member States courts: toward a European Standard" [1993] 1 *Columbia Journal of Transnational Law*, p.394 who notes that "the Factortame case goes far further than Von Colson because the Court actually specified the new remedies that the national courts must provide".

[25] See P. Oliver, "Le droit communautaire et les voies de recours nationales" [1992] *Cahiers de droit européen*, pp.348 and 353; Labayale, "L'effectivite de la protection juridictionelle des particuliers" [1992] *Revue française de droit administratif*, pp.619 and 630. Also see R. Caranta, *op.cit.*, p.710.

[26] See J. Steiner, *Enforcing EC Law*, Blackstone, London, 1995, p.10.

[27] See C. Stefanou and H. Xanthaki, "Are national remedies the only way forward? Widening the scope of Article 215(2) of the Treaty of Rome" in J. Lonbay and A. Biondi (eds), *Remedies for Breach of EC Law*, John Wiley and Sons, Chichester etc., 1997, pp.85-101, at 87.

[28] See R. Caranta, *op.cit.*, p.710. Also see Massera, "L' amministrazione e i cittadini nel diritto communitario" [1993] *Rivista Trimestrielle di Diritto Publico*, p.47.

[29] See J. Bridge, "Procedural aspects of the enforcement of EC law through the legal systems of Member States" (1984) 9 *E.L.Rev.*, p.31.

[30] *Ibid.*, p.32; also see C. Harding, "The choice of court problem in cases of non-contractual liability under EEC law" [1979] 16 CMLR, p.391; T.C. Hartley,

combined with references for preliminary rulings additional problems include the length of time required for a final decision, especially when appeals or cassations are involved. It is argued, amongst others by Harding, that a direct legal action before the ECJ would be faster and cheaper.[31] Such direct action would also resolve another inherent problem of the *Francovich* scenario, namely the frequent unwillingness by national judges to refer to the ECJ. As Voss points out, German judges are consistently put off from referring cases to the ECJ primarily because of the length of proceedings.[32] Perhaps more vivid is the example of the Greek *Areios Pagos*, the civil and criminal Supreme Court, which has never referred to the ECJ because its Secretariat is unfamiliar with the format of the reference forms.[33]

So far it has been established that one possible route for the final realisation of the effective judicial protection would be the strengthening of the state liability doctrine and the harmonisation of the national legal remedies that lead to compensation for damages due to unlawful actions or omissions by Member States.[34] Another possible solution would be the parallel strengthening of direct actions for damages before the Court of First Instance (the CFI) and the ECJ against the Commission and the Member State which infringes EC law on the grounds that they are concurrently liable. This is not an entirely new scenario. The concept of concurrent liability between Union institutions and Member States based on the second paragraph of Art 215, concerning the possibility of compensation for individuals who suffered damages due to wrongful acts

---

"Concurrent liability in EEC law: a critical review of the cases" (1977) 2 *E.L.Rev.*, p.264; also see C. Harding, *op.cit.*, p.265, note 37 who notes that "since the question would be governed by national law, the difficulty could not be solved by means of reference under Art.177 EEC". T. Hurtle in "Non-contractual liability: where to sue", (1975-1976) 1 *E.L.Rev.*, p.399, notes that under such procedures the "jurisdiction of the European Court depends on a matter of national law: the existence of a remedy before the national courts".

31 See C. Herding, *op.cit.*, p.391.

32 Voss also quotes "ignorance of Community law" as an additional reason for the reluctance of German judges to refer cases to the Court of Justice. See R. Voss, "The National Perception of the Court of First Instance and the European Court of Justice", [1993] 30 CMLR, p.1124.

33 See C. Geraris, "The beginning of a dialogue between the Community and the Greek judge" [1988] *Nomiko Vima*, p.1037 who notes that while the secretariat of the *Areios Pagos* argues that the reference to the ECJ could only occur after an action on behalf of the litigants of the case, the latter lack the *locus standi* to actually take the secretariat's advice and announce the Greek judgment to the ECJ. For further analysis on the Greek courts and their enforcement of EC law, see H. Xanthaki, *The establishment of foreign companies in Greece with particular reference to the compliance of Greece with the law of the European Union*, P.Sakkoulas, Athens, 1995, pp.145-153.

34 See W. van Gerven, "Bridging the gap between Community and national laws: Towards a principle of homogeneity in the field of local remedies?" [1995] 32 CMLR, pp.690-691 who notes that this harmonisation comprises three aspects, namely the definition of the exact scope of the rights conferred by EC law, the provision of adequate sanctions guaranteeing the enforcement of these rights and the introduction of effective legal remedies for securing these rights. Also see A. Barav, *op.cit.*, pp.522-523; Peter Oliver, "Enforcing Community rights in the English courts" (1987) 50 *Modern Law Review*, p.894; F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) *Modern Law Review*, pp.45-47.

or omissions by the Union, its institutions and members of staff acting during the performance of their duties, is a doctrine already presented before the ECJ. Academics recognise the following circumstances as giving rise to concurrent liability:

- the application by Member States of wrongful acts issued by EU institutions;
- unlawful decisions taken jointly by Member States and the Union; and
- cases of infringement of EC law by Member States.[35]

In the pre-*Francovich* era a claim for damages before the CFI or the ECJ, on the basis of concurrent liability between the Member State that infringes EC law and the Commission that does not act towards the prevention or abolition of this infringement, would have been considered admissible. However, its success would have been hindered by the, admittedly widely accepted, view that the Commission's involvement in cases of violations of EC law by Member States stems from its right, rather than its duty, to act.[36] Support for this argument signifies that the Commission has the mere discretion to act and that, therefore, its failure to do so can only give rise to liability in circumstances of extreme negligence.

This article, however, follows a different approach. It is proposed here that concurrent liability should be accepted in most cases of infringement of EC law by Member States. Such liability is based on the combination of Arts 5 and 155. Indeed, Art 5, which introduces the Member States' obligation to comply with their EU duties, constitutes an ideal legal basis for the establishment of the Member States' liability for damages caused to individuals as a result of the States' acts or omissions. Insofar as the Commission is concerned, Art 155 –as interpreted consistently by the case-law of the ECJ during the last decade– places not only a general right, but also a duty, on the Commission to ensure that EC law is applied within the Member States.[37] Thus, any failure of the Commission to ensure the implementation of EC law by Member States gives rise to its liability for any damages caused to individuals by the violation of EC law by the States involved.[38] It must be noted, however, that such liability occurs only

---

[35] See W. Wils, "Concurrent Liability of the Community and a Member State" (1992) 17 *E.L.Rev.*, pp.194-198; also see A. D. E. Lewis, "Joint and several liability of the European Communities and National Authorities" 33 [1980] *Current Legal Problems* 99-119, at 100.

[36] See P. Craig and G. de Burca, *EC Law: texts, cases and materials*, Clarendon Press, Oxford, 1995, p.539.

[37] The Commission is considered to have the "right and duty" to pursue its mission as a guardian of the Treaties, to monitor the application of EC law, as well as to monitor and enforce compliance with the rules of Community law. See cases 351/88 *Laboratori Bruneau* v *Unita Sanitaria Locale RM/24 von Monterotondo (Rom)* ECJ Fourth Chamber, Transcript, 11 July 1991; 248/89 *Cargill BV* v *Commission* [1991] 1 ECR 2987; C-301/87 *France* v *Commission* [1990] 1 ECR 307; Joined cases 326/86 and 66/88 *Benito Francesconi and others* v *Commission*, Transcript 4 July 1989; 141/87 *Commission* v *Italy* [1989] ECR 943 and [1991] 1 CMLR 234. It should be noted here that the "procedure for establishing an infringement, as laid down in Article 155 of the Treaty, imposes upon it [the Commission] an obligation unlimited in time". See case 324/82 *Commission* v *Belgium* [1984] ECR 1861.

[38] The ECJ has repeatedly held that "the action before the Court under Art 169 constitutes one of the Commission's institutional prerogatives and is associated

if the Commission's inaction was a result of its incompetence or negligence rather than a conscious decision falling within the discretion allowed to it by the Treaties.[39] This might occur in cases where the Commission failed or omitted to initiate even the first, informal, administrative phase of the procedure introduced by Art 169, or when the Commission wrongfully ignored the information presented to it by individuals on the occurrence of an alleged violation.[40] If the Commission fails to act or if the Commission improperly uses its discretion in deciding not to act, the European judges should award compensation to the individuals involved. If they decide not to do so, then they themselves are violating the principles of equality and of legitimate expectations.

This second scenario has been analysed extensively in the last two decades by EU legal experts, most of whom have criticised it as unrealistic and impractical. It is argued in this paper that the proposed remedy can find considerable support in the post-*Francovich* case-law and, therefore, should no longer be ignored by analysts and judges.

The Francovich Effect

The main criticism of the concurrent liability scenario has been that a joint legal action is neither easily conceivable nor practical, as it would entail judgment on the basis of European law for the liability of the Commission and of national law for the liability of the Member States.[41] However,

---

with its general task under Article 155". See case 137/88 *Scneemann and others* v *Commission* [1990] 1 ECR 369; also see cases 355/87 *Commission* v *Council* [1991] 1 CMLR 586 and [1989] ECR 1517; 205/84 *Commission* v *Germany* [1987] 1 CMLR 69. It must be noted that the Commission may also take preventative measures. See Joined cases 188 to 190/80 *France, Italy and UK* v *Commission* [1982] ECR 2545. It goes without saying that the Commission has the right and duty to act under Art 171 EC. See case 48/71 *Commission* v *Italy* [1972] ECR 527, [1972] CMLR 699. Clearly when the Commission does bring an action against the Member State in question, it fulfils its duty to ensure that EC law is implemented and, in principle, cannot be held liable for damages.

[39] According to the ECJ's caselaw what is involved in this case is "decisions of principle which must be reserved to the full Commission", whose discretion must be interpreted widely. See cases 137/92P *Commission* v *BASF AG and others*, *Financial Times* 3-8-1993 and 21-7-1994, Transcript, 15 June 1994; 23/75 *Rey Soda* v *Cassa Conguaglio Zucchero* [1975] ECR 1279; 337/82 *St. Nikolaus Brennerei und Likorfabrik, Gustav Kniepf-Melde GmbH, Rheinberg* v *Hauptzollamt Krefeld* [1984] ECR 1051, [1985] 3 CMLR 83.

[40] According to the regrettable, but admittedly current, position of the CFI and ECJ, "as far as proceedings under Article 169 are concerned, persons who have lodged a complaint do not have the possibility of bringing an action before the Community judicature against a decision of the Commission not to take action on their complaint". See the recent judgment of the CFI in case T-575-93 *Casper Koelman* v *Commission* [1996] ECR II-1, con.71; also in case T-84/94 *Bilanzbuchhalter* v *Commission* [1995] ECR II-101, con. 23; also see the ECJ's judgment in case 247/87 *Star Fruit* v *Commission* [1989] ECR 291, cons. 10-14.

[41] See, amongst others, G. Lysen, "Three questions on the non-contractual liability of the EEC" [1985] 2 *Legal Issues of European Integration*, pp.86-120, at 104; also see P. Oliver, "Joint liability of the Community and the Member States" in H. Schermers, T. Heukels and P. Mead (eds), *The non-contractual liability of the EC*, Martinus Nijhoff, Dordrecht-Boston-London, 1988, pp.125-147, at 127-128; for the difficulties deriving from the application of two

Francovich introduced a theory of state liability which is established, judged and assessed following EC legal principles. After this subjection of both elements of concurrent liability to EC law provisions, concurrent liability can be judged during the one trial before the European courts, as these have exclusive jurisdiction to deal with claims for damages against EU institutions. Furthermore, in most cases of concurrent liability the acts of the EU and the Member States interlock in such a way that the liability of both parties can be established only if the complaints against both are taken into account jointly. It is, therefore, precisely the doctrine of state liability which has recently made the concurrent liability scenario not only attractive in theory, but also possible in practice.

In addition to this procedural contribution *Francovich* has clarified the substantive conditions for the establishment of the Member State's liability in the concurrent liability remedy. Moreover, by doing so, it has defined the elements of EU liability thereto. Indeed, the elements of state liability in *Francovich* can be used in the concurrent liability scenario as the conditions for the liability of the Member State for damages caused to the individual due to failure or omission to comply with EC law. Furthermore, following Advocate General Mischo's expressly supported view that "the grant of damages by a national court for breach of Community law by a Member State should be subject to the same conditions as the grant for damages by the Court of Justice for infringement of that same Community law by a Community institution",[42] the *Francovich* conditions are now also applicable in the non-contractual liability of EU institutions. *Francovich* argued that these conditions must be interpreted by the national laws of the Member States.[43] However, in view of the variety of the relevant legal provisions in the national laws of the Member States[44] and the inequalities that it may cause,[45] a European doctrine on the content of the conditions of state liability would obviously serve the principle of the effective protection of the individual more fully.[46]

---

different sets of legal rules, see Joined cases 5, 7 and 13-24/66 *Kampffmeyer* v *Commission* [1967] ECR 245; also see case 30/66 *Firma Kurt A. Becker* v *Commission* [1967] ECR 285.

42 See Opinion of Advocate General Mischo on Joined Cases C-6/90 and C-9/90 *Francovich and Others* v *Italian Republic* [1991] ECR I-5370-5402, con.71.

43 See Joined cases C-6/90 and C-9/90 *op.cit.*, cons. 42 and 43. It must also be noted that Lord Mackenzie Stuart notes that Art 215(2) EC was deliberately ambiguous on this matter. See Lord Mackenzie Stuart, "The non-contractual liability of the EEC" [1975] 12 CMLR, p.495.

44 See F. Schockweiler, G. Wivenes and J.M. Godart, "Le regime de la responsabilite extra-contractuelle du fait d'actes juridiques dans la communaute européenne" [1990] *Revue Trimestrielle de droit européen*, pp.27-74; also see Bruno du Ban, "Les principes generaux communs et la responsabilite non contractuelle de la Communaute" [1977] *Cahiers de droit européen*, pp.397-434; T. Elster, "Non-contractual liability under two legal orders" [1975] 12 CMLR, pp.91-100 and 254-257.

45 See M. Brealey and M. Hoskins, *Remedies in EC law*, Longman, London, 1994, p.74.

46 See W. Wils, *op.cit.*, p.192, who notes that "the Court of Justice will determine, in its case law, the conditions under which Community law mandates liability of a member state, for different categories of Community law violations"; also see Joined cases C-6/90 and C-9/90 *op.cit.*, cons.41 and 43. It must also be noted that a European doctrine would facilitate the abolition of inequalities even under the remedy introduced by *Francovich*, since EC law would then

The Elements Of Liability In The Post-Francovich Era

The substantive conditions that establish EU liability under the pre-*Francovich* case-law,[47]include a sufficiently serious breach of Community law, the existence of harm (loss or damage) and a causal link between the two. In the remedy analysed here the Commission's failure to fulfil its duty would be considered a serious breach of EC law, unless the Commission could prove that its omission was due to a higher public interest which justified the harm caused to individual interests. Damage includes any actual, certain, concrete, assessable, direct (positive) or consequential (negative) loss. Compensation for the individual on the basis of concurrent liability would be equal to the amount of money that the individual would have gained, had s/he been allowed to pursue his/her rights under EC law. Interest and other claims would also be taken into account. The third and last element of the EU's liability is the causative link between the wrongful act or omission and the damages suffered by the individual. This is fulfilled when the damage is a sufficiently direct consequence of the unlawful act or omission of the EU institution involved.

In the pre-*Francovich* era the ECJ had interpreted the concepts of Art 215(2) to a certain extent. In view of the limited number of cases brought before the ECJ on the basis of Art 215(2) and the even more limited ECJ judgments on this provision, there are still gaps in the existing doctrine. Their interpretation lies with the ECJ and, according to the text of Art 215(2), the general principles of law common to the laws of the Member States. After *Francovich* and the development of the EC doctrine on non-contractual liability for damages, however, these gaps can be adequately and validly clarified by reference to the post-*Francovich* judgments, which we will now proceed to examine.

In the second *Marshall* case Advocate General Van Gerven discussed in some detail the definition of damage in state liability, the extent of compensation and the possibility of awarding interest for claims brought before the ECJ under Art 215(2).[48] In particular, the Advocate General expressed the view that a Member State must compensate individuals for four types of damages, namely loss of physical assets (*damnum emergens*), loss of income (*lucrum cessans*), moral damage and damage as a result of the effluxion of time. The compensation awarded must be adequate in relation to the damage sustained but does not have to be equal thereto. However, Mr. Van Gerven did admit that this rule should not prevent Art 215(2) from introducing a principle of compensation in full. This line of argumentation was not accepted by the ECJ, which in its judgment held that the prevailing doctrine in EC law is that of full compensation for damages caused to individuals. Moreover, the award of interest must be regarded as an essential component of compensation.

---

specify the standards of procedural and substantive rules of this remedy under national law. See John Bridge, *op.cit.*, p.40.

47 See case 4/69 *Lütticke* v *Commission* [1971] ECR 325, con. 10; also see case 281/84 *Zuckerfabrik Bedburg* v *Council* [1987] ECR 49, con.17; and cases 153/73 *Holtz and Willemsen* v *Council and Commission* [1971] ECR 325, con.10; case 253/84 *Gaec de la Segaude* v *Council and Commission* [1982] ECR 117, con.9; case 253/84 *Briantex and di Domenico* v *EEC and Commission* [1989] ECR 3623, con.8; and the CFI judgment in case T-575/93 *Casper Koelman* v *Commission* [1996] ECR II-1, con.89.

48 See case C-271/91 *M. H. Marshall* v *Southampton and South West Area Health Authority* [1993] ECR I-4367; [1993] 3 CMLR 293.

The second *Marshall* case introduced a series of post-*Francovich* judgments which, while referring to issues seemingly irrelevant to the remedy analysed here, did (directly or indirectly) interpret Art 215(2) and the concept of concurrent liability. The first point worth mentioning here concerns the suggestion of Advocate General Van Gerven that the individual may be entitled to some degree of compensation on the basis of the state liability doctrine and full compensation under Art 215(2). Even though this view was not endorsed by the ECJ in this case, it indicates that ECJ officials recognise that there are two parallel (not necessarily self-excluding) remedies for the achievement of compensation for damages: the *Francovich* scenario and the concurrent liability doctrine. This introduced a turn in the role awarded to the latter, which for a long time was considered a mere last resort to be followed only when all other national and EC remedies have either been exhausted or are obviously futile. The second noteworthy point concerns the categorically expressed provision of the ECJ concerning the prevalence of the doctrine of full compensation in cases of state liability and the consequent view that in concurrent liability compensation is owed in full. This covers damages for loss of physical assets, loss of income, moral damage and damage as a result of the effluxion of time, including interest thereon.

In *Banks*[49] Advocate General Van Gerven stressed the view that the right of individuals to seek compensation before the national courts "is only a minimum guarantee and is not sufficient in itself to ensure the full and complete implementation of the Treaty".[50] Thus, the state liability doctrine must not be seen as an end in the pursuit for effective protection of the individual. *Francovich* introduces merely one of the choices available in parallel for the individual who seeks compensation for damages. One result of this parallel co-existence is the recognition of the Art.215(2) remedy as an autonomous measure, which may not be viewed as one of last resort. Another result of this co-existence and the need for the harmonisation of the results achieved by both routes is the view that the criteria introduced by the ECJ for the establishment of liability under Art 215(2) are based on common legal principles of the Member States which apply to all types of non-contractual liability.

This view was also supported in *Francovich* and *Asteris*, where it was held that the essence of all types of non-contractual liability, both of the national authorities and of EU institutions, is the underlying breach of EC law and it would therefore be inconceivable for this same breach to give rise to different consequences depending on the type of authority involved.[51] This argument is of paramount importance for the concurrent liability doctrine. Firstly, this line of thought demolishes the procedural barriers concerning a single trial judging both the liability of the Member State and that of the Commission before the same court, thus rendering the action for damages due to concurrent liability of the Member State and the Commission realistic in practice. Secondly, it allows the development of

---

[49] See case C-128/92 *H. J. Banks and Co Ltd* v *British Coal Corporation* [1994] 4 ECR I-1209.

[50] See Opinion of Advocate General Van Gerven in case C-128/92 *H. J. Banks and Co Ltd* v *British Coal Corporation* [1994] 4 ECR I-1209, con.37; also see cases C-120/88 *Commission* v *Italy* [1991] ECR I-621, con.10; case C-119/89 *Commission* v *Spain* [1991] ECR I-641, con.9; C-159/89 *Commission* v *Greece* [1991] ECR I-691, con.10; 72/85 *Commission* v *Netherlands* [1986] ECR 1219, con.20; 166/85 *Commission* v *Italy* [1986] ECR 2945, con.11.

[51] See Opinion of Advocate General Mischo in Joined cases C-6/90 and C-9/90 *op.cit.*, con.71; also see Joined cases 106/87 and 120/87 *Asteris* v *Hellenic Republic (Ypoyrgeio Oikonomikon) and Commission* [1988] ECR 5515, con.8.

one single theory on non-contractual liability established on the basis of the recent ECJ case-law on state liability and the previous case-law on Art 215(2).

So far the Advocate General in *Banks* was reaffirming the view supported by the Advocate General in *Francovich.* This is important in itself, as it demonstrates that the Opinion of Advocate General Mischo is not a mere eccentricity, a one-off view, in EC legal theory. The main significance of the Opinion of Advocate General Van Gerven, however, is that it took the *Francovich* argument one step further. Since, under *Francovich*, there is a single theory on non-contractual liability, the question arising here is: which are its elements, the ones introduced by *Francovich* or the ones introduced by the well-established pre-*Francovich* case-law on Art 215(2)? Mr Van Gerven referred to this issue and supported the view that it lacks substance, as both sets of conditions really refer to the same elements of liability. Thus, damage, illegal conduct and causal link are the conditions applicable not only in claims based on Art 215(2), but also in the *Francovich* scenario. The reason they were not all named by the ECJ in the second case is that the loss and damage factors were "evidently fulfilled" in the factual circumstances of *Francovich*.[52]

The same view was put forward in the Opinion of Advocate General Tesauro in the well-known joined *Brasserie* and *Factortame* cases.[53] Mr Tesauro held that the first condition of state liability, namely that the infringed legal provision should entail the granting of rights to individuals, is always met in the case of provisions having direct effect. The second condition, namely that the right deriving from the infringed provision should have a precise content, is satisfied by all provisions with direct effect. The reference to only one of the Art 215(2) elements in the *Francovich* judgment, namely causal link, is due to the fact that the other two conditions, damage and illegal conduct, were obviously satisfied. Thus, Mr Tesauro re-affirmed that the common elements of non-contractual liability both of the Member States and the Commission are damage, illegal conduct and causal link. It must be noted here that this position was endorsed by the ECJ in its judgment on the case for the first time.

Another contribution of the Opinion of Mr Tesauro refers to the interpretation of these three elements. Illegal conduct is defined as any action or omission which conflicts with the rules of the system on a strictly objective and hence no-fault basis. The damage must be real, that is certain and actual damage. Any conditions concerning the nature or seriousness of the damage caused by unlawful actions or omissions have no legal *raison d'être* either in the case of state or in the case of Union liability. Damage includes any financial loss, consequential damage and loss of profits and earnings with interest thereon. Causal link exists if the damage in question is a direct consequence of the action or omission giving rise to liability. Thus, causal link does not exist if the injured party has not done everything reasonably possible to prevent or limit the damage suffered.

From this brief reference to the post-*Francovich* state liability judgments and the relevant Opinions of the Advocate Generals the following conclusions can be drawn:

---

[52] See Opinion of Advocate General Van Gerven in case C-128/92 *H. J. Banks and Co Ltd* v *British Coal Corporation* [1994] 4 ECR I-1209, cons.50 and 51.

[53] See Joined cases C-46/93 and C-48/93 *Brasserie du Pêcheur SA* v *Federal Republic of Germany* and *R* v *Secretary of State for Transport, ex parte Factortame Ltd and Others* [1996] ECR I-1029.

(a) state liability is not a fool-proof remedy for the protection of the individual;

(b) an alternative route, existing in parallel with the state liability scenario, is the claim for damages on the basis of concurrent liability between the Member States and the EU under Art 215(2);

(c) the conditions for the establishment of state and Community non-contractual liability are the same, have been introduced by *Francovich* and the ECJ case-law on the liability of EU institutions under Art.215(2);

(d) these conditions are illegal conduct, damage and causal link;

(e) illegal conduct is defined as any breach of EC law;

(f) damage refers to real, that is certain and actual, damage;

(g) the damage must be the direct consequence of the illegal conduct;

(h) the recognition that non-contractual liability is established on the basis of the same set of conditions has opened the way to the admissibility of the claim for damages due to concurrent liability between the Member States and the Commission;

(i) reparation is owed in full; and

(j) reparation includes compensation for any financial loss, consequential damage and loss of profits and earnings with interest thereon.

The contribution of these judgments to the interpretation of Art 215(2) and the strengthening, from a practical point of view, of the concurrent liability remedy is quite extraordinary, especially if one takes into account that the cases in question were not brought before the ECJ either on the basis or for the interpretation of this legal provision. The post-*Francovich* case-law of the ECJ, or at least the consistent suggestions of the Advocate Generals thereon, have managed to award autonomy, admissibility and substance to a so far hypothetical remedy, namely one not tried in practice, at least not in the form and under the factual conditions proposed here.

However, one question still remains: which are the possible types of illegal conduct which may give rise to non-contractual liability? In other words, are legislative actions or omissions by the EU or the Member States included in the concept of illegal conduct? Moreover, if the answer to this question is affirmative, which are the additional conditions, if any, applicable in these cases? The question is of particular interest in view of the very stringent conditions introduced by the ECJ case-law concerning Community liability for legislative actions.[54] For the purpose of this paper and the remedy referred to here this issue is significant in relation to the liability of the Member States. Since in the scenario examined here the liability of the EU refers to the failure or the omission of the Commission to act towards the abolition of a violation of EC law by Member States, the liability of the Union can not be characterised as liability deriving from legislative actions. The question therefore is whether the individual can achieve compensation under Art.215(2) for damages suffered due to the passing of a national legislative measure that clashes with EC law or due to the maintenance in force of such a measure in combination with the Commission's failure or omission to act towards the abolition of this violation?

---

[54] See H.J. Bronkhorst, "The valid legislative act as a cause of liability of the Communities" in H. Schermers, T. Heukels and P. Mead, *op.cit.*, pp.13-22.

Concurrent liability for legislative actions

In his Opinion in *Brasserie* Advocate General Tesauro supported the view that the principle of state liability introduced by *Francovich* "holds good for any situation in which Community law is infringed and not merely where there has been a failure to implement a directive".[55] The ECJ itself had in the past admitted that the principle of the effective protection of the individual cannot be realised in a judicial system where the sources of state liability would be only those allowed under Art.169.[56] Moreover, the ECJ has extended the application of the principle of state liability in other factual circumstances, such as in the *Dori* and *Miret* cases.[57] On the basis of these arguments the Advocate General was of the opinion that the individual does have the right to seek compensation for damages suffered due to actions or inaction of any type of national public authorities, including the legislature. This position was expressly and clearly confirmed by the ECJ in its judgement.

Since legislative liability is accepted the question is which are the conditions under which such liability is established. The ECJ examined the applicability of both the *Francovich* set of conditions and of those introduced by the previously restrictive case-law of the ECJ on Art.215(2) and concluded that the particular circumstances surrounding the important role of legislative authorities and the wide discretion usually awarded to them for the fulfilment of their duties justifies the imposition of additional elements for the establishment of legislative state liability. These conditions, also applicable on EU liability for unlawful legislative action or inaction, include a breach of an EC provision aiming to confer rights to the individual, the seriousness of the breach in question and a causal link between the breach and the damage suffered by the individual; however, they do not include fault by the legislative organ in question. A serious breach of EC law occurs when the relevant legislative authority, national or EU, has "manifestly and gravely disregarded the limits on its discretion".[58] Thus, the breach would undoubtedly be serious if the ECJ has already declared the action or inaction illegal following proceedings under Art 169 or if the infringed provision has been adequately clarified by a preliminary ruling or well-established CFI or ECJ case-law.

Three weeks after the *Brasserie* judgment the Court issued another decision on a similar matter, namely on the liability of the state for damages caused to individuals due to timely, but incorrect, transposition of a directive.[59] The *BT* case gave both Advocate General Tesauro and the ECJ judges the opportunity to reaffirm the principles introduced in *Brasserie* on legislative liability and the conditions for its establishment. The ECJ held once again that liability deriving from actions or inactions of the national legislature is acknowledged by EC law as depending on the fulfilment of three conditions which are the conference of rights to individuals by the infringed rule, the seriousness of the breach in question and the causal link between the breach and the damage suffered by the

---

[55] See Opinion of Advocate General Tesauro in Joined cases C-46/93 and C-48/93, *op.cit.*, con.25.

[56] See case 26/62 *Van Gend en Loos* v *Nederlandse Administratie der Belastingen* [1963] ECR 1, con.13.

[57] See case C-91/92 *Faccini Dori* v *Recreb* [1994] ECR I-3325, con.27; also see case C-334/92 *Wagner Miret* v *Fondo di garantía salarial* [1993] ECR I-6911, con.23.

[58] See *ibid.*, con.55.

[59] See case C-392/93 *R* v *H.M. Treasury, ex parte British Telecommunications Plc* [1996] 2 CMLR 217.

injured parties. The ECJ accepted that the timely but incorrect transposition of a directive by the national legislature of Member States does constitute a serious breach of EC law. In *Dillenkoffer* the ECJ held that the failure of Member States to take any steps for the transposition of a directive within the period laid down for that purpose also is a serious breach,[60] whereas in *Lomas* the ECJ accepted that a serious breach of EC law occurs in every case of infringement, as long as the national legislature had very little discretion.[61]

The *Lomas* judgment seems to approach the issue of legislative state liability in a slightly different manner to the one adopted by the other recent relevant state liability cases. Indeed, in *Lomas* the interpretation of the second condition for the establishment of state liability appears to be much broader, as the ECJ seems to support the view that a breach of EC law is always serious unless the national legislature can prove that in this particular case it has wide discretion. Should this interpretation be adopted, the remedy proposed here will acquire an even wider use, since the liability of the state and the consequent right of the individual to seek compensation will exist in the vast majority of infringements of EC law by the legislature of Member States. In order to better understand the legal basis of the ECJ's judgment in *Lomas*, one must look at the relevant detailed analysis in the Opinion of Advocate General Léger. The Advocate General's main point was that legislative state liability does not have the same legal basis as the restrictively interpreted EU legislative liability under Art 215(2). Indeed, legislative state liability derives from the failure of the state in question to respect the primacy of EC law, or from the state's "simple failure to fulfil a precise non-discretionary commitment", whose observance gives rise to liability *per se*.[62] Thus, legislative state liability may result both from inaction, namely the maintenance of unlawful rules or the failure to adopt lawful rules), as well as from positive action, namely the adoption of unlawful rules.

This interpretation, which was after all followed by the ECJ in its final judgment, seems to indicate a turn in the case-law of the Court concerning the conditions for the establishment of state legislative liability. It seems that the ECJ is now focusing on the realisation of the effective protection of the individual and that in order to achieve this aim it is willing to compromise some of its prior restrictive doctrines regarding the liability for legislative actions. It can therefore be stated that the post-*Francovich* judgments on state liability have demolished an additional barrier concerning the remedy of concurrent liability analysed here. Concurrent liability may derive from the failure of the Commission to exercise its duties in combination with any action or omission of any organ of the national authorities, irrespective of their nature and role. This includes the administrative, legislative and judicial authorities of the Member States.

Concurrent liability: A remedy of last resort?

Another hurdle in the effectiveness of the concurrent liability doctrine concerns the condition, imposed by long and well-established ECJ case-law, that this remedy should be seen as one of last resort, used only after all the other possible legal routes have been either unsuccessfully used or are obviously futile. The question arising here concerns the effect, if any, of the post-*Francovich* judgments on this doctrine. The matter was tackled

---

[60] See Joined cases C-178, 179, 188, 189 and 190/94 *Dillenkoffer and others* v *Commission* [1996] 3 CMLR 469.

[61] See case C-5/94 *R* v *Minisrty of Agriculture, Fisheries and Food, ex parte Hedley Lomas (Ireland) Ltd* [1996] ECR I-2553; [1996] 2 CMLR 391.

[62] See *ibid.*, cons.108, 153 and 156 accordingly.

in *Brasserie*, where Advocate General Tesauro expressed the view that the right to reparation should not be limited to parties having already brought an action for a similar claim before the national courts. This view was shared by the judges of the case, who held that any such requirement would clash with the principle of effectiveness, since it would exclude the admissibility of any claim for damages for breaches of EC law not already declared as such in proceedings under Art 169. In *Dillenkoffer* the ECJ held that reparation of loss and damage cannot depend on an already judicially established breach of EC law.

In *Lomas*, however, Advocate General Léger argued that an action for damages before the ECJ is inadmissible only if the individual in question can obtain full compensation in proceedings before the national courts. This view, which ignores the recent change in the case-law of the ECJ, was based on the, admittedly consistent, case-law of the ECJ during the pre-*Francovich* era.[63] The Léger view, which contradicts at least two recent ECJ judgments, can only be viewed as a mere reminder of a long established tradition of the past and it is hoped that it will constitute a mere temporary break in the new approach on the relationship between the remedy of Art 215(2) and other remedies initiated before the national and European courts. It is the clear current wish of the ECJ and its officials to ensure that the effective protection of the individual becomes much more than a theoretical doctrine. The introduction of a parallel system of remedies initiated before the national or the European courts would award to the individual the choice to achieve the same aim, that is compensation for damages, through two different –but hopefully equally effective– legal routes. Should the *Brasserie* and *Dillenkoffer* approach be followed in the future, the post-*Francovich* ECJ case-law will have managed to destroy another barrier in the effectiveness of the concurrent liability remedy, its use as a legal action of last resort.

ARTICLE 215 (2) AND THE INTEGRATION DIALECTIC

Having looked at the effective protection of the individual, let us now return to the integration dialectic which the two competing hypotheses represent. In crude terms, with reference to the European integration process, the supranational theoretical vein has three main requirements for the development of integration: (a) The creation of a supranational authority; (b) the deposition or transfer of sovereignty from the nation-state to the supranational authority; and (c) a shift of loyalties by the people from the national level to the supranational level. Of course, this list of requirements is rather simplistic; there are different approaches with reference to the speed of the transfer of sovereignty, for example, the evolutionary and revolutionary federalist approach,[64] or the development

---

[63] See Case 281/82 *Unifrex* v *Commission and Council* [1984] ECR 1969, co.11; also see case 20/88 *Roquette Frères* v *Commission* [1989] ECR 1553; [1991] 2 CMLR 6.

[64] For example, after the split in 1947 the federalist movement was split in two groups. The "evolutionary" or gradualist *Centre d'action Européene Federaliste* (AEF) argued that Europe was, and was likely to remain in the near future, a society of nations each with a clear political identity. A revolutionary process which "forced" federalism on the nations of Europe was, therefore, doomed to failure because it was likely to result in an outright rejection and subsequent hostility, to the notion of a United States of Europe. They proposed to achieve their aim in stages by drawing the attention of the public to the notion of a united Europe, by a campaign for direct elections to the European Parliament and finally by the ratification of a new Treaty (drafted by the EP)

of the "we" feeling. However, all supranational theoretical models seem to agree that the shift of peoples' loyalties is a necessary condition for the realisation of integration.

This "push" to win the hearts and minds of the people of Europe is not new. It is consistent with the Commission's attempts to establish a "Peoples' Europe" and dates back to the mid-1980s and the attempts to rally public support for the Single European Act. The logic of the supranational hypothesis –that the effective protection of the individual can best be achieved through direct actions to the European Courts– seems to be in line with the third requirement of the supranational theoretical vein, concerning the shift of loyalties, mentioned above. If individuals can bypass their national courts and seek compensation for their grievances directly from the European Courts then clearly the new supranational centre of authority would appear to fulfil an important part of their welfare needs. Although a shift of loyalties (or, at this early stage, a partial shift of loyalties) from the nation-state to the EU would not be an inevitable or automatic consequence, it is obvious that the existence of a new centre of authority which serves the interests of the EU citizen can become a powerful tool in the hands of supranationalists. Given that this process is seen, by and large, as a gradualist one the role of the ECJ, especially its activism, becomes an important tactical element in the supranational strategy.

As we have already seen, providing the ECJ is in an activist mood, existing provisions (that is, Art 215(2) in conjunction with Arts 5 and 155) can offer an effective way to protect the citizens of the Union.[65] Through legal integration, and irrespective of the time-variant of the process of functional spillover, through a mixture of "formal" and "informal" integration[66] the establishment of a "political community" can be supported not only by elites but by direct appeal to the people of Europe. Thus, the proposed interpretation of Art 215 – which would explicitly allow the individual to pursue, before the European Courts, claims for compensation on the basis of concurrent liability – can become a litmus test with wider implications for the European integration process. In fact, the recent ECJ rulings, analysed previously, indicate that the Court, in the best activist tradition, is still prepared to create new competencies for itself at the expense of the national court system.[67]

---

which would embody the federalist principles. This strategy places great emphasis on representative central institutions.

The "revolutionary" *European Federalist Movement* proposed the drafting of "militant Europeanists" in support of a directly elected EP. The sole purpose of that Assembly would be the drafting of a federal constitution to be ratified by the governments of the member states. Heraud and Spinelli have elaborated on this strategy which shared with the evolutionaries the focus on a campaign to raise public awareness. However, the distinct difference between them and the evolutionaries was the time factor. While the evolutionaries agreed that the process of federating Europe would be on-going and probably long, the revolutionaries had a sense of urgency, mistrusting national governments and fearing that a resurgence of nationalism could redress the balance against the process of integration.

65 See C. Stefanou and H. Xanthaki, "Are national remedies the only way forward?… ", 1997, *op.cit.*

66 See W. Wallace, *The Transformation of Western Europe*, RIIA, Pinter, London, 1990, pp.53-67.

67 In these cases the ECJ held that claims for compensation which are based on concurrent liability are admissible even if all other legal means at the national

In contrast, the logic of the statecentric hypothesis – that the effective protection of the individual can best be achieved through the national courts – very much reflects the intergovernmentalist/realist paradigm which resists the erosion of national sovereignty, preferring instead to keep important judicial powers within the sphere of the nation-state. It is well understood that many member states object to the ECJ's activism which they consider as an encroachment on their autonomy. As far as direct actions before the European Courts are concerned, under Art 215(2), it is obvious that national governments dislike a process which can bypass the national court system and land them with compensation claims. As a general rule, national governments dislike developments which affect the nation-state but are beyond their control. The introduction of a European citizenship has provided general background for the effective protection of the individual[68] which appears to be moving towards the supranational paradigm for which, as Snyder notes, "…the principle of State liability may prove a powerful political and legal symbol".[69] One might therefore expect a considerable backlash from the member states and their national courts to the procedure introduced by Art 215(2), given the issues at stake.

Yet, neither the member states themselves nor their national courts have really reacted as strongly as might be expected to the activist interpretation of Art 215(2) by the ECJ, which has essentially transformed this Article to a vehicle for judicial review.[70] Until recently, it was argued that national governments had not been alarmed because despite its activist interpretation of Art 215(2) the ECJ had ensured that "vertical review" relied on the behaviour of national courts and their willingness to refer cases to the ECJ.[71] Torn between activism and minimalism, in *Francovich* the ECJ had produced another compromise. Even though there was more scope for individuals to seek compensation the national courts remained at the epicentre of such procedures. However, following the *Brasserie* and *Dillenkoffer* rulings this position has changed. The understanding that EC law will be dispensed in the national courts "…influenced by rules which are characteristic of the law of that Member State"[72] may be in jeopardy as the ECJ's jurisprudence impinges on remedies at the national level and to some degree contributes to a transformation of national legal systems.

---

level have not been exhausted. See H. Xanthaki, "The effective protection of the individual, the Community level: Article 215(2)EC in the Post Francovich era", Paper presented at *UACES Second Research Conference*, University of Loughborough, 10-12 Sept. 1997.

68 For an elaboration of this argument see K. Bradley and A. Sutton, "European Union and the Rule of Law" in A. Duff, J. Pinder and R. Price (eds), *Maastricht and Beyond, Building the European Union*, Routledge, London & NY, 1994, pp.262-264.

69 F. Snyder, "The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques" (1993) *Modern Law Review*, p.45. See also, however, the recent developments in S. Fries and J Shaw "Citizenship of the Union: First Steps in the Eurpoean Court of Justice," *European Public Law*, 1998 (vol 4) pp. 533-59.

70 See T.R. Roberts, "Judicial review of legislative measures: the ECJ breathes life into the second paragraph of Article 215(2) of the Treaty of Rome" 26 *Columbia Journal of Transnational Law* [1988], p.281.

71 See M. Shapiro, "The European Court of Justice" in A.M. Sbragia (ed), *Euro-Politics Institutions and Policy making in the 'New' European Community*, The Brookings Institution, Washington D.C., 1992, p.127.

72 J. Bridge, *op.cit.*, p.35. Also see J. Steiner, "How to make the Action Suit the case: Domestic Remedies for Breach of EEC Law" (1987) 12 *E.L.Rev.*, p.102.

The prevalence of national courts in this process has traditionally been accepted as necessary primarily because of the lack of harmonisation of national legal remedies.[73] Although some experts have argued that the transformation of legal systems is already taking place,[74] national courts, like all branches of power, protect themselves against intrusions from outside bodies and are reluctant to give up power. Although German judges tend not to refer to the ECJ claiming that the length of proceedings can cause unnecessary delays, the example of the Greek *Areios Pagos* indicates that the real reasons may lie with the national courts' "nationalistic" or self-serving tendencies. After all they would not be the first branch of power to indulge in "empire building".

Returning to our two hypotheses, it does appear that the recent rulings of the ECJ lean towards the supranational paradigm. Whether this is part of an orchestrated plan is a subject for speculation. In recent years there has been evidence to suggest that the ECJ approaches cases with strong "nationalistic" overtones in a minimalist frame of mind.[75] Yet, the rulings on *Brasserie* and *Dillenkoffer* indicate a resurgence of activism which, though, may be somewhat out of place. As Arnull has noted:

> "In a Community in which the political institutions are functioning reasonably effectively and the Member States are carrying out regular reviews of the Treaties, the need for, and even the legitimacy of, an overtly activist approach by the Court of Justice may increasingly come to be questioned." [76]

Having revised the treaties three times within the space of ten years the member states have certainly shown their willingness to update the Treaties and carry forward the process of integration at their own pace. Under the circumstances it might have been better for the ECJ to exercise its minimalist option.

The emphasis on the individual citizen of the EU has become the *leitmotif* of integration in the 1990s. Both the Commission and the European Parliament have declared that in the years to come they will focus their attention on the rights of the citizens of the EU. And yet, integration theorists have not examined the individual in the context of the EU. As the state is the basic unit of reference, in traditional International

---

[73] This is the oldest legal argument in favour of the prevalence of national courts. See for example the arguments put forward by Lord Mackenzie Stuart in 1975 and those put forward by Advocate General van Gerven in 1995. See Lord Mackenzie Stuart, "The non-contractual liability of the EEC" [1975] 12 *C.M.L.Rev.*, pp.493-512 and W. van Gerven, "Non-contractual liability of Member States, Community Institutions and Individuals for Breaches of Community Law with a view to a common law for Europe" [1994] 1 *Maastricht Journal of European and Comparative Law*, pp.690-695. Also see the comments of Advocate General Capotorti in the *Express Dairy* case 130/79, [1980] ECR 1887, p.1910.

[74] Steyger has argued that this transformation can be seen already in legislation concerning the implementation of Community directives. See E. Steyger, *Europe and its Members a Constitutional Approach*, Dartmouth, Aldershot, 1995, pp.89-116.

[75] For the ECJ's minimalist tendencies on cases which touch on "sensitive" aspects of national sovereignty, such as the *Commission* v *Greece* case C-120/94 see C. Stefanou and H. Xanthaki, "Article 224 of the Treaty of Rome and the repercussions of case C-120/94", [1995] 3 *Web Journal of Current Legal Issues*.

[76] A. Arnull, "Judging the New Europe", (1994) 19 *E.L.Rev.*, p.13.

Relations, the individual has been largely ignored by EU experts. At this stage, the effective protection of the individual is a principle established by the ECJ and as such it is subject to different interpretations. From a political viewpoint the issues raised by Art 215(2) pose some sovereignty questions. Clearly Europhiles would like a broader interpretation of Art 215(2) while Eurosceptics would regard a broad interpretation as an encroachment on the authority of the nation-state. If anything, the two hypotheses reflect the different political dynamics and perceptions about the EU's destination in the 21st century and perhaps the need for an explicit regulation which settles the issue.

CONCLUSION

This article looked at the theoretical implications of two competing hypotheses about the principle of the effective protection of the individual. In the absence of explicit Treaty provisions the Treaty-based vehicle for this principle is Art 215(2). For the time being, this principle is largely determined by the ECJ which, in its rulings, would appear to lean towards the supranational paradigm.

The recent ECJ case-law on state liability was viewed by some as the final solution to the problem of ineffective protection for the individual suffering damages due to the failure of member states to comply with their EU obligations. It is true that the contribution of the post-*Francovich* judgments on the judicial protection of the individual and its ability to seek compensation before its own national courts have been remarkable. However, the state liability doctrine had an effect not yet noted by academics and legal commentators. It opened the way to a more realistic doctrine of concurrent liability by demolishing many of the restrictions concerning the remedy of Art 215(2), namely the inadmissibility of a concurrent liability claim before the ECJ, the ambiguity concerning the substantive conditions of state and EU liability, the restrictions on legislative state liability and the view that any remedy based on Art 215(2) is inevitably one of last resort.

What the two competing views on the effective protection of the individual expose is that the fundamental dialectic of integration is still present after 40 years of Community life. With reference to theories of political integration, despite the continuing search for "synthetic" theories,[77] many theorists seem to have come full circle, rediscovering this fundamental dialectic in practically all aspects of Community life. The growth of Eurosceptics around Europe has simply reminded political scientists that this dialectic can only be ignored at their peril.

---

[77] See C. Stefanou 1995, *op.cit.*

SURRENDERING TO TRUST

Alison Dunn, Lecturer in Law, University of Newcastle*

CENTRAL LONDON COMMERCIAL ESTATES LTD V *KATO KAGAKU CO. LTD (AXA EQUITY AND LAW LIFE ASSURANCE SOCIETY PLC., THIRD PARTY)*

"The search for the true meaning of a statute, especially the Land Registration Act 1925," commented Sedley J. in *Central London Commercial Estates Ltd v Kato Kagaku Co. Ltd*,[1] "is not the same thing as a search for simplicity." Particularly is this so in the context of the provisions of that Act which concern the acquisition of title by adverse possession. Indeed, the Law Commission in their recent consultative document on registered land expressed the view that far from simplicity, the registered land provisions on adverse possession added a "quite unnecessary layer of complexity".[2] Eschewing simplicity, it was the search for clarity in the face of uncertainty in this arena which fell upon Sedley J in *Kato Kagaku*.

In *Kato Kagaku* a 94 and a half year lease was entered into by London County Council in 1935 as freeholder, leasing from the 24 June 1934 the south-west wing and the abutting courtyard of Bush House in the Strand, London, to St Clement's Property Co. At all relevant times the freehold and leasehold titles to Bush House were registered. After sub-demising the south-west wing and the building below ground level, but not the abutting courtyard of the property, to the Crown in 1935 for a period of ten days less than the headlease, St Clement's Property Co thereafter passed the headlease to Axa Equity & Law (Axa) in 1942. In December 1996 Axa surrendered by deed the headlease to the freeholder, who by this time was Central London Commercial Estates Ltd (Central), the plaintiff in the present action. Upon surrender of the headlease by Axa to Central, the Land Registry closed the title to the leasehold and re-registered the freehold of the south-west wing as subject only to the sub-demise in favour of the Crown. The north-west wing of Bush House was owned by the defendant, Kato Kagaku Co Ltd (Kato). For more than twelve years Kato and Kato's predecessors had used the courtyard abutting the north-west wing and, by virtue of adverse possession, the courtyard abutting the south-west wing of Bush House for a paying car park. After the surrender of the headlease by Axa, Central sought possession of the south-west wing courtyard from Kato.

On a hearing of certain preliminary points one principal issue arose. In the context of registered land in England, where leasehold title had been acquired through adverse possession, would surrender of the lease to the lessor by the dispossessed lessee operate so as to defeat the possessory title and allow the lessor an immediate right to possession? Sedley J, sitting as an additional judge of the Chancery Division, rightly approached this issue as turning upon construction of section 75 of the Land

---

* I am grateful to Dr Alan Dowling for his helpful comments on an earlier draft of this article.

1 [1998] 4 All ER 948, at 959.

2 *Land Registration for the Twenty-First Century*, Law Com No. 254 (1998), para 10.28.

Registration Act 1925 (LRA).[3] His ultimate interpretation of that section leaves a marked difference between the operation of limitation in unregistered and registered conveyancing in English law, and raises crucial questions about the nature of the interest which a squatter acquires when registered leasehold land is adversely possessed.

The relativity of rights between a lessor, lessee and a squatter who has dispossessed the lessee has never been fully or satisfactorily resolved either by the English or Irish courts. Few cases concern adverse possession of a leasehold, and even fewer adverse possession of a leasehold in registered land. In unregistered land, the solution accepted by the House of Lords in *Fairweather v St. Marylebone Property Co Ltd*[4] falls clearly in favour of a lessor. Where a dispossessed lessee surrenders the lease to a lessor in unregistered land, the House of Lords have held by a majority that the lessor has an immediate right to possession against a squatter, even where the adverse possession has occurred for twelve years or more prior to the surrender. This position is based on the premise that the squatter acquires a right to possession but, crucially, the dispossessed lessee retains his estate in the land, albeit shorn of his own right of possession. The estate which remains in the hands of the original lessee allows surrender of the lease on the covenants, and upon surrender the lessor has an immediate right to possession. This is because the squatter's possession "only defeats the rights of those to whom it has been adverse."[5]

The system of registered land with its requirement for registration of proprietors makes the limitation scheme, which hinges upon possession and the automatic extinguishing and acquiring of titles, somewhat more difficult to apply. To that end special provisions are to be found in section 75 of the LRA which, whilst allowing for the Limitation Act 1980 to apply to registered and unregistered land alike, accommodates the limitation scheme to registered land principles. Accordingly, under section 75(2) of the LRA, a squatter who has acquired title by adverse

---

[3] According to section 75 LRA "(1) The Limitation Acts shall apply to registered land in the same manner and to the same extent as those Acts apply to land not registered, except where, if the land were not registered, the estate of the person registered as proprietor would be extinguished, such estate shall not be extinguished but shall be deemed to be held by the proprietor for the time being in trust for the person who, by virtue of the said Acts, has acquired title against any proprietor, but without prejudice to the estates and interests of any other person interested in the land whose estate or interest is not extinguished by those Acts.

(2) Any person claiming to have acquired a title under the Limitation Acts to a registered estate in the land may apply to be registered as proprietor thereof.

(3) The registrar shall, on being satisfied as to the applicant's title, enter the applicant as proprietor either with absolute, good leasehold, qualified, or possessory title, as the case may require, but without prejudice to any estate or interest protected by any entry on the register which may not have been extinguished under the Limitation Acts, and such registration shall, subject as aforesaid, have the same effect as the registration of a first proprietor; but the proprietor or the applicant or any person interested may apply to the court for the determination of any question arising under this section."

[4] [1963] AC 510, overruling *Walter v Yalden* [1902] 2 KB 304. For criticism of *Fairweather* see *Ching Ping Kwan v Lam Island Development Co Ltd* [1997] AC 38, *Perry v Woodfarm Homes Ltd* [1975] IR 104, Wade, "Landlord, Tenant and Squatter" (1962) 78 *Law Quarterly Review* 541.

[5] Per Lord Radcliffe, *Fairweather v St Marylebone Property Co Ltd*, *supra*, n 4, at 536.

possession has the right to apply to become registered as proprietor of that title, and section 75(3) of the LRA empowers the Land Registrar to complete registration of title as is appropriate, with such registration taking the same effect as first registration.[6] Moreover, where a squatter has succeeded in exercising his right to become the registered leasehold proprietor under section 75(2) and (3) of the LRA, following the decision in *Spectrum Investments Co v Holmes,*[7] registration provides protection against a lessor's action for possession subsequent to a surrender of the lease by a dispossessed lessee.

Section 75(1) of the LRA is concerned with the situation where the twelve year limitation period has passed but the squatter has not yet exercised his rights under section 75(2). A sometime debated issue, Sedley J rightly pointed out in *Kato Kagaku* that construction of section 75(1) remains one of property law's vexed and unresolved questions.[8] Central to its interpretation is to understand whether the section merely provides the machinery by which principles of limitation applicable to unregistered land can be adapted to suit the registered land régime, or whether the section provides for a different set of principles for limitation in registered land which fundamentally affect the nature of the interest acquired by adverse possession.

The House of Lords in *Fairweather* had extolled the view that in cases of surrender prior to registration the position under section 75(1) of the LRA should be no different to the position in unregistered land, allowing the lessor to defeat the possessory title of the squatter by an immediate right to possession. This approach construes section 75 as simply an adapting section which provides the necessary materials to paper over the differences between registered and unregistered land. Their view on this point, however, is no more than *obiter* and against it must be set the general rule put forward in *Williams & Glyn's Bank v Boland,*[9] that whilst the registered land scheme should ordinarily follow the principles applicable in unregistered land, interpretation of the Land Registration Act should be based upon the natural meaning of each section where that meaning is clear.

To ascertain the natural meaning of section 75(1) of the LRA, Sedley J took his lead from Browne-Wilkinson J's earlier judgment in *Spectrum Investments Co v Holmes* that section 75(1) is to be regarded "as creating a specified exception to a general rule that limitation should affect registered and unregistered land similarly".[10] Whilst Browne-Wilkinson J in *Spectrum* had been quick to distinguish and express no decision on the situation represented by facts similar to the present case, that is surrender of a lease before as opposed to after registration under section 75(2), he had construed section 75 on its "clear and unequivocal" terms.[11] In *Kato Kagaku* the accepted interpretation of the section on such terms was that whilst the limitation provisions are applicable to registered land as to

---

[6] Such registration takes place without prejudice to any registered estate or interest not extinguished by the period of limitation.

[7] [1981] 1 WLR 221.

[8] *Supra,* n 1, at 950. Earlier Lord Radcliffe in *Fairweather, supra,* n 4, at 541 expressed his view that the true meaning of section 75(1) was "not at all easy to discover", and that on that occasion it was best "to say as little about it as possible". See also Sir John Pennycuick, *Jessamine Investment Co v Schwartz* [1978] QB 264, at 275.

[9] [1981] AC 487.

[10] *Supra,* n 1, at 958.

[11] *Supra,* n 7, at 230, 231.

unregistered land, whereas in unregistered land a proprietor's estate is extinguished after the limitation period had passed, in registered land the proprietor's estate is not extinguished, but deemed to be held by the proprietor on trust for the adverse possessor. So where leasehold land has been adversely possessed, as by Kato in the present case, on the expiration of twelve years a statutory trust automatically arises by virtue of section 75(1) in favour of the squatter. This has the consequence that, in the words of Sedley J:[12]

> "a squatter on registered land is deprived by section 75(1) of his own prescriptive title ('such estate shall not be extinguished') and is furnished instead with the right to acquire and register as his own the usurped leasehold title."

Such a conclusion is found in contradistinction to the accepted position in unregistered land where, as Lord Radcliffe clearly stated in *Fairweather*,[13] the squatter's title "is never derived through but arises always in spite of the dispossessed owner".

In arguing against the imposition of a statutory trust in *Kato Kagaku*, counsel for Central and Axa contended that such a trust was in any event a legal oddity, bearing no relation to a private trust in the general legal understanding of such a term, it merely being a conveyancing device.[14] Indeed, the House of Lords in *Fairweather* had earlier questioned whether the mechanism which arose under section 75(1) of the LRA was in fact a trust, being of the view that if it was it would give rise to numerous problems. It is true that the acceptance of this statutory trust under section 75(1) will have consequences in the context of leasehold title which go beyond the principles of limitation as ordinarily understood, and which lead to a marked divergence in approach between registered and unregistered land. Particularly is this so where a dispossessed lessee attempts to surrender a usurped leasehold interest before the squatter has exercised his rights under section 75(2).

In construing section 75(1) and in seeking to provide an answer to the issue of whether surrender by a dispossessed lessee in registered land would allow a lessor an immediate right of possession against a squatter, it was incumbent upon Sedley J to ascertain the extent of the interest which the statutory trust protects. As noted above, in unregistered land adverse possession against a lessee leads to no more than the shearing of the lessee's right to possession from his leasehold estate. Counsel for Central and Axa both argued that a distinction between title and estate applied equally in registered land, inasmuch as section 75(1) of the LRA only provided an exception to the unregistered land rule where it was a proprietor's estate which had been extinguished. This exception, they argued, would not actually take effect in fact because section 17 of the Limitation Act 1980 only barred title, not estate.[15] Whilst the precise nature and characteristics of the statutory trust which arises under section 75(1) of the LRA were left open by Sedley J, he rejected counsels' argument, finding a distinction between estate and title "meaningless" in the overall framework of the Limitation Acts. The dismissal of such an artificial distinction in this context is surely correct, though it has specific ramifications in the registration scheme. Sedley J went on to hold that for the purposes of section 75(1) of the LRA there was nothing within its ordinary meaning to suggest that the leasehold or freehold estate adversely

---

[12] *Supra*, n 1, at 955. *Cf Tichborne v Weir* (1892) 67 LT 735.
[13] *Supra*, n 4, at 535.
[14] *Supra*, n 1, at 957.
[15] *Supra*, n 1, at 957.

possessed could be divisible into possessory or other rights. He reasoned that[16]:

> "To split the leasehold interest after twelve years' adverse possession into an element related entirely to the freehold and another related solely to the squatter, as is now known to happen with unregistered land, does not seem to me to marry up with either the purpose or the operation of section 75(1)."

Moreover, since registration under section 75(2) afforded a squatter the entire leasehold interest, Sedley J felt that the statute itself indicated that section 75(1) should preserve the same and not a lesser interest than that within section 75(2).

The consequence of maintaining the indivisibility of an estate under section 75(1) of the LRA, however, is that the interest of which the squatter becomes a beneficiary under the statutory trust is furnished with rights and obligations not readily associated with acquiring possessory title. As Sedley J explained[17]:

> "section 75 lifts the extinguishing effect of the Limitation Act and substitutes a trust of the leasehold interest, *benefits and burdens alike*, from the moment of extinction of the leasehold title. The squatter becomes entitled, without regard to merits, to be placed in the same relationship with the freeholder as had previously been enjoyed by the leaseholder."

As such, any surrender by a dispossessed lessee in registered land, according to Sedley J, will be ineffective to allow a lessor into possession precisely because the lessee's entire estate is held on trust leaving him with no interest to surrender on his own behalf. This is in line with the general principle *nemo dat quod non habet*. All that surrender would be effective to do would be to pass trusteeship from the dispossessed lessee to the lessor. Moreover, once the trust has arisen, the squatter has an overriding interest under section 70(1)(f) of the LRA which would bind the lessor upon disposition of the leasehold.[18]

Sedley J's decision on indivisibility of estate has meant that the limitation scheme now provides a squatter of registered land who has not taken the step of registering his title under section 75(2), all the benefits and burdens associated with a lessee's estate, beyond a possessory title, under the protection of a trust. This would seem to include all the dispossessed lessee's covenanted obligations, such as those to pay rent or effect repair.[19] Taken to its natural extent, it would also include the lessee's liabilities, so enabling the lessor to recover against the squatter redress for any breach of the lease's covenants previously committed by the lessee - perhaps most

---

[16] *Supra*, n 1, at 959.

[17] *Supra*, n 1, at 959, emphasis added.

[18] See sections 23(1)(c) and 69 LRA. The squatter may also have an overriding interest under section 70(1)(g) LRA up to and including when the limitation period is satisfied.

[19] This could lead to anomalies. On the facts of *Kato Kagaku*, Kato had adversely possessed only part of Axa's land - the courtyard to the south-west wing of Bush House. If, as Sedley J held, Axa's entire estate forms the subject matter of the trust, is that simply with regard to the courtyard, or the whole south-west wing? If the latter it would include a reversionary interest in the sub-demise to the Crown and so include an interest in and liability for parts of the property not so directly connected to the courtyard, but which fall within Axa's full estate.

seriously a lessee's non-payment of rent.[20] Quite apart from concerns over the resurgence of a 'statutory conveyance' and its associated consequences,[21] surely it is not the purpose of the scheme of limitation which practises a disinterested even-handedness, indeed a neutrality, in quieting possession between parties to set up a penalty through protection. In the early 1960s Professor Wade had argued that whilst section 75 of the LRA did modify privity between the dispossessed and the dispossessor, the provision was no more than a mechanical device to "preserve continuity of the registered title where otherwise there would have to be rectification of the register".[22] As such what marks the difference between limitation in registered and unregistered land should be no more than the addition of a device in registered land to achieve ease of application of the limitation principles. However, the operation of section 75(1) of the LRA with its imposition of a trust as interpreted in *Kato Kagaku* can be seen to go beyond the remit of a tool used to ease the achievement of a particular object as to altering the nature of the object itself.

In view of the fact that Sedley J. held that surrender did not operate to permit a lessor an immediate right to possession and so defeat the title of the squatter, there was no need for him to go on to consider Kato's further submission that a surrender causing defeat would amount to a breach of the trust imposed by section 75(1) of the LRA, and thereby allow a defeated squatter a remedy for breach against the lessee. It is a shame that the purport of this submission could not have been tested by the court, since any analysis of it would surely have challenged the appositeness of applying a trust at all in these circumstances without a full appreciation of the trust's nature, breadth or extent. Kato's submission highlights the many potential problems associated with a section 75(1) LRA trust. For example, as a trustee, and at that most likely a bare trustee, the dispossessed lessee, or a substituted lessor, must ensure that the trust be carried out in a way which does not frustrate the trust's purpose. Whilst the purpose of the trust is presently unclear, one would expect it to concern the preservation and protection of the squatter's interest. This raises immediately the question of the trustee's duty of care in carrying out the trust, which includes a duty not to make an unauthorised profit from the trust and a duty to ensure that the trustee's interests and the interests of the beneficiary do not conflict.[23] These duties are strictly applied in the law of equity[24] and possible areas of tension can be easily predicted. For one example one could point to the conflict of interest which may arise, particularly on a question of forfeiture, between a lessor's role as a

---

[20] Protection already exists for a lessor who wishes to seek redress for the dispossessed lessee's parting of possession. It would be considered unusual now for leases not to have within them a covenant against assignment or against parting with possession of the whole or part of the property without the consent of the lessor. For those leases which do contain such a covenant a lessor would have a remedy on the contract against the original lessee, or against the squatter where so bound by the covenants.

[21] The notion of a statutory conveyance was laid to rest in England by *Tichborne v Weir* (1892) 67 LT 735 and in Ireland by *O'Connor v Foley* [1906] 1 IR 20. In *Tichborne* Lord Esher, at 737, had emphasised that the effect of the limitation provisions was to extinguish and destroy the title of the dispossessed owner rather than to transfer that title to the squatter.

[22] In "Landlord, Tenant and Squatter", *supra*, n 4, at 558.

[23] *Bray v Ford* [1896] AC 44.

[24] See, for example, *Keech v Sandford* (1726) Sel. Cas. Ch 61, *Boardman v Phipps* [1967] 2 AC 46, *Reading v Att-Gen* [1951] AC 507.

substituted trustee to act in favour of the squatter and the lessor's role as a self-interested landlord.

The paucity of cases in this arena has meant that the trust which is deemed to arise under section 75(1) has yet to be tried and tested. This trust is an enigma and, as already pointed out by a number of commentators, it raises more issues than it ostensibly solves.[25] The decision of Sedley J in *Kato Kagaku* does much the same and one should be wary of an automatic adoption of the case's *ratio*, reasoning and effect. What is specifically highlighted is that success of the trust device which is used to adapt the limitation scheme with regard to freehold and leasehold land into registered conveyancing in England, is clearly open to debate. This debate is one which Ireland should consider carefully before embracing a similar approach, most particularly because of the greater prevalence in Ireland of possession of leasehold land.[26]

Northern Ireland's adjustment of the limitation provisions into its registered land scheme are provided for in section 53 of the Land Registration Act (Northern Ireland) 1970. This provision allows for the registration of a squatter as proprietor after the expiration of twelve years.[27] In practice this has meant that registration takes effect on the same folio of the dispossessed owner,[28] compared with the practice in England where registration of the adverse possessor as proprietor takes effect as first registration.[29] There is no similar provision in section 53 or more generally in the Land Registration Act (Northern Ireland) 1970 to the English provision in section 75(1) of the LRA, allowing for a trust to arise in the period between the expiration of the twelve years and the exercise of the power by the squatter to apply to be registered as proprietor under section 53(2). Thus, where a dispossessed lessee seeks to surrender the lease to the lessor prior to an application for registration by the squatter the lacuna in the Northern Ireland legislation means that it is unclear what effect, if any, the surrender will have. Disagreement already exists as to the extent to which the provisions of the House of Lords with respect to unregistered land from *Fairweather* are applicable in Northern Ireland,[30] but they were distinctly rejected in the Republic of Ireland by the Supreme Court in *Perry v Woodfarm Homes Ltd.*[31] Whilst the Supreme Court in *Perry* agreed with the view of the House of Lords in *Fairweather* that upon the expiration of twelve years the lease was not destroyed, it disagreed with the view that this allowed the dispossessed lessee to effectively deal with the property and so validly surrender the

---

[25] See in particular, Cooke, "Adverse Possession - Problems of Title in Registered Land" (1994) 14 *Legal Studies* 1.

[26] A point given as one rationale for not adopting the *Fairweather* approach in the Republic of Ireland: see the comments of Griffin J in *Perry v Woodfarm Homes Ltd* [1975] IR 104, 129, case discussed *infra*.

[27] The interest of the adverse possessor is also capable of being an overriding interest, see Sch 5, pt I, para 14, Land Registration Act (Northern Ireland) 1970.

[28] As to which see Wylie, *Irish Land Law* (Oxon: Professional Books, 2nd edn., 1986), at 940, Wallace, "Adverse Possession of Registered Land" (1981) 32 *NILQ* 254, 261.

[29] Section 75(3) LRA.

[30] Wylie, *Irish Land Law* (Oxon: Professional Books, 2nd edn., 1986), at 942, *cf* Wallace, supra n 28, at 261.

[31] [1975] IR 104, and see section 49 Registration of Title Act 1964.

lease to the lessor.[32] Rather, in *Perry* the principle *nemo dat quod non habet* applied with the consequence that the lessor remained bound by the lease for the remainder of the term unless a question of forfeiture arose.[33]

Whilst ostensibly not offering much protection to either the dispossessed lessee who will remain liable on the covenants or the squatter who may suffer forfeiture for a breach of covenants of which he could be unaware, the approach taken in the Republic of Ireland under *Perry* does seem to be more preferable overall than the artificial imposition of a trust in registered land, a trust whose nature is not only unclear but which also appears from its application in *Kato Kagaku* to adulterate the principles of limitation. If the trust's primary purpose is to more properly reflect the registered land mirror of title principle then in so doing it should not create fundamental confusion as to the nature of the interest so held. It would be best in absence of any express provision for the imposition of a trust, as is the case in Northern Ireland, to fall back upon first principles[34] rather than to unleash an animal of indeterminate disposition. The English Law Commission in their most recent consultation paper on registered land have in fact recommended that the trust which arises under section 75(1) LRA be abolished, and that the law of adverse possession as it applies to registered land be "recast" to more properly reflect the scheme's principles of registration of title.[35] Whilst it would be a shame to wholly lose the utility of possession which is an important feature of both English and Irish land law, the decision in *Central London Commercial Estates Ltd v Kato Kagaku Co. Ltd*, inasmuch as it highlights the problems of the section 75(1) trust and adverse possession in registered land, does little if not add fuel to the Law Commission's argument.

---

[32] See in particular the judgment of Walsh J, *supra*, n 31, at 119, and Griffin J, at 130. The Supreme Court accepted the views of Lord Morris of Borth-y-Gest who had given the dissenting judgment in *Fairweather*.

[33] For comment see Wallace, "Adverse Possession of Leaseholds - The Case For Reform" (1975) 10 *Irish Jurist (n.s.)* 74.

[34] For example the effect of estoppel, see *O'Connor v Foley* [1906] 1 IR 20; Wylie, "Adverse Possession: An Ailing Concept" (1965) 16 *NILQ* 467, at 485ff. If the lessor accepts a benefit from the squatter (a most obvious example being the payment of rent, but the benefit could derive from an accepted performance of any covenant under the original lease), the lessor must also accept the burden of the interest and will be estopped from denying the title of the squatter. This principle operates in a similar manner to the situation where the grant of an unauthorised tenancy under a lease of mortgaged premises may become authorised, and so binding upon a mortgagee, in circumstances where the mortgagee's acceptance of acts of the unauthorised tenant estops the mortgagee from denying existence of a valid tenancy, see for example *Stroud Building Society v Delamont* [1960] 1 All ER 749.

[35] *Land Registration for the Twenty-First Century*, Law Com No. 254 (1998), para 2.44, 10.19.

THE BRUSSELS CONVENTION: A STILL BORN CHILD?

Maria O'Neill, Lecturer in Law, University of Abertay Dundee

INTRODUCTION

At first sight the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Brussels 1968, (more commonly known as, and hereinafter referred to as, the Brussels Convention) has all the appearances of being just another piece of EC law, dreamt up in Brussels by the vast European Union machinery pursuant to the Treaty of Rome as amended. Upon further examination, however, it becomes apparent that this document does not fall into any of the tidy boxes, of Regulation, Directive or Decision, that usually account for the emanations from Brussels. This piece is not the product of the Council or the Commission. It is, in fact, an international treaty between the then Member States of the European Economic Community in 1968, as independent and sovereign states, to be subsequently amended and endorsed by each of the new Member States upon accession to what is now known as the European Union.

The Brussels Convention[1] was updated as new members joined the EEC,[2] as it was then known.[3] Reports were also drawn up upon each accession.[4] The European Court of Justice (the ECJ) was granted jurisdiction to interpret the Convention under the Luxembourg Protocol,[5] which was signed on the 3 June 1971, but which only came into force on the 1 September 1975. The 1971 Protocol gives the ECJ power, negotiated on the basis on Article 220(4) EC and Article 3(2) of each Act of Accession,[6] to give preliminary rulings on interpretation of the Convention at the request of the final appeal courts of each Member State.

It is the argument of this article that because the Brussels Convention[7] is not EU law it lacks potency and potential. By virtue of its International

---

1 OJ No L 229 31.12.72. All references to the EC Treaty in this article are to the pre-Amsterdam Treaty numbering.

2 Luxembourg Convention 9th October 1978 re accession of Denmark, Ireland and the United Kingdom, (OJ No. L 304, 30.10.1978). Luxembourg Convention 25 October 1982 re accession of Greece, (OJ No. L388, 31.12.1982). San Sebastian Convention on the accession of Spain and Portugal, (OJ 1989 L285/1). The updated and consolidated Brussels Convention, upon the accession of Sweden, Finland and Austria, (OJ No. C 15, 15.1.97, page 1).

3 It was also used as a model for the Lugano Convention, OJ No L 319, 25.11.1988.

4 Jenard-Moller Report, (OJ No. L 319, 25.11.1988). Jenard Report, (OJ No. C 59, 5.3.1979). Schlosser Report, (OJ 1979 C59). Evrigenis and Kerameus Report, (OJ 1986 C289/1). Almedia Cruz, Desantes Real, Jenard Report, (OJ 1990 C189/6). (There appears to be no report published as yet upon the accession of Sweden, Finland and Austria).

5 [1990] OJ C No. 189/2.

6 Peter Stone, *The Conflict of Laws*, Longmans, 1995, p 155.

7 Along with the subsequent Rome Convention on the Law applicable to Contractual Obligations, Rome 1980, OJ L 1980 No. 266/1 and the European Insolvency Convention EU Convention on International Insolvency Proceedings, Brussels November 23, 1995 35 ILM 1236 (1996).

Law status the role of the ECJ is fundamentally different, and the potential for the Convention to govern the free movement of judgments from one jurisdiction to another, (a necessary corollary to the free movement of goods, establishment, services, workers and capital), is limited, thus adversely affecting the further development of the Single Market.

THE IDENTITY OF THE BRUSSELS CONVENTION.

The issue of the identity of the Brussels Convention was brought sharply into focus in the case of *Kongress Agentur Hagen* v *Zeehahgen*[8] when the Commission, in making its submissions to the ECJ, engaged in an amazing dichotomy of argument,[9] which perhaps reflected its own ambivalence towards the exact nature of the Brussels Convention. The Commission's oral and written presentations to the Court in this case were completely at odds. The first of the arguments was to the effect that the Brussels Convention was recognized as a framework document and that other sources of law, such as national procedural rules, should be used to supplement it.

The second argument envisaged the Brussels Convention as a supreme law, to which national rules of jurisdiction should be subordinate. This argument reflects the view that laws based on the Treaty of Rome take precedence to national law, that the Convention forms "an integral part of the Community legal order". It also recognizes that reference to national rules for supplemental purposes, (as required by the first argument), would lead to an uneven application of the provisions of the Convention, militating against its uniform application.

If the first argument (that the Brussels Convention is to be interpreted as a framework document to be supplemented by national procedural rules) prevails, then the Convention becomes merely a conduit through which fifteen or more diverse and varied national rules of law and procedures can, in computer parlance, interface. There is no attempt to harmonize or co-ordinate existing law and procedure. Any attempt to move a judgment from one jurisdiction to another requires knowledge of three sets of laws and procedures, those of the originating jurisdiction, of the destination jurisdiction, and those of the Brussels Convention as the interjurisdictional conduit. The national and jurisdictional boundaries remain, imposing a barrier to the free movement of jurisdiction, thus delaying and hindering their pursuit of assets or persons, who enjoy the benefits of the free movement provisions of the EC Treaty. The European Single Market is thereby flawed, and business people operating in a flawed market will always be conscious of the added burden of enforcing a judgment on a transnational basis.

If the argument that the Convention is to take precedence over national law prevails, then new procedures for the implementation of the Convention would have to be developed by the ECJ. The end result of this would be one European-wide substantive and procedural system for the movement of judgments from one Member State to another. That system would be applied in a similar manner within each of the Member States. European procedural rules would operate in addition to or instead of existing national systems for enforcing judgments. Thus, normally, lawyers in each member state would be fully familiar with the procedures to be applied from the instigation of the action to its final execution. This

---

[8] Case C-365/88, *Kongress Agentur Hagen* v *Zeehaghen*[1990] ECR 1-1845 at 1865.

[9] *Op cit*, n 6.

certainty and clarity of law and procedure would provide a smooth running and a fully coordinated pan-European system, where judgments could move as freely as the persons or assets that they are pursuing through the Member States, thus contributing to a true European Single Market.

This scenario would reflect the ideal situation, although it might encounter some initial objection from traditionalists, as it would require root and branch reform of the judgment enforcement procedures in each Member State. Such opposition has not, however, prevented the promulgation of European law before. This hypothesis of the Brussels Convention taking precedence over national law is based on the premise that the Convention can be regarded as law enacted pursuant to the Treaty of Rome. This is not in fact the case. The status of the Convention as an international document is reflected in the restricted access of litigants to the ECJ, and the limited competence of the ECJ on issues deriving from the Convention, in contrast to exclusive competence on EC law issues.

Francesco Capotorti[10] is of the opinion that the similarities between Article 177 referrals and Brussels Convention referrals are greater than the differences. The two systems are after all being administered by the same court, for the same Member States. The differences in the two schemes, however, become all the more important given the above facts. Capotorti does acknowledge however that "a Convention between Member States cannot be classified as a Community Measure" and "cannot be classified as an actual source of Community law".[11]

Trevor C. Hartley appears to take a different view.[12] He makes specific reference to the case of *Peters* v *ZNAV*,[13] which stated that "the concepts of matters relating to a contract" in the Article 5(1) of the Brussels Convention should be determined by the ECJ, rather than the laws of one of the Contracting States.[14] At issue in this case was the payment of money on the basis of an association / member relationship.[15] Rather than arguing, as Hartley does, with reference to this case, that the ECJ does not exercise an undue restraining influence on the national courts through "unnecessary Europeanisation", it is a more tenable proposition to state that the national courts are given excessive competence (to the detriment of the ECJ) in the

---

[10] Fransco Capotorti: "Tasks of the Court of Justice and the System of the Brussels Convention"; *European Court of Justice: Civil Jurisdiction and Judgments in Europe, Proceedings of the Colloquium on the Interpretation of the Brussels Convention by the Court of Justice considered in the context of the European Judicial Area*. Luxembourg, 11 and 12 March 1991, Butterworths 1992, p 14.

[11] *ibid.* at p 15.

[12] In his article entitled "Unnecessary Europeanisation under the Brussels Jurisdiction and Judgments Convention: the Case of the Dissatisfied Sub-Purchaser" *ELR* 1994, 18(6), 506-516. Hartley defines "Europeanisation" as denoting the "process whereby a given question becomes a matter for determination by Community law, rather than by national law".

[13] (*Reference for a preliminary ruling from the Hoge Radd der Nederlanden*) Case 34/82, *Peters* v *ZNAV* [1983] ECR 987.

[14] At point 9 of the judgment.

[15] And whether obligations in question arose from membership, or whether it was necessary for such membership to be in conjunction with one or more decisions made by the organs of the association. He goes on to argue that this appears to breach the principle of subsidiarity. However, as subsidiarity is enshrined in Article 3b it would appear to cover EC law only, and not International Treaties such as the Brussels Convention.

operation and interpretation of the Brussels Convention. This can result in an uneven approach to the interpretation and application of the Convention.[16]

Substantial differences exist between Article 177 referrals and those under the Brussels Convention. These include;

1. A greater reliance upon the national judiciary for applying and interpreting the law;

2. A more restricted access to the ECJ under the Brussels Convention than under Article 177 referrals;

3. An unwillingness of the ECJ to take a more proactive and constitutional style approach to the application of the Brussels Convention, as evidenced in the case of *Industrie Tessili Italiana* v *Dunlop PG*.[17]

National Judiciary and Restricted Access to ECJ.

One of the causes for the undue reliance upon the national judiciary is the much more restricted access to the ECJ under the Brussels Convention than under the EC Treaty. Only the courts listed in Article 2 of the Luxembourg Protocol of 1971 can request the ECJ to give rulings under the Brussels Convention. When a matter is referred to it, the ECJ can only interpret the Convention by way of a preliminary ruling.[18] The ECJ is not engaged in the application of law to specific cases, unlike in some instances under the EC Treaty. The ECJ itself has stated that its function, as envisaged in the Protocol of 3 June 1971, "is to give interpretative rulings on the provisions of the Brussels Convention which are binding on the national courts which put questions to it"[19] and is (as a result) reluctant to give merely advisory rulings, particularly if they appear to pertain to matters which are outwith the constraints of a rigid interpretation of the Convention and, as a result, fall to be dealt with under national law.

Lack of Constitutional Style.

In the case of *Industrie Tessili Italiana* v. *Dunlop PG*,[20] where there were differences in the rules of Contracting States concerning the place of performance of a contract, the ECJ decided that it was not in a position to provide a definition. In issues arising under the EC Treaty the ECJ has acted in the capacity of a Supreme Court[21] developing law to strengthen

---

[16] The assumption of control exercised by the ECJ in the case of *Peters* should be interpreted as an attempt by the Court to mitigate the damage caused by undue reliance on national legal systems, where the underlying assumption of the Convention, (that all jurisdictions had a similar understanding of the term "contract") had been undermined.

[17] Case 12/76 *Industrie Tessili Italiana* v *Dunlop PG* [1976] ECR 1473.

[18] Marco Darmon Advocate General: "The Task of the Court of Justice and the System of the Brussels Convention"; *European Court of Justice: Civil Jurisdiction and Judgments in Europe, Proceedings of the Colloquium on the Interpretation of the Brussels Convention by the Court of Justice considered in the context of the European Judicial Area*. Luxembourg, 11 and 12 March 1991, Butterworths 1992, p 3.

[19] Case C-346/93 *Kleinwort Benson Ltd*. v *City of Glasgow District Council* [1995]ECR I-615.

[20] Case 12/76, *Industrie Tessili Italiana* v *Dunlop PG* [1976] ECR 1473.

[21] In defence of the constitutional status that it appears at times to confer on the EC treaty. See S. Weatherill, "The Constitutional Court", Chapter 6 in *Law and Integration in the European Union*, 1995; van Gerven "The Role and Structure

the provisions of the EC Treaty. The ECJ cannot, in its role as arbiter of the Brussels Convention, develop the Convention in order to fill in the gaps left by its drafters. The ECJ is equally unwilling to assume powers to itself under the Convention that it was not otherwise given,[22] an approach in complete variance with its much more proactive approach for issues arising under the EC Treaty.[23]

The difference in the role of the ECJ under the two regimes can also be seen as a result of the fact that under Article 177 EC Treaty a ruling may be requested (optionally) by any court or tribunal of a Member State (provided it considers that a decision on the question is necessary to enable it to give judgment), with obligatory referral of the case by the final appellate court. Under Article 3(1) of the Brussels Convention, however, preliminary rulings or interpretations on any aspect of the Convention may be sought by the national courts only "when they are sitting in an appellate capacity" and by the courts granted jurisdiction to hear appeals against decisions authorizing enforcement by Article 37 of the Brussels Convention. First instance courts may not refer a matter on the Brussels Convention to the ECJ.[24]

A further difference refers to an unusual further jurisdiction arises under Article 4 of the Protocol of the Convention whereby a ruling on interpretation may be sought from the Court by authorities other than the courts specified in Article 2 of the Protocol. This jurisdiction only arises where a matter is already *res judicata* and one or more decisions given by the Courts of the Contracting States conflict with a previous interpretation given either by the Court of Justice or by a Court of Appeal of another Contracting State. This final form of referral is for the future reference of the relevant jurisdiction only, as any judgment by the ECJ will have no impact whatsoever on the facts of the case originally in question. This, as stated by Francesco Capotorti,[25] despite the provision's lack of use, is a substantial departure from the procedures set out by the Treaty of Rome for its own application. The above factors would appear to militate strongly against the "Supreme Law" argument, whereby national rules of jurisdiction should be subordinated, proposed by the Commission is its

---

of the European Judiciary now and in the future," 1996 21(6) *ELR* 221-223; and Cappellitti: "Is the European Court of Justice "Running Wild?", (1987) 12 *ELR* 1.

22 As stated by Pieri in *CMRL* 34 867-893, 1997, "The 1969 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters: the Evolution of Case Law of the Court of Justice 1992-1996:" "Any special jurisdiction had an exceptional character, and may not be extended if the norm does not specifically allow for", referring to case of Case 32/88, *Six Constructions Ltd*. v *Humbert* [1989] ECR 341.

23 As evidenced in *J.J. Zwartveld and others*, Case C-2Imm[1990] ECR 3365, and *Cordoniu SA* v *E.C. Council,* Case C-309/89, [1994] ECR I-1853. The development of the concept of procedural fairness beyond the basic Article 190 duty to give reasons in the joined Cases C-6 9/90, *Andrea Francovich and Dinila Bonifaci and others* v *Italian Republic* [1991] ECR 5357 and the progressive adoption of Human Rights into EC law, in the cases of Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorrasstelle fur Getreide und Futtermittel* [1970] ECR 1125, and Case 46/87, *Hoechst* v *Commission* [1989] ECR 2859, as subsequently followed by Article F(2) of the Treaty on European Union, all evidence the proactive approach of the ECJ to EC Law.

24 Case 80/83 *Habourdin* v. *Italocremona* [1983] ECR 3639.

25 *Op cit*., n 10.

written submission in *Kongress Agentur Hagen* v *Zeehaghen*,[26] and to favour the framework argument.

Where the Convention prescribes a legal position[27] or procedure[28] (that is, rights of appeal)[29] the Convention does takes precedence over national provisions.[30] There are many issues, however, not addressed at all by the Convention, thus leading to an undue reliance on national law,[31] and thus supporting the framework argument. Such matters include problems arising from the defective service of the document instituting proceedings[32] and issues dealing with the assessment of the quantum of damages.[33] Here national law is utilized on condition that its application does not impair the "effectiveness" of the Convention."[34] Other issues are dealt with by specific reference to the national laws of the court seized, such as the law applicable to the legal relationship in question. National laws are also used to determine the place of performance of the contractual obligation.[35] "As there is no uniformity among the laws of the contracting parties permitting a standard determination of the 'place of performance', there is no alternative but to let the court seized interpret this rule, according to the international private law of the *lex fori*".[36] Another example of reliance on national law arises under Article 21, which refrains from introducing any procedures for the automatic consolidation of cases. This is evidenced in the case of *Tarty* v *Maciej Rataj*.[37] In the earlier case of *Deutsche Genossenschaftsbank* v *SA Brasserie du Pecheur*[38] Advocate General Lenz, adopting the stance of the German authorities, accepted

---

[26] *Op cit*., n 8.

[27] As in the case of Article 39 which deals with enforcement matters; *Capelloni & Aquilini* v. *Pelkmans* (Case 119/84), [1985] ECR 3147.

[28] Case 42/76, *De Wolf* v. *Cox* [1976] ECR 1759.

[29] The Convention itself "constitutes an autonomous and complete system of appeals" according to the Court in paragraph 17 of its judgment in the case of *Deutsche Genossenschaftsbank* v *S.A. Brasserie du Pecheur*, Case 148/84, [1985] ECR 1981.

[30] In the case of *Duijnstee* v *Lodewijk Gorerbauer* Case 288/82, [1983] ECR 3663, (reference for a preliminary ruling from the Hoge Raad der Nederlanden), the Court held at point 15 of its judgment that the Convention "which seeks to determine the jurisdiction of the courts of the Contracting States in civil matters must override national provisions which are incompatible with it".

[31] To include an Action Paulienne, Case C-261/90, *Reichert and Kockler* v *Dresdner Bank* [1992] ECR 2175, and non enforcement of settlements, Case C-414/92, *Solo Kleinmotoren GmbH* v. *Boch* [1994] ECR I-2237.

[32] Which are governed by the *lex fori*, including, where applicable, relevant international agreements Case C 305/88 *Isabelle Lancray S.A.* v *Peters und Sickert* [1990] ECR I-2725.

[33] Case C-68/93 *Fiona Shevill* v *Press Alliance* [1995] ECR 1-450.

[34] "The 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in civil and commercial matters: The Evolution of the Text and the case law of the court of Justice over the last four years" S. Pieri *CMLR* (29) 537-555.

[35] C-288/92, *Custom Made Commercial* v *Stawa Metallbau*, [1994] ECR 1-2949, confirming (Case 12/76 *Industrie Tessili Italiana* v *Dunlop AG* [1976]ECR 1473, and Case 266/85, *Shenavai* v *Kreischer* [1987] ECR 239.

[36] See n 34 *supra.*

[37] Case C-406/92, *Tarty* v *Maciej Rataj* [1994] ECR 1-5460.

[38] Case 148/84, *Deutsche Genossenschaftsbank* v *SA Brasserie du Pecheur* [1984] ECR 1981.

that, where procedures are circumscribed in the Brussels Convention, they are applicable exclusively. It must be noted that the exclusion of procedures under national laws "does not extend beyond the field of application of the uniform rules provided for in the Convention": it is for national law to determine any extraneous matters.[39]

Renhold Geimer points out[40] that, not only do many procedural requirements fall under national laws, but so do questions of substantive law, as evidenced above in *Industrie Tessili Italiana* v *Dunlop A.G.*[41] The ECJ itself stated in the case of *Sanicentral GmbH* v *Collin* that "the Convention does not affect rules of substantive law", but rather the role of the Convention is to "determine the jurisdiction of the courts of the contracting states in the intra-Community legal order".[42]

Matters relating to execution on foot of a judgment are also to be determined according to national law. In his opinion on the case of *Hoffmann* v. *Kreig*,[43] Advocate General Darmon stated that, despite the fact that the Convention laid down an exhaustive list of the rights of appeal available,[44] "the Convention merely regulates the procedure for obtaining an order for the enforcement of foreign enforceable instruments" and that its execution is to be governed by the domestic law of the court where the execution is sought.

As the whole purpose of the Brussels Convention is the enforcement of judgments in other EU Member States this is a very significant area of substantive and procedural law which the Brussels Convention does not even attempt to address. However, problems do not end here. Other problems that may be encountered in the enforcement of judgments include issues pertaining to family or divorce matters,[45] or to the enforceability of some cases in the country of enforcement for national reasons.[46]

PLURALITY OF INTERPRETATION

One of the consequences of the Framework construct of the Brussels Convention (with the consequence lack of a Supreme Court approach on the part of the ECJ) is plurality of interpretation. This may arise with regard to the Brussels Convention to an extent not possible under the EC Treaty. This is demonstrated in the case of *De Bloos* v. *Bouyer*,[47] which involved language problems in the interpretation of the phrase "the place where the obligation has been or should be performed".[48] The case turned on the term "obligation" with Belgian commentators (the referring

---

39 Interested third parties were prevented from challenging enforcement orders in this case.

40 "Right of Access to the courts under the Brussels Convention": in *supra*, n 34 at p 40.

41 Case 12/76, *Industrie Tessili Italiana* v *Dunlop A.G* [1976] ECR 1473.

42 Case 25/79, *Sanicentral GmbH* v *Collin* [1972] ECR 3423, (preliminary ruling requested by the Cour de Cassation of France), at point 6 of its judgment.

43 Case 145/86, [1988] ECR 645, (reference for a preliminary ruling from the Hoge Radd der Nederlanden).

44 See Case 148/84, *Deutsche Genossenschaftsbank* v *S.A. Brasserie du Pecheur* SA [1985] ECR 1981.

45 Case 145/86, *Hoffman* v *Kreig* [1988] ECR 645.

46 Case 42/76, *de Wolf* v *Harry Cox* [1976] ECR 1759.

47 Case 14/76, *De Bloos* v *Bouyer* [1976] ECR 1497.

48 *Op cit*, n 36.

jurisdiction) unable to provide a satisfactory definition of same.[49] Different language versions of the Brussels Convention provided different interpretations of the term, with the ECJ eventually determining that "obligation" referred to the contractual obligation forming the basis of the legal proceedings, reflecting the Italian and German version of the Convention. This situation, where the ECJ feels itself constrained by the language of the Convention with the result that it tries to stick rigidly to its wording, is less likely to occur in the context of the application of the EC Treaty, particularly when the Court operates in a Supreme Court style mode, as in the case of *Parti Ecologiste Les Verts* v *European Parliament*,[50] where the Court went so far as to insert the word "Parliament" into Article 173 EEC.

CONCLUSION

As has been evidenced by the aforementioned cases of *Francovich*[51] and *Zwartveld*,[52] the very issue of the "international" recognition of judgments is also uncharacteristic of the general tenor of EC law developments over the past number of years. The international treaty status of the Brussels Convention is based upon a vision of the EU as being composed of independent states, coming together for a limited purpose. The increasing emphasis on unity has been negated in this important area of law. This Convention emphasizes the disparities within the Member States in the process for enforcement of judgments, and makes no effort whatsoever to harmonize them. The case of *Kongress Agentur Hagen* v *Zeehaghen*[53] was decided against the backdrop of the above cases, and at the hearing was the subject matter of two conflicting submissions of the Commission:

1. That the Convention could be supplemented by procedural rules, and

2. The Convention was part of the integral legal order of the Community, and all emphasis should be placed on uniform application of the Convention. After considering the arguments, the Court held in its judgment, at paragraph 17 thereof, that the object of the Convention "is not to unify procedural rules but to determine which court has jurisdiction in disputes relating to civil and commercial matters in intra-Community relations and to facilitate the enforcement of judgments".[54]

Echoing the opinion of Droz,[55] the Convention is an entirely original, dynamic and effective legal entity, and as Advocate General Marco Darmon has pointed out: "The Brussels Convention constitutes the Community's first achievement in the field of international private law",[56] but as such, regard must be had to the fact that the purpose of the Brussels Convention on Jurisdiction and Enforcement of Judgments 1968 is not to

---

[49] The choice presented to the court was whether the term "obligation" referred to the obligation to compensate or the obligation to perform the contract in question.

[50] Case 294/83, *Parti Ecologiste Les Verts* v *European Parliament* [1986] ECR 1339.

[51] Joined Cases C-6 9/90, *Andrea Francovich and Dinila Bonifaci and others* v *Italian Republic* [1991] ECR 5357.

[52] Case C-2Imm, *J.J.Zwartveld and others* [1990] ECR 3365.

[53] *Op cit*, n 8.

[54] The Court went on to state that there was a necessity to clearly distinguish between jurisdiction and the conditions governing admissibility.

[55] Competence Judicaire et Effects des Jugments dans le Marche Commun, (1972), referred to in Anton & Beaumonts *Civil Jurisdiction in Scotland*.

[56] *Op cit*, n 18.

unify the procedural rules, as stated by the ECJ in the judgment in the case of *Kongress Agentur Hagen* v. *Zeehaghen*,[57] nor in certain situations, the substantive rules.

This international trend[58] introduces a note of tension into the European legal order. We are no longer all progressing along the same road, but we have shown a willingness, not only to slow down, but to turn around and go backwards. This move is reinforcing the concept of "a Europe of bits and pieces",[59] a move that has also been noted in other areas of European law. While the Convention might have been the product of a more realistic approach to solving the particular problem posed at the time, avoiding the thornier issues of approximation or unification of national laws, it may prove to be, in time, a stumbling block in the quest for the development of a true European Union. The United Kingdom recognizing the inherent rigidity of the Brussels Convention had advocated the need for greater flexibility along the lines of the common law doctrine of *forum non conveniens* at the 1978 accession negotiations, but to no avail.[60]

The Brussels Convention has a very potent effect, as every court in a Contracting State is required to apply it. This is the case, according to the Jenard report,[61] whether or not the Convention is pleaded by the parties. This report was granted the status of an interpretative document, as evidenced by section 3(3) of the United Kingdom's enacting legislation, the Civil Jurisdiction and Judgments Act 1982,[62] which provides that the separate reports accompanying each of the Accession Conventions are to be considered by the English courts in cases requiring the application of the Convention.

The usefulness of the Brussels Convention can be determined by its day to day application in the courts of EU Member States. The processing of claims for monetary judgments and their subsequent enforcement is very much part of the day to day operations of regional courts in each Member State, with many of the claims emanating from the lowest courts. With the greater mobility of all sectors of society between countries the issue of the international recognition of judgments is no longer the preserve of big business, but encompasses every EU citizen.

Access to the ECJ to determine issues which might arise under the administration of the Brussels Convention is severely restricted, with (as referred to earlier), only Article 2 courts being given the right to refer matters to the ECJ. Appeals to a higher court in the land simply to facilitate such a referral to the ECJ is therefore adding unnecessary burden and expense to the plaintiff. Such an additional burden could restrict access to justice for many smaller claimants.

---

[57] *Op cit*, n 8.

[58] Commenced by the Brussels Convention on the International Recognition and Enforcement of Judgments, OJ No. L 229, 31.12.72, and as subsequently developed by the EEC Convention on the Law applicable to Contractual Obligations, Rome 1980, OJ L 1980 No. 266/1, and the EU Convention on International Insolvency Proceedings, Brussels November 23, 1995, 35 ILM 1236 (1996), (which is due to come into force as soon as the last Member State signs it).

[59] Deirdre Curtin, "The Constitutional Structure of the Union, A Europe of bits and pieces" (1993) 30 CMLRev 17.

[60] *The Option of Litigating in Europe*. Edited by D.L.Carey Miller and Paul R. Beaumont. United Kingdom National Committee of Comparative Law. "The 1968 Brussels Convention and Subsequent Development" Karl M Newman.

[61] Jenard Report, (OJ No. C59, 5.3.1979).

[62] C 27.

The Convention, by relying on national law to the extent that it does, is held to ransom by the national courts and their domestic provisions dealing with judgments. A new EU system for recognition of judgments cannot be developed, as there is, (to date), no attempt to unify the substantive and procedural law in this area.[63] Every judgment has to be governed by two national laws, the law of the forum of the judgment, and that of the forum of enforcement. One lawyer is unlikely to be sufficiently proficient in two legal systems to prosecute any case to its conclusion. Two legal teams on one judgment case continues to make the international recognition and enforcement of judgments unwieldy and cumbersome, with the free movement of judgments lagging a long way behind the other freedoms, thereby handicapping the development of a true internal market.

This disjointed development of the European market makes it easy for a defendant to move himself, his assets, or even his entire business from one jurisdiction to another, without permitting those who seek to enforce a judgment against him an equal opportunity to avail of the lowering of the internal EU borders. Similarly, the full potential of pan-European commerce requires a seamless and effective method of enforcing contracts through judgments, such a system being a far cry from that currently available under the Brussels Convention.

Free movement of judgments, as with the other free movements, requires the supreme European court, the ECJ, to operate in a constitutional manner with full authority to develop and evolve the provisions of a judgment recognition system, as necessity demands, without issues falling outside the European law system, and relying on national laws and procedures, which have been developed for purposes other than pan-European enforcement of judgments. Problems arising from the strict interpretation of the Brussels Convention in its various language formats should never have been permitted to arise, and would have been less likely to have arisen had the Brussels Convention been developed within the EC legal system.

This lack of identity as EC law, deriving from the EC Treaty, stifles the Convention's potential. It is not an organic law capable of growth and development by the careful nurturing of the ECJ, under its more pro-active, Supreme Court style of judicial decisions, making it very much a legal document which operates as a "blunt instrument"[64] born fully developed. Any further progress to be made in this area will have to be done by way of a further international Convention,[65] while practitioners and public alike suffer from a system that is still, on many occasions, determined by national laws and procedures, with a true single commercial market in matters of European recognition of enforcement of judgments in civil matters a long way off.

---

[63] There is a possibility that such unification may arise at some stage in the future under Article K1 point 6 of the Treaty of European Union.

[64] Adrian Briggs, "The Brussels Convention," Yearbook of International Law [1991] p 521.

[65] As in the case of the provisions for Consumer Contracts, which could have been developed from the original text of the treaty, and had to be introduced upon the accession of the United Kingdom, Ireland and Denmark to the treaty. See further: Pieri, *op cit*, n 22.

REVIEW ARTICLE

Caroline Fennell, Statutory Lecturer and Dean of the Faculty of Law, University College, Cork

SEX AND GENDER IN THE LEGAL PROCESS. By Susan Edwards. [London: Blackstone Press Ltd. 1996. xxv and (with index) 461pp. Paperback £19.95.]

The first question which comes to mind on reading the title and contents page of Susan S.M. Edwards' text *Sex and Gender in the Legal Process* is whether this is another women *and* the law type text, or whether it is something more. Does it move the debate further along in terms of developing a feminist critique of law? The chapter divisions indicate this could almost be two unrelated texts, with the first four chapters focusing on issues of sex and sexual identity, and the rest of the book concentrating on various aspects of the criminal law with a view to assessing how its methodology is gendered. A clue as to the reason for the choice of an apparently eclectic series of chapter headings is provided by the fact that Edwards states the collective task of feminists is to render masculinity, masculinism, structures of patriarchy and heterosexism accountable and open to challenge.[1] It might have been helpful, if aside from the introduction, there had been some thematic focus to the sections or a final concluding chapter.

The kernel of Edwards' argument is found in the following passage from her introduction, where she says:

> "It is said, so we are told, that reasonable *man* means the reasonable *woman* just simply by saying so, even though the experiences of women are otherwise immaterial, otherwise irrelevant, and unlike the male experience are rarely authenticated or given law's divine blessing. If such experiences are authenticated they remain specific to women without universal applicability."[2]

Much of Edwards' task in revealing the masculinism of legal method is executed in the field of criminal law, particularly in the second section of the text. Hence it is useful to remind ourselves of that context. Criminal law and procedure and criminology constitute relatively new territory for feminists. In fact it is fairly new territory for women whether as lawyers, judges, jurors or accused. The initial incursion and recognition of women in this context was as victims, and therein lies a tale. Early rape depictions and discussions fall readily into the male (aggressor)/ female (passive victim) paradigm. Within the study, rather than practice, of crime, women are similarly lacking. Rafter and Heidensohn in their volume on feminist criminology put it as follows: "Late 20th century mainstream criminology was the most masculine of all the social sciences, a speciality that wore six-shooters on its hips and strutted its machismo."[3]

---

[1] At page 6 of the text.

[2] At pp 2-3.

[3] Rafter and Heidensohn (eds), *International Feminist Perspectives in Criminology: Engendering a Discipline* (1995) at p 5.

Criminal law was not all that different, nor were most criminal lawyers. Moreover, feminist lawyers face a difficulty identified by Smart, not faced, she suggests, by other feminists in academe:

> "In all areas of the academe radical (i.e. at root) dissent from the dominant paradigm of knowledge production causes problems for the dissenter....[T]o follow radically different ways of thinking can amount to professional suicide. In the discipline of law there is almost a double suicide involved. Not only does the dissenter challenge academic standards, but also the standards of law as a profession. Inasmuch as law has a direct practical application, the dissenter in law is more subversive than in a discipline like sociology. The former challenges the standing of judges, barristers, and solicitors as well as academic lawyers. Little wonder then that feminism has such a hard time taking root in law."[4]

In the course of her introduction, Edwards points to the endeavour of recent legal feminism to explore the relationship of gender to law, beyond the application by agents operating the law, and to look within, to the form and structure itself.[5] The core of the argument here is that the issue is not so much that the empire of law is masculinist, or indeed that the application of legal rules is masculinist, but that the method of law itself is masculinist. This, Edwards claims, is not so easily or readily conceded.

The first chapter, which is entitled 'Transsexuals in legal exile', makes the point that the human body in law is, for the most part, biologically determined.[6] Edwards points out that it is the social construction of the body and its meaning that is the primary source of enslavement. It is what the body has come to signify; it is these meanings that must be challenged. The significance of language is considerable. "A need for a concept to define transsexualism is overwhelming, for without language to define the transsexual then they are lost."[7] Edwards quotes Grbich, who explores the way in which language and legal language is a system of signification which gives authorisation to certain experiences.[8] She also explores the way in which the legal organisation of sexual dimorphism and the gender roles attaching to it creates the surgeons prepared to operate on transsexuals and thereby creates the transsexual. Edwards points to the incongruity of law in terms of medical and scientific developments enabling transsexuals to undergo sex change operations, saying:

> "Yet once surgically transformed the transsexual inhabits a legal 'no man's land', a barren terrain of sexual statelessness, where the only rights, obligations and duties are those pertaining to the form of sex, the sex renounced, the sex erased, leaving the transsexual in a state of 'exile'…..Those who identify as a 'third sex', androgynous, neither male nor female, are similarly despised and misunderstood, outcasts in a society

---

[4] Smart, *Feminism and the Power of Law* (1989) at p 21.

[5] At page 6 of the text. Edwards there claims that the present work is a contribution to this enterprise, saying that it "aims to address the several levels of engagement which have characterised scholarship in examination of the legal method underlying the law, the content of the law, the application of the law by judges and the process of applying the law, and the symbolic function of law not merely as a product of social construction and power relations but in the authentication of these relations and the formation of the institutions of patriarchy and heterosexuality with which they are enmeshed."

[6] At page 8 of the text.

[7] At p 10.

[8] At p 11.

> whose credo is the social and legal organisation and maintenance of sex difference and the reproduction of institutions premised on biological essentialism."[9]

That the solution to this problem should simply be accedence to the demands that the transsexual be accorded legal status congruent with the post-operative sex is questioned by the author,[10] for whom the way forward may be to limit surgical intervention and try alternate means of treatment. She suggests the silence of the law is of itself indicative of the marginalisation of this group.[11]

In this chapter the author also pursues the issue of biological determinism and its impact on family law. Her examination of apparently neutral criteria such as "the best interests of the child", and the conflict between such criteria and the priority of the child's interest, reveals that when there is any conflict between the "best interest" principle (which in practice is judicial determinism) and the wishes and feelings of the child, the child's wishes are invariably overruled. She makes the point that "rights to parenthood depend quintessentially on heterosexuality, on subscribing to fixed codes of social conduct and gender orientation within that gender role, requirements which are, arguably, social conventions unrelated to the caring function".[12] Transsexuals in the context of family law disputes are thus regarded as wholly unfit parents.

The difficulties with regard to the sex specificity of offences under the Sexual Offences Act 1956 and the resulting implications under the Criminal Justice and Public Order Act 1994 are explored. In the context of prostitution the criminal liability of the male-to-female transsexual is an issue. The legislation here assumes that the offence of prostitution is committed by women only, and that when men solicit they are importuning other men.[13] Further problems are posed by the sex-specificity of the offences committed by those who live on the immoral earnings of prostitution. Despite the case of *DPP* v *Bull*,[14] where the Divisional Court held that section 1 of the Street Offences Act 1959 applied only to females, Edwards points out that it is only where a plea of not guilty is tendered that the appropriateness of using the charge against a transsexual prostitute is subject to scrutiny. Where the transsexual prostitute is charged with an offence of soliciting and pleads guilty the sexual status is not questioned, and a conviction for the female-only offence is duly recorded. It remains tantalising that, notwithstanding the sex-specific nature of the charge of loitering for the purposes of prostitution, so many males are being proceeded against for this offence.

The transsexual as victim of sex offences poses a particular problem, not least in that such a victim may be even less likely than a natal sex victim

---

9 *Ibid.*

10 At p 12.

11 *Ibid.*

12 At p 19.

13 While the English courts remain manacled to biological hegemony in respect of the sex-specificity of the offences of loitering and soliciting, and also in respect of the determination of the sex of the post-operative transsexual according to the pre-operative status at birth, courts in Australia have taken a more realistic approach. Thus in *Harris* v *McGuinness* [1988] *A Crim R* 146 Matthews J declared (at 161-162), "the time has come when the beacon of *Corbett* will have to give place to more modern navigational guides to voyages on the seas of problems thrown up by human sexuality".

14 [1994] 4 All ER 411.

to report an offence. The issue of whether a rape can be committed on a person where that person's vagina is artificially constructed, as in the case of a male-to-female transsexual, remains to be decided. Certainly the whole issue of transsexuals in this context raises questions about the viability of laws relating to such crimes which focus unduly on anatomical definitions and furthermore draw a questionable equation between levels of anatomical interference and degrees of hurt. Likewise, in the context of employment, pensions and welfare benefit, the author points out that sex orders the entirety of our entitlement to employment benefits, to pensions and to social welfare.[15]

Having reviewed the relevant legislation and the refusal of the courts on grounds of public policy to give legal recognition to the changed position of transsexuals, Edwards moves on to consider the ethicality of current medical practice and nosology. An interesting economic dimension to this whole question is identified by the author where she suggests that debates as to the nature of illness and as to the most appropriate forms of treatment for certain conditions are not merely medical questions, but questions which exist in the context of competing needs and limited resources.[16] Thus recent legislation in the United States regarding prison inmates has taken the view that transsexuality is a mere preference; indeed, a deliberate deviance which provides yet another manifestation of the offender's truculence.[17] This view of transsexuality as lifestyle facilitates the denial of the right to any treatment at all, and presumably also further control and punishment.

In general, Edwards identifies a pressing need for a coherent policy on the question of intervention and therapy in a situation where surgical intervention has fast become the perceived panacea of all gender ills. The question of the justification of surgical intervention in the context of removing healthy living tissue, the implications for consent and the criminality of surgeons are all relevant to this particular issue. The author's thesis is that surgery and amputation would not have progressed this far in the absence of policy debate were it not for the fact that transsexuals are regarded as a less than worthy class, beyond the fringe even of politically powerless minorities. "A dilemma for the courts is whether or not to validate the transsexual in the new sex in private and public and whether now to place some limits on the amputation programme whilst a proper public debate is launched."[18]

There is no doubt that the notion of determining legal rights and duties on the basis of natal sex is eroding, yet the question still remains as to how far transsexualism is a social construct, the product of society's disapproval of those who refuse to align themselves with the gender demand predicated by anatomy.

The second chapter deals with gay prohibition, social engineering and the heterosexual hegemonies which regulate public and private rights. The legal construction of family life, which is what in Edwards' view precludes homosexual parenting, is, she states, a key site of conflict and at the heart of the contemporary struggle for gay rights. In this context she examines a number of discrete areas of the legal organisation of homosexual relations. The first is the role played by the criminal law as

---

[15] Some of the case-law in this area is quite extraordinary: see for instance *White* v *British Sugar Corporation* [1977] IRLR 121 and *Collins* v *Wilkin Chapman* (EAT 945/93, 14 March 1994).

[16] At page 47 of the text.

[17] At p 49.

[18] At p 51.

the vehicle of prohibition of gay sexual expression; the second is the role of family law, and in particular the construction of parenthood. The third area examined is the limits of public tolerance of homosexuality, and in this context the author critiques the more recent and specific struggle by gay men towards a recognition of sadomasochism as a viable and legitimate form of expression of consensual gay sex or homo-erotisicism. In the latter context, and in particular in the analysis of the decision of the House of Lords in *Brown*,[19] Edwards' critique, and the parallels that she draws with the area of rape and domestic violence, are illuminating. Edwards makes the point that the issue of consent is extremely problematic in the context of relationships where there may be power differentials.

In terms of family law and specifically the issue of parenting, Edwards makes the case that the homosexual parent almost inevitably fails the fitness test, and that where the mother is the homosexual parent, the maternal preference principle will be subordinated overwhelmingly to the hegemony of the heterosexual imperative.[20] The author here reviews the law's function as a mechanism of ideological control in the promulgation of certain attitudes and in the determination and sanction of the degree of tolerance of homosexuality both in the UK and in North America. She provides in this context an interesting analysis of Proposition 6 in California, Amendment 2 in Colorado, and section 28 of the Local Government Act 1988 in England.

Edwards is unafraid to identify a fundamental flaw existing within current notions regarding gay lifestyle or homosexuality, namely the belief that there is an area which stems from the homosexual experience that is free from patriarchy and its master/slave power and equality resonances.[21] Returning to *Brown* she comments:

> "Surely it is the very inequality of law which means that violence against gay men by gay men can be made invisible or else denied and reconstructed as celebratory sex. The *Brown* judgment ensures that gay men have a right to protection in a world where the drawing of boundaries of legitimate and illegitimate conduct and the regulation of homosexual conduct is not of necessity homophobic."[22]

The third chapter of the book deals with the issue of freedom from pornography in an age of sexual liberalism. Edwards points out that it has been a major consideration of the critique of law by contemporary feminists to transform law in a way which embraces women's experience and is more consonant with their lives. A major site of this has been the issue of pornography. Edwards points to the conflict between sexual liberals and feminists which has resulted in feminists and the moral right being seen to be in an unholy alliance. A contemporary feminist critique of pornography challenges sexual liberalism and formulates pornography as inequality, objectification and violence. It is not merely the objectification of women in pornography but the violence that constitutes the main objection. In this context, Edwards suggests that the generic application of the label "pornography" must be challenged, for "by signifying and encoding the text with sexual meaning, through labelling, the violence or perversion within its content is legitimated as part of the domain of the sexual".[23] The author draws on Lacan to make the point

---

[19] [1993] 2 All ER 75.
[20] At page 78 of the text.
[21] *Ibid.*
[22] At p 89.
[23] At p 94.

that, at least in part, pornography precedes sexual relations and so communicates, largely to men, a particular meaning for sexual relations underpinned by the conflation of sex and violence and pleasure.

In relation to this topic, the author also argues that at the prosecutorial discretionary stage (often immune from scrutiny) the low standard of prosecution is a product not only of inherent difficulties with the relevant test for liability, but also of judgments made as to the public interest in pursuing such cases in that arena. The result is that obscenity and indecency are concepts constructed extra-judicially and outside the courts, and not by judges or by jurors, but by those producing pornography on the margins of prosecution, which the author terms "near porn". Similarly, the growing ubiquity of "near porn" in the popular press lends further legitimacy to pornography and brings it into the mainstream popular culture.[24] Thus in the absence of any policy or commitment on the part of the authorities to prosecute threshold cases, pursuing only cases where conviction is certain, pornographers determine the boundary. This is a very significant point and it is to the author's credit that she points to the underbelly of law, and to the practicalities of its invocation at a decision-making level, which is where women are losing ground.

In her attempts at reformulating pornography Edwards sees the influence of feminism in redefining the issue as one of women's human rights. The draft Dworkin/ MacKinnon ordinance is typical of this approach, though its constitutionality has been challenged. According to the author, "...what we define pornography to be, e.g., depravity, sexual morality, or harm has consequences for the framing of any attempts at legislative regulation".[25] Despite the lack of success of Dworkin's civil measures they have in the author's view reshaped the debate in a way which equates with women's perceptions. However, Edwards neglects to address whether refocusing on civil rather than criminal remedies in this area is positive or not. It is arguable that any attempt at differential regulation in this context, particularly where it involves women, is as problematic as in the context of so-called "domestic" violence.

In the fourth chapter, Edwards looks at the issue of women's work. In this context she is particularly concerned with prostitution, in relation to which she identifies a conflict of approach between that which constitutes prostitution as a question of morality and that which constitutes prostitution as a question of freedom. In other words, prostitution is variously constituted as sex and as a contract. As the author points out:

> "Challenges to both arguments that prostitution is immoral and is a private contract voice a very different concern, *inter alia*, the failure to recognise the institutionalisation and the commercialisation on both a national and an international scale. … Within this critique, prostitution is not about sex, although it is about what sex and power have become for men."[26]

For Edwards, the contractual argument is such an individualised perception of prostitution that it negates any recognition of the international scale of the problem and its connection with other forms of abuse of women and children. She makes the case that it is no longer appropriate or possible to consider prostitution in isolation from the institutions which support it, nor is it possible to limit an analysis to the domestic context alone. Edwards also raises the issue of sex tourism in this context, and argues that most analyses of prostitution banish the

---

[24] At p 116.
[25] At p 140.
[26] At p 143.

exploitation of Third World woman and children from consideration. In differentiating the position of the prostitute and prostitution as an activity from that of ordinary workers, Edwards makes the point that whereas alienation is anathema to the wage labourer, alienation is essential to the psychological survival of the prostitute. In the context of reviewing the domestic legal regulation of prostitution Edwards points out that prostitution itself has never been a criminal offence. Yet the law has asserted its influence on all women involved in prostitution, and most particularly the female street-walker. However, the number of women working in off-street prostitution is unknown and, comparatively speaking, such women are rarely the subject of prosecution. Street-solicitation by males has been restricted to homosexual solicitation in terms of prosecutions. Edwards also finds fault with the law in its failure to recognise the presence of coercion in prostitution except where there is financial gain and control. In any event, she comments, the reality of such control is that such prosecution unfairly penalises male members of the family, such as the sons and brothers of prostitutes, and anyone who might be living with them in a household or considered in some way to be receiving money from them.[27]

The focus of policing has not been on the receiver or the consumer of prostitution. Where there has been such regulation, the focus has been on the visibility of his conduct, emphasising the law's preoccupation with the public nuisance factor and the visibility of the negotiation of the contract. An interesting conflict or conundrum is identified by Edwards in the context of legislation increasing regulation of on-street prostitution, in so far as she points out that those who support legal measures to control kerb-crawling include moral crusaders, feminists wanting safer streets for all women, and left-lobbyists wanting to improve the quality of life in run-down neighbourhoods. On the other hand, other feminists and supporters of the left oppose such proposals on the basis that they would legitimate the increased surveillance of marginalised men, especially men from the black community. It is also objected that the surveillance of both potential male kerb-crawlers and potential female prostitutes would increase the vulnerability of women, who would be forced into making snap judgments about potential punters. In terms of a changing debate on prostitution in recent years, Edwards points out that while right-wing moralists have called for greater legal regulation, more punitive sanctions, more policing and more prosecutions, civil libertarians and others on the left share the view that prostitution laws penalise working class women to an unacceptable degree.

Some feminists argue that prostitution is about sexual choice and that women should be free to sell their sexual services unhampered. On this view, "sound prostitution" is possible. The author, however, holds little sympathy with the pro-prostitution lobby. She sees its politics as naïve and confused, taking the principles of *laissez-faire* to the point of absurdity, and is particularly scathing when it comes to the adoption of the language of human rights to further the cause of what is seen as the emancipation of prostitute women. In the author's opinion, to propose that prostitute women should have a right to self-determination which facilitates further prostitution seems to be an abrogation of that self-determination, to say nothing of dignity and respect. For those who view prostitution as a human rights violation Edwards argues that there is a need to move away from the moral basis of prostitution legislation, and to frame future legislation on the basis of exploitation and harm. The European dimension, and in particular the incoming tide of what Edwards terms Europe's "sex market", is considered. The author makes the point

---

[27] At pp 159-160.

that the trade in sex has already begun to make an impact on European Community law in the name of freedom of movement of goods and services. She points to licensed sex shops, soft porn satellite television stations, and the ability of European prostitutes to function in the UK sex industry. Her commentary here is rather strange in its desire to preserve English law from the influence of this European sex industry. Having identified the global dimension, Edwards here expresses concern solely in relation to English women.

The following five chapters focus on the issue of criminal justice and women, and it is in this area that one can best form a view as to whether Edwards is making a truly radical contribution to feminist jurisprudence or whether in fact she is simply documenting the great volume of material which exists to date. While the latter is useful, it is arguably more urgent to have an account which moves the debate further along, giving an indication of the directions for future reform and thought.

At the beginning of chapter 5, which focuses on domestic violence and the issue of privacy, the author concedes that law is only one of several ways in which male violence against women can be addressed, but claims that its importance remains as a powerful symbolic statement and barometer of society's unwillingness to tolerate such violence. For this reason the reform of the law, including its more effective application and implementation, has been a major task of contemporary feminism. Notwithstanding recent developments such as spousal compellability and relaxation of the rules of evidence, the victim of domestic violence, according to Edwards, is still very much unprotected within the criminal process. Sentencing tends to be derisory. In sentencing negotiations counsel for male abusers frequently invoke ideologies which promulgate a divide between domestic violence and other crimes of violence in minimalizing the criminality and perceived dangerousness of their clients.[28] With regard to the phenomenon of victim impact statements and the question of acquainting the court with the victim's needs, defence lawyers regard them as an opportunity to reduce sentence by placing justice for victims back in the family domain. Once again it is ironic that a supposedly feminist and woman-friendly reform, for which indeed many women's groups agitated, is discovered on application to have had not quite the effect it anticipated. In this context Edwards reviews a number of decisions supporting the thesis that the impact of victim statements at the sentencing stage has negative rather than positive indications from the point of view of prosecuting and sentencing of domestic violence offenders, and comments:

> "If, as some of these cases clearly indicate, the 'apparent' wishes of victims have a varying impact on the sentencing process in domestic violence, this is a most disturbing trend. Women are 'got at' by the men themselves, by their relatives and by their lawyers, the victims are encouraged to believe that only they can make a difference to the sentence. Women's sense of responsibility is absolute and overwhelming and women never escape from this cycle of duress."[29]

The author unfortunately does not pursue the implications of this finding in relation to supposed women-friendly reforms for future feminist stratagems for change.

Another indication that domestic violence is being trivialised and privatised is the documented trend towards mediation in North America

---

[28] At p 208.
[29] At p 212.

and in England and Wales. Edwards gives particular attention to civil remedies in the context of domestic violence and, with a particular resonance for the Irish context where the civil remedies have been the ones that have received most recent attention, comments that the existence of a specific civil legal remedy to address domestic violence outside the general arena of the remedy for assault in tort serves to reaffirm the belief that domestic violence is a civil and not a criminal matter.[30] She also makes the point that such legislation in providing a very restrictive view of the range of applicants eligible for protection merits a concept of a legal rather than a social family. Thus the civil remedies are largely restricted to cohabiting or married couples so that partners living apart, ex-cohabitees, ex-spouses and girlfriends are not protected by such legislation. Definitional difficulties also arise in respect of living together where some parties may spend only part of the week cohabiting. The suggestion is that the concept of a family, as embraced by these provisions, is both outdated and incongruous. While the author's critique of the appropriateness of civil or criminal remedies is well made, it would have been useful if in this or in an overall thematic chapter she had linked and reviewed these recurrent issues.

Chapter 6 examines the so-called "battered woman syndrome". Edwards makes the point with regard to the use of the battered woman syndrome defence strategy as it has been developed by defence lawyers in North America and Australia that whilst evidence of the syndrome may assist in acquainting the jury with the long-term effects of persistent violence on the mental state, particularly the defendant's perception of imminence, this accommodation is achieved within a conceptual framework which ditches a woman's rights back into a pathological straightjacket focusing on her mind instead of the man's prior conduct.[31] Many of the issues raised here are not restricted to the particular question of battered women syndrome, but raise the more general question of whether such adjustments truly engage with the legal system or simply become an additional adjunct designed for women. As the author comments, transcending the way a masculinist legal system, legal method and legal structure constructs law and utilises feminist insights as attempts at prosthetic rather than a root and branch treatment of law is one of the key feminist objections to engaging with the law at all.[32]

An interesting dimension to this particular argument focuses on the manner in which battered women's syndrome is brought before the courts. In order to comply with the rules of evidence, which limit law's knowledge, testimony about battered women and the effects of battering has to be categorised as expert testimony. This has two consequences, in that it may imbue the evidence with greater authority, but at the same time the stance of that evidence becomes reified and not part of the common domain. As Edwards remarks, if knowledge about men is common sense and knowledge about women requires experts to speak to it, what does that say for the relevant status of that knowledge and its relevant ubiquity and exceptionality?[33] Within any jurisdiction the battered women's struggle is by no means over once this theory has been accepted by the courts, for she must then show that she fits the category in every respect that is going to assist her.[34] Edwards comments that it would appear that women are more likely to fit the model of battered woman syndrome

---

[30] At p 214.
[31] At p 227.
[32] At p 231.
[33] At p 234.
[34] At p 248.

where they are non-assertive and passive and conform to the legitimate victim stereotype:[35]

> "A question which inevitably arises is whether the syndrome perpetrates injustice against women who deviate from the syndrome's mould, accommodating only those women who conform to the stereotype and thus diverting attention away from the extent of their victimisation onto the demands of a fixed psychological reaction to it." [36]

In sum, the author questions whether battered women syndrome is a panacea for masculinism in the law, or whether it further "psychiatrises" women and by doing so excludes many women from having their battering background considered by the courts. Battered women syndrome in the author's view addresses only one aspect of the law and injustice to women; what is required is a root and branch treatment.

> "The feminist critique of law must not be content with the piecemeal and highly controversial gains achieved by the admissibility of battered women syndrome....Emphasis should be placed more on the experience of being battered and less on establishing whether a defendant meets a pre-determined construction of the effects of battering on women."[37]

Chapter 7 deals with the sexual abuse of children. This is an issue of concern to feminism given that men are in large part the abusers of both children and women. Edwards does not seem to see the use of the criminal sanction in this context as problematic. It would have been useful to have had her justification of a position that is by no means uncontroversial. Zedner, for example, expresses the concern that criminal proceedings and penal sanctions are far from being an unproblematic solution to sexual offences against women and children:

> "Insensitive intervention by the criminal justice system risks inflicting yet further harm on the victim. Whilst punishing sexual offenders may serve the purposes of public condemnation, retribution and temporary incapacitation, custodial sentences do little to review offending behaviour and may do much to exacerbate it.... Whether indeed it is reasonable or realistic to look to the criminal justice system to tackle the underlying problems that lead to sexual offending must remain open to doubt." [38]

In this connection, a recent report[39] emphasises the need for a multifaceted approach to these issues of concern. As the report points out, the problem of child abuse raises uncomfortable questions about adult power and responsibility, the structure of the western nuclear family, fatherhood, masculinity and male sexuality, as well as about the myths and fictions surrounding childhood.[40] It would have been useful if these thematic questions could have been linked throughout the text and further pursued.

Recent developments in this area have been marred or characterised by a number of scandals relating to over-zealous professionals and their

---

35 As in *US* v *Whitetile* 956 F 2d 857 (1992).
36 At page 253 of the text.
37 At pp 262-3.
38 "Sexual Offences", in *Criminal Justice Under Stress* (Stockdale and Casale, 1992), at pp 282-3.
39 *The Irish Report of the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence Against Women and Children* (National Women's Council, Dublin, October 1996).
40 *Op cit* at p 36.

identification of sexual abuse. The newer battleground of the 1980s and the 1990s is in the area of "recovered memory". The problem of what has been called "false memory syndrome" has provided fresh ammunition for defence teams to discredit child sex abuse victims and rebut their allegations, thus, in the author's words, "bringing us full circle once again to the denial and refutation of child sexual abuse, as a problem of the narrative of false allegations.."[41] It is hard to deny the accuracy of her comment that the new battleground will be fudged by polarising the positions of the two camps, rather than listening to their valid claims and criticisms. Yet the broader implications of these scandals, and the issues posed for feminism and for justice, are not explored by Edwards, nor is the problematic nature of some of these proceedings explored.

In England, as in Ireland, there have been concerted efforts by those working with children and within the legal process to reform the rules of evidence in order to provide support and assistance to children in the giving of testimony. Edwards is quite justifiably cynical of some of these changes, particularly where they leave the remit of discretion to the judiciary. In relation to the recent changes with regard to corroboration, for example, she comments that this does not mean in considering general principles of justice that judges will refrain from offering a warning, but simply that they are released from a straightjacket of recitation of a set form of words. What they say may amount to the same thing.[42] She notes that the perpetrators of child abuse frequently try to allocate blame to social and other family factors, to unhappy marriages, to unemployment, to the stresses and strains of life and to alcoholism. In mitigation of sentence the courts have also considered the effect on the victim and the willingness of the family, invariably the wife, to stand by the abuser. Where wives are willing to stand by their partners in the face of sexual abuse, the abuse is redefined as an episodic rather than a long-term problem. As the author concludes:

> "The sexually abused child faces a social construction of child sex abuse which denies the reality and a legal system which perpetrates further violence. The ideology of the family as a safe haven from the demands of the public world continues to resist the reality of abuse. It is not a masculinist construction of child sexual abuse per se but a construction of the sanctity and implacable sanctuary of family life and the indelible, universal truth of parents as protectors which are the precepts that need continually to be challenged."[43]

Whatever one's views on the appropriateness of the criminal sanction in this context, Edwards' analysis of the role of the family and its mythology is fairly damning. Once again it is unfortunate that this critique is not linked with the issue of the family ideology documented elsewhere.

The eighth chapter, which looks at sex crime, sets out to explore the nature and extent of the sexual abuse of women and the negotiation of legal defences by perpetrators. At the beginning of this chapter the author adopts the mechanism used to great effect by Estrich,[44] whereby she personalises the experience feared by most women of exposure, literally, to the indecent behaviour of males. The main focus in this chapter is the law on rape. The author points out that fundamental assumptions about male and female sexuality are played out in rape law, the legal method

---

41 At page 289 of the text.
42 At p 314.
43 At p 321.
44 At (1986) 95 *Yale LJ* 1087.

governing rape, and the conduct of the cross-examination of the complainant in the rape trial, in which the law perpetrates further an ultimate violation on complainants. The thesis is a familiar one, but the discussion is characterised by a quality and amount of statistical and empirical information often absent from such work. One really interesting point made by the author is that in the 1990s a new approach has opened up to constructing violence and abuse. Her claim is that the comments made by the courts in the name of sexual liberalism indicate that what otherwise would have been in the domain of the violent is now considered part of the sexual. It is unfortunate that she does not expand on this point.

In the context of sentencing, Edwards points out that in sexual assault as elsewhere, the length of the sentence depends largely on the presence or absence of a prior relationship between the parties. She poses the interesting question of whether, now that the offence of rape in England applies also to men, male complainants will receive the same shoddy treatment as women. The author suggests that stereotypes and presumptions about male sexuality will no doubt be implied only where the complainant is homosexual, though in what way this will be done in practice we have yet to witness.

Chapter 9 focuses on the gender politics of homicide. Feminist critique of homicide in recent years has been focused on concern for the battered woman who kills. This has resulted in a focus on the woman's state of mind, often to the exclusion of the man's violence. In this context the author deals with the question of spousal homicide, examines the relevant law, and contrasts the availability of defences for men and women. Then she gets to the kernel of the matter, saying

> "Whilst men utilise superior strength...killing through the use of brute force, women's physical incapacity means that they will often resort to a weapon to effect their purpose. The law's response to women's innate and conditioned incapacity is to deem certain methods of killing to be more or less indicative of heinousness and cold blooded intent and other methods to indicate passion and loss of self-control."[45]

The result of this is that women are more likely to be convicted of murder, or manslaughter on the grounds of diminished responsibility, and are less likely to be convicted of manslaughter on the grounds of provocation, than their male counterparts. It is the comparative dimension to Edwards' work here that is most gratifying. "Battered women who kill" defence analysis very often focuses solely on the woman and her accommodation by theories of justification and excuse. So the comparative analysis given by Edwards of men who kill and the contexts in which relative adjudications are made by the courts makes for interesting reading. The author precedes this analysis with a "flat statement of what the law is" on homicide. Whether this is really necessary is questionable, and one might take issue with some aspects of that account, but it is more than compensated for in the detailed and informed critique of decisions like *Ahluwalia*[46] and *Thornton.*[47] Edwards makes the case, for example, that an enormous significance attaches to the words used by the defendant to describe the state of mind at the moment of killing and in relation to *Thornton* comments: "Sara Thornton said, 'there was no loss of self- control'…and by failing to explain herself in *the appropriate linguistic terminology*, she neglected the second element of the subjective test necessary for a

---

[45] At page 370 of the text.
[46] [1992] 4 All ER 889.
[47] [1992] 1 All ER 306.

successful defence of provocation".[48] Interesting parallels could be made here with the tyranny of language in cross-examination in rape cases. These are alluded to by Edwards in the chapter on rape, but are not pursued here.[49]

With regard to how much loss of self-control is required in provocation, Edwards comments that judges have become the exponents, arbiters and gatekeepers of traditional notions of what constitutes loss of self-control. Loss of self-control, as it is bound by a masculinist construction, is seen reflected in rage and anger rather than despair, exhaustion, isolation and hopelessness.[50] With regard to the requirements of English law as to the kinds of conduct likely to elicit a loss of self-control, the test requires jurors to consider how a reasonable man presented with the same facts might have reacted. In Ireland there have been attempts to soften the test,[51] while in England recent cases such as *Ahluwalia*,[52] *Humphreys*,[53] *Morhall*,[54] and *Dryden*[55] have all contributed to moving the debate forward in terms of interpretation of what constitutes a "characteristic" of the accused sufficient to be attached to the reasonable man. The notion of "cumulative provocation", which allows for the inclusion of the background circumstances in assessing whether the reasonable man might have reacted in the same way, has also prospered. Edwards makes the point that the weapon used is relevant to the assessment of the defendant's state of mind and loss of control. Thornton, she suggests, failed in provocation because of the time lapse caused by the need to obtain the weapon. Edwards suggests that whether the body or a weapon is used to perpetuate the violence is a consideration which disadvantages women.

While the weakest part of this chapter is probably the author's "flat statement of the law", its strength lies in gendering law's underbelly. Edwards makes the point that that facts are indefatigably social and historical, which in the process of assimilation into legal rules lose their social facticity and acquire the guise of truths which have authority *sui generis*.[56] The problem with provocation for Edwards is simply its masculinism:

> "Although not a rule of law, loss of self-control is acknowledged through rage, anger, passion and indignation. By contrast, there is no accommodation of a concept of loss of self-control through fear, panic, hysteria, and trauma, emotions which may not necessarily manifest themselves in the typified explosive outburst."[57]

The relationship Edwards documents between the recognition of the factual scenarios seen as provocation, the law, and the behaviour and language of men and women, is insightful as to its circularity:

---

48 At page 379 of the text (emphasis added).

49 *Cf* Matosesian, *Reproducing Rape - Domination through Talk in the Courtroom* (1993).

50 At page 380 of the text.

51 *DPP* v *MacEoin* [1978] IR 27 purported to adopt an entirely subjective test, though the court also rather illogically maintained the requirement of a reasonable correlation between the provocation and the retaliation to it.

52 [1992] 4 All ER 889.

53 [1995] 4 All ER 1008.

54 [1995] 3 All ER 659.

55 [1995] 4 All ER 987.

56 At page 390 of the text.

57 At p 394.

> "Only certain grounds for provocation are given authority … These archetypal scenarios serve to exculpate man, and such accounts are reproduced in law thereby becoming 'authority' in a reified form in two ways.… Men who kill learn to utilise and articulate the more socially acceptable and legally enshrined rationalisations in their own defence. Men's pleas and defences are negotiated in the knowledge of the nature of legal rules and precedents, being guided by defence lawyers." [58]

The author points to a litany of cases where the less than model acquiescent wife is murdered and the loss of control alleged by the defendant receives the courts empathy. She reviews some of these cases, showing how it is victim precipitation which becomes the dramatic focus when men kill. By contrast, she points out, "when wives kill husbands, their reasons for killing are not given a voice". In a passage full of potential for further development Edwards suggests that motives for murder become linguistic devices in the arena of developing a defence to murder. There is an interesting circularity here whereby what is defined or recognised in law becomes factually valid, which in return affects the assessment of the facts:

> "The image of the troublesome husband does not exist within society and the comparison for the adulterous female or the nagging wife in the adulterous husband or the nagging husband does not have the same cultural meaning and is not considered in society or in law to be imbued with the same degree of provocation such as to make killing understandable or justifiable."[59]

Thus lawyers defending women in such cases face a tactical challenge: when building up the case for the defence the scene constructed must be one capable of convincing a jury of the congruence between social and legal accounts.[60]

Women are similarly disadvantaged in raising self-defence, and as Edwards cogently points out, the central issue for battered women is that they know the offender, he has hit them before, he has threatened them and their anticipation of attack is grounded in empirical experience. In defending themselves they lose out, since the court is not satisfied that the attack is imminent.[61] Again, the author's most interesting insights here are on the *modus operandi*, which she identifies as a gendered question, in so far as it is the use of a weapon which disadvantages women. "Men who use the body to perpetrate deadly force, find that the method itself serves to obscure and conceal the 'intent' for practical legal purposes."[62] Again, in relation to sentencing she notes that when women kill it is only when the wife kills the violent husband that mitigation or exoneration is adduced. "Whether at the point of defences or at the point of sentencing, the accommodation of women can be likened to a poor prosthesis. Women can only succeed if they behave more like men, exploding in the heat of the moment."[63] Notwithstanding the results in some recent cases,[64] Edwards' conclusion is a somewhat depressing one:

---

[58] At p 396.
[59] At pp 398-399.
[60] At p 400.
[61] At p 410.
[62] At p 411.
[63] At p 417.
[64] *Thornton*, *Ahluwalia* and *Humphreys* (*supra* notes 47, 52 and 53). The author suggests that these decisions do justice first and law second.

> "[L]aw authorises the particular statements of the male experience and the construction of reasonableness which it elevates into precedents, largely impervious to the experiences of women which are now beginning to challenge, if not falsify, the masculinist universal truths upon which the homicide heresy is built."[65]

As law itself and indeed legal method is selective or partial, feminists or writers in the areas of sex and gender in the legal process make decisions as to selection and focus. Feminists disagree as to how that focus should be formed, and whether lawyers or non-lawyers, may argue, as Smart suggests, that there has long been too great a focus on law. Undoubtedly many women lawyers feel the conflict of law and feminism and the difficulty of reconciling the two.[66] Is there even a distinct feminist method? Edwards sees the feminist perspective as grounded in feminist experience, insights and knowledge. She recognises that there are also many forces of feminist jurisprudence, and that it cannot speak for all women.[67]

It is certainly true to say that *Sex and Gender in the Legal Process* does not speak for all women. Perhaps it does not purport to, but it particularly neglects those feminists whose focus is not only on the treatment of women and children by the legal system, but also on constructing the face of the legal system as women would have it to be. Although this is arguably a topic falling outside the proper purview of the present text, it does have ramifications for the subject matter, not solely because of what Edwards says and does not say in relation to issues of justice and rights for those accused, but also because so much of the public debate to date has ignored these issues. Yet their time may now have come. Many supposedly feminist concerns have been defined, if not hijacked, by conservative law and order politics, which hears only those (albeit legitimate) expressions of concern regarding particular crimes, such as rape, and "domestic" violence, and their impact upon women. A more radical feminism, which would address alternative ways of dealing with offenders and focus on the causes of crime, is ignored. To this extent, as feminism has moved to the centre, it has been tamed. Edwards' text does not challenge that taming.

Part of the task of feminism, certainly in the criminal law field, must be to reclaim that territory. Superficial portrayals of clashes or conflicts, such as lawyers being concerned solely with fairness and feminists with prosecution, need to be revealed as just that. To accept such ready classifications and dualities is not just mistaken, but an impoverishment of the potential of feminist concepts of justice. It is as foolish as retaining a view of criminality structured along gender lines, in which men do violent acts, and women steal. Just as we need rather to understand why it is that *men and women* in certain situations commit crime, we need to avoid the easy demonisation of those who break the rules and their ready classification as abnormal. We need to be alert to the hijacking of legitimate fears on the part of women and men as part of government campaigns of moral panic and media portrayals of folk devils who can bear both male and female forms. Feminist lawyers and women activists need to carve a better response. A lead can be taken perhaps from a comment made by Supreme Court Justice Susan Denham in the context of a recent case: "When women and children come to the legal system it

---

[65] At page 419 of the text.

[66] Mossman, "Feminism and Legal Method" (1986) 3 *Australian Journal of Law and Society* at 30-52.

[67] At page 5 of the text.

would be a disservice to them if it was perceived that they sought vengeance rather than the rule of law and justice."[68] The complexity of women's lives, whether as victims of crime, people accused of crime or the relatives of those caught up in the criminal process, must surely be reflective of a broader and deeper concept of justice than that now so crudely offered.

Other feminists, of course, would take the view that either concern cedes too much to law. Thus Smart, for instance, feels that feminists like Mossman and Lahey take law too seriously, and makes a strong case for ignoring academic legal method and focusing on the law in practice.[69] By stressing how powerless feminism is in the face of law and legal method, we simply add to the power of the latter. Smart contends that it is important for feminism to sustain its challenge to the power of law to define women in legal terms. Whilst it is important that feminism should recognise the power that law can exercise, it is axiomatic that feminists do not regard themselves as powerless. It is easy to sympathise with Smart's thesis that feminists have too often ceded power to law, seeing it as a more effective feminist instrument. In this way, far too much feminist energy has been used to introduce more and not necessarily better law, as in the fields of rape and sex abuse. But regardless of whether law reform should be a priority issue for feminist activists in general, and the not unrelated question of how they should go about it, there remains the dilemma posed to feminists within law as to where to take a stance when their feminism and legal training take different positions. Recent challenges are posed, for example, by issues of fair trial and due process in relation to cases of sexual abuse.[70] Is it as simple as considering fairness only in terms of fairness to the victim? Or the accused? Do feminists and lawyers necessarily line up on opposite sides? Do feminists lose out if they rank up on only one side, not only abandoning any concern for men accused of such crimes, but identifying such issues as off their agenda? Where does Edwards stand on these issues? Her very decision to exclude them from the purview of her text indicates the weight she places on their importance, and her view as to their irrelevance in relation to her task of exposing the masculinisms of what is, rather than what might be or ought to be. Yet this risks the interpretation that our concern in law, and within criminal law particularly, is with one side only: that of the (female) victim. Even the woman accused has a victim's past. But do we have a philosophy wide enough to accommodate more than "victims"? Is feminism inextricably linked to conservative "law and order" politics?

It has been pointed out by Klein[71] that the accommodation of feminist thinking in criminal law and criminology has often been of the "add women and stir" variety rather than involving any conceptual paradigm shift:

> "The narrow high beam focused on deterring and punishing street crime has engulfed criminology and eclipsed most radical approaches to social problems including feminism. In this climate, the pro-feminist position that has succeeded best has been the advocacy of criminalizing individual violations (e.g. battering, sexual assault) and arresting and punishing the identified offenders. Law and criminology have accepted with relative

---

68 In *G* v *DPP* [1994] 1 IR 238.

69 *Op cit* at n 4.

70 As in *G* v *DPP* [1994] 1 IR 238, *D* v *DPP* [1994] 2 IR 456, and *Z* v *DPP* [1994] 2 IR 476. The first two of these involved the problem of delay, and the third the problem of pre-trial publicity.

71 "Crime through Gender's Prism," in Rafter and Heidensohn, *op cit* at n 3.

> willingness, albeit ill grace, those pro-woman perspectives centred on violent crimes, especially those involving relatively powerless offenders and respectable or 'legitimate' victims. These can be incorporated into the traditional paradigms. Less successful has been the advocacy of alternatives to punishment and incarceration for female and other offenders."[72]

Klein makes the case for a new kind of feminist criminology and points the way, saying that feminists must refuse to play a game whose rules are not on their terms. We must instead question the construction of the fundamental dichotomies: feminine versus masculine, black versus white, stupid versus smart, criminal versus law-abiding, abnormal versus normal.[73] Perhaps we would also wish to share Klein's optimism: "Whatever a feminist vision of justice might incorporate, I predict that it would bear little resemblance to the present system of cyclical processing and confining of people at the economic bottom of our society."[74]

Despite the criticisms that may be made of Edwards' thesis, she does succeed in exposing the inter-relationship of facts, law, truth and how we construct reality. She brings to light ways in which the law's power in a forgotten, or often not perceived way, colours all of our world vision and vocabulary. The challenge this poses is truly enormous. It is of the order of reconstructing not just reality but our way of viewing and interpreting it. The latter is deeply engrained, and vital. If it is to be removed in its entirety, and not just vestiges of it, it must be replaced. As Marina Warner points out about myths, they are not always delusions, and deconstructing them does not necessarily mean wiping them, but they represent ways of making sense of universal matters, like sexual identity and family relations, and they enjoy a more vigorous life than we perhaps acknowledge, and exert more of an inspiration and influence than we think.[75] Feminists bear a responsibility for what they have demystified, for the possibilities they have opened up, and for the crises they have engendered with their queries.

To gain control of, to further focus and to expand the debate, the feminist perspective or methodology needs to find terms which do not just address that which is given to women, in the sense it has been defined as ours, by the current status quo. To paraphrase MacKinnon, that is a definition which is not ours. Ours is a broader canvas entirely. It is here that the next work must be done.

The next stage will not be easy. It may not be as marked with the ready certainty or consensus as to injustice as hitherto. There may be dissonance and diversity as to choices and priorities, and uncertainties as to what justice might comprise. But this does not detract from the importance of the task. As Lahey succinctly puts it, the ambiguities and ambivalence which are in male thought the hallmarks of uncompleted or imperfect theory, are within a feminist praxis crucial aspects of moments of knowing.[76] To the extent that the task is difficult it will bring reward. Facing a road heading into uncharted territory should not fill feminist travellers with fear. Edwards demonstrates how well it has been mapped to date. Her text is a worthy milestone on the way.

---

[72] *Op cit*, pp 218-219.
[73] *Op cit*, p 225.
[74] *Op cit*, p 233.
[75] *Six Myths of our Time* (1994), at pp xix-xx.
[76] [1985] 22 *Osgoode Hall Law Journal* 519.

BOOK REVIEWS

DEATH AT MIDNIGHT: THE CONFESSIONS OF AN EXECUTIONER. By Donald A. Cabana. [Boston: Northeastern University Press. 1998. xii & (with index) 200pp. Paperback £14.95.]

From the cover charcoal drawing of the exterior of the Mississippi gas chamber to the title, Death By Midnight leads the prospective reader to believe its subject to be capital punishment. Surprisingly, only one third of the book is devoted to this topic. For the most part, Death By Midnight is a treatise on the author's twenty-five year professional life in the criminal correction establishment. This book is actually a chronicle of the inefficiencies of the American system of punishment of criminals in general. In that respect, the title is misleading to the unsuspecting reader.[1]

The author, a Massachusetts native and post-Vietnam- service graduate of Boston's Northeastern University, writes of his initial fascination with the prison system, which affected him a "like a powerful narcotic."[2] His service in the Air Force was a hiatus from the college work he had begun, and when he resumed, he aspired to attend law school. Hence, his choice of criminal justice as an undergraduate major was directed toward this goal. However, an internship at Massachusetts Correctional Institute persuaded him that prison work was his passion, and he promptly cast aside any thoughts of a career in the law. He writes of the illogic of this choice, conceding that he had always been irretrievably convinced that the embodiment of the Quaker concept which had spawned that American correctional system over 200 years earlier was so ineffective as to be an abysmal failure.[3]

Each of the eight chapters begins with a quotation from such luminaries as former U.S. Supreme Court Justices William O. Douglas and Thurgood Marshall, Horace Greeley, and the widow of the Reverend Martin Luther King. Cabana makes imposing use of photographs of the Mississippi penitentiary: its gas chamber; inmates harvesting vegetables and working the fields; a pre-1970s armed prison trusty; and the home of one corrections worker. The latter was the site of the corrections officer's fatal shooting by his prisoner-"houseboy" while Cabana served as warden. The one-page appendix, a compilation of facts and figures on capital punishment in the U.S.A., is unavoidably outdated. Drawn from statistics provided by the National Coalition Against the Death Penalty and Amnesty International, the author outlines the status as of 1996. To the chagrin of any opponent of capital punishment, the number of state killings increases almost as one set of statistics is published. For example, this reviewer's home state of Virginia executed a record 10 persons during 1998. Cabana's epilogue notes that this upward trend is reflected in the national figure.[4]

---

[1] The title has, however a poignant meaning, which is revealed toward the end of Cabana's story.

[2] DEATH AT MIDNIGHT (hereafter "Cabana"), at 20.

[3] *Id.* at 19.

[4] *Id.* at 192.

Chapter 1, entitled "Full Circle", describes in detail the gas-chamber death of Connie Ray Evans, a young (age 27 when executed) convict for whom Cabana's duties as warden required him to issue the edict to carry out the jury's verdict and court's judgment, once all avenues of appeal had been exhausted. Cabana's close contact with Evan had resulted in a protective-natured friendship, and the impact of the experience of ordering and witnessing the killing of the prisoner who had become his friend ultimately caused the demise of his life in corrections. Cabana's story, with regard both to the procedure and the method, are graphic. For example, he refers to the "smell of [the] preparations of death.[5] Immediately after Evans had been put to death, Cabana emphatically announced to his wife that "I don't want to do this anymore."[6] He credits this experience with his personal transition to the belief that the death penalty is intrinsically wrong. After his initial discourse on Evans' execution, Cabana quixotically repeats this portion of the text, in part verbatim, in the book's concluding pages. Leaving the reader with a sense of *déjà vu*, this strange redundancy is both unnecessary and distracting. A summary revisit would have sufficed.

Following the first chapter the author commences his long digression into a biographical depiction of each progressive step of his professional sojourn, from rehabilitation counselor, to a first offender's unit, to the death row section, to case manager, to termination, re-employment, and ultimate appointment as warden. He takes the reader from his first job at the Massachusetts Institute, continuing through his move to the imposing and imperious Parchman prison in Mississippi, with detours into the Missouri and Florida prison systems, and his final return to Parchman in 1984. He offers the reader insights into the nadirs and zeniths of each successive post.

There are nonetheless needless distractions. Cabana seems obsessed with including detailed physical and personality descriptions of each mentor, colleague, and associate throughout his career, with accolades or disparagement for each. These details often are unnecessary insertions, apparently intended to serve as an exposé illustrating the need to “correct corrections” in the USA. They are generally only tangentially related to capital punishment *per se*. Although he appears to strive toward a chronology of his professional career, there are frequent and sudden flip-flops in sequence. Consequently, the reader is on occasion uncertain whether he is back in Massachusetts, Mississippi, Missouri, or Florida. These faults in presentation and format would have been easily solved with the use of an effective editor or collaborator. Furthermore, the author commits occasional grammatical errors. For example, he leaves dangling prepositions; uses reflexive pronouns as subjects and/or objects and conjunctions with no following object; and inserts excessive and unnecessary commas.[7]

To the reader who is trained in the law, Death By Midnight is at times frustrating for its paucity of explanatory text. The author only alludes to some of the more significant legal elements that make him so critical of the attempt to achieve justice through incarceration. For example, he mentions the housing of juvenile offenders with adult prisoners at

---

[5] *Id.* at 3.

[6] *Id.* at 190.

[7] *See, e.g.,* respectively, “[w]hom she had been having sex with” (*id.* at 104.); “had arrived at (at151); and “myself among them” (at118) and “[t]he warden, myself, and the other deputy warden” (at125).

Parchman,[8] but there is no reference whatsoever as to when and why minors may find themselves in a facility which houses hardened criminals.[9] Moreover, there is no succinct explanation of the reasoning by the Supreme Court in two companion cases in 1972,[10] when it held the Georgia and Texas capital punishment statutes to violate the Eighth Amendments of the U.S. Constitution. (This section prohibits "cruel and unusual punishment[11] and is the usual constitutional reference by opponents of capital punishment.) In this landmark decision, *Furman V.Georgia*,[11] the Court did not, as is frequently misstated, hold that the death penalty in general is unconstitutional. The constitutional difficulty with these laws was the absence of any guidance for juries in capital cases, leaving the decision-makers with unbridled discretion which resulted in arbitrary and capricious meetings out of the most ultimate of penalties. He simplistically states that "executions were once again approved by the Supreme Court in 1976...provided it was employed fairly and impartially."[12] The reader is left to wonder about the distinctions between the statutes later approved by the Court in 1976, and those which had been struck down in 1972. The 1976 decision resulted from several state capital punishment laws, which had been virtually identical to those in Georgia and Florida disapproved by the Court in 1972. The 1976 decision again involved companion cases. Statutes in North Carolina and Louisiana which had mandated the death penalty for specified crimes without any possibility of mitigating or aggravating circumstances, were held unlawful because juries had been stripped of any discretion whatsoever.[13] The Georgia, Texas and Florida statutes, however, were held to meet constitutional muster. The common characteristics in these three state laws were the elaborate statutory guidelines for juries, including factors that might be considered in mitigation or aggravation, and an automatic appeal of all verdicts imposing the death penalty.[14] A brief explanation of these holdings would have provided a significant perceptive element for the reader.

Furthermore, the author writes of his termination from his first position at Parchman as a result of his criticism of policies implemented by the new administration. He should have remarked upon the unconstitutionality of this act by an arm of the state, since the First Amendment includes the

---

[8] *Id.* at 62.

[9] The age for waiver of juvenile court jurisdiction over a minor who is charged with the commission of a serious felony is established by state law in the U.S.A. Upon request by the state's attorney, the juvenile court conducts a hearing during which the offender's potential for rehabilitation in the juvenile court system and his prior track record of violations of the law, if any, are considered. The juvenile court then might waive jurisdiction and certify the offender as an adult, transferring him to an adult court for trial. A cursory explanation of this minimum age for waiver and types of charges for trial as an adult at the time of the author's work in Mississippi would have given this section more substance. At least this would have clarified the gravity of the offenses for which these youths had been convicted.

[10] Cabana at 108. His only reference to these momentous decisions is to the Court's conclusion, without stating the rule of law and holding.

[11] 408 U.S. 238 (1972).

[12] Cabana at 118.

[13] Woodson v. North Carolina, 428 U.S. 2809 (1976) and Roberts v. Louisana, 428 U.S. 325 (1976).

[14] Gregg v. Georgia, 428 U.S. 153 (1976), Jurek v. Texas, 428 U.S. 262 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976).

assurance of freedom of speech without encroachment by the government. (The first ten amendments to the U.S. Constitution - all adopted in 1791 and termed the Bill of Rights - are limitations upon federal infringement upon individual rights. Courts have construed the Fourteenth Amendment as subsuming all these limitations and applying them also to the individual states.) It is puzzling as to why Cabana does not comment upon his failure to challenge this patently unconstitutional dismissal.

He mentions inmate Nazareth Gates' lawsuit against the Mississippi prison system,[15] charging that its policies were unconstitutional. Nonetheless, he does not specify which policies were attacked nor on what constitutional basis. This reference is therefore a dangling one, and the reader is left uninformed except to be told that the case was not tried, but settled.[16] Cabana should have revealed the terms of this settlement if they in fact had been made public. Alternatively, it would have been preferable not to comment upon Gates' action at all.

Finally, Cabana attacks the inhumanity of the obvious suffering and brutality of the 1983 execution of Jimmy Lee Gray in the Mississippi gas chamber.[17] However, although he devotes some three pages[18] to the 1976 execution by electrocution of John Spinkelink in Florida, there is no comment as to the apparent pain during that execution, suffering that was evident and highly publicized. In fact, the Spinelink execution caused adamant death penalty opponents to rail against the necessity for three jolts to be administered to Spinkelink and the duration of five minutes before the prisoner finally succumbed. Such gaps in the text are incomplete, inconsistent, and inexplicable.

These critical remarks are not intended to ignore the book's many commendable points. Cabana capably compares and contrasts the many variants among operations of prisons from state to state. His descriptions of Mississippi's probably unique former use of so-called "trusties"--providing firearms for "trusted" inmates and vesting them with authority over fellow prisoners--is most telling. Such intriguing vignettes of preferential treatment for selected inmates present an effective description of the internal operations of that institution. Cabana couples his upsetting revelations of atrocities committed among inmates with his critical analyses of how best to deal with some of the inevitable problems endemic to corrections.

The author's personal reflections often lend much meaning to his effort. His parallel of the slow and arduous death of a close friend from a growing brain tumor with the contemporaneous pre-execution process of Evans is dramatic indeed. Cabana successfully personalizes Evans and explains his conviction on the basis of testimony from his accomplice. The criminal law scholar or practitioner in Northern Ireland will likely be reminded of "Supergrass" informants in terrorism cases. The author effectively explains that many state laws place equal criminal responsibility upon the actual "trigger-puller" and other participant(s) in a

---

[15] Cabana at 44 and 85.
[16] *Id.* at 85.
[17] *Id.* at 7 and 161.
[18] *Id.* at 119-121.

murder and/or robbery[19] and points out the drastic inequity of equal punishments for unequal culpabilities.

Cabana's expertise and his personal sincerity and impeccable ethics are evident throughout. One is left with the hope that such competent and caring managers are the rule within American prisons.

Death By Midnight struck this reviewer as a rough draft of what might have been a compelling book. However, a change of title to reflect the true thrust of Cabana's message, substantial changes in structure and organization, and some inclusion of explanatory information on significant features of the law are very much in order. This book is recommended only for the reader interested in corrections operations, but not for one hoping to augment his grasp of the essence of capital punishment.

PROFESSOR CAROL DAUGHERTY RASNIC
Professor of Employment of Labor Law,
Virginia Commonwealth University, USA

PUBLIC HEROES, PRIVATE FELONS: ATHLETES AND CRIMES AGAINST WOMEN By Jeff Benedict [Boston: Northeastern University Press, 1997. xvii & 245pp. Hardback £23.95]

As professional sports command increased public attention the personal lives and behaviour of high profile athletes have come under greater scrutiny. When this involves illegal or socially deviant conduct extensive media attention is guaranteed. This is as true in the British Isles as it is in North America with athletes who engage in drug and alcohol abuse, domestic violence and sexually abusive conduct guaranteed to feature prominently in news bulletins and on the front pages. *Public Heroes, Private Felons* deals with the phenomenon of sexual and physical abuse of women by college and professional athletes in North America. These problems are not unique to North America and, despite the different bases on which sports are organised in these islands, the topics discussed should be of concern to those involved in the governance of sport on this side of the Atlantic. Nine chapters of the book deal to one extent or another with various incidents of sexual assault by athletes, one deals with domestic violence, while three proposals that might be implemented by the sports industry are briefly outlined in the final chapter.

College and professional sport in North America, it would seem, is characterised by "widespread mistreatment of women" (p25) with athletes having a "warped sense of what constitutes appropriate treatment of women" (p 155) and a "morally destitute, socially deprived (*sic*.) outlook" (p 185). This is the result of a system that recruits athletes from troubled backgrounds and places them in an environment where they are conditioned to behave without an appreciation of consequences and offers them little or no preparation for the exceptional public scrutiny to which they will be exposed. In this environment athletes pursue "deviant lifestyles" (p 154) and engage in "indiscriminate sexual relations" (p 172)

---

[19] Indeed, the Supreme Court has affirmed state statutes permitting impostion of the death penalty for non-principals. *See* Tison v. Arizona, 458 U.S. 782 (1982).

and "socially degenerate behavior" (p 213). Coaches who are motivated by "ruthless self-serving greed" (p 221) turn a blind eye to such conduct and continue to recruit and select these delinquent athletes. While police and prosecuting authorities are likely to pursue these athletes more vigorously than would be the case were "ordinary" members of the community involved they face an uphill struggle with athletes being defended by highly experienced lawyers, described variously as "savvy" (p 88), "astute" (p 91) and "distinguished" (p 181), and juries being reluctant to record convictions against public heroes. This is disturbing in the extreme and in this context the proposals that are advanced – namely, the adoption of a code of conduct that expressly prohibits crimes of violence against women, the imposition of penalties by colleges, clubs and leagues against athletes who violate the code and a screening process that should minimise the recruitment of potentially violent athletes - are modest. Indeed, if the picture painted by Mr Benedict is accurate one might reasonably expect greater efforts on the part both of the sports industry and society to tackle this problem.

However, the story related by Mr Benedict fails to convince. It might well be that abusive treatment of women by athletes is as extensive as he suggests (although at one point he does refer to a "silent majority" (p 226) who support stricter disciplinary measures, suggesting that in fact abusive athletes form a minority) but little is offered in the way of hard evidence. Instead the author opted to relate a series of well-publicised incidents of sexual abuse and domestic violence. However, what could have been a set of illustrative case studies from which reliable conclusions might be drawn is reduced to the level of lurid anecdote by a style that is at best journalistic and at times worthy of a cheap novel. An example of the latter is the description of a particular offending athlete as "an imposing man with a crew cut and large muscles showing through his ripped T-shirt" (p 109). This is compounded by a shrill moralistic tone and I am not sure what offends the author more – criminal violence against women by athletes or their promiscuous (but lawful) personal behaviour. True, he attempts to identify their promiscuous lifestyles as the source of their violent conduct but this is more by way of assertion than reasoned conclusion.

This book deals with an important issue that should be of concern to sports administrators, lawyers and policy makers. It would be unrealistic to expect the author to provide answers but unfortunately he fails to ask pertinent questions. How extensive is violence against women by prominent athletes? Is this a sports problem or a societal problem? What is it about sport that demands a response on its part to egregious off-the-field conduct by athletes? Are athletes to be cast as role models in a sense that other equally high profile celebrities such as actors, rock stars and politicians are not? And if so why? If the representation of athletes by expensive lawyers places them in a better position than defendants who are represented by public defenders does this not reveal as much about the administration of criminal justice as it does about the sports industry? What conclusions about the jury system might be drawn from the high rate of acquittals of athletes by juries? Had these matters been considered and had the easy option of focusing on the shocking details of particular cases been avoided this could have been a valuable work. It can be expected that sports administrators on both sides of the Atlantic will be forced to deal with issues of this nature in the future, if only as a result of pressure from sponsors, television stations and other major investors in the industry. Unfortunately they will not find either a convincing case for a response by the industry to the phenomenon nor a workable strategy in this book.

J PAUL MCCUTCHEON
University of Limerick

EUROPEAN BUSINESS LITIGATION. By Abla Mayss & Alan Reed. [Dartmouth Press: Ashgate 1998. 624 pp (with index). Hardback £67.50.]

The common law rules on jurisdiction and enforcement of foreign judgments and choice of law are complex and challenging. In recent years the Brussels and Lugano Conventions on Jurisdiction and the Enforcement of Judgments and the Rome Convention on Choice of Law in Contractual Matters have had a radical impact on private international law. Unfortunately, there have been few recent comprehensive commentaries on this new private international law regime. There have been a number of excellent commentaries on the two Conventions, but many of these are now sadly out of date and very few attempt to place the Conventions in context with the common law rules. Many general texts on conflict of laws exhibit a common law bias. These texts tend to adopt a historical approach and analyse the common law rules before dealing with the Conventions, treating them as exotic and unwelcome new developments. This runs contrary to the manner in which this area of the law should be treated. The Conventions are the first line of approach – only if the subject matter of a dispute falls outside their scope are the common law rules of relevance.

European Business Litigation confines its treatment to legal issues of relevance to commercial litigation within the European Union. Thus, while there is some discussion of common law rules such as *forum non conveniens*, this is confined to a consideration of whether these rules survive the entry into force of the Brussels Convention. The only exception to this approach is a brief chapter on the recognition and enforcement of judgments at common law. The book focuses on a number of different subjects: jurisdictional rules under the Brussels Convention, choice of law under the Rome Convention, choice of law in tort and recognition and enforcement of judgments under the Brussels Convention and at common law. The authors also give a brief overview of the operation of the Conventions to date.

This focus means that this work will be of considerable assistance to the practitioner and the more general reader alike. The book traces recent decisions of the English courts and of the European Court of Justice on the interpretation of the Convention. This is done in a clear and very readable manner. Anyone with an interest in the subject matter will find this a surprisingly enjoyable read.

Tracking developments in the interpretation of some of the Convention's more difficult articles is done in a very immediate way. These difficulties of interpretation are where problems have arisen. One instance is Article 5.1 concerning jurisdiction in contractual disputes. This provision of the Convention has attracted a considerable jurisprudence both before the English courts and the European Court of Justice. The scope of this provision has proved contentious – primarily because of its complex wording. Among the issues, which have been considered, are whether restitutionary claims can come within the scope of this provision. Despite protracted litigation before the English courts this question had not been satisfactorily answered. The authors engage some of the more contentious issues and are not slow to express their own views. While I would not agree with all of the views advanced this does make for an engaging read.

One of the most exciting aspects of the law in this area is its speed of development. This rate of change has already overtaken the book's contents. Since its publication, the Court of Justice has handed down a number of significant decisions. In addition, the debate on the future of the Brussels Convention has begun in earnest. The European Commission has put forward a document advocating radical amendment to the Convention. Unfortunately these proposed amendments were not to hand in sufficient time for their consideration in this book. Likewise, the Brussels 2 Convention on Jurisdiction and Recognition and Enforcement of Judgments in Family Law Matters has recently been signed by the EU Member States. This too was signed after publication of this work. This rate of change merely serves to point out how timely this work is. It is to be hoped that the authors have future editions in prospect.

In summary, the authors guide the reader through the other provisions of the Convention and related problems of private international law in a very direct and lucid manner.

T.P. KENNEDY
Legal Education Co-Ordinator
Law Society of Ireland

TELECOMMUNICATIONS LAW HANDBOOK. By John Angel and Ian Walden. London: Blackstone Press. 1997. x & 987pp. Hardback £75.00]

If we live in an information society, then telecommunications provide the vital infrastructure of that society, overtaking other forms of manufacturing and service industries as the prime sunrise enterprise coveted by states world-wide. Accordingly, a mighty subject is tackled in this book, and so it is not surprising that it requires just under 1000 pages in order to detail the law. That objective is made even more difficult by the "monumental" (p.ix) pace of change in the telecommunications sector, which arises not only from rapid technological innovation but also the spreading policy of the liberalisation of the market-place arising from the privatisation of state monopolies and the encouragement of entry and diversification. To cope with this agenda, the objective of the book is set out with precision: "to provide in a convenient and easily accessible form some of the main regulatory texts within telecommunications law." (p.ix) There is the further delimitation that the text is to concentrate on telephony rather than broadcasting.

The body of the book is set out in three unequal parts - one on the United Kingdom (the largest), followed by European Union law and then a brief foray into international (and comparative) law. There is an introduction to the whole, but, combined with the prelude to the United Kingdom section, it only amounts to just under three pages. Furthermore, there are a few annotations to the materials within each Part, but they are sporadic and again very brief - little more than references to cases or cross-references.

The "laws" in Part I, "United Kingdom", are detailed according first to source - primary legislation, secondary legislation and then "grey" laws - and then according to chronology. A significant part of the cursory introduction sections rightly relates to the establishment in 1981 and regulation of the major player, British Telecommunications plc. Most of the materials are about telecommunications licensing and regulation, and include the keynote Telecommunications Act 1984. The licensing arrangements and usage agreements form the major body of Part I. Since these are not as accessible as the statutes, the collection is valuable, but, with the aid of just a little more commentary, it should have pruned substantially. There is considerable overlap between the various licenses,

plus a lot of standard conditions which do not tell us anything about telecommunications. As a result, the potentially valuable messages are lost in a lot of static as one wades through almost 400 pages of corporate lawyer-speak.

Somewhat out of place in this agenda is the Interception of Communications Act 1985, which is presented as "the main provision designed to protect the privacy of users of telephony" (p.4). Some of the limits of this legislation are mentioned in the annotations, but without reference also to the Security Service Act 1989, the Intelligence Services Act 1994 and the Police Act 1997, an inadequate picture is given. This deficiency is characteristic of the book, which is weak on the treatment of individual rights. The authors are silent (at least until the final gasp on US law) about content and the rights of authors and consumers and concentrate instead upon corporate rights and duties. Given the vast amount which has been written and legislated (especially on pornography), this limit is understandable, but it should have been followed more consistently and explicitly.

The European Union laws in Part II have been motivated by several concerns. They include the encouragement of open markets, mainly inspired by Directorate-General IV which is hostile to potentially anti-competitive agreements and in favour of technical compatibility and open public procurement (though this latter aspect is not actually covered). More generally, there is a concern in the Directorate-General XVIII to encourage an "Information Society", perhaps most inspirationally advocated (or as inspirational as it gets for a document from the European Union) in the *Bangemann Report (Europe and the Global Information Society at*:http://www2.echo.lu/eudocs/en/bangemann.html>, 1994). In the light of these policy strands, the contents of this book are again narrow. They mainly relate to liberalisation of markets and the policing of anti-competitive arrangements. The materials include very detailed Commission decisions on proposed telecom mergers. The agenda of the facilitation of the Information Society is secondary. The *Bangemann Report* is not included, nor is there mention of the important initiatives and regulations to encourage European content in the electronic media (on which see Winn, D.B., *European Community and International Media* Law, Graham & Trotman, London, 1994). Rather like in Part I, there is a very brief excursion into regulation of individual rights, in this case data protection (p. 891), but this is not set in the context of the earlier instruments both of the European Union and of the Council of Europe. Nor is there any attempt to consider the debates going on in Europe about encryption.

Part III is called "International law" but also incorporates a foray into comparative law. The international law aspect comprises the regulatory activities of the International Telecommunications Union and, since 1994, the World Trade Organisation, which are seeking to carve out a role for themselves in these fields. The political tensions between these international regulators, the European Union and the United States are not explored. The comparative law consists mainly of the US Telecommunications Act 1996. There is an extremely brief mention on the final page (p.984) concerning the litigation on some of the controversial aspects of the Act, but publication deadlines presumably did not allow the incorporation of the decision in AC*LU v Reno* (138 L. Ed. 2d 874, 1997). It is legitimate for the authors to look at the United States as the largest and arguably most advanced telecommunications market in the world. However, in the context of a book with such a pronounced European flavour, it would arguably have been more interesting and relevant to compare another European jurisdiction (the Netherlands perhaps being the prime candidate) to gauge the progress of the United Kingdom.

Overall, reservations must be expressed about the limited conception of this book. It does little more than advert to some of the social consequences of the growth of the telecommunications sector, such as globalisation (see Castells, M., *The Rise of Network Society*, Blackwell, Oxford, 1996) and changes in working practices (see Susskind, R., *The Future of Law*, Oxford University Press, 1996). It is limited to the legal texts and does not include debates about the texts, such as the White Paper, *Competition and Choice: Telecommunications Policy for the 1990s* (Cm. 1461, 1991). Though broadcasting is not on the menu, one would expect to hear a little about the convergence of the future (trends now considered by the Department of Trade and Industry in *Regulating communications: approaching convergence in the information age*, Cm.4022, 1998). All of these limitations probably betray the origins of the book, which relate to the teaching of an LL.M. course within the University of London. The book therefore has the feel of being the successor to photocopied bundles of student handouts, which are of limited value without the excellent commentaries and discussion no doubt provided in class. The focus on original texts alone would be perhaps justifiable if those texts were devilishly hard to locate. Some of the licensing arrangements fall into this category, though, as noted above, they are greatly overdone. But inaccessibility hardly applies to statutory materials, and even the more arcane European Union materials can in the main be unearthed via a web search engine (such as EUR-Lex at <http://europa.eu.int/eur-lex/en/index.html>). There is certainly skill in collecting the sources and explaining their location, but one suspects that this type of exercise will in the future (especially once the Lord Chancellor delivers on his promise of a web-based statutes in force (see <http://www.open.gov.uk/lcd/lawdatfr.htm>) be delivered much more effectively by developing the authors' related web page (<http://www.ccls.edu/~ccls/itlaw>). A book would then deal with the much more intellectually challenging and interesting task of explaining, analysing and contextualising the source materials.

In conclusion, many reservations are here expressed about the conception of this enterprise, though it is delivered clearly and effectively according to its own limited lights. In addition, one sympathises with authors working in this field. As is stated by the European Commission in the BT-MCI merger decision, "It is particularly difficult to give a precise picture of the existing structure of this emerging market because its principal feature is that it is in constant evolution." (reproduced at p.769) Even so, much more could have been made of the exciting issues being faced on a global scale. We have here a glimpse of what is happening but by no means the digitally enhanced picture.

CLIVE WALKER
Centre for Criminal Justice Studies
University of Leeds