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REFLECTIONS ON THE DEVELOPMENT IN BRITAIN OF INTERDISCIPLINARY APPROACHES TO LAW: UTILITY AND DISUTILITY

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INTRODUCTION

Over twenty-five years have elapsed since the Social Science Research Council (now the Economic and Social Research Council) first became interested in developing collaboration between social sciences and the law. It seems an appropriate time to reflect on how interdisciplinary approaches to law have evolved[2] and, given the forthcoming annual conference of the Socio-Legal Studies Association at Belfast, this journal is a fitting outlet.The paper proceeds on the assumption that the approaches need no longer to be justified. Its title is intended simply to indicate that within the huge body of work which has accumulated there have inevitably been major variations in quality and usefulness and I have set myself the task of trying to explain how and why such variations should have occurred. At the heart of the "utility of research" issue there is a tension between the two traditional wings of interdisciplinary research: on the one hand that which involves high theory or much abstract modelling; and, on the other, that which is empirically based or at least is designed to answer hard policy questions. An important goal of research management and financing is the optimal mix of these two approaches: for the discipline or sub-discipline to be advanced, scholars must have "space" in which to develop the theoretical tools. At the same time, there should be measurable returns on the investments in theoretical developments, in the sense of the research findings being used to facilitate understanding or to guide policy choice.

My sense is that, in the first half of the period under review, there was an unhealthy obsession with high theory and abstraction; in the last decade or so the pendulum has beneficially swung in the other direction. To understand these developments,[3] it is necessary to relate them to the changing conditions of the academic marketplace.

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[1] A revised version of a paper presented at the Israeli Science Foundation Research Workshop on Empirical Research and Legal Realism – Setting the Agenda, University of Haifa, June 1999. I am grateful for the comments of participants at the workshop and for the helpful suggestions of a referee.

[2] Several collections of essays on the topic have recently been published. See especially: ESRC, *Review of Socio-Legal Studies: Final Report* (1994); Galligan (ed), *Socio-Legal Studies in Context: The Oxford Centre Past and Present* (1995); Thomas (ed), *Legal Frontiers* (1996); Thomas (ed), *Socio-Legal Studies* (1997).

[3] As has been pointed out to me by a referee, there may be interesting parallels with developments in the American law schools in the 1930s. There the revolt against formalism led to much interest in social science methodology, although involvement in empirical research did not endure: Duxbury, *Patterns of American Jurisprudence* (1995), pp. 90-97.

LEGAL INTERDISCIPLINARY STUDIES: THE FIRST WAVE

If I take as my first period that from 1972 (the founding of the Oxford Socio-Legal Centre) to about 1984, how should it be characterised? It was a period in which

> "social science and scientists were drawn into socio-legal research as the handmaidens of largely disaffected lawyers. These lawyers in turn saw socio-legal work as a means of escaping from what they regarded as the increasingly socially irrelevant and narrow intellectual confines of traditional legal and jurisprudential theory and research."[4]

Many pursued their work from a deep conviction that law which purported to be neutral and available to all was in fact systematically biased towards wealth and privilege. They saw their task as exposing the reality beneath the surface. These were the times when Marxism made its greatest impact on the British law schools and there was much talk of commodification and the "withering away" of law. The writings of Pashukanis seemed, for ever, to be the flavour of the month. The impetus for critical legal scholarship, as it came to be called, was then primarily political. In Alan Hunt's words,

> "many proponents wish to espouse an explicit political commitment in that their work seeks to contribute towards some political goal. A typical formulation expresses a commitment to overcoming "domination" and "hierarchy". This concern involves a rejection . . . of the prevalent apolitical stance of much legal scholarship founded on the belief or in the possibility of value neutrality which portrays the lawyer as technical expert." [5]

There were benefits to such an approach. "Law in context" or the "living law" was seen to have contemporary significance; we could at last relate our legal studies to the intellectual climate of the decade. And yet did not this obsession with social justice reveal only a partial vision of how the application of social science theory could enrich our understanding of law? The understandable intellectual reaction against the stifling dullness of doctrinal, "black-letter" legal scholarship might suggest that *any* external perspective on the law seemed to offer stimulus, but the concern seemed to focus almost exclusively on the insights provided by social theory on how legal institutions might – or more typically might not – facilitate fair distributions of wealth and power. Might not other theory, say economic theory, help us to explore, say, functional relationships between legal arrangements and the creation of wealth? It was, after all, a time when there was – if not among sociologists – a general concern about the decline of the United Kingdom's industrial performance. I recall a meeting of the Social Sciences and Law Committee of the Social Science Research Council at which my fellow members seemed initially quite perplexed at my contention that our research agenda ought to include questions of how law operates as a resource-allocating device.

The ubiquitous concern with social justice did not imply a uniformity of approach. There was, indeed, a serious conflict between "sociology of law" and "socio-legal studies".[6] Those engaged in the latter attempted to

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[4] ESRC Review, above n.2, p.36.

[5] Hunt, "The Critique of Law: What is Critical About Critical Legal Theory?" in Fitzpatrick and Hunt (eds.), *Critical Legal Studies* (1987), p. 6.

[6] See especially Campbell and Wiles, "The Study of Law and Society in Britain" (1976) 10 *Law and Society Review* 547. For a critical contemporary view on this

come to grips with actual legal principles in those areas of law which centrally affected the disadvantaged or marginalised sections of the community, thus particularly criminal law and criminology, family law, mental health, welfare law, labour law. But the high theorists appeared to have the dominant voice, arguing that the work of the "empiricists" served largely to uphold the legitimacy of the established legal order.

We should not, however, forget that while those engaged in socio-legal studies may have been in the minority, they nevertheless included some powerful figures, including some who might be described as the "establishment" of legal interdisciplinary work of the period. Oliver McGregor and Donald Harris were already senior academics with international reputations in mainstream sociology and law, respectively, when they became the first two Directors of the Oxford Socio-Legal Centre.[7] They managed large and successful major research projects on family[8] and accident law.[9] Here we see work that was intended to put British socio-legal work on the map and to convince doubters that, given the significant impact which it could make on policy-making, it deserved generous public funding. There was not an expectation that the work would necessarily and immediately influence policy developments; rather, the information acquired and the ideas advanced would fuel the debate and indicate possible ways forward.[10] For this purpose, it was essential that publication of the research findings should use language that was easily comprehensible to those lawyers and policy-makers that were likely to be most influenced by them.[11] It is striking too that, although reputable social science methodology had been employed, the language of social science theory was carefully avoided.[12] Also, while both studies revealed major shortcomings in existing legal provision for single parents and accident victims, the mode of analysis is manifestly apolitical and impeccably free from ideological bias.

But not all interdisciplinary work followed this pattern or had so smooth a passage. Inevitably, there were in those early days some considerable problems of communication between those working with abstract, sophisticated social science theory and the legal world whose practices and principles were the subject of investigation. I recall, for example, a law-and-economics workshop in the mid-1970s at which an eminent economist rendered his theory of the "Value of Life" totally meaningless to his legal audience, because it had never occurred to him that they would be unfamiliar with mathematical exposition. I remember also, at about the same time, a not too fruitful dialogue at a Civil Procedure workshop

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debate, see Hutter and Lloyd-Bostock, "Law's Relationship with Social Science: The Interdependence of Theory, Empirical Work, and Social Relevance in Socio-legal Studies" in Hawkins (ed.), *The Human Face of Law: Essays in Honour of Donald Harris* (1997), ch.1.

7 For an account of this period, see Hawkins, "Prologue: Donald Harris and the Early Years of the Oxford Centre" in Hawkins, above n.6, pp. 1-17.

8 See McGregor, *Social History and Law Reform* (1979).

9 Harris et al, *Compensation and Support for Illness and Injury* (1984).

10 ESRC Review, above n.2, p.17. For a more polemical view, see Mansell, "Tort and Soicio-Legal Studies. The Road to Damascus: Paved With Good Intentions But Few Epiphanies" in Thomas (1997), above n.2, pp.227-228.

11 See also Harris's "The Development of Socio-Legal Studies in the United Kingdom" (1983) 3 *Legal Studies* 315 which avoids jargon and presents a very empirically-orientated vision of the subject.

12 I remember an isolated reference to Durkheim appearing in an early draft of *Compensation and Support*, above n 9, but subsequently disappearing.

between researchers, clad in tea-shirts and jeans, engaging in ethnomethodological analysis of social interaction in the courtroom, and an eminent Master of the Queen's Bench, in a three-piece suit, more concerned with reforming the procedures for payment into court.

This was a matter of greater import than these anecdotes might suggest. What McGregor and Harris had been quick to perceive, but what many younger scholars were reluctant, sometimes stubbornly so, to admit was that for interdisciplinary studies of law to make their impact they had to transcend the conceptual framework of the disciplinary base from which they originated. It is relatively easy to persuade those who share the same conceptual framework and language of discourse. As Posner puts it,

> "The closer knit the interpretative community . . . the simpler the interpretative task. In economic terms one might say that the more homogeneous the interpretative community is, the lower are the costs of overcoming inevitable "noise" in communication."[13]

The task of translating "noise" into meaningful signals for those outside the cosy interpretative community was more challenging but also essential. As an example, let me take Pat Carlen's 1976 study of the magistrates' courts. The late Edward Griew's elegant review of this in the *Criminal Law Review* epitomises so well the problem that I am describing that I have taken the liberty of extracting a large passage from it.[14]

> "I should not wish it to be said that I had misrepresented Dr. Carlen's theme by any clumsy attempt to state it in my own words. She puts it this way herself in her Introduction (p xi): "The argument of the book is that the justice produced in the magistrates' courts emanates from social relationships which, though they may appear to ironicise the ideal conceptions of justice as they are encapsulated in the Criminal Law, are, in this capitalistic society, socially coherent." I am not sure that I fully grasp the notion of "social relationships which . . . are . . . socially coherent." I doubt whether, if I did, I would find it inconsistent with the reality, let alone the appearance of, ironicising even a single conception of justice, ideal or otherwise, and whether or not encapsulated in the Criminal Law. I have not in fact discovered what conceptions of justice, by whomsoever entertained, are so encapsulated. Moreover, I do not quite see the relevance of the distinction between capitalist and other forms of society which is implied here and, with similar suddenness and lack of explanation, at a number of other places in the book. And plainly Dr. Carlen and I use the word "irony", with or without ingenious derivatives, in different ways. The full force of Dr. Carlen's summary of her work is therefore something of a mystery.
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> It is not as though this book is intended only for sociologists. "The bulk of the book is . . . written for all those who work in, or who one day might find themselves in, the magistrates' courts" (p xii) . . . All the more reason why one would expect to find careful explanations of words used in specialised ways and painstaking attention to the problem of communication with a varied audience. . . .

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[13] Posner, "Jurisprudence of Scepticism" (1988) 86 *Michigan LR* 827, at p.850.
[14] [1976] *Criminal LR* 647-648.

> It is a great pity. Dr. Carlen has a very important concern – mainly (I now use my own language) the study of court processes in terms of rituals, roles, relationships, interaction, communication, control. This is indeed a subject of great significance for anyone concerned with the quality of legal operations. Legal education at every stage almost entirely neglects reference to the reality of the consumer's experience in his contact with the law, to the genuineness of his alleged choices, to the problem of real (as opposed to ritual) communication between him and his lawyer or the court. Those trained in other disciplines have to help us to wake up to these problems. We look to them to furnish tools for the humane reform of legal processes. . . . [Dr. Carlen's] work might have been the source of a host of plainly transmitted insights of great value. But, alas, if she is unread, as her prose makes inevitable, the opportunity is lost."

These are not the pedantic whinings of an old fogey. Nor do I have any reason to doubt the genuineness of the plea for more coherent work and comprehensible exposition on the same topic. The criticism is derived from a simple conviction (which I share) that insights generated by technical analysis can and must be expressed in a language which a lay person can appreciate.

If, as I would suggest, much British interdisciplinary legal scholarship of this period was hidebound in its own conceptual base, failed to penetrate the barriers between disciplines, involved dialogues only between the cognoscenti, tended towards self-indulgence and, most importantly, failed to impact on legal policy-making, why should this have occurred? I think that we must look to the academic environment at the time and, in particular, the market forces which impinged on research efforts.

Legal educational establishments were expanding rapidly in the 1970s. Given also the expansion occurring more generally in legal work at that time and that the demand for high quality academic staff probably outstripped supply, it was a reasonable assumption that young, reasonably gifted legal scholars could find tenured positions relatively easily. How they would advance their career was mostly left to their own initiatives but two messages seemed to have been assimilated. First, if you were engaged in work with another discipline, that would suggest intellectual endeavour of a high order; even more so, if you could publish papers revealing that you had a mastery of the language and concepts of that discipline. Nevertheless, secondly, you should be wary of articulating the ideas of the foreign discipline in relation to mainstream legal doctrine because you might not be understood and, in any event, that might undermine the authority of senior legal scholars working in the field along more traditional lines[15] – and this might not be good for promotion prospects. The implications for the development of interdisciplinary studies in law would seem to be that progress within a particular disciplinary base would be encouraged and dialogue between those, primarily young, scholars so engaged was likely to flourish. But such work would be insulated from mainstream legal scholarship, there being little motivation to transcend the intellectual boundaries and communicate relevant research findings to those engaged in traditional doctrinal analysis.

What, then, of research funding? At that time, with the possible exception of the Home Office, there was little prospect of interdisciplinary legal scholars obtaining contracts directly from government departments for policy-related research. True, the Social Science Research Council, with

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[15] *Cf* Thomas, "Introduction" in *Legal Frontiers*, above n 2, at p.6.

its newly established interest in socio-legal studies,[16] had a significant amount of money available for this purpose, but it was used in ways which largely enhanced, rather than combated, the trends described above. Decisions on the grants were made by a specialist committee comprising a small group of predominantly committed scholars whose primary concern was to see the development of socio-legal studies. It had a heavy criminological bias. Alongside the research grant system, core funding on a very generous and prolonged scale was provided for the Oxford Socio-Legal Centre.[17] Neither the SSRC nor the Advisory Board of the Centre gave the latter any direction regarding its research objectives, and control was largely limited to ensuring that the research agenda was compatible with the Centre's terms of reference. Understandably, that was perceived to be considerably advantageous for the development of socio-legal studies because it allowed scholars, many of whom were employed on relatively prolonged research contracts, time to develop theoretical paradigms without feeling under pressure to produce "hard" research results. That did not inhibit, as we have already seen, the launching of major empirical projects with significant policy overtones, such as those on family law and compensation for accidents. But in relation to these I would repeat the observation that the main protagonists were already senior scholars in their field. They were not subject to the same incentive structures as their junior colleagues, were not concerned to establish their own legitimacy (except as being identified with the socio-legal movement) and were not going to be perceived as a threat to colleagues in the mainstream.

Let me draw some conclusions on this, the first period of interdisciplinary studies. It was an exciting era in which many of those frustrated by the intellectual and theoretical limitations of traditional, doctrinal analysis, acquired – often self-taught – new methodological approaches to law. With the notable exception of some major empirical projects undertaken mainly by senior academics, the published work tended to be highly theoretical and not easily accessible to those outside the particular discipline. If the work was also seen as being iconoclastic, that perhaps was unsurprising given the political context in which major challenges were being made to the established order both inside and outside the universities. In any event, as I have tried to demonstrate, the characteristics of interdisciplinary work were to a significant degree related to the institutional and financial structures used at that time to encourage research. As Thomas has written,

> "For so long as it remained in unthreatening opposition to doctrinal legal scholarship its otherness, offered as a minority alternative, was acceptable. Its apparently unchallenging marginality ensured its untroubled existence from external scrutiny."[18]

LEGAL INTERDISCIPLINARY STUDIES: THE SECOND WAVE

I take as my second period that between (about) 1985 and the present. In some respects I am ill-placed to offer reliable commentary on interdisciplinary legal studies generally. True, I am more embedded than ever in one particular branch of those studies (law-and-economics) and

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[16] See Hawkins, above n 7, at pp.5-9.

[17] Between 1985 and 1991, ESRC funding of the Centre accounted for over a third of its total socio-legal research funding (ESRC Review, above n 2, at p.31) and it is a reasonable inference that in the earlier period this figure was even higher.

[18] Thomas (1997), above n 2, at p.3.

have published surveys of British work in this area[19] as well as a piece on how such work has impacted on legal thinking.[20] Nevertheless, I am further removed than I was in the earlier period,[21] from interdisciplinary legal research generally. In particular, I feel less than comfortable when faced with one or more of the various branches of post-modern legal scholarship. I therefore make the following observations with some diffidence.

The overriding impression is that interdisciplinary legal studies have been, during the last decade or so, a success story. The creation of the Socio-Legal Studies Association (in 1990) and the current size of its membership (over 500 in 1996)[22] testify to the numerical strength of this type of research. Equally striking is the degree to which interdisciplinary work has now penetrated the mainstream of legal discourse. We saw in the earlier period the strategic advantage of not "threatening" the core areas of legal scholarship and the evidence suggests that in 1974 such areas were listed as representing the interests of only 11 per cent of socio-legal researchers. By 1994 that figure had increased to 26 per cent.[23] Far from being threatened, now many of the leading textbook writers and compilers of "cases and materials" in the core areas were to relish the opportunity of drawing upon interdisciplinary research to broaden their accounts of the subjects.[24] And those working on family law, the legal professions, alternative dispute resolution, the criminal process and regulation, areas to which interdisciplinary studies had made a major contribution,[25] could not hold themselves out as having expertise unless they were able to relate their analysis to these studies. Twining has ventured the impression that

> "In both research and teaching of particular subjects within law schools, socio-legal studies have moved from barely tolerated marginality, to acceptance, to a relatively high degree of integration . . . Socio-legal studies have made significant contributions to the rethinking and reconceptualization of specialized fields of law, both traditional and new."[26]

While, as we shall see, the tension between "high theory" and policy-orientated research has not disappeared, nevertheless there has been an

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[19] Ogus, "Law and Economics in the United Kingdom: Past, Present and Future" in Galligan, above n 2, pp.26-34; Ogus and Amass, *Research Review on Law-and-Economics: State of the Art and Questions for the Future*, (1997), LCD Research Series No 4/97.

[20] Ogus, "Law-and-Economics from the Perspective of Law" in Newman (ed.), *The New Palgrave Dictionary of Economics and the Law* (1998), vol.2, pp. 486-492.

[21] During much of that period, I was a member of a relevant SSRC, later ESRC, Committee.

[22] Thomas (1997), above n 2, at p.11.

[23] *Ibid*, at pp.14-15, defining "core" as those required by the Law Society for exemption from Part I of the Law Society Finals (now the Common Professional Examination).

[24] Some key examples of the latter from the early 1990s: Beale, Bishop and Furmston, *Contract Cases and Materials* (2nd ed, 1990); Hepple and Matthews, *Tort Cases and Materials* (4th ed, 1991); Wheeler and Shaw, *Contract Law* (1994); Ramsay, *Consumer Protection Text and Materials* (199l).

[25] See ESRC Review, above n 2, ch.2.

[26] Twining, "Remembering 1972: The Oxford Centre in the Context of Development in Higher Education and the Discipline of Law" in Galligan, above n 2, at pp.41-42.

increased involvement in the latter. Many of those previously over-sensitive to the hostility aroused by "empiricism" have been able to accommodate themselves to the utility of "bottom-up" work by embracing theory at a "grounded or middle-range rather than a social structural level".[27]

Of course, this degree of penetration could not have occurred if the relevant findings of the interdisciplinary researchers had not been communicated in concepts and language which the conventional scholars were able easily to understand. The magnitude and importance of this task of acting as intermediary between what is sometimes highly sophisticated social science theory and traditional legal doctrine should not be underestimated. Let me take the example of law-and-economics, the subdiscipline with which I am most familiar. The growth of abstract work in this area by American economists has been spectacular, so much so that it is now difficult to have a paper published in one of the specialist journals unless it is mathematical. The contribution of British economists has been less significant but nevertheless has not been insubstantial, and they too have tended to explore legal concepts or procedures with abstract, theoretical models, not easily accessible to those unfamiliar with the discipline. That should be contrasted with the work of, for example, Bill Bishop and Brian Cheffins, two Canadians who have straddled the two disciplines and, through a careful "translation" of concepts, have generated particularly important insights for British scholars working in, respectively, tort[28] and company law.[29]

The changes that I have described may be attributed, to some degree, to developments in the academic environment and the market forces which related to research. Take first the labour market. The "radicals" whose career ambitions in the 1970s and early 1980s might seem to have been thwarted by their advocacy of interdisciplinary studies had now, as a result either of "natural" promotion progression or of eventual recognition of their intellectual contributions, become part of the academic establishment.[30] Interdisciplinary scholars of the next generation were, therefore, unlikely to be disadvantaged.

The introduction, and increasing importance, of the Research Assessment Exercise has had a mixed impact on legal interdisciplinary studies. In some social sciences – economics is a notable example – work on the law is seen as "applied" research, which is not rated so highly by the evaluating panel as pure, "theoretical" work. This has clearly deterred some economists from engaging in collaborative work with lawyers.[31] My impression is that the experience in law has been almost exactly the opposite. The panel has regarded interdisciplinary research as a "broadening-out" rather than a "narrowing-down" and, given also its policy relevance, has, it seems, rated work of this kind as particularly valuable. One consequence has been the recruitment of social scientists into some law departments to boost research performance.[32] Another,

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27 ESRC Review, above n 2, at p.37.

28 In a number of papers, but perhaps most notably in Bishop, "Economic Loss in Tort" (1982) 2 *Oxford* JLS 1.

29 Cheffins, *Company Law: Theory, Structure and Operation* (1997).

30 Thomas, above n 15, at p.2.

31 Ogus and Amass, above n 19, at p.22.

32 Hillyard and Sim, "The Political Economy of Socio-Legal Research" in Thomas (1997), above n 2, at p.64.

more controversial, outcome has been that lawyers have been given greater control of the interdisciplinary agenda.[33]

Perhaps the most significant "market" influence on interdisciplinary work has been the growth of interest in, and readiness to fund, socio-legal research displayed by UK government departments, much of it allocated on the basis of competitive tendering. True, as some critics have observed,[34] at the height of the Thatcherite period, there was a "blurring of the distinction between consultancy and research", with private sector institutions winning contracts for short-term, and largely number-crunching, research exercises. The phenomenon was allied to the faith shown in, and dependence on, quantifiable variables and audit as policy tools.[35] But focussing on this aspect of government strategy should not be allowed to detract from what else has occurred, particularly recently. The Home Office has always been a significant sponsor of interdisciplinary research in crime and related areas and between 1988-91 devoted about 40 per cent of its £4.826m budget to externally-conducted research on socio-legal topics.[36] It has been a different story with regard to the Lord Chancellor's Department. Traditionally suspicious of research, especially social science research, until relatively recently it has done little to encourage interdisciplinary studies.[37] A major change occurred in 1996, following the transfer of a leading civil servant to the LCD from the Home Office. A new and well-funded research programme, with its own secretariat and covering broad areas of the legal system, was then launched.[38] And to this may be added perhaps the most significant development for policy-orientated socio-legal research: the readiness of government to engage in pilot studies of legislative reforms before they are implemented.[39]

Of course, the Economic and Social Research Council (the successor to the Social Science Research Council) has continued to support interdisciplinary legal studies (spending £6.727m on socio-legal research between 1985 and 1991[40]). But, as a consequence of a general governmental concern that research was too theoretical,[41] there was a major development in the direction of policy relevance. Now "research users" were to play a significant role in both the selection and the evaluation of

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33 *Ibid*, at p.65.
34 *Ibid*, at pp.56-7.
35 Power, *The Audit Society: Rituals of Verification* (1997).
36 ESRC Review, above n 2, at p.32.
37 When I and colleagues were, in 1985, awarded a grant of some £400k to investigate divorce mediation, this was the largest project hitherto funded by the LCD. We quickly became aware that the departmental officials lacked experience in dealing with academic researchers.
38 LCD, *Research: The Way Forward* (1996). For current developments, see the website www.open.gov.uk/lcd/research/introfr.htm.
39 The outstanding example is the Family Law Act 1996 and research carried out on the piloting of information meetings and mediation. Recently the Lord Chancellor announced that the government did not intend to implement Part II of the Act and it is clear from the statement that the research of the piloting by the Centre for Family Studies at the University of Newcastle upon Tyne was the main reason for that decision.: HL Written Answer 17 June 1999.
40 ESRC Review, above n 2, at p.30.
41 Office of Science and Technology, *Realising Our Potential* (1993, Cm 2250).

funded projects.[42] This may have had a constraining influence on the type of funded research undertaken and for that reason, as we shall see, has been vigorously criticised. On the other hand, it has helped to ensure both that the research is related to key policy issues of the day[43] and, because potential users are involved, that it will have a higher profile; it also increases the likelihood that the findings will significantly influence policy-making.

The fact that there has been an increased engagement in interdisciplinary work that is policy-orientated does not mean that the "high theory" end of the spectrum has been neglected. There has been a seemingly endless supply of publications applying to law various aspects of post-modernism: feminism and gender studies; semiotics and autopoiesis; socio-biological analysis; and so on.[44] Some of this is written in uncompromising language that is largely incomprehensible to those outside the discourse of the particular discipline. It may involve some development in the theoretical understanding of law, but it makes a relatively small contribution to issues that have to be addressed by policy-makers. There is, too, a stream of post-modern thought which, like some aspects of critical legal studies to which it succeeds, adopts provocatively[45] an almost nihilistic approach to the law: after so much "deconstructing" little is left in law which is meaningful. I, nevertheless, sense that there is not the same distancing from empirical work that characterised the earlier period; nor, for the majority, is there an unwillingness to engage in legal policy debate.[46]

Any *rapprochement* between high theory and empirical studies has, however, not inhibited sharp and bitter criticism of the institutional developments which I have described above. The Research Assessment Exercise is castigated on the grounds that "it is impossible because the tools for measurement do not exist", wasteful of resources (the 1992 exercise was estimated to have cost over £13m) and, because it increases competition, tends to colonise "the space for independent and critical scholarship" by "a disciplinary project of classification, categorisation and assessment".[47] Then the institutional changes to the public funding bodies (the expansion of government department sponsored research and the introduction of "user" evaluation") have been seen as threatening the independence of academic research.

> "The danger is . . . that the expectation of the sponsor is not simply that the research be conducted, but that it does indeed support a policy line and

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[42] A Socio-Legal Research Users' Forum was established in 1994. On this, see Partington, "Socio-Legal Research In Britain: Shaping The Funding Environment" in Thomas (1997), above n 2, at pp.24-27.

[43] As an example particularly pertinent for this journal, I should mention the award of £134,107, for the period 1998 to 2000, to researchers at the University of Ulster to undertake an evaluation of the alternative criminal justice system in Northern Ireland.

[44] For a general overview, see Douzinas and Warrington, *Postmodern Jurisprudence: the law of texts in the texts of the law* (1993).

[45] "CLS has been a persistent provocation to mainstream legal scholarship from its earliest guise as variants of phenomenology and critical social theory to its later inclusions of postmodernism, feminism and anti-racism": Fitzpatrick, "Distant Relations: The New Constructivism in Critical and Legal Studies", in Thomas (1997), above n 2, at p.146.

[46] *Cf* O'Donovan, "Fem-Legal And Socio-Legal: An Incompatible Relationship", in Thomas (1997), above n 2, ch.6.

[47] Hillyard and Sim, above n 32, at pp.52, 62, and 63.

> advocates as powerfully as possible a pre-determined interest. Indeed the research may be evaluated by the sponsoring organisation in terms of how effectively this is done."[48]

More generally, the accusation is that the phenomena of competitive tendering, short-term research employment contracts and the like have led to

> "The commodification of research . . . a shift within academe from "publication" as the currency unit of values to "grants" . . . the monetarisation of intellectual labour."[49]

It will be clear from my earlier remarks that I consider much of this criticism to be misplaced. Indeed, I would argue that legal interdisciplinary studies have been able to flourish in the later period precisely because of the conditions in the market, or quasi-market, for such research. Let me conclude this short paper by expanding on the theme.

UTILITY AND DISUTILITY

First, we need to be reminded that law is predominantly a professional discipline, without its own scientific methodology. By that, I mean that it is basically a body of knowledge and techniques used by practitioners to organise social and economic life. The consequence is that academic lawyers have to come to terms with the (not always welcome) fact that serious attempts to understand and evaluate the content of the law must necessarily come from other, predominantly social science disciplines.[50]

How then can we, and others, determine the utility or disutility of how we use those other disciplines? As indicated at the beginning of this paper, there is a spectrum from, at the one end, "high theory" to, at the other, empirical, policy-orientated investigation. There is utility to be derived throughout the spectrum, but that utility is maximised at the point of optimal mix. Although opinions may differ in identifying that point, my account of the evolution of legal interdisciplinary study in Britain suggests that in the first period too much research was undertaken too far from it. But that, in the second period, the market and other institutions which influence academic output were so deployed as to generate activity much closer to the optimal.

To understand the latter development, we need to explore how the demand and supply sides of the market for interdisciplinary research are likely to operate. Since law is to a large extent dominated by professional practice, we would expect that as the relevant decision-makers become increasingly aware of the value of interdisciplinary work so they will generate a demand for policy-orientated outputs, with the concrete benefits that these may generate. Will such demand be adequate relative to what is socially desirable? The answer is probably, no. As is well known, information – including the outcome of scientific research – has public good aspects, since many users are able to "free-ride" on those who pay for it. Add to this that academic lawyers are unlikely to derive much non-financial utility from engaging in empirical work –

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[48] Lee, "Socio-Legal Research – What's the Use?", in Thomas (1997), above n 2, at p.87.

[49] Hunt, "Governing the Socio-Legal Project: Or What Do Research Councils Do?" (1994) 21 *Journal of Law and Society* 520, at pp.520-521.

[50] Balkin, "Interdisciplinarity as Colonization" (1996) 53 *Washington and Lee* LR 949.

> "Legal academics feel about empiricism the way that most men feel about housework: they are extremely glad that someone else does it"[51] –

and we have a case of market failure. We need to use public institutions to fund policy-orientated, particularly empirical research. Those public institutions, if they are doing their job properly, will seek to reflect the demand for interdisciplinary work which thus should have a bias not only towards policy-orientation but also with an emphasis on dissemination and the communicability of the results of the research.

What then of "high theory"? Clearly, the demand side of the market is here even more problematic. Although those engaging in applied research will, to a greater or lesser extent, require theory in which to ground their hypotheses, they can expect to "free-ride" on the general availability of books and articles by theorists. And the other benefits of theoretical work are even more diffusely spread. On this basis, given the inadequacy of returns, we should expect a significant under-supply of such work. Does this suggest the need for public institutions to inject additional resources to encourage theoretical, as well as empirical work? I would argue that it does not for, as my account above reveals, there has not been – even in the earlier period – a problem on the supply side of this market. There are, it seems to me, two main reasons for this. First, it appears that many scholars derive substantial non-financial utility from theoretical work.[52] Secondly, security of tenure of employment, when achieved, enables them to pursue longer-term projects of the kind necessary for work of this kind, although to some extent this may be undermined by pressures from the research assessment exercise.

To summarise: the observable utility of interdisciplinary studies of law has increased within the last decade or so. To some degree, the development may be attributed to changing conditions in the market for research and the response of public institutions to failures in that market.

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[51] *Ibid*, at p.969.

[52] Landes and Posner, "An Economic Analysis of Copyright Law" (1989) 18 *Journal of Legal Studies* 325, at pp.331-333.

KEEPING WOOLF FROM THE DOOR - THE REFORM OF CIVIL PROCEDURE IN NORTHERN IRELAND

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INTRODUCTION

Problems of cost, complexity and delay have bedevilled the civil courts of England and Wales for decades. The final report of Lord Woolf's review of the civil justice system[1] was the latest of 60 reports on the same subject dating back to 1851. Since 1921 Northern Ireland has had five reports concerned wholly or in part with civil procedure and the organisation of the civil courts.[2] To these must now be added the *Interim Report of the Civil Justice Reform Group* (hereafter the *Interim Report*), whose proposals will be the subject of comment in the present article.

The Civil Justice Reform Group was set up on 21 February 1998 with the following task:-

> "To review procedures in Northern Ireland for the administration of civil justice, and produce, for consultation with interested parties, recommendations as to how the civil justice system could be developed so as to make it as accessible, economical and efficient as possible." [3]

In doing this the Group was to have regard to the recommendations made in the report of Lord Woolf and the review conducted in the summer and early autumn of 1997 by Sir Peter Middleton.[4]

Lord Woolf's report recommended radical reform of the way in which civil cases were conducted. The proposed reforms largely came into force on 26 April 1999 when the Civil Procedure Rules 1998, which replaced the former Supreme Court Rules and the County Court Rules, came into force. These rules establish three different tracks for civil cases depending on their complexity and the value of the case. Cases valued up to £5,000 are determined on a small claims track; cases valued above £5,000 but not above £15,000 go to a fast track; and cases valued above £15,000 are determined on a multi-track. The small claims track is essentially an expanded version of the Small Claims Court which previously had jurisdiction to determine disputes valued up to £3,000. The fast track operates on the basis of a fixed timetable of 30 weeks with limited

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1 Lord Woolf, *Access to Justice: Final Report to the Lord Chancellor on the civil justice system of England and Wales* (London, HMSO, 1996).

2 The report of the Shiel Committee, *Report of the Committee on the Supreme Court of Northern Ireland* (1957); the MacDermott Committee, *Report of the Committee on the Supreme Court of Judicature of Northern Ireland* (1970); the Lowry Committee, *Interim Report of the Joint Committee on Civil and Criminal Jurisdiction in Northern Ireland* (1973); the Jones Commission, *Report of Committee on County Courts and Magistrates' Courts in Northern Ireland* (1974); *Courts in Northern Ireland - The Future Pattern* (1977) - the Government's response to the three previous reports.

3 See the speech of the Lord Chancellor, the Right Honourable Lord Irvine of Lairg, to the first Bar of Northern Ireland conference on 21 February 1998.

4 *A Review of Civil Justice and Legal Aid* (October 1997).

discovery and limited scope for other interlocutory matters. The multi-track is intended to provide a flexible system for matching the procedure to be adopted to the value, importance and complexity of the dispute. The central feature of the multi-track, and the fast track to a lesser extent, is the provision for judicial case management of proceedings. Parties are no longer to be trusted with the management of civil litigation themselves. Instead they must attend hearings before a procedural judge who has power to determine what steps shall be taken to get the case ready for trial and to lay down a timetable for taking those steps. There is no coincidence between the County Court or the High Court with either the fast track or the multi-track, both courts retaining their independence and the upper limit on the monetary jurisdiction of the County Court remaining at £50,000.

For Northern Ireland, the Civil Justice Reform Group (hereafter the "Group") accepted some of the Woolf reforms but rejected others. It accepted the first of the two main tenets of the Woolf Report, the three track system, but in a substantially reduced and modified form. What is proposed is a three tiered system, consisting of the Small Claims Court, the County Court and the High Court. Unlike England and Wales there is an exact coincidence between tiers and courts, with £15,000 representing the dividing line between the middle tier (County Court) and upper tier (High Court) and £2,000 forming the boundary between the Small Claims Court and the County Court. The second main tenet, judicial case management, is almost completely rejected apart from the proposal to introduce to the High Court a system akin to the Certificate of Readiness system currently operating in the County Court. Many of the more specific recommendations of the Woolf Report were considered, some being accepted in part and others rejected. The general philosophy of the *Interim Report* is clearly Woolf sceptic and aims to preserve as much of the current system as appears to be working well. The author believes this general approach to be a wise one but also one which fully justifies the slightly irreverent title to this article.

The *Interim Report* was published in April 1999 and requested consultees to deliver their submissions to the Group by 25 June 1999. The author should immediately declare that he has contributed to the preparation of some of the comments which have already been passed to the Group. This article is written to set out the author's own individual views with the aim of contributing further to the debate on this important subject. There will not be much divergence from the views expressed by other bodies with which the author has been associated, but nothing in this article should be understood as representing the views of anyone apart from the author.

The article sub-divides the proposals of the *Interim Report* into five sections and offers commentary upon each. The first section deals with the Small Claims Court, the second with the County Court, the third with the High Court, the fourth with the conduct of litigation in both the County Court and the High Court, and the fifth with the development of civil justice policy. Commentary will not be provided on every proposal made in the *Interim Report* as that would be an exhausting and not particularly productive undertaking. Instead the layout and shape of the civil justice system of Northern Ireland, as the *Interim Report* conceives it, will be subjected to analysis.

THE SMALL CLAIMS COURT

The Civil Justice Reform Group made an extensive series of recommendations relating to the Small Claims Court. First they recommended that the monetary limit on the jurisdiction of the court in

Northern Ireland be raised from £1,000 to £2,000. With regard to the types of claim which can be brought to the Small Claims Court the Group came to no fixed conclusion on whether personal injury cases should continue to be excluded but was definite that claims arising from road traffic accidents should not be litigated there. The existing list of "excepted proceedings" contained in Order 25, Rule 15(1) of the County Court Rules (Northern Ireland)[5] was left untouched and it was further recommended that in small claims the District Judge should not be given power to issue injunctions or orders for specific performance. Several recommendations were made with respect to pre-hearing procedure. These included permitting proceedings to be served out of the jurisdiction, introducing a default judgment power, allowing the removal of small claims to the County Court, and preserving the present rules dispensing with pleadings and discouraging interlocutory motions. In relation to procedure at hearing the Group recommended very little change. The current disapplication of the usual rules of evidence was supported. The Group was undecided on the circumstances in which expert evidence should be allowed, setting out four options ranging from a complete ban to unrestricted use. Where it is allowed the Group recommended that it should come in the form of a written report, with oral testimony only being permitted at the discretion of the District Judge. Legal representation should continue to be permitted and the right of litigants to be represented by lay advisers, normally allowed in practice, should be statutorily confirmed. The Group also recommended a new right of appeal to the County Court against a small claims decision. With regard to costs the Group recommended that the "no costs" rule should continue but that the court fees for using the small claims procedure and the costs of enforcing a small claims award should be examined to see whether they are too high.

These proposals differ from the small claims track operating in England and Wales in several very material particulars. Most important is probably the very much lower monetary limit on the jurisdiction of the Small Claims Court, but also important are the refusal to accept that claims arising out of road traffic accidents are appropriate for this forum and the absence of any positive recommendation to include personal injury claims. Much of the Group's analysis of the Small Claims Court is both thorough and thoughtful and the majority of its recommendations should be accepted. But despite these positives the *Interim Report* lacks an overall conception of what purpose a Small Claims Court should serve. Perhaps a committee dominated by judges and practising lawyers inevitably would have difficulty with a task of this kind. Reading between the lines there appears to be an almost grudging acceptance that there is a separate procedure for low value claims but that the bar (monetary limit) should be set as low as possible. Some of the recommendations which should be accepted are better justified on grounds different from those the Group relied upon.

The author's preferred conception of a small claims procedure is one where consumers can litigate claims or defend proceedings brought against them in an informal atmosphere where they do not need to be represented by a lawyer. The *Interim Report's* failure to grasp this concept is most clearly seen in its statement that the Group is unaware of any evidence to suggest that individual members of the public are not fully

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[5] These cover actions for libel or slander; actions for the recovery of legacies, annuities or gifts to charity; proceedings in relation to title to land; proceedings under section 17 of the Married Women's Property Act 1882; and cases remitted from the High Court.

utilising the current procedure and in its failure to make any substantive proposals to raise publicity about the Small Claims Court.[6] Unhappily there is evidence of under-utilisation of the small claims procedure. In an unpublished report for the General Consumer Council for Northern Ireland in 1998, Coopers and Lybrand found that only 21% of those surveyed knew anything about the Small Claims Court; 66% had heard of it but knew nothing about it; and the remainder had never heard of it.[7] Other indications of the Group's slightly blinkered approach to the concept of a small claims court include its failure to consider what kinds of help with small claims are available for litigants and what is needed in this area; the proposal for a default judgment procedure; and the failure to address any arguments in support of the banning of lawyers from the Small Claims Court. These issues will be addressed in more detail below where it will be seen that sometimes the Group's recommendations should be accepted anyway, albeit for reasons different from those given.

The Group was correct to recommend that the monetary limit on the jurisdiction of the Small Claims Court be increased from £1,000 to £2,000 but no further for the meantime. The best reason for this is that in the absence of recent detailed research into the operation of the Small Claims Court there would be no way of predicting the consequences of a dramatic increase in the monetary limit. The last such research was the General Consumer Council's 1992 publication *How to Make Small More Beautiful* and occurred around the time when the small claims limit was raised from £500 to £1,000. The risks involved in a too drastic increase in the monetary limit are that many people would be compelled to litigate cases in a forum where Legal Aid is unavailable; it is unknown to what extent alternative forms of assistance such as those provided by the voluntary advice sector could cope; and costs could not be recovered where a litigant felt compelled to engage the services of a solicitor. There is clearly nothing like the need that existed in England and Wales to increase the monetary limit more significantly. The system of fixed legal costs in the County Court ensures that the cost of litigation in Northern Ireland is both lower and more predictable than in England and Wales. The horrifying picture presented by Professor Baldwin of County Court litigants in England and Wales incurring costs significantly in excess of the value of the claim is unlikely to be replicated in Northern Ireland.[8] However this is not to say that an expanded Small Claims Court could not offer real advantages, particularly in terms of speed and informality, but it is to say that the way forward should be a cautious one which places a high premium on monitoring and ascertaining the consequences of increases in the monetary limit.

With regard to the kinds of claim which can be brought to the Small Claims Court it is submitted that personal injury cases should only be brought to this forum where the plaintiff wishes to do so. Negligence is difficult to prove unless the litigator has some practical experience and many litigants in person might not even understand the need to prove that someone was at fault and that this caused the injuries they suffered. The risk of litigants without trained assistance being outgunned by claims managers acting for insurance companies is too great to make this a

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[6] See *Interim Report*, para 7.34.

[7] *Consumer Rights and Redress Study* (unpublished report for the General Consumer Council for Northern Ireland by Coopers and Lybrand, 1998) pp 23-24.

[8] See J. Baldwin, *Monitoring the Rise of the Small Claims Limit: Litigants' Experiences of Different Forms of Adjudication* (Lord Chancellor's Department Research Series no. 1/97).

compulsory process. Claims for property damage arising out of road traffic accidents should continue to be excluded in the light of the English experience with this process. There it is quite clear that insurance companies have been abusing the small claims procedure to get quick and cheap decisions on liability to govern issues of great importance, such as which company must pay compensation for personal injuries and which driver's "no claims" bonus will be lost. It was wise to recommend keeping the "excepted proceedings" out of the Small Claims Court and to preserve the current restriction on injunctions and specific performance as the issues involved in these proceedings are too important for a procedure so informal.

The pre-hearing procedure recommendations contain a mixture of good and bad. Good is the recommendation to allow small claims proceedings to be served out of the jurisdiction. At present where a consumer has a claim against a mail order company or a tour operator based outside Northern Ireland the case has to be taken to the jurisdiction where the defendant is situated. Good also are the recommendations to allow removal of a small claim to the District Judge's civil bill list, either on the application of a party or of the judge's own motion, and the preservation of the principles disposing of pleadings and discouraging interlocutory motions. Less good is the proposal to introduce a default judgment procedure to the Small Claims Court. Vulnerable litigants are frequently defendants and it provides a measure of protection to them if the plaintiff (more often than not a business) has to come to court and prove the case anyway. The problem giving rise to the recommendation for default judgments, that of litigants with contested cases having to wait around all day while the uncontested ones are processed first, could be better solved by having separate listings for defended and undefended cases, as is the current practice in the County Court.

In relation to the hearing the first issue to tackle concerns expert witnesses. Here the Group was clearly concerned to ensure that experts could assist the decision making process without their use becoming disproportionate to the complexity of the issues or the amount in dispute. The proposal that expert witnesses should generally give their evidence in the form of a written report and only be permitted to give oral evidence with the leave of the judge can be supported as an attempt to maintain a sensible balance between these considerations. As to when expert witnesses should be allowed, the two extremes of "never" and "unrestricted use" are plainly inconsistent with the objective just stated so some in-between position should be sought. The proposal that this be either on the direction of the court or with the agreement of all parties appears to be the most appropriate one. The question of representation raises one relatively uncontentious issue and another very contentious one. The uncontentious one is the proposal to give statutory recognition to the right of a litigant to be represented by a lay adviser. This happens quite frequently at present but the increase and prospect of further increases in the monetary limit of the jurisdiction of the Small Claims Court is likely to create greater need for lay representation so clarification of this issue is clearly desirable. The contentious issue concerns whether professional lawyers should be barred from the Small Claims Court altogether. The *Interim Report* gives a fairly emphatic "no" to this question, citing the probable wishes of some litigants to be represented by a lawyer and a possible infringement of the European Convention on Human Rights as reasons why this would be inappropriate. A reason why it would be inappropriate *at present* is that a heavy burden might then be placed on the voluntary advice sector to fill the gap vacated by lawyers before this sector

is sufficiently funded and otherwise ready to assume this role.[9] However it is somewhat disappointing that the *Interim Report* never enters into the debate which has gone on in several countries as to whether professional lawyers should be barred from such tribunals. Reference is made to Professor Baldwin's research to justify a role for lawyers in giving pre-hearing advice to litigants but his reference to the debate just mentioned is not even acknowledged.[10] Failure to do so is indicative of a lack of vision as to how the Group saw the Small Claims Court developing in the future and its overall role in the civil justice system.

The remaining recommendations can be discussed relatively briefly. First of all it is welcome that a real right of appeal against decisions of the Small Claims Court has been recommended. The present appeal to the High Court on a point of law offers virtually nothing[11] so the proposal both to make this to the County Court and on the additional ground of serious irregularity of procedure should be supported. It would be going too far for disputes of this nature to make the right of appeal as extensive as that from the County Court to the High Court but the proposal to require leave from the District Judge could be problematic. Few would take exception to the suggestion that they had made an error of law but serious irregularity of procedure is another matter. It would be better if leave had to be sought from a County Court judge. In relation to fees the Group was correct to challenge the apparent lack of proportionality between the fees charged to litigants and the amount of money involved, both in relation to fees charged for litigating a claim and for the enforcement of an award. As far as enforcement is concerned current fees for small judgments are startlingly out of line with the recommendations of the Anderson Committee whose work laid the foundations of the Northern Ireland enforcement of judgments system.[12] In fact enforcement of judgments generally is a subject neglected by the entire civil justice review project, as much by the Group's terms of reference as anything else. It is long past the time when the many recommendations of the Hunter Committee for the improvement of this system were implemented.[13]

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[9] Two recent publications bear testimony to the very fragmented funding arrangements which the voluntary sector is subject to. See *The Community Legal Service* (Lord Chancellor's Department consultation paper, May 1999); L. Lundy and S.R. Glenn, *Advice Services in Northern Ireland* (report for the Lord Chancellor's Legal Aid Advisory Committee for Northern Ireland, June 1999).

[10] See J. Baldwin, *Monitoring the Rise of the Small Claims Limit: Litigants' Experiences of Different Forms of Adjudication* (Lord Chancellor's Department Research Series no. 1/97) at p 76 where the author states - "[t]his question is the subject of a vigorous debate that continues to preoccupy commentators in other jurisdictions, some of whom argue that legal representation causes needless expense to litigants, that it changes the informal character of proceedings, and that it favours the wealthy who are usually well placed to take care of themselves. It is surely time the same question was raised here too."

[11] See D.S. Greer, "Challenging a Small Claims Award" (1987) 30 *NILQ* 79.

[12] See *Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts of Northern Ireland* (Belfast, HMSO, 1966) para 53 where an enforcement fee exceeding 5% of the amount recoverable was only recommended for judgments in the £20-50 bracket. Contrast the current position where enforcement fees do not get below 10% until well into the £3,000-10,000 bracket and do not fall below 5% until £15,000 is reached.

[13] See *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (Belfast, HMSO, 1987).

THE COUNTY COURT

Measured against the triple cocktail of cost, complexity and delay the County Court in Northern Ireland does not present serious problems. Costs are controlled by the fixed scale costs in the County Court Rules (Northern Ireland), these being much lower as well as more predictable than the billing by the hour which has caused so many problems in England and Wales. The civil bill procedure followed in the County Courts in this jurisdiction has been remarkably successful in keeping complexity away from these courts.[14] And the recent innovation of the Certificate of Readiness, under which plaintiffs must be ready to set down a case for trial within six months of filing of a notice of intention to defend, seems to have accomplished much of what a system of judicial case management would be expected to achieve.

None of this means that there is no room for improvement. In particular it is clear that the Certificate of Readiness is not achieving all that it could because delays in the Legal Aid Department have caused many cases not to be ready for trial within six months of the notice of intention to defend. It is also tolerably clear that many cases which settle at the door of the court are listed for hearing quite unnecessarily in the sense that they could have been settled without listing had the parties and their advisers put their minds to it. But the system is clearly achieving enough, and could achieve more without change, to require very good reasons to be advanced to justify significant reform. The Civil Justice Reform Group were correct in their contention that Northern Ireland does not need a Woolf style fast-track because its County Court system is working very much like a fast-track already.

In consequence the Group recommended that the central features of the County Court system in Northern Ireland (fixed costs, civil bill procedure, Certificate of Readiness) be preserved. Some proposals for reform were made but these were essentially modest and conservative. First it was recommended that the upper limit on the monetary jurisdiction of the County Court remain at £15,000, thus synchronising with Lord Woolf's fast-track/multi-track boundary. Within this limit it was proposed that the District Judge's civil bill jurisdiction be raised from £3,000 to £5,000 and that the exceptions contained in Order 15, Rule 25(1) of the County Court Rules be abolished.[15] There should be a more extensive power to remove cases from the County Court to the High Court. This should be upon the motion of the judge as well as the successful application of a party and should be on the grounds, not just of value, but also for reasons of exceptional importance, complexity or public policy. With regard to remittals from the High Court to the County Court the Group was of the view that this should be easier but came to no fixed conclusion as to precise grounds. Fixed times for hearings were considered as a means of ensuring that cases did not have to be adjourned because too many listed cases were contested but this was rejected on grounds of practicality. Finally with respect to appeals the Group recommended that the right to apply for a judicial review be abolished in all cases where there is a right of appeal against a decision of a County Court and that the time limit for all appeals should be 21 days from the decision. However the Group was undecided about that unique feature of the Northern Ireland civil justice

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[14] On the history and development of the civil bill see D.S. Greer, "The Development of Civil Bill Procedure in Ireland" in J.F. McEldowney and P. O'Higgins (eds), *The Common Law Tradition: Essays in Irish Legal History* (1990) pp 27-59.

[15] These are the same as for the Small Claims Court. See n 5 above.

system, the appeal by way of complete rehearing from the County Court to the High Court.

The monetary limits on the jurisdiction of the County Court and the District Judge's civil bill list are logically the first of these proposals to consider. So much more successful is the County Court than the High Court in processing cases quickly that it must have been tempting to recommend an extension of the County Court's upper limit beyond £15,000. However figures quoted in the *Interim Report* showing an already dramatic rise in the number of civil bills listed in the County Court and corresponding fall in the number of cases set down for trial in the High Court suggest that the distribution of business between these courts is reasonably sensible,[16] unless one takes the position that the High Court should generally stop handling ordinary Queen's Bench work. Raising the monetary limit of the District Judge's civil bill list is more problematic. While this might make the career of a District Judge more interesting and thus aid recruitment to a bench from which County Court judges might be recruited in future, it was somewhat disturbing that the *Interim Report* presented no figures or analysis of any impact this increase might have on the volume of business handled by District Judges. They will hardly lose much if the monetary limit of the Small Claims Court is increased as this just requires the same persons to determine the same disputes wearing a different hat. But a £3,000 to £5,000 jump in the civil bill list might put considerable pressure on lists in the District Judges' courts and on the District Judges themselves. When the sensible proposal to abolish the excepted categories of proceedings is added it should become reasonably clear that this is a proposal needing further thought.

Removal of proceedings from County Court to High Court and remittal from High Court to County Court raise very difficult issues. The easiest one is whether the County Court should have the power proposed to remove cases to the High Court on grounds of importance, complexity or public policy. It seems reasonably clear that this would be a worthwhile power with which to invest the County Court. Removal or remittal on grounds of value alone requires deeper reflection. The author is in possession of anecdotal information to the effect that County Court decrees for sums exceeding £10,000 are relatively rare. This, allied to the *Interim Report's* information that approximately 40% of High Court settlements are within the County Court range, strongly suggests that where a case appears to be worth a five figure sum proceedings are almost invariably issued in the High Court to avoid being trapped by the £15,000 cap. If, as the author believes, it is worth utilising the County Court rather more whilst preserving the £15,000 symmetry with the Woolf fast-track, the objective should be to remove the penalty for issuing in the lower court. The penalty can be avoided at present by seeking removal to the High Court but that involves losing the speed and informality of County Court proceedings. Hence a way forward might lie in only permitting removal where a case was obviously worth more than £15,000 and providing further that an application to remove would permit the County Court judge to award more than £15,000 and costs on the High Court scale if the case were genuinely of High Court value. To reinforce this move it should further be provided that cases can be remitted from the High Court to the County Court where there is any reasonable prospect that the case could be worth less than £15,000, again with the proviso that the County

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[16] At para 2.21 of the *Interim Report* it is stated that the number of civil bills and ejectments in the County Court has risen from 5,311 in 1992 to 11,094 in 1997, while the number of cases set down for trial in the High Court has declined from 5,610 to 1,749 in the same period.

Court can award what it thinks the case is worth with High Court costs if appropriate. To some extent these ideas may undermine the £15,000 boundary between the County Court and the High Court but this boundary should be our slave and not our master. It can work flexibly as a means of distributing business between the two courts without the need for a procedural judge to allocate proceedings between courts based on a range of factors, case value being only one of them.

One of the unsatisfactory features of County Court litigation is the frequency with which cases settle at the door of the court when they really should have been settled long before. Every practitioner will be familiar with court lists which occasionally collapse completely or almost collapse, leaving the judge with unanticipated time on his hands which might have been used eroding a backlog of other cases. It might be very good for barristers who earn brief fees on cases where their services might not have been needed but it causes delay for clients even if it is on nothing like the English scale. Another problem which this causes is that court lists are made very long to ensure that judges have something to do even when a lot of cases do settle. Unfortunately this may mean that when very few cases settle at the court door, others have to be adjourned to another day or the parties settle unwillingly to avoid the inconvenience of having to come back to court. Set times for hearings were rightly rejected because they would only make this problem worse. Fewer cases would be listed per day and collapsed lists would cause further delays in the system. Probably the only way of tackling this problem would be through a system of judicial case management which might succeed in concentrating parties' minds earlier than the day of the hearing but there are other problems with case management which will be discussed below in connection with the High Court. Overall it is clear that the County Court is working reasonably successfully without case management and a system which is not broken does not need to be fixed.

With regard to appeals it seems sensible to dispense with judicial review as an unnecessary duplication where a right of appeal exists. It also makes sense to standardise time limits for appeals at 21 days for both rehearings and cases stated for the opinion of the Court of Appeal. The most difficult issue here is whether to preserve the existing right of appeal by way of complete rehearing to the High Court. This right has existed ever since the establishment of the Supreme Court of Judicature in Ireland in 1877 but has no parallel in England and Wales where appeals from the County Court lie to the Court of Appeal and are essentially confined to issues of law. The author would prefer that the current appellate process remain in place. It provides a valuable safeguard whilst preserving the essential strengths of our County Court system, namely speed and informality. If there were only an English appellate process, County Court judges might have to take more copious notes of evidence, stenographers and tape recording equipment might be needed to prepare transcripts of proceedings, and the whole process would probably be slowed down and rendered more expensive. The *Interim Report's* figures on the number of such appeals set down for trial between 1993 and 1997 ranges from under 3% to more than 10% of cases entered for hearing before the County Courts in any year, with the success rate of appeals running at about 60%.[17] The author considers that these figures support the view that County Courts are getting it right first time often enough that this right of appeal should be no cause for concern.

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[17] Interim Report, para 8.70.

THE HIGH COURT

It is quite clear that the Northern Ireland High Court has not been troubled by problems of cost, complexity and delay to anything like the same extent as the equivalent institution in England and Wales. But problems do abound and a reading of the *Interim Report* clearly reveals that the Civil Justice Reform Group considered that the High Court was not functioning anything like as well as the Small Claims Court or the County Court.

Complexity is the easiest problem to deal with. Complex litigation is fairly rare in Northern Ireland and the procedure for handling ordinary cases, although it possesses features like pleadings and discovery which are capable of causing complexity, usually operates in a relatively informal manner. Apart from the additional paperwork, running a High Court personal injury case is not markedly more difficult than a civil bill. Chancery actions and cases in the Commercial List are more complex by nature but there are insufficient of these to cause any large scale problem and the case management systems in place for these actions seem to be working reasonably well.

Delay is a more serious problem. Although not as bad as England and Wales it is still routinely taking four years in Northern Ireland to process an ordinary personal injury case. This causes anxiety for individual litigants, deprives them of compensation in the period following the accident when they most need it,[18] and can be exploited by insurance companies to secure settlements favourable to themselves.[19] It may also contribute to litigation proving more expensive than it really needs to be. Anyone familiar with the long corridor in the Royal Courts of Justice knows that every morning a substantial amount of personal injury litigation is resolved after a few minutes haggling between counsel on both sides. This does not just look bad for the reputation of lawyers, the courts, and the law in general, it strongly suggests that much litigation could be resolved far earlier than the "door of the court" if only the parties' legal advisers had put their minds to it. It is difficult to escape the conclusion that a great many cases are set down for trial when they were never likely to be tried in the first place and that in consequence a great deal of preparatory work is unnecessarily done. The precise impact this has on costs is difficult to assess. Taxation proceeds on the basis of hourly rates and the Belfast Solicitors' Association and Comerton scales, in contrast to the County Court scales, provide for additional remuneration when cases are settled at later stages. To the extent that this makes late settlements more expensive it may have more to do with the incentives provided by the remuneration process than the phenomenon of late settlements themselves. The problem of costs will be addressed further below.

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[18] See B. Bryant, R. Mayou and S. Lloyd-Bostock, "Compensation Claims following Road Accidents: a six-year follow-up study" (1997) 37 *Med. Sc. Law* 326.

[19] As Professor Genn found, offers were often delayed until the last minute when the defendant would offer to settle for a sum both substantial from the plaintiff's point of view and also at substantial discount on full value. See H. Genn, *Hard Bargaining: Out of Court Settlement in Personal Injury Actions* (Oxford, Clarendon Press, 1988); H. Genn, "Access to Just Settlements: The Case of Medical Negligence" in A.A.S. Zuckerman & R. Cranston, *Reform of Civil Procedure* (Oxford, Clarendon Press, 1995) p393.

The Woolf solution to delay was judicial case management. Hearings before procedural judges would establish timetables for taking the necessary steps to prepare cases for trial, would prevent unnecessary interlocutory proceedings and other kinds of procedural skirmishing, and might concentrate the minds of parties and their advisers at an earlier stage so that earlier settlement might be promoted. This system was rejected for Northern Ireland on two quite sensible grounds. First, it was pointed out that most High Court cases settled anyway so that case management would only "front load" and increase costs unnecessarily. Secondly, additional expense would be incurred in terms of judicial training and additional court staff.[20] Instead of judicial case management the Group proposed that a modified version of the County Court's Certificate of Readiness be introduced, under which the parties would have to be ready to set down a case for trial within nine months of the filing of a defence. This can be supported on the grounds that it would be cheaper than judicial case management, it has worked well enough in the County Court to deserve a chance in the High Court, and that independent studies show that one of the most effective ways of ensuring quick case processing is to set an early date for trial and stick to it.[21] However if the professions cannot make this system work they may well find that judicial case management is something they have to learn to live with. It does have potential to deliver earlier settlement by concentrating the minds of the parties before they reach the door of the court, the benefits of this arguably outweighing any additional costs.

With regard to costs the current position is broadly that High Court costs can be assessed in two different ways. The usual way is in accordance with informal scale costs set by the Belfast Solicitors' Association for solicitors, and for barristers there is a separate scale known as the Comerton scale. Like the County Court scales, these scales provide for professional fees varying with the amount recovered or defended, although there are important differences from the County Court scales which will be discussed below. For pleadings and interlocutory proceedings fixed fees are laid down by the Taxing Master. The other way is to apply to the Taxing Master for taxation of costs, in which case costs are assessed on hourly rates as opposed to fixed scales.[22]

Fixed scale costs are one of the strengths of the Northern Ireland civil justice system. They make the cost of litigation more predictable than it has been in England and Wales, and almost invariably make it less expensive too. They operate on a "swings and roundabouts"[23] principle, that is for some cases lawyers will be underpaid for a lot of work but for others they can earn generous scale fees without excessive effort. In principle the Group's proposal to give the Belfast Solicitors' Association and Comerton scales statutory force like the County Court scales is to be

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[20] See C. Menkel-Meadow, "Will Managed Care give us Access to Justice?", in R. Smith (ed) *Achieving Civil Justice: Appropriate Dispute Resolution for the 1990s* (1996, Legal Action Group, London) pp 94-100.

[21] *Ibid*. See also G. Hoon, "Modernising Civil Justice" (1998) *Nottingham Law Journal* 10 at p15, where research carried out by the RAND Corporation is referred to.

[22] See *Donaldson* v *Eastern Health and Social Services Board* [1997] NI 232; E. McMenamin, "To Tax or Not to Tax? That is the Question!" *The Writ*, Issue No. 90 (April 1998).

[23] The County Court scale costs were so described by Carswell LCJ in *In the matter of C & H Jefferson, a firm and In the matter of the Solicitors (Northern Ireland) Order 1976* (judgment delivered 30th October 1998).

welcomed as enhancing the drive towards controlling costs. However there are curious features of both scales which are worthy of comment.

The Belfast Solicitors' Association scale provides for scale costs for settlement after issue of a writ, which are approximately 60% of those for settlement after entry in the warned list, and a sliding scale for settlement at various stages in between. The County Court scales are tied to the amount in dispute and are generally unaffected by the stage of proceedings at which a case settles. What is questionable about the sliding scale is that it may offer solicitors an incentive to progress cases on to a later stage to earn a higher fee, when this may not be in the client's best interests.[24] Like taxation, based as it is on hourly rates, it also represents a detraction from the principle of payment by results as opposed to payment for work done, whether or not any benefit for the client is gained. Other professionals, notably insolvency practitioners, are now having to get used to justifying their remuneration in terms of results as opposed to work done or billable hours.[25]

The Comerton scale does not possess these features to anything like the same extent. Thus fees are only 10% higher if the case is listed for hearing than if counsel is instructed in early negotiations, and there is also only a very modest difference in scale fees where liability is admitted as compared with when it is denied. The question raised by this scale is why barristers are instructed to do work which does not obviously call for the services of an advocate. Does it follow from the specific provision made for early negotiations and quantum only cases that barristers are "carrying" solicitors through stages of litigation which one might expect solicitors to be able to handle themselves? Is it possible that the large number of very small firms in Northern Ireland means that some litigation practitioners do not have the expertise or the confidence to take cases through to settlement themselves? Is this having an adverse impact upon the costs of litigation by employing two professionals when one might do? Or is this keeping litigation costs down by enabling solicitors and barristers to make easy money out of "settlers" to compensate for "working their socks off" in those rare cases which go to trial? Does this scale promote settlement[26] and thereby keep litigation costs lower in this jurisdiction than they have been in England and Wales?

THE CONDUCT OF LITIGATION

This section covers a variety of topics dealing with the conduct of litigation before and after proceedings are issued. These topics relate both to the County Court and the High Court but are of much greater importance in connection with the latter.

(a) Pre-action protocols

The Woolf reforms in England and Wales have led to the introduction of a template, known as pre-action protocols, for the conduct of negotiations prior to the issue of proceedings. They cover matters such as the exchange of information between the parties, gathering evidence through discovery

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[24] On this and costs' rules generally see G. Bevan, P. Fenn and N. Rickman, *Contracting for Legal Services with Different Cost Rules* (LCD Research Series No. 3/98, March 1998).

[25] See the *Report of the Working Party on the Remuneration of Office-holders and certain related matters*, chaired by Mr Justice Ferris (Lord Chancellor's Department, July 1998).

[26] For the case against settlement see O.M. Fiss, "Against Settlement" (1984) 93 *Yale Law Journal* 1073.

without issuing proceedings, and the engagement of expert witnesses. They can be very detailed and prescriptive and are clearly designed to feed into the system of judicial case management. However there is no reason to suppose that they are unworkable without judicial case management and, subject to the cautionary notes sounded below, might be worth trying in Northern Ireland as a way of promoting earlier settlement. Although the County Court and the High Court in Northern Ireland have been able to process civil business faster than in England and Wales, the County Court much faster, there are still a great many cases where proceedings are issued and hearing dates arranged unnecessarily. Pre-action protocols, although they could be expensive and could front-load costs in cases which would settle without them, might be able to prevent the unnecessary costs of issuing proceedings and listing for hearing in those very same cases, as well as produce an earlier resolution. They might also give the parties a healthy steer towards Alternative Dispute Resolution, about which more will be said below, before attitudes harden too much for this to have any real chance of success.

(b) Pleadings

The function of pleadings is to set out each party's case in summary form, so as to crystallise issues for trial and inform the conduct of pre-trial negotiations. They have never been a feature of County Court litigation in Northern Ireland and were rightly rejected for that forum on the basis that they could add nothing to a system functioning very well without them. They have been used in High Court litigation, and in this jurisdiction the former Minister of State's description of English pleadings as "some of the most uninformative documents that human genius is capable of producing"[27] applies with no less force. It is difficult to disagree with the Group's proposal that pleadings be drafted in conformity with the principles undergirding the Civil Procedure Rules 1998, but in the absence of a procedural judge to impose discipline upon the parties it is very difficult to see how this requirement could be enforced. The proposal to replace the writ and statement of claim for plaintiffs, and the acknowledgement of service and defence for defendants, with a claim form and a defence, can be supported on the basis that if we are stuck with uninformative documents a reduction in their number is preferable. However too much should not be made of pleadings. They may not be doing much good but they are not doing much harm either. They do not prevent trials from running satisfactorily and are not the prime cause of late settlement.

(c) Witness statements

Except for the more complex proceedings in the Chancery Division and the Commercial List, witness statements are not used and exchanged in civil cases in Northern Ireland. This may surprise English readers but it is a product of the relative lack of complexity of civil litigation in this jurisdiction. The experience with witness statements in England and Wales renders it inadvisable, as the Group acknowledged, to introduce witness statements on any larger scale to Northern Ireland. What has happened in England is that a lot of time and effort has gone into drafting witness statements to make them foolproof support for the party on whose behalf they are tendered. So whatever is gained in terms of clarifying the issues is lost in terms of expense. In fact it is questionable whether witness statements do make a major contribution to clarifying issues

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[27] G. Hoon, "Modernising Civil Justice" (1998) *Nottingham Law Journal* 10 at p11.

because the effort put into getting them "right" renders them less like the statements of witnesses and more like elaborate pleadings. It is also doubtful whether they shorten trials by reducing examination in chief because their prior exchange enables counsel to prepare protracted cross-examination. Witness statements have no contribution to make to solving the problem of late settlement.

A related issue is the exchange of witness names. Here the recommendation of the Civil Justice Reform Group, that provision for this should not be made, was a little perplexing. The Group believed that this would lead to the intimidation of witnesses, but disclosure of witness names by the prosecution in criminal cases is mandatory, and the problem of intimidation is arguably more serious there.

(d) Discovery

In England and Wales everybody seems to agree that there is too much discovery. Either the plaintiff applies for more than it can reasonably use or the defendant throws in everything including the kitchen sink in an attempt to overwhelm the plaintiff or answer any claim that it has not come clean. Whether this problem is replicated in Northern Ireland to any extent, there is nothing in the *Interim Report* capable of solving it. For the High Court there is the proposal to adopt the principles of discovery enshrined in the Civil Procedure Rules 1998, but these are largely a restatement of traditional principles which obviously did nothing to prevent abuse. What might prevent abuse in England and Wales is judicial case management but this is not going to apply in Northern Ireland. For the County Court the principles applying in the High Court will also apply and there are a series of detailed procedural steps proposed as well. It is not immediately obvious why these are necessary, the best explanation for them probably being that a prominent member of the Group (the learned Recorder of Belfast) thought they were desirable.

(e) Settlement offers

In a system designed to promote earlier settlement it is clearly important that a party should be able to make a settlement offer which will cost the other party dearly if it rejects the offer unreasonably. At present the only effective way of doing this is through a payment into court, which is limited in two respects. First, it is limited to paying money; and secondly, only a defendant can take advantage of it. There is the alternative of making a "Calderbank"[28] offer to settle "without prejudice save as to costs" but this really only applies where payments into court cannot be made.[29] The Group's proposal to allow any party to make a settlement offer and to reinforce this with costs or interest penalties where the party rejecting the offer does worse at trial is therefore to be welcomed. It makes sense to allow these offers to be made before, as well as after, the issue of proceedings, and it is also right that they should not be made after a case has been set down for trial. Making such offers at that time would only encourage brinkmanship, which is one of the features of the current system which reform needs to stamp out.[30] Since the objective of these proposals is to prevent parties unreasonably prolonging litigation, it might be better if a further provision were made that a party subject to a costs or interest penalty be permitted to apply for relief on the ground that it did not unreasonably refuse the offer of settlement. If this were provided for,

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[28] See *Calderbank* v *Calderbank* [1975] 3 All ER 333.
[29] See *Cutts* v *Head* [1984] Ch 290.
[30] See the Genn research referred to at n 19 above.

it almost goes without saying that the excuse would have to be a very good one.

(f) Summary judgment

In a High Court case a plaintiff can apply for summary judgment under Rules of the Supreme Court (NI) 1980 Order 14 if the defendant has no viable defence to the plaintiff's claim. The defendant has a much more restricted right to apply under Order 18 Rule 19 to strike out the plaintiff's statement of claim on the ground that it discloses no reasonable cause of action. In the County Court there is no real summary judgment procedure at all. A summary civil bill may be issued in respect of a claim for a liquidated amount and an ordinary civil bill, to which the defendant enters no defence, may proceed as an undefended case before the District Judge on a separate hearing date from defended civil bills. The proposal to adopt the rule in the Civil Procedure Rules 1998, that summary judgment can be granted in either the High Court or the County Court against any party which has no realistic chance of winning, is clearly welcome although the *Interim Report* does not make clear why this proposal is not simply to replace all existing rules having similar effect.

(g) Expert witnesses

Broadly speaking, expert witnesses give evidence either on matters of quantum or on issues of liability. Some give evidence on both but this is a relatively rare occurrence.

Those experts whose evidence relates mainly to quantum are usually medical experts, giving reports and testimony about the extent and seriousness of a plaintiff's personal injuries. Only in medical negligence cases would expert medical evidence often relate to issues of liability. In the County Courts in Northern Ireland it is rare for oral evidence to be given by medical practitioners. Before the County Court's monetary limit was raised from £5,000 the practice was for medical reports to be agreed and handed to the judge for perusal at the commencement of the hearing. Often the defendant did not even instruct a medical expert of its own, reserving any argument about the plaintiff's injuries to comment upon the plaintiff's medical reports. After the increase in the monetary limit of the County Court to £15,000, defendants started instructing medical experts more frequently and oral evidence became more common. However it was quickly realised that the latter was simply impracticable because of the understandable unwillingness of medical practitioners to leave their surgeries to attend a County Court. The former practice of agreed reports and comment has been restored. In the High Court the practice has usually been for medical experts to attend court and this has caused considerable delay in listing cases because a day has to be found which suits the experts as well as the parties and their advisers. Given the frequency with which cases settle close to the hearing or at the door of the court, this often turns out to be unnecessary delay. Hence the Group was correct to recommend that expert medical evidence relating to quantum should normally come in the form of written reports, and that oral evidence should only be allowed with the leave of the court or the consent of all parties. For those cases where oral evidence is needed the proposal for a telephone conferencing system should be developed as a possible means of reducing delay and cutting costs.

Experts whose evidence goes to liability, for example consulting engineers, present more difficult issues. The Group clearly had the perception that some experts were "hired guns" for either plaintiffs or

defendants and there is a reference to courts being faced with "clearly biased professional witnesses".[31] Whatever the extent of this problem, expert witnesses are sufficiently vital to establishing liability that the potential for abuse undoubtedly exists. It would neither be correct in principle nor practicable for there to be a court appointed expert witness for individual cases. Such persons could become too much like an arm of the judicial authority, effectively deciding some cases themselves, and would lead to parties appointing their own experts to provide material to challenge adverse findings. The better ways forward are, as the Group proposed, for experts to present their evidence in the form of written reports and only to be allowed to give oral evidence with the leave of the court or the agreement of all parties. Another proposal with the potential to curb abuse is the one encouraging expert witnesses to meet and discuss points of difference with a view to presenting a joint report. Whether or not they can achieve this, reports must be shared with other parties. These proposals are probably as far as one can go to control the use of expert witnesses without resorting to judicial case management. In the absence of the latter all the court could do would be to impose costs orders against, for example, the use of unnecessary expert witnesses, and the effectiveness of this step may well be blunted by a party's ability to pay and the need to ensure that unfair hindsight judgments were not made.

CIVIL JUSTICE POLICY

It is proposed to examine two subjects in this section – how Alternative Dispute Resolution (ADR) might be developed as a suitable alternative to conventional litigation, and the development of civil justice policy through the Civil Procedure Rules Committee and the Civil Justice Council.

(a) Alternative Dispute Resolution

There is virtually no ADR infrastructure in Northern Ireland. Mediation is hardly used in family cases, the Commercial List offers no stay or adjournment for ADR treatment and no early neutral evaluation, and there is nothing like the mediation scheme for personal injury cases that operated in the Central London County Court from May 1996 until March 1998.[32] The only formal alternative to trial is the procedure operating in the Chancery Division whereby a case can be adjourned for four weeks to give the parties an opportunity to explore settlement themselves. The vast majority of civil cases in Northern Ireland settle out of court but they settle through a process of "litigotiation", in which legal proceedings are issued and the parties then bargain in the shadow of the law, often resolving the dispute a short or very short time before the case is due to be heard.

The Civil Justice Reform Group suggested that the legal profession should embrace ADR much more whole heartedly than it does at present, and it did make a number of more concrete proposals which are useful as far as they go. Thus the Group proposed that pilot mediation schemes should be established in medical negligence and commercial cases. Judges would have power to order a stay of proceedings to give the parties an opportunity to consider ADR but the reference would only occur if all parties consented to it. Long term study of ADR would be a matter for the Civil Justice Council which will be discussed below. These proposals, useful though they undoubtedly are, reveal a very narrow vision of what ADR is about. Essentially the Group saw ADR as another form of "litigotiation", this time with the intervention of a third party. The Group

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[31] *Interim Report*, paragraph 10.63.

[32] On this see H. Genn, *The Central London County Court Pilot Mediation Scheme: Evaluation Report* (LCD Research Services No. 5/98).

did not conceive of ADR as being something to resort to *before* legal proceedings are issued, as an attempt to resolve disputes without the pretence that the case is going to be tried. If ADR is going to make a significant contribution to the earlier and generally more satisfactory resolution of disputes, the period prior to the issue of proceedings is the one where a difference can be made. After the issue of proceedings is often too late; parties' attitudes have hardened by then and do not soften until the hearing is imminent. This is the challenge for ADR in the future and this is the kind of development which the Civil Justice Council should try to stimulate.

Of course ADR may not succeed in producing an earlier settlement and where a settlement is produced there would be no way of knowing whether one would not have been produced anyway. In either case further costs might be incurred and the argument could be made that this is of no benefit to a system where the vast majority of cases do not require a judicial determination. However this would be a short sighted view of the future of civil justice and it is not one which the Group was adopting. The bottom line is that consumers of dispute resolution services deserve a choice of methods of obtaining justice. ADR might be more expensive, especially if it does not succeed, but where it does succeed it will probably be quicker and should be considerably pleasanter than the present adversarial process. It should be encouraged by those who have power to encourage its development, and if clients do not buy into it, it can be abandoned on the basis that "litigotiation" is what people prefer.

(b) The Development of Civil Justice Policy

Looking to the future the Group recommended the formation of two committees, similar to those now established in England and Wales, which would have responsibility for developing civil justice policy. A Civil Procedure Rules Committee would have responsibility for drafting and maintaining rules of civil procedure to be used in the Northern Ireland courts. Its membership might be composed of eight judicial officers, four to six practitioners, and two or three others who could be members of the Northern Ireland Court Service or others with experience of the workings of the civil justice system. The equivalent committee in England and Wales has a membership composed of six judicial officers, six practitioners (defined so as to include persons like legal civil servants), one person with knowledge and experience of consumer affairs, and another drawn from the lay advice sector. The other committee to be established is the Civil Justice Council. Its responsibilities would include taking forward the proposals of the Civil Justice Reform Group, keeping the civil justice system under review, advising the Lord Chancellor upon the development of the civil justice system, and commissioning research into matters affecting the system. Given the absence of much research into the operation of the civil justice system in Northern Ireland this last role would be of great importance.[33] The Council's membership would consist of six judicial officers, four practising lawyers, two members of the Northern Ireland Court Service, and four to six other persons from persons with knowledge of consumer affairs, the advice sector, legal academia, or litigant representation. The equivalent English body has very similar responsibilities and similar membership, although persons with

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[33] On the value of research into civil justice policy see R. Cranston, "The Relational Study of Law", in A.A.S. Zuckerman & R. Cranston (ed.), *Reform of Civil Procedure - Essays on "Access to Justice"* (Clarendon Press, Oxford, 1995) pp 31-59.

experience of consumer affairs, the lay advice sector and litigant representation are listed as separate categories.

One of the first tasks of the new committees would be to consider whether Northern Ireland needs to retain separate rules of procedure for the County Court and the High Court or whether a unified body of Civil Procedure Rules would be desirable. If the civil bill procedure is to be retained, as the Group recommended, a degree of divergence will be inevitable but it would still be possible to have unified rules with some adaptations for the County Court.

Two main criticisms may be made of the Group's proposals with regard to these committees. The first is that they are very lawyer dominated, more so than the equivalent English committees. The Civil Procedure Rules Committee probably should be lawyer dominated because much of its work will be technical but it is not even proposed that there should be any persons who can speak for consumers or litigants. As the Civil Justice Council is concerned with policy matters it should preferably have a 50-50 split in membership between lawyers and non-lawyers. A marked contrast is provided by the proposed Legal Services Commission for Northern Ireland, to take over the operation of the Legal Aid scheme in this jurisdiction. As proposed its membership will be lay dominated, with lawyers not even certain to have any membership at all.[34]

The other criticism to be made of these committees is that the relationship between them is not clearly defined. There is to be some overlap in their membership but the status of each and their responsibilities *vis-à-vis* the other are nowhere stated. The preferred relationship, it is submitted, is for the Civil Justice Council, as the policy making body, to be the senior committee which should have the power to delegate responsibility for implementing proposals to the Civil Procedure Rules Committee. Even though the latter would be the junior committee, it should be able to act on its own initiative with regard to rule changes, especially in relation to technical matters. However in respect of more substantive policy questions it should refer to the Civil Justice Council for a view before proceeding to make new rules itself.

CONCLUSION

The Northern Ireland civil justice system shares some of the problems of the former English system although not to the same degree. The Civil Justice Reform Group's proposals draw on English reforms to some degree but many of the most important tenets of Lord Woolf's report are either rejected or adapted to reconcile them with current Northern Ireland practice. To this extent Woolf is kept from the door rather more than welcomed to cross the threshold.

The Small Claims Court would remain essentially the same as it is now with a relatively modest increase in its upper monetary limit. Neither of the other big features of the English Small Claims Court, personal injury cases and road traffic accidents, are strongly supported. The County Court retains its separate procedure and very much lower monetary limit, and no big push is given towards abolition of the distinctive Irish right of appeal by way of rehearing to the High Court. In the High Court judicial case management is almost completely rejected, the Certificate of Readiness

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[34] See *Public Benefit and the Public Purse – Legal Aid Reform in Northern Ireland* (consultation paper issued by the Northern Ireland Court Service, June 1999).

system proposed being grounded essentially on principles of party autonomy. Witness statements are also rejected and even some of the Woolf reforms which are accepted, such as those relating to pleadings and discovery, are not likely to produce any real change in the absence of case management.

The overall approach taken by the Civil Justice Reform Group is to be welcomed. It consists of examining the Northern Ireland system itself, to ascertain its own strengths and weaknesses, and to prescribe solutions for Northern Ireland based upon an understanding of the problems here. It is very much to be hoped than when reforms to that other pillar of the justice system, the Legal Aid scheme, are undertaken, that they will be guided by the same considerations.

RADICAL PARTICULARISM: A NATURAL LAW OF CONTEXT

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INTRODUCTION

Do judges *discover* the law or do they *create* it? This is an old question, perhaps the oldest in legal thought.[1] In recent years, it has been the subject of intense scrutiny in legal philosophy, particularly as it arises in the complex debate concerning the extent of law's 'objectivity'.[2] For those with a realist[3] disposition (that is: those who wish legal theory to be driven by practical legal questions) there is perhaps some disquiet about permitting the question to be approached exclusively in philosophical terms, with debates about the semantic conditions under which the usage of concepts is warranted replacing analysis of the specific subject matter of substantive law. A more distinctively legal approach to the question is to ask whether we should view case law as revealing a natural order which underlies and structures judicial reasoning, or whether any order we find is merely artifice and convention. The first of these views is commonly associated with natural law perspectives rooted in the doctrines of Aristotle and Aquinas (for example, corrective justice analyses[4] of the law of tort which claim that there is an essential order beneath doctrines such as the non-recoverability of certain forms of economic loss, or principles of compensation). The second view is more variegated and clearly

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[1] It is certainly evident in Greek writings which consider law, such as in the *themis/dike* distinction in the Homeric poems, Aristotle's distinction between that which is naturally just (*to physikon dikaion)* and that which is just only by virtue of enactment (*to nomikon dikaion)*, and in the oft-cited speech of Antigone in Sophocles' play of the same name. It is also taken up very directly in Roman times in the writings of Cicero (*De legibus).* For discussion of these issues see generally J.M. Kelly *A Short History of Western Legal Theory*, (Oxford, OUP, 1992) chaps 1 and 2.

[2] See for example, N. Stavropoulos, *Objectivity in Law*, (Oxford, OUP, 1996), A. Marmor, "Three Concepts of Objectivity", in A. Marmor (ed), *Law and Interpretation* (Oxford, OUP, 1995), A. Marmor, 'An Essay on the Objectivity of Law', in B. Bix (ed) *Analyzing Law*, (Oxford, OUP, 1998), R. Rorty, 'The Banality of Pragmatism and the Poetry of Justice', in Brint and Weaver, eds, *Pragmatism in Law and Society*, (Westview Press, 1991), H. Putnam, 'Are Moral and Legal Values Made or Discovered?' 1 *Legal Theory*, 1995, 5.

[3] I refer here to *legal* realism not the metaphysical variety. Brian Leiter has defended the view that realist jurisprudence should be viewed as being based on philosophical naturalism. While this is not the place for an analysis of Leiter's sophisticated arguments, I suggest that the dominant concern of the legal realists was in fact to point to the *redundancy* of philosophy in law but in any case Leiter's theory relates better to the Scandinavian realists than to those in the U.S., such as Frank and Holmes (see B. Leiter, 'Naturalism and Naturalized Jurisprudence' in Bix, *op cit* n 2.

[4] See for example: J Gordley, 'Tort Law in the Aristotelian Tradition', and R.W. Wright, 'Right, Justice and Tort Law' both in D.G. Owen (ed), *Philosophical Foundations of the Law of Tort*, (Oxford, OUP, 1995).

resonates with critical legal perspectives[5] such as legal feminism and critical race theory which concede very little natural determinacy in law. However, it is appropriate also to include within this second view those writers who combine a belief in law's conventional or 'constructivist' character with a belief that law has a high level of internal, principled consistency akin to 'objectivity'.[6] While some may be happy to use the label 'natural law' in relation to certain writers in this latter camp[7], it shall appear that I take a true position of natural law to be claiming a more substantial sense of objectivity[8], such that law is expressive of conformity to a natural order of events which imposes order on legal reasoning.

According to the philosophers, and not unreasonably, we cannot believe that law is expressive of a deeper, or 'out there'[9] order and, *at the same time*, that it is an artificial construct created by judges. And yet for those who immerse themselves in case law a blend of these perspectives would seem quite near to the truth of the matter. There seems to be a clear order to legal reasoning that is beyond artifice, and independent of convention, such that experienced judges talk about their intuitive sense of what is *demanded* by the facts of a particular case. Part of this demand comes from the legislative and case law context but it is perhaps more accurate to say that it comes from the *situation* or *context* of the adjudication. To explain this demand according to convention or 'shared conviction' (for example, of liberal morality) subtly downgrades our sense that the contexts of adjudication are 'real'[10], that the circumstances of case law exert a strong pull which cannot properly be labelled merely as shared belief about liberal political values, economics or whatever. At the same time it does seem odd to modern sensibilities to talk about a metaphysical realm of objective virtue, essences or dispositions underlying legal reasoning. After all, Aristotle viewed slavery as a natural institution, and Dicey in his *Law of the Constitution* described the case against women's suffrage as "conforming to the nature of things"[11], and this seems to suggest to many that any form of naturalist essentialism is destined to lead to bigotry. As usual therefore, the alternatives offered to lawyers by the philosophers seem to miss our sense of the distinctive character of legal

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[5] It is perhaps a little problematic to characterise *legal realism* in similar terms because leading realists asserted both that legal reasoning is highly artificial and yet potentially determinate, e.g. by reference to notions such as situation sensitivity (see K. Llewellyn, *The Common Law Tradition,* (Little Brown & Co, 1960)).

[6] The most famous of such theorists of course being Dworkin but in a slightly more idiosyncratic way than those adopting the insights of philosophers such as Putnam (see references to Marmor in n 2 above). Dworkin would perhaps deny that one has to make the choice between a constructed and a 'real' form of objectivity, since any notion of 'real' objectivity is a hoax (see his 'Objectivity and Truth: You'd Better Believe It', 25 *Philosophy and Public Affairs* 87 (1996), and see Rorty *op cit* n 2.

[7] See discussion of how to characterise Dworkin in this regard in A.J. Lisska, *Aquinas's Theory of Natural Law,* (Oxford, OUP, 1996), at p34.

[8] See discussion in section four of this article.

[9] See articles referred to in n 2 above.

[10] Brian Tamanaha offers a very good defence of the role of realism in law, on the foundations of Deweyan pragmatism (B. Tamanaha, *Realistic Socio-Legal Theory*, (Oxford, OUP, 1997), and see my critique of his arguments 'Is There a Proper Subject Matter for Socio-Legal Studies?', 18 *Oxford Journal of Legal Studies* 1998, 707.

[11] A.V. Dicey, *The Law of the Constitution*, (London: Macmillan, 8th ed, 1926), Introduction, p lxvi.

reasoning. In particular, we are not permitted a version of natural law thinking which points to a real order beneath judicial decision but which is compatible with the belief that legal reasoning is, in important senses, artificial.[12]

This article seeks to suggest and develop in outline form this version of natural law, based upon a strong form of particularism and a belief in the objectivity of legal situations. Particularism[13] applied to law is the idea that the properties which are relevant to judicial decision in particular instances of adjudication are not generally relevant in adjudication, that is, properties which make a difference in the resolution of a particular case should not be understood to *generally* make a difference in the resolution of cases. While modern particularism advances considerably the legal realist project, it is in the same spirit, and would support statements such as Llewellyn's that "*everything*" said by a judge in a case is to "*be read with primary reference to the particular dispute, the particular question before him*",[14] and of Jerome Frank that "[u]ntil a court has passed on those (that is, a particular set of) facts no law on that subject is yet in existence".[15] Particularism points to the way that in law the very same features of a situation which are a reason for X in one case may be no reason, or indeed a reason against X in another case. By contrast, *generalists* see the law as ordered according to general evaluative considerations, most notably principles, under which the facts of particular adjudications can be *subsumed*.[16] The essential difference between particularists and generalists is that generalists believe that all the factors which may explain why reasons apply differently in different cases could be added in to a general formula which would be able to act as a guide to the determination of disputes. Particularists reject this as being hopelessly non-specific in that there are just too many factors of context to add in for the generalist project to be redeemable. More importantly, particularists claim that an intelligible notion of value does not require any form of generalism: it does not matter that the only explanations of what is an appropriate resolution of a case are limited to *that* particular case. For our purposes it is significant that positions of natural law have always been assumed to be inextricably linked to a discourse of impersonal and generalist moral principle, and thus seen as incompatible with positions linked to the agenda of critical legal theory.

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[12] Such a view might be attractive to those modern critical legal theorists who while stressing the dominance of context over principle still believe that there are more sensitive responses to context (i.e. that some accounts of context are 'way off'), and that there are ways of *failing* to be sensitive to context in law. See discussion in sections three and four of this article.

[13] See J Dancy, *Moral Reasons*, (Oxford, Blackwell, 1993), J Dancy, 'Ethical Particularism and Morally Relevant Properties', *Mind* (1983), Vol. XCII, 530, J Dancy, 'Why There is Really No Such Thing as the Theory of Motivation' Presidential Address, Proceedings of the Aristotelian Society, October 1994. See my attempt to apply Dancy's particularism to law; 'Reason, Cause and Principle in Law: The Normativity of Context', 19 *Oxford Journal of Legal Studies* 1999, 203.

[14] K N Llewellyn, *The Bramble Bush*, (1930, Oceana Edition) p42. Emphasis in the original.

[15] J Frank, *Law and The Modern Mind*, (New York: Brentano, 1930), at p46. Words in parentheses are mine.

[16] There are distinct types of generalist argument, broadly divided into the *prima facie* and absolutist forms. See J Dancy, *Moral Reasons*, *op cit* n 13, at p180.

The essay is in four sections. In the first, I argue that a position of natural law does not have to be tied to generalism. I put forward a particularist account of law as the basis for a modern form of natural law thinking. The second section examines in more detail the application of particularism to legal theory, and some of the objections. In the third section I discuss the role that the concept of 'intuition' might play in this model. Broadly, I wish to defend a greater role for intuition than has been fashionable in legal theory for many years. Lastly, I discuss the sense in which particular intuitions about law can be objective: I claim that such intuitions *are* objective since they derive from the *real and inevitable* demands of context in particular cases. A subsidiary aim of the analysis, and one which is not developed here, is tentatively to offer radical particularism as a theoretical foundation for modern critical legal theory (given its acknowledgement of the situatedness of legal problems in the middle of local human concerns), and moreover to present this as a better foundation for critical legal theory than the currently fashionable deconstructive or sociological perspectives.[17]

PARTICULARISM AND NATURAL LAW

I want to say that the law is discovered not created, that it has order, but that it is also a response to the complex particularities of life which are thrown up in case law. Traditional[18] natural lawyers might argue that there is nothing new in this, since there has always been room for the particularities of life to be accommodated within a traditional natural law approach. They might argue, in Aristotelian terms, for a set of dispositional properties embedded in human nature which tend towards the perfection of their end, and which contribute to 'proper' human flourishing. So, just as an acorn thankfully cannot grow up to be a management consultant but must become an oak tree, we too should identify those dispositions that contribute to our 'proper' flourishing as human beings. Legal reasoning can then play its role by acting as one means to the practical encouragement of virtues, such as wisdom and justice, which conduce or incline to the maturation of the dispositions. This account leaves room for a high level of discretion, or determination,[19] of the requirements of the virtues in individual cases (we recall here Aquinas' analogy of the housebuilder who dictates the structure of the house but not the placement of individual features such as doors and windows). It is of course doubtful that, even could we agree on them, the 'virtues' which are said to be conducive to proper human development would speak to many modern lifestyles. A more fundamental problem however is the old chestnut of the so called 'naturalistic fallacy', since it appears that evaluative judgements, about what *ought* to be done,[20] or what is the virtuous aspect of a disposition, are being made on the basis of facts about human nature, about what *is* a natural disposition.

Aware of this difficulty, contemporary natural lawyers such as Finnis have sought to retain Aristotelian notions *and* to accept the force of the naturalistic fallacy by locating the basic goods of human striving

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[17] Particularism is presented here as an alternative basis to both the Derridean and Habermasian bases of modern critical legal theory. For a good, recent, discussion of these rival bases for critical legal theory see M Rosenfeld, *Just Interpretations: Law Between Ethics and Politics*, (California, University of California Press, 1999).

[18] See discussion in Lisska, *op cit* n 7 at pp 198-9.

[19] This was the term used by Aquinas: see Question 91, Article 3, of Aquinas' *Summa Theologiae*, translated in part in Lisska, *op cit* n 7 at p 260.

[20] See Jabbari *op cit* n 13, at pp 215-225.

somewhere other than in the realm of human nature. Instead the natural law originates in speculative knowledge of an underived and self-evident realm concerning those things which are goods for human beings.[21] The knowledge of these basic human goods is not derived from facts about human nature but is regarded by Finnis as self-evident, and it is an exercise in deduction to obtain moral precepts from the basic goods. This is not to be seen as problematic, since it would be pointless to deny that the proposition "killing is wrong" flows directly from the self-evidence of life as a basic component of human flourishing. Yet arguably Finnis' solution pays a price in terms of the concreteness, or particularity, of natural law. The problem lies in understanding the relation between the precepts of natural law and practice,[22] since, as I shall argue below, Finnis' account weakens the ability of natural law precepts to be understood as guides to action in the *particular* contexts of the law's regulation of human affairs. In this respect the traditional natural law theory of Aquinas, which links natural law to human dispositions, offers a more convincing account of the process of *practical reasoning*, that is, from a concrete human disposition to the particularities of life. [23] It is, in simple terms, a more *grounded* and particularistic account of the role of natural law than is provided in Finnis' theory. Yet even traditional natural law theory suffers from excessive generalism in that it stresses the dominance of the general, for example, 'proper' human dispositions, primary precepts of natural law and so forth, over the particular characteristics of context. The problem for all variants of existing natural law, traditional or modern, is their identification of the natural law with a fairly narrow set of *general* evaluative considerations, within which the particularities of life may be subsumed (or alternatively treated as a 'corruption' of the natural law).

To elaborate on these points, consider more closely Finnis' depiction of law as a means of rationally pursuing basic human goods.[24] Does Finnis truly demonstrate how underived basic goods, and the abstract precepts deduced from them, can be understood to have a role in guiding the resolution of concrete, particular, disputes? While we may concede Finnis' account of the derivation of the basic precepts of natural law from the basic goods, why should we concede that the precepts have sufficient content to determine the resolution of particular disputes? Indeed, leading scholars on Aquinas, such as Lisska, have commented that Finnis could be argued to have neglected the traditional natural law preoccupation with *practical reasoning* since his account is more concerned with forms of self-evident knowledge, pieces of knowing than of doing.[25] As Lisska

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[21] See J. Finnis, *Natural Law and Natural Rights* (Oxford, OUP, 1980), chaps 2,3 and 4.

[22] See the excellent analysis in Lisska, *op cit* n 7, chap 6. Lisska discusses the arguments of Veatch that Finnis' approach to natural law lacks a proper ontological foundation.

[23] See Lisska, *op cit* n 7, on how Aquinas viewed the application of principles to situations (pp 253-54). Lisska seems to suggest that Aquinas is engaging in a form of radical particularism but this seems hard to square with the implicit *governing* role for precepts which we find in Aquinas, and which is clearly evident in Finnis' treatment of Aquinas' notion of determination (see J.M Finnis, *Natural Law and Natural Rights* (OUP, 1980), pp 284-286). I reach no conclusion on this since if Lisska is correct then there is a clear bridge between the argument in this article and the traditional natural law of Aquinas and Aristotle. See further discussion of this in n 42 below.

[24] See Finnis *op cit* n 21. Refer also to his use of Aquinas' notion of *determinatio*, at pp 284-9.

[25] Lisska, *op cit* n 7, at p 156.

further points out, since the Aristotelian notion of practical reason concerns actions to be undertaken, not a knowledge of ends, Finnis could be said to blur the distinction.[26] What I find lacking in Finnis, as in all other general moralists in law, is a convincing account of how precepts such as "one should not destroy life" can be understood to operate to *demand* particular outcomes within the craft of law. An example I use later is the English House of Lords' case of *Bland* [27] which concerned the legality of discontinuing a regime of nutrition and medication for a patient in a persistent vegetative state (PVS). Can it truly be said that knowing life to be a basic good, and recognising the principle "thou shalt not kill" can be understood to guide us in complex cases such as these? For so long as we have non-controversial answers to questions such as "does this particular state constitute 'life'?" or "should the ending of nutrition in these circumstances be seen as 'killing'?" then the purity, in the sense of the lack of dependence of natural law on considerations of fact, in Finnis' model remains intact. But of course law by its very regulation of complex matrices of fact does not provide this: it is *par excellence* the realm of controversy. Finnis is driven to treat the subsumption of particular cases within general principles as being *relatively unproblematic*, and this is why all such moralists are far happier with hypothetical cases. The sleight of hand used by the moralists is to demonstrate coherence between precept and outcome in the area of hypothetical or imaginary cases,[28] rather than to reach conclusions in the realm of *particular* cases. Hypothetical cases are of course very convenient since one can so frame the facts to fit the principles, and their abuse by natural lawyers is only one instance of widespread abuse of the concept of principles in this way in legal theory. I shall argue in the next section that as well as being of limited *explanatory* weight, the generalism of writers such as Finnis should be seen as a morally bankrupt approach to the *justification* of decision.

A large part of the difficulty here is understanding what is meant when we speak of law as a species of practical reasoning. Practical reasoning is said to apply to law because it is reasoning concerning things to be done not the objects of theoretical or speculative knowledge. There does, however, seem to be genuine room for disagreement concerning the meaning of Aristotle's remarks in the *The Nicomachean Ethics* concerning practical reasoning,[29] and in particular their implication for law. What needs to be clearly debated is whether law is best understood as a form of reasoning concerning particular moral objects or whether it is reasoning concerning practical knowledge. In the realm of knowledge concerning things to be done Aristotle distinguished[30] between productive knowledge and practical knowledge. The key difference here surrounds the objects or *telos* of these activities. In the case of productive knowledge the objects of the activity should not be seen as identical with the activity, that is to say they are external objects. So for example the sculptor can use his productive knowledge or skill to carve a figure. The external object, that is, the figure, is clearly separate from the carving. But in the case of practical knowledge, Aristotle invites us to see that the objects of knowledge are directly linked with the activity itself, becoming manifest in the activity. Any objects internal to the activity will be judged and

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[26] *ibid* at p 156.

[27] *Airedale NHS Trust* v *Bland* [1993] 1 All ER 859

[28] See Finnis' discussion of the law of bankruptcy, in Finnis *op cit* n 21 at p 188.

[29] See Finnis, *op cit* n 21, at pp 20 and 77, and Lisska *op cit* n 7, at p 156. Finnis is less than clear on this point (*op cit* n 21 at p 20).

[30] I am indebted to Professor Matti Niemi of the Faculty of Law, University of Lapland for his comments, in an unpublished paper on Aristotle, derived from Aristotle's *Nicomachean Ethics*, 1139a, 1139b and 1140b.

evaluated from *within* the activity. While it is assumed in principle-based approaches that practical reasoning in law must be towards some form of external object, I would argue that the notion of 'practical knowledge' described above is the best analogy for legal reasoning. In adjudication we see law as a craft with a clear internal dynamic unconnected to the attainment of any preconceived outcome. The primary value is the craft and the destination is merely the result of the diligent exercise of the craft. This pre-eminence of *activity* is the true meaning of practical reasoning in law.

The real obstacle in generating a modern natural law, which is properly sensitive to the unique and real demands of modern life, is therefore generalism. Specifically, it is the assumption that the properties which are relevant to judicial decision in particular instances of adjudication are *generally* relevant in adjudication, that there is a scheme of external objects which guide and structure judicial reasoning. This generalist view can be contrasted with a particularism which, as noted in the introduction to this essay, holds that properties which make a difference in a particular case should not be seen as generally making a difference, that the behaviour of a reason in a new case cannot be predicted from its behaviour elsewhere.[31] Putting it in other words, the dynamic of reasons in law is internal to the craft. Applying particularism at its simplest level to law, we might point to the way that legal principles, derived from broad moral principles, such as "no one should profit from their own wrong" might in one case be a reason to invalidate a will and in another a reason to affirm it, and thus conclude that principles have little role in legal reasoning.[32] While this is a valuable insight, a more sophisticated form of particularism would point to the way that in law the very same features of a situation which are taken as a reason for X in one case may be no reason, or a reason against X in another case.[33] To take perhaps an over simple example, the fact that plaintiff and defendant are in a relation of 'proximity' might be a reason for imposing a duty of care in one case (for example, between doctor and patient), and yet in another 'proximity' might be the very reason for not imposing a duty of care (for example, in relation to domestic relationships between a husband and wife in the home). Take as a further example the fact that a minor has "sufficient understanding and intelligence to be capable of making up his own mind".[34] This might be a reason to grant the child capacity to consent to medical treatment in one case but in another might function as a reason against the grant of capacity. For example in *Re E* a case concerning the right of a 15 year old Jehovah's Witness to refuse a blood transfusion for the treatment of his leukaemia, it was said that the clear intelligence and understanding that had led E to resolve so firmly to make up his mind against a transfusion demonstrated that he could not truly be *capable* of

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[31] See Dancy, *Moral Reasons*, *op cit* n 13, at p 60. Also see, J Dancy, 'Ethical Particularism and Morally Relevant Properties', *op cit* n 13, at p 534.

[32] Dancy gives the example of borrowing a book from someone and then finding out later that it has been stolen. Normally the fact that the book has been borrowed is a reason for returning it to the person from whom it was borrowed, but not here: see J Dancy, *Moral Reasons*, *op cit* n 13, at pp 60-61.

[33] Dancy gives the example of sending an article to a journal on the grounds that since they have published the author's work before that is a reason to publish a further piece. In the example, this turns out to be a reason not to publish a further piece: see J Dancy, *Moral Reasons*, *op cit* n 13, at p 62.

[34] The formula for the test of mental capacity of minors in English law: see House of Lords in *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1985] 3 All ER 402.

refusing consent to the treatment, on grounds that it revealed an inability to appreciate the *implications* of the refusal.[35]

It is thus that particularism questions the extent to which traditional principle-based theories really capture the *irreducible complexity* of practical legal situations. This is clearly linked to the earlier discussion concerning law's status as practical knowledge with its own internal objects. Take as a further example the case of *Merrell Dow* v *Norton*,[36] in which the House of Lords held a patent for a metabolite of terfenadine to be lacking in novelty (one requirement for a valid patent) on the grounds that the prior patent for terfenadine itself had revealed all the essential features of the 'invention'. This was despite an acceptance by the House of Lords of the earlier European Patent Office decision in *Mobil*[37] which had held that the details of a patent are not to be regarded as lacking in novelty unless they have been clearly communicated to the public, that is, it is not enough that the details were inherent in the prior use they must be clearly communicated to the public. In *Mobil*, the patent concerned the discovery of friction-reducing properties in an additive to engine oils, which additive had already been included and sold to the public in engine oils as a rust-preventing agent. The *Mobil* principle makes perfect sense: something cannot be said to be known until it has been communicated to the world, and the principle would therefore seem to require clear public disclosure as a *general* pre-condition to a finding of lack of novelty. The problem in *Mobil* was that the discovery was of a new advantage to a known substance already present in engine oil available to the public. Hence, the absurd result that people could be stopped from using their engine oil when they have friction-reducing intent rather than the legitimate rust-preventing one. The House of Lords' reluctance to follow *Mobil* demonstrates a belief that principles (in this case that novelty is only destroyed by prior communication) can make sense in themselves but have no sensible application to the complex particularities of life. This should be seen as a fundamental conceptual difficulty with the notion that the world of fact is *subsumed* under a realm of principle, and the problem is not eased by regarding principles as having a *pro tanto* or *prima facie* form.[38]

The challenge of particularism in legal theory then is to point to the way that actual cases always outrun the capacity of general considerations to account for them. This is not to be treated as requiring some small modification of generalism so that it can better demonstrate the governing role of principle[39]. Rather it points to the inadequacy of generalism for most important purposes[40]in legal theory. The accusations of generalism are however less stringent when applied to the older versions of natural law. Aristotelian essentialism builds value directly into nature: it does not rest on the idea of a realm of general value being applied to an inert world

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35 *Re E (A Minor)* [1992] 2 FCR 219. It might be said that this case merely shows that E lacked understanding, and clearly Ward J covers this possibility in his own conclusion. But it seems reasonable to interpret the case as saying that the ability to make up one's mind decisively *with full understanding* indicates a lack of capacity since a reasonable person would not reach this conclusion.

36 [1995] RPC 233

37 *MOBIL/Friction reducing additive* [1990] EPOR 73

38 See Dancy's dismissal of *prima facie* forms of generalism: J. Dancy, *Moral Reasons*, *op cit* n 13, at pp 92-100.

39 See *ibid.*

40 See Jabbari, *op cit* n 13, at pp 233-4, stressing that principles have *a* role in legal education and that the arguments against their use must be carefully understood.

of natural fact.[41] On Aristotle's account practical reasoning is a very concrete form of reasoning centred on natural human dispositions and virtues by people who possess wisdom and sensitivity to experience. Similarly in Aquinas who, while avoiding any statement that natural law was to be identified with the detailed particularities of judgement[42], retains the notion of *determination* as a good, earthy means of depicting how the requirements of natural law may be instantiated in individual cases. The dispositional basis of Aquinas' natural law lends itself to particular statements about the good in human affairs, so that we might for example be able to derive a good deal of practical significance from statements such as "just people will listen to both sides of an argument", or "only greedy people enjoy excessive remuneration from high office in a company". These are the kind of statements which Finnis avoids making because they call upon *observations* concerning the good in particular factual contexts, not what is self-evident or deduced from self-evident propositions. Finnis' version of natural law doesn't really touch the particularities of life or show how we can understand judicial decision to be guided by natural law, and one might go further and say that his use of *determination* is significantly different in this respect from that of Aquinas'. A better rendering of *determination* would be to emphasise context over principle, of earthiness over high-sounding detachment. Such a version of natural law would move away from principle to an interest in the way that life's situations impose normative demands on decision-makers: it moves us to a renewed interest in the *natural* in natural law.

The assumption of an inevitable link between natural law and generalist factors, such as principles, dispositions, basic forms of good and so forth, has been questioned. It is of course further assumed that the objectivity in a position of natural law derives from generalism (this is the subject of section four below). I wish to develop an alternative form of natural law, based upon particularism, which is not tied to assumptions about the facts of human nature, abstract principles of theoretical reason, or causal relations. Whereas the focus of traditional natural law is on development and perfection of basic goods, a particularist finds the 'virtue' of a decision in the matrix of the facts and context which make up that particular decision. These unique facts are reasons and thus do not need to

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[41] See Lisska , *op cit* n 7, p 163.

[42] The relation between the general and the particular in Aquinas is not clear cut. Aquinas clearly stressed the importance of particularity, as can be seen from this quote from his *Commentary on the Nichomachean Ethics*: ".... moral judgement in particular cases is left to the prudence of each moral agent. The moral agent, in acting prudently, must attentively consider the action to be undertaken at the present time, but only after all the particular circumstances have been taken into consideration", quoted in Lisska *op cit* n 7 at p 259. But how far can this go without losing the *guiding* role of the natural law (whether conceived of in terms of basic goods or natural dispositions)? Lisska presents Aquinas as a 'radical particularist': "There is radical particularity in Aristotle and Aquinas involving moral situations that is opposed theoretically to the rule-bound directives of most post-Enlightenment moral theory. This radical contingency of Aristotelian and Aquinian moral theory should not be forgotten in the process of developing a consistent theory of natural law. What one has in this reconstructed account of Aquinas' natural law theory is a balanced account of existentialist subjectivity within the context of a dispositional theory of human nature", at p 253. Since I am sympathetic to Aquinas I am happy to accept this interpretation (see point in n 23 above): I merely wish to suggest certain difficulties in stressing the 'existential' component of moral choice given Aquinas' broader conception of the natural law.

draw their 'normativity' from essences, dispositions or abstract (Kantian) theoretical precepts. This approach has the courage to be intuitionistic[43] since it does not need to infer or derive the requirements for decision from anything other than the kinds of circumstances which are found in particular cases. Interestingly, this kind of intuition can claim to be objective in the sense that we require, and in the sense in which generalist legal theory cannot, since it furnishes an answer that is absolutely appropriate in these circumstances. Moreover, since these precise circumstances should be understood to be unrepeatable there is nothing more absolute that such a theory stands as a pale reflection to. These points are developed in sections three and four below.

Put in a more simple way, my argument is that it is best not to see legal reality as a terrain of atoms[44] of legal principle and atoms of brute fact, an inert ether in which normative significance is attached to brute facts by their conjugation with principles, precepts or rules. I prefer to dispense with Humean language *for these purposes* and identify legal reasons as emerging from, for want of a less imprecise term, an active *background* [45] (or even less satisfactorily, a *legal subconscious*), which furnishes judges with a unique reason to decide a case one way rather than another[46]. Far

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[43] Lisska presents Finnis as being reliant on a form of moral intuitionism despite Finnis' denial of the this: "What is the structure of the 'practical grasp' which Finnis suggests is the 'primary grasp' of the basic goods?…Without an object for theoretical reason, it is unclear what else, despite his protestations to the contrary, Finnis might use for 'moral knowledge' but a form of intuition under the guise of practical reason", *op cit* n 7 at p 158.

[44] A more extended discussion can be found in Jabbari, *op cit* n 13. This sense of atomism permits legal positivists in particular to continue to find further formal benchmarks or rules of recognition to anchor forms of 'black letter' scholarship, even extending this to less 'atomistic' constructs such as principles: see for example H.L.A. Hart, *The Concept of Law*, (Oxford, OUP, 2nd ed, 1994), p 247. The legal theorist who has come closest to a non-atomistic conception of legal reality, excluding the purer archaic forms of natural law found in for example Cicero or Grotius, is Ronald Dworkin in his use of principles to avoid the 'all-or-nothing' character of rules. It is important to recognise however that while rejecting atomism in parts (with the qualification that Hart, citing MacCormick, sees no difficulty in including principles within a rule of recognition), Dworkin's theory is still firmly rooted in certain basic Humean oppositions. He clearly regards the exercise of justification (in the elaborate architecture of law as integrity) as something separate from particular contexts of adjudication as constituted by the brute facts of cases and the motivation of judges. Despite the risk of over-simplification, Dworkin's principles must have an atomistic and generalist character if they are to be *applied as justifications* to the facts of cases, or if they are to be used to choose *between* legal rules: it is thus that they can be incorporated into a modified rule of recognition along with rules.

[45] See more extended discussion of this in Jabbari, *op cit* n 13. This is not an argument that judicial decision-making consists of an indefinable *mixture* of normative and factual elements (so-called 'thick' concept) since the language of mixture still presents us with a Humean distinction between norm and fact, and leaves us with Hart's problem of attempting to both radically separate then to fuse the normative and the factual. For a philosophical analysis of the relevance of the concept of the *background* in social life see J.R. Searle, *The Construction of Social Reality*, (London, 1995).

[46] Weinrib is defending a very similar argument, different in important respects to mine, in his 'Legal Formalism: On the Immanent Rationality of Law', 97 *Yale*

from being inert, this background *demands* resolution in one way rather than another, and not by the mere inclinations of judges but often against them. The key concern is the detailed and active context of an adjudication, where we are able to discern the *rationality* or *logic* of a judicial decision, or the reason *why* the decision was reached, and the reason *for* the decision, that is the conscious rationalisation of the decision by the judge.[47] This is a realm which transcends our taken-for-granted architecture of hermeneutics versus structuralism.

PARTICULARISM VERSUS GENERALISM

On one view of legal theory it does not matter that theory has nothing useful to say about the world. The order of ideas is completely separate from the order of events, and the fact that a proposition can have no bearing on events in the world is not significant as long as the proposition makes sense in semantic terms. For example, modern legal positivists who defend an 'incorporationist' thesis, so-called 'inclusive legal positivism', seem unconcerned that a rule of recognition which incorporates moral principles need only be *understood to be capable* of guiding action rather than actually being able to offer guidance to concrete action by officials. To the extent that legal philosophers are concerned with individual rules or principles of law, the same disinterest in practicality reigns (or perhaps it would be more accurate to say that this disinterest is mandated by the theorists' belief in the priority of the conceptual, in its autonomy from matters of fact). Hence the fact that a rule or principle of a general character, such as "no one should profit from their own wrong", is a factor which under-determines the outcome of a particular case, providing no concrete guidance to a judge, does not matter as long as we can understand the meaning of the sentence as being potentially a guide to conduct. The question of course is: how can something which cannot be shown to be a determining guide to conduct in particular cases be so in a 'semantic' sense? Or, to put it another way, does the sentence still have any meaning which is of value in legal theory? Along with the realists, I would answer no, and this is perhaps the fundamental division of view in modern legal theory.

The basic problems of explanation that result from generalism were the subject of section one. Let us move to the issue of justification,[48] and return to the point made earlier concerning the *moral* bankruptcy of generalism. It should not be thought that generalist arguments, based upon principles for example, have some form of monopoly on moral force. Many modern legal theorists accord a privilege to the 'local' (whether these be considerations of race, gender or sexual identity) in assigning ethical value to decision. Minow and Spelman convey the attraction of a more particularist argument concerning 'context' extremely well:

> "Context . . . represents the acknowledgement of the situatedness of human beings who know, argue, justify, and judge. Rather than a weakness or a departure from the ideal of distance and impersonality, acknowledging the human situation and the location of a problem in the midst of communities of actual people with views about it is a precondition of honesty in human judgements. Ultimately, the attention to the varieties of contexts for judgement helps to focus on human intelligence, the thinking, creating,

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Law Journal (1989), 949. The concept of 'immanent rationality' is a good one: the question concerns the nature of that rationality.

47 See further discussion of this in Jabbari, *op cit* n 13.

48 See references to Dancy's writings in n 13, in particular his 'Why There is Really No Such Thing as the Theory of Motivation'.

> responding parts of human beings, drawn out by the task of making decisions about how to live and treat others."[49]

These kinds of sentiments demand that we question the moral force of the ethic that demands fidelity to principle in the face of compelling circumstance.[50] A good illustration of this is found in those commentators, such as Keown and Finnis, who criticise the decision in *Bland* for weakening the principle of the sanctity of life. For such writers the law becomes 'misshapen', intellectually and morally, if this principle is weakened (despite the fact that medical law has never adhered to any such principle).[51] It is, I think, significant that these high-sounding moral arguments are never directed at the particular individuals *in extremis* in these cases nor their family and their dilemmas, and it is never suggested directly that the family is acting wrongly in the circumstances. The real crime is the violation of abstract principle, despite the almost outrageous lack of compassion and the clear lack of governing weight of the principle of sanctity of life in the circumstances. Particularists reject the view that principles or rules can account for the moral force of judicial reasons: they believe that such force derives from sensitivity to facts. Further, they claim that the generalist, the "Man of Principle" is a harsh individual who accords more moral value to consistency than to a response to the demands of context.

The leading philosophical exponent of particularism is Jonathan Dancy. As Dancy concisely puts it, the question is not "Which other cases does this one best resemble?", but rather "What is the nature of the case before us?." While settled understandings, experience and other factors may be relevant, the crucial question is how things are in the case before us. The danger in generalism for Dancy is manifested in the sort of person who refuses to make a decision that the facts call for because of a desire to achieve consistency with a decision made on quite a different occasion, or to ensure consistency with established principles. In particularism, moral principles are reminders of the sort of importance a property *can* have in suitable circumstances, and hence particularism weakens the usefulness of imaginary cases, since "we would have already to have the sort of understanding of the actual case we were trying to use the imaginary one to achieve".[52] The crucial point on justification therefore is to attack the idea that justification:

> "[can] only consist in the subsumption of this case under some general principle which commands rational support in some way or other. Since description is clearly not intended to achieve any such thing , description is

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[49] M. Minow and E.V. Spelman, 'In Context', in M. Brint and M. Weaver, eds, *Pragmatism in Law and Society*, (Westview Press, 1991), at p 269.

[50] For a defence of a more particularist ethic see the writings of E. Levinas. A good introduction is S. Hand, *The Levinas Reader* (Oxford, Blackwell, 1989).

[51] See J. Keown, 'Restoring Moral and Intellectual Shape to the Law After *Bland*', (1997) 113 *LQR* 482, and J.M. Finnis, '*Bland*: Crossing the Rubicon?' (1993) 109 *LQR* 329. Countless examples could be given of the failure of the law in this area to give unequivocal support to the principles of sanctity of life. This is not just to point to obvious areas such as abortion and embryo research but to cases which had they not taken place in a medical context would almost certainly amount to murder or manslaughter, eg *R* v *Adams* [1957] CLR 365 (concerning the legality of administering lethal doses of pain killers with a predominantly therapeutic intent) and *Re J* [1990] 3 All ER 930 (concerning the legality of terminating treatment in the case of a profoundly handicapped baby).

[52] J Dancy, Moral Reasons, *op cit* n 13 at p 69.

> one thing and justification another. I reject this account of justification, *and with it the distinction between justification and description* (my emphasis). To justify one's choice is to give the reasons one sees for making it, and to give those reasons is just to lay out how one sees the situation, starting in the right place and going on to display the various salient features in the right way; to do this is to fill in the moral horizon. The persuasiveness here is the persuasiveness of narrative: an internal coherence in the account which compels assent. We succeed in our aim when our story sounds right. Moral justification is therefore not subsumptive in nature, but narrative." [53]

There is much in this account that offers to provide a theoretical infrastructure for modern critical legal theory. Turning our backs on the 'formalist' and Dworkinian view that the value of law is *consistency* with previous decisions or principle, we can require judges to be consistently sensitive to the features of individual cases in mature and intelligent ways. The Dworkinian idea of an unfolding, but *unified*, discourse can be rejected in favour of a consistency based upon the demands of context. Clearly there is a good deal of working out of the implications for law in this view but the direction of the argument is clear.[54]

We need to abandon the fiction that the normative, or reason-giving, element in law stands apart from the living context of judicial decision. All generalists have difficulty in accounting for this dimension in law, since the very nature of generalism is to point to normative factors *standing apart* from the decision, for example, rules or principles, which govern its resolution. Even Dworkin, despite his attempts to distinguish his 'constructive interpretation' from conventionalist or backward-looking theories, must concede that principles derived from past practice are *applied* to new situations. If not, he would be forced to take a step which he would not wish to take of saying that law comes into being only at the time of decision. It is thus that modern positivists are quite right to say that most Dworkinian principles can be incorporated into a reformed rule of recognition.[55] The radical particularism which I defend has the courage to say that the law does in fact come into existence at the point of decision, that it is in the demands of particular contexts that the law comes into being. As Jerome Frank put it, endorsing a definition of law from the point of view of the 'lay person' which I have referred to earlier:

> ". . . the law, with respect to any particular set of facts, is a decision of a court with respect to those facts so far as that decision affects that particular person. Until a court has passed on those facts no law on that subject is yet in existence. Prior to such a decision, the only law available is the opinion of lawyers as to the law relating to that person and to those facts. Such opinion is not actually law but only a guess as to what a court will decide" .[56]

Dramatically this would seem to suggest that judges can never actually be wrong in their judgments. Of course it does not suggest any such thing, rather it suggests that the language of 'truth' and 'wrongness' is simply inappropriate when seeking to understand judicial decision, and that what we are truly talking about are *degrees* of sensitivity to the order in a

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[53] J Dancy, Moral Reasons, *op cit* n 13 at p 113.
[54] See Jabbari *op cit* n 13 for further discussion.
[55] See Jules Coleman, 'Authority and Reason' in R.P. George, ed, *The Autonomy of Law*, (Oxford, OUP, 1996).
[56] Jerome Frank *op cit* n 15 at p 46.

particular context. Frank's invitation is not that we consider his view as an *alternative* theoretical understanding but rather that we see that reality constantly *undermines* theory. This surely is the true intent behind Holme's celebrated statement that the life of the law is not logic but experience, and this is a sentiment which stands in the way of attempts to provide a foundation for realist legal *theory*.[57]

Generalists will of course say that the above account does indeed mean that judicial decision can never be 'wrong', and furthermore that it is important to retain the ability to say that the balance of reasons that proved salient in the resolution of an issue, including the agent's reaction to them at the time, could have been different. This neglects the fact that what appears relevant later, for example on appeal, may include considerations based on the *effect* of the original decision in terms of its consequences: such information was not available to the decision-maker at the time of the decision. In other words, such reflection on other possibilities is only possible with *hindsight*, that is, after one has assessed the changes to circumstances made by the decision itself. If particularism is to be rigorous, we must resist the temptation to de-contextualise the dynamic nature of adjudication in order to compare it to non-particularised notions of right and wrong. I see reasons as emerging *in* contexts, and *governing within* contexts; I do not concede a place for general or presumptive ethical principles as determining legal outcomes. In my approach everything turns on the unique facts (combined normative/fact of the matter) [58] of a particular adjudication. The label 'normative' should be used as an *ex post facto* rationalisation of judicial action; it ought not to be used to isolate exceptionless (or even presumptively applicable)[59] normative facts apart from the detail of adjudication.

The critics, such as Raz,[60] would perhaps claim that there must be general evaluative considerations if we are to retain the intelligibility of the notion of value and judgement. Without such considerations judicial decision making would be completely arbitrary. This reveals a good deal about the fundamentally different way in which the legal world is seen by analytical legal philosophers and those with a more realist slant. The question is why should the abandonment of general evaluative considerations lead to arbitrariness. Part of the response here is to point to the arguments mentioned earlier concerning the way in which arguments from principle seem insensitive, and thus in a sense arbitrary, to the morally compelling demands of context. But in addition, I would go further and accept fully that particularism to be consistent must abandon the intelligibility of value conceived as a general property. I would argue that consistency does not require generalism since a better meaning of consistency is to talk of judges being continually sensitive to the *demands of context*. Similarly, the realist notion of 'situation sense' describes well the consistency that can arise in the craft of law.

To put this in more abstract terms, an essential difference between particularists and generalists is that a generalist believes that all the factors which can explain why reasons apply differently in different cases can be added into a general formula which may act as a guide to action. Raz, in an analysis of Dancy's particularism, comments:

> "Does not the intelligibility of value compel the rejection of particularism? . . . The case for an affirmative answer lies in the thought that since

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[57] See n 3 above.
[58] See Jabbari *op cit* n 13 for fuller discussion of this.
[59] See n 38 above.
[60] J. Raz, 'The Truth in Particularism' unpublished paper.

> regarding any evaluative concept and any two situations, if it applies to one and not to the other there is an explanation for this difference, it must be in principle possible to amass all the points which all these explanations may rely on and formulate one principle which sets a comprehensive and exceptionless rule for the use of that evaluative concept."[61]

Characteristically Raz goes straight to the heart of the problem. He is correct to point to a tension in Dancy's particularism along the lines that Dancy regards reasons as general, that is, they are features of situations which can be instantiated on an indefinite number of occasions. As Raz comments, Dancy's view is particularist to the extent that the rightness of an action is not determined by the reasons which apply to the agent (that is, we need to know about the situation). Dancy does therefore seem to admit a gap between reasons for action and the evaluation of those reasons. That is to say, there must be a difference between two contexts which can explain why the same fact is a reason in one case and not a reason in another. Raz asks why therefore, if certain factors are relevant to the evaluation of action, are they not part of the reasons for or against it. As we know Dancy's response would be that this is bordering on fiction and is perhaps the most glaring weakness in generalism, in that it assumes that an agent can be understood to be guided by *all* the evaluatively relevant considerations in a situation. But Raz has a reasonable rejoinder which is that a person need not be consciously aware of their reasons for acting as long as the reasons are potentially citeable (that is, there is more to people's reasons than those factors which figure in their deliberations)[62]. Indeed, Raz accepts that the most rigorous form of particularism is linked to an absence of deliberation by the agent: the agent reacts to the situation in "all its concreteness":

> "In some ways this view that reasons are concrete is more attractively particularistic than Dancy's thesis. On this view reasons are particular, not general as per Dancy. Being particular they cannot justify any other action (assuming that they are conclusive reasons for the action taken). But, unlike Dancy's reasons, they justify the action they are reasons for. No gap is allowed between the evaluative and the guiding function of evaluative considerations".[63]

This puts extremely well the version of particularism I am reaching for. While Raz accepts Dancy's rejection of this type of thesis on grounds of preservation of the intelligibility of reasons, I am happy to defend the non-deliberative approach, subject to some debate concerning the meaning of 'deliberation' and its implications for the concept of a 'reason' in law. I have argued elsewhere that subconscious responses to situations should not be viewed as potentially re-describable in terms of conscious ones.[64] Rather, the logic of situations, and concrete responses made to them, requires a departure from our usual assumptions about the distance between the agent's reasons and a realm of inert fact 'beyond' those conscious reasoning processes.

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[61] *Ibid* at p 8.

[62] This requires analysis since it over-simplifies the nature of subconscious reasons: see Jabbari, *op cit* n 13, pp 228-231.

[63] See Raz *op cit* n 60 at p 17.

[64] See Jabbari, *op cit* n 13.

THE ORDER IN LAW AND THE ROLE OF INTUITION

Although not the exclusive property of lawyers, 'intuition' can surely claim a place in the pantheon of 'legal concepts by adoption', alongside 'reasonableness' 'principles', 'rights' and so forth. It is not just that academic natural lawyers, calling upon Aristotle, have made natural reason a centre-piece of legal thought for over 2000 years, or that modern theorists such as Dworkin have made intuitive understanding (of principle) a central feature of adjudication. It is also that judges and those closest to them in the academy have accorded a special place to intuition, as the cement that holds together the legal universe, or as Cardozo put it quoting James "the total push and pressure of the cosmos which, when reasons are nicely balanced, must determine where choice shall fall".[65] Intuition is a special friend of common lawyers who see something intangible beneath the mechanics of statute and rule, some means of bringing "experience of life and the structure of thought and belief " to bear on the exercise of discretion.[66] In the context of this article, intuition captures well the living nature of decision which I am urging on the reader as part of a radical particularism. Yet, intuition has its problems. It can be a veil for prejudice, for example concealing controversial issues of sexual identity or national culture. A modern form of intuition would have to overcome these objections, and I can only hint at the direction of such an account in this article.

Any attempt to make intuition appealing to modern, not just medieval, sensibilities must address a number of key questions. In what situations does it make sense to talk of a role for judges' intuition? Is intuition in law close to pure contemplation, with the judge as prophet or seer making pronouncements by some infallible right of divination, or is it more structured? Perhaps the way out of some of the traditional reservations concerning the use of intuition is to focus a little less on divination, and more on the way in which the context of decision exerts a clear pull towards the intuitively correct answer. The traditional understanding is that if intuition has a role at all in law it is limited to an exercise in the excavation and application of principles to facts, in the working out of the requirements of the general for the particular. A more particularistic account of intuition clearly rejects this and must therefore address a key question: if intuition in law is not of principles, what is it intuition of ? Further, to what extent can this intuition be understood as an intuiting of objective features in adjudication (this is developed in section four)?

The broadest meaning which we can give to intuition, according to Rorty[67] is "immediate apprehension", and he goes on to distinguish a number of distinct sub-senses of intuition. First, there is intuition as unjustified true belief not preceded by inference. This notion of a 'hunch' is not regarded as a theoretically important sense by philosophers. Second, there is intuition as immediate knowledge of the truth of a proposition: this is more significant theoretically. Third, intuition may refer to immediate knowledge of a concept, roughly "knowledge that does not entail an ability to define the concept". Lastly, there may be intuition as non-propositional knowledge of an entity, knowledge that may be a necessary

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[65] B N Cardozo, The *Nature of the Judicial Process*, (Yale University Press, 1921), p 12.

[66] Lord Radcliffe, *Not In Feather Beds* (Hamish Hamilton, 1968) at p 212.

[67] Not to be confused with mathematical intuition or intuitionistic logic, both of which have separate specialised meanings. See R. Rorty 'Intuition' in Vol 4 *The Encyclopaedia of Philosophy*, ed P Edwards (Macmillan, New York, 1967).

condition for, but not identical with, intuitive knowledge of the truth of propositions. Rorty distinguishes three sub-senses within this last category which exemplify this sense of intuition: (i) sense perceptions, considered as products of a cognitive faculty, (ii) intuitions of universals or of such insensible particulars as time and space, and (iii) inexpressible intuitions that, unlike sense perceptions and intutitions of universals, do not make possible knowledge of the truth of propositions about the entities intuited.

It is beyond the scope, and against the spirit, of this article to reflect on the conditions (viewed as semantic conventions) under which propositions of law can be viewed as being true. The notion of 'truth' is highly problematic when law is viewed in the way suggested in this article, with 'appropriateness' and 'sensitivity' being better words. The strong particularism argued for in this essay is perhaps closest to Rorty's second and third senses of intuition than the others, but I do not blanch at using the word 'hunch' in the context of legal reasoning in so far as it points to a non-intellectual discernment of appropriate responses to active situations. In giving meaning to this sense of intuition, we must bear in mind that, traditionally, accounts of intuition have been viewed as being inevitably based upon moral realism and foundationalism. It would after all make little sense to talk of intuition of factors which are themselves constructed by reasoning (for example, in relation to notions such as 'warranted assertibility'). But I would suggest very tentatively that it is possible to say that the significant properties in a practical context are intuited directly without endorsing foundationalism or the view that beliefs arising from intuition have direct justification in the moral realist sense. A particularist account of intuition would reject the view that intuition must be of generalist moral principles. Instead it would argue that the agent (judge) has a direct grasp of the demands of context in particular situations without the mediation of general reasons related to principles and so forth.

I have explained my account of the genesis of legal reasons in some depth elsewhere.[68] I have there questioned the Humean and Cartesian structure of legal thought based on sharp divisions between the thinker and the world, and between norm and fact. I wished to question this view of human understanding as it was applied to law. On the first issue, I adapted to law the arguments of modern post-Humean philosophers, principally Dancy, in arguing that what judges believe about the facts of cases (that is, what *is* the case before them) can constitute complete reasons for judicial action. There is no need for a judicial desire to achieve X to be postulated, compounded with beliefs about norms or principles, and applied to an inert world of fact. On this account, the matrix of facts in adjudication can be called 'intrinsically motivating'[69] in that such facts are immediately intuited by judges as being a reason to resolve a case one way rather than another. I attempted to go further than many contemporary writers however on my approach to the second issue, the *is/ought* dichotomy, by suggesting that the *facts* in the judicial decision, are better not viewed as consisting in a mixture of normative matter, such as relevant legal rules or principles on the one hand, and of other pure *facts of the matter*, such as 'the damage was £1.2 million' on the other. Rather, my concept of a legal reason pointed to the way that this distinction, between normative and mere facts of the matter, fuses in the dynamic, practical contexts of adjudication.[70] Of course, this distinction can be made, and many will be

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[68] Jabbari *op cit* n 13.

[69] See J Dancy, Moral Reasons, *op cit* n 13 at p 24.

[70] See discussion concerning role of facts in moral reasons in J Dancy, Moral Reasons, *op cit* n 13, at p 33.

reluctant to abandon it. But generally such distinctions can only be understood as rationalisations *after the event* of a particular judicial decision, when the factors which determined the outcome appear with hindsight to be clearly separate from those which did not. Principles, and other normative generalisations, which derive in this retrospective manner from adjudication furnish useful evidence to predict what the law *might* be in similar situations in the future, and can be useful in the teaching of novices. My essential point however was that they are not helpful in understanding, nor in teaching, what the law *is* in its proper determination.

Accordingly, one could say of case law that intuition of the order in a particular complex of facts is the reason for the choice of the formal reason given by the judge. The question is does this intuitive approach require a commitment to substantive moral aims, moral realism or principles, or does it require no more than an attitude of mature contemplation which is the property of people of reflective ability who can demonstrate sensitivity to the facts of cases? Is the community of legal expertise one of technical mastery, moral sensibility, or instinctual reflective ability? Although my argument is that the latter is the most accurate description of the essence of true ability in law it does leave the question of how we measure or 'grade' intuitions. I would argue that we need to abandon the notion that judges get cases 'wrong', in favour of a notion closer to 'sensitivity' or 'receptivity'. Rather like a radio which is 'poor' in its reception of a signal, some judges will not be as receptive or sensitive to the demands of context as others. Indeed, what offends people is not that judges get it 'wrong' but that they are insensitive to what the context facing the judge requires (*stressing* that legislative rules and principles derived from past cases will be an ever-present feature of the situation in which judges find themselves). True sensitivity requires an abandonment of all pre-conceptions about how the particularities of the case should be characterised. All forms of intellectualisation, of governing principles, stand in the way of allowing the order which is beyond thought to configure situations in appropriate ways. While Aquinas wanted to narrow the role that the inexpressible can play in natural law, the monastic tradition of Christianity has eschewed his intellectualism,[71] as have other religious traditions. It is very difficult to express in words the sense of something which is beyond the oppositions of ordinary thought, and it is even more difficult to convince people that there can be anything of practical value in terms of practical reasoning to be derived from 'non-intellectual understanding'. But this is a limited view. It neglects the manner in which decision arises from quiet contemplation, from stillness and a complete emptying of mind so that the individual may be directed to a proper response to context. In this realm the seeming incontestability of propositional logic, the basis of Western thought, is challenged by a logic of activity and place.[72]

As an aside on the religious foundations of natural law, clearly those wishing to defend a position of natural law derived from religious conviction will consider it important to see practical reasoning as being an attempt to give effect to ultimate values in human affairs. The Christian writers naturally see this in developmental terms, as Man proceeds slowly to salvation through History. However, it is important to appreciate that Christianity does not have a monopoly on natural law thinking, and that in other traditions of religious thought divinity is seen to be a fully realised

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[71] See Father Thomas Merton, *Contemplative Prayer* (Dalby, Longman & Tood, 1993).

[72] See N. Abe, 'Nishida's Philosophy of Place', *Int. Philosophical Quarterly*, 28, no 4, (Dec 1988) 355-371.

potential of the universe in each moment of its unfolding. It should not be thought that the only credible attempt to defend a position of natural law is linked to hard and fast precepts for Man as a fallen being, tainted with original sin. Rather, natural law could be seen as an attempt to intuit directly the divine aspects which inhere in any practical context. In other words, what truly guides in a practical context, what steers towards the intuitively correct response, is not principle but the requirements of eternal order in that context. Such a position is firmly a position of *natural law*, since there are very clearly *degrees* of sensitivity to context and ways of failing to meet the requirements of order. This is not strictly an intellectual exercise but rather an attempt to penetrate beyond discriminative consciousness to the reality of things. There is a form of natural reason which derives from the submission of the discriminative consciousness to that which lies beyond it, and this has a role in law as much as in any other walk of life.

OBJECTIVE, PARTICULAR INTUITIONS ABOUT LAW

I have suggested that there is something real and objective in this modern conception of natural law. In this section I wish to suggest in very outline terms the view that the intuitive responses of judges to context can be seen to be grounded in the *real* demands of situations. Perhaps the most ambitious argument of this essay is that an account of judicial intuition, which claims to be a position of natural law, need not rest upon metaphysical (moral) principles, nor natural faculties, as the basis of that intuition. Judges have a direct intuition of the salient features in particular circumstances of case law, and these salient features are neither objective moral principles nor are they disciplining rules of interpretation/conditions of warranted assertibility. The objectivity here is in the precise circumstances of the case. What is recognised in judicial decision-making is real and objective, since what judges find therein is independent of their recognition of it in one sense (that is, there is a determinate order imposed by context). But this has to be qualified by the point that a proper understanding of recognition (as argued elsewhere[73]) points to the way that the judicial subconscious should not be seen as fundamentally separate from the terrain of 'fact' underlying context.

What does it mean to say that an intuition can be 'objective'? This entails some understanding of the usage of the term 'objectivity'. Marmor identifies a category of metaphysical *objectivity* which carries the commitment that there is a truth of the matter, that things are in the world as semantically objective statements describe. There is a difference between realism and objectivism, in that realism presumes the existence of an objective reality which is ontologically independent of our knowledge, whereas one can be an objectivist about kinds of objects which do not meet this condition of independence. Examples such as the rules of chess, speed limits and so forth show that objectivism does not entail the possibility of verification-transcendent truths. Much of the direction of this anti-realist approach to objectivity is derived from Putnam's writings on internal realism. For some time, there was disagreement between Putnam and the other key protagonist in the debate, Richard Rorty, over the extent to which the language of objectivity was appropriate to capture this anti-realist sense of stability in judgement. Putnam had always maintained that being anti-realist and opposed to a correspondence theory of truth, as Rorty is, does not threaten the existence of a realm of knowledge about which one can use the language of objectivity, based upon the concept of

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[73] See Jabbari, *op cit* n 13 at pp 229-30.

'warranted assertibility'. In similar vein, Dworkin[74] has argued that since the idea of an 'Archimedean point' in ethics is illusory, we should have no difficulty in endorsing the language of objectivity (perhaps merely to sound a note of 'rigorism').[75] Marmor is critical of Dworkin's position, however, in that there seems no reason to take the absence of an Archimedean point as leading to objectivity, when it had led other such as Rorty to scepticism.[76]

It could reasonably be argued that Rorty seems to be winning in the contemporary debate. As Marmor has stated, Putnam has, in recent writings, changed his views on internal realism. Putnam's idea of warranted assertibility under ideal conditions was meant to remove the problem, identified by Rorty, that truth as correspondence requires us to have referential access to things 'out there' in the world. But, as Marmor[77] notes, Putnam realised that this was an illusory solution since "there is an equal problem related to the issue of how we can have referential or other access to 'sufficiently good epistemic situations' ":

> "[I]f the problem is that there is an interface between the 'knower' and the 'world', then this interface is still there, only shifted from the 'world' at large to the conditions which render a situation epistemically appropriate. This is mainly so because the idea of an ideal epistemic situation must be, as Putnam put it, 'a world involving notion'. If it is not, then we will be drawn very quickly to the highly implausible conclusion that the totality of human knowledge determines the totality of truths."

Rorty denies that there is a distinction between truth and justified belief: the notion of justified belief is the only option open to us.[78]

All of this has a very interesting application to an account of law based on intuition. We have seen that much of the talk about a tenable position of objectivity in law, which does not lapse into realism, turns on the identification of a realm of *truths* which remain recognition-dependent. However, we have seen that Putnam has conceded that this position of objectivity still requires an interface between the knower and the 'world' (in this case 'sufficiently good epistemic situations'), and that this retains some degree of recognition-independency. What all this seems to show is the impossibility of maintaining the Cartesian architecture of a world divided into the 'knower' and the 'known'. Elsewhere I have developed an argument along these lines in relation to the notion of the judicial subconscious, and have defended the view that reasons and causes are on a spectrum rather than independent oppositions[79]. I regard this as a significant movement beyond the limited intellectual architecture of contemporary critical legal theory.

Any talk of 'objectivity' of course risks perpetuating the Cartesian architecture. So how is it possible use the vocabulary of 'real' and 'objective' to refer to the demands of context in adjudication? One response is Dworkinian which is merely to mark a preference for the

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[74] See Dworkin *op cit* n 6.

[75] This is a pejorative point concerning Dworkin made by Rorty *op cit* n 2 at p 89.

[76] See Marmor 'An Essay on the Objectivity of Law' *op cit* n 2 at p 20.

[77] See ibid at p 28. The quotation by Marmor is from H Putnam 'Sense, Nonsense and the Senses: An Inquiry into the Powers of the Human Mind', 91 *The Journal of Philosophy* (1994) 445 at 462.

[78] Marmor endorses Putnam's recent alternative, derived from Wittgenstein, see Marmor and Putnam *ibid*.

[79] See Jabbari, *op cit* n 13.

vocabulary of objectivism whilst accepting the inevitability of regonition-dependency. The alternative which I suggest, tentatively, is the need to drop the vocabulary which informs debates such as these which by its very nature is premised on a Cartesian architecture, and which leads to an impression of active minds confronting an inert world. Once we see the world as being a direct source of motivation to the will, and a source of justification of action, we can move beyond the dualisms of hermeneutics versus structuralism, deconstruction versus sociological theory. Any talk of a Wittgensteinian picture which points to the importance of immersion in a practice as the only way to being able to understand 'truth' in that practice is of course convincing in important respects, but it is misleading if the 'practice' is construed as a pale shadow of something more real external to it. It is, if you like, the order (conflating fact/value, knower/known) of the world which undermines the dualisms of our theoretical architecture in legal theory, something I have tried to capture in my account of the judicial subconscious which conflates reasons and causes.[80] It is an order beyond the oppositions of Humean and Cartesian thinking which suggests an intuitively appropriate resolution to a dispute.[81] I regard this modern, particularist, version of natural law as the movement beyond the dead ends of deconstruction (which radically overstates hermeneutic considerations in law) and the sociological theorists who overstate the significance of 'external' structure.

There are great overlaps between the kind of objectivity of particular, albeit transient, contexts which I have defended and the views of Aquinas and Aristotle on a similar point. The difference is that theirs is an objectivity which is linked to human nature and the dipositional properties which ground it and mine is linked to *place* and *context*. The difference between radical particularism and generalist or universalist objectivism (as found in Aristotle and Aquinas) is that the circumstances here are not to be seen as repeatable elsewhere. Lisska cites an illuminating passage from Martha Nussbaum concerning what she calls the 'non-relative virtues' in Aristotle which illustrates this:

> "What I want to stress here is that Aristotelian particularism is fully compatible with Aristotelian objectivity. The fact that a good and virtuous decision is context-sensitive does not imply that it is right only *relative to*, or *inside*, a limited context any more than the fact that a good navigational judgement is sensitive to particular weather conditions shows that it is correct only in a local or relational sense. It is right absolutely, objectively, anywhere in the human world, to attend to the particular features of one's context; and the person who so attends and who chooses accordingly is making, according to Aristotle, the humanly correct decision, period. If another situation should ever arise with all the same ethically relevant features, including contextual features, the same decision would again be absolutely right."[82]

What I have tried to suggest is that there can be none of the kind of recurrence suggested in Nussbaum's last sentence. The notion of an order in law is more in the nature of a new lava flow: there is a constant moving on and a constant uniqueness of situation unfolding before the courts. It is

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[80] See *ibid.*

[81] In this way it may be possible to defend some form of Dworkinian 'right answer' thesis, yet the risk of misunderstanding outweighs the possible advantages.

[82] M. Nussbaum, 'Non-Relative Virtues' in M. Nussbaum and A. Sen, *The Quality of Life*, (Oxford, OUP, 1993) 257, cited in Lisska, *op cit* n 7 at p 217

thus that law is bound up with living, active, contexts; that its objectivity is one of ceaseless response to new contexts.

CONCLUSION: THE GOD OF SMALL THINGS

The God of traditional natural law is a brooding uniformity in the sky, without gender, sexuality, or colour. He is a Man of Principle not of compassion and particularity. While Augustine's God was prepared to get his hands dirty, by striking down inferior human laws, by the time of Aquinas any talk of God had become almost redundant to a conception of natural law, with human law and society left to follow its own logic. In modern times the Kantian God of Finnis is a very remote being who contributes very little to the development of substantive law.

But how far should we leave natural law to the generalists? Can we keep God as a postscript, as a posited essence atop an Aristotelian pyramid of virtues, like a fairy on a Christmas tree? Any natural lawyer worth their salt will want God to shape every detail of law. The issue for all natural lawyers is how to bring the requirements of eternal order into every detail of life. This is not Aquinas's dualistic conception of determination, the implicit assumption of an inert realm where God has no voice, but a seeing of the divine in all contexts, perhaps dimly but always exerting a voice. It is thus that small situations are imbued with meaning, and not through their governance by impersonal precepts and principles. We have to choose: do we want to give expression to the real life of that which is beyond duality, or do we want merely to walk amongst the shadows of mental oppositions?

If we can take our post-modernism into natural law, and see that compassionate sensitivity is the very essence of the order in law, we might be a little less embarrassed to speak the language of natural law. In between physical faculties and abstract mental concepts, there is the inexpressible sense of the demands of context which helps us most of the time. Judges need to find this sense for themselves, and not just emulate those who demonstrated great sensitivity in the past. In law it is important to work out what belongs to secular dust and what expresses true order. The form of particularism I have defended is a position of natural law since it is not concerned with imposing order on case law but rather with *responding* to the requirements of order. These requirements are not deduced or determined by the use of principles but by a still, silent immersion in context. The atrophy of intuitive ability is currently so severe that most people reading this will have difficulty in seeing the deeper import. But despite this, in the intuitive wisdom of the heart we glimpse what is meant here. We know in our bones when mundanity is in the ascendant, when the still quiet sense has been destroyed by a mechanical language of principle.

THE NATO ACTION AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA: HUMANITARIAN INTERVENTION IN THE POST-COLD WAR ERA

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INTRODUCTION

On 23 March 1999, the NATO Secretary-General, Javier Solana, delegated responsibility for the initiation of air strikes against the Federal Republic of Yugoslavia,[1] to the NATO Supreme Commander, General Wesley Clark, following the failure of the Federal Republic to comply with NATO demands that it accept an interim political settlement on the future of Kosovo and end the excessive and disproportionate use of force employed by the Serb Army and Special Police Forces in the region.[2] The stated aim of the military intervention, "Operation Allied Force", which commenced on 24 March 1999, was "to prevent more humanitarian suffering and more repression and violence against the civilian population of Kosovo . . . and bring an end to the humanitarian catastrophe . . . unfolding".[3]

This article examines the legality of the NATO intervention. In doing so, it considers the background to the humanitarian tragedy which unfolded in Kosovo, the application of provisions on collective security under the Charter of the United Nations and, most importantly, the extent to which the international community recognises a right of intervention by military

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1 Federal Republic of Yugoslavia (FRY): (claimed) successor State to Yugoslavia, although not recognised as such by the international community – accordingly not permitted to participate in the United Nations, the Organization for Security and Co-Operation in Europe, or other international organisations (alternate name Serbia and Montenegro). Kosovo is a region of the Republic of Serbia, one of the constituent republics of the Federal Republic of Yugoslavia, with Montenegro. These constitutional niceties should not obscure the reality that the Federal Republic of Yugoslavia and Serbia are effectively controlled by President Milosevic, President of the Federal Republic of Yugoslavia: see, generally, "U.S. Department of State Serbia-Montenegro Country Report on Human Rights Practices for 1998", released by the Bureau of Democracy, Human Rights, and Labor, February 26 1999: <http://www.state.gov/www/global/human rights/1998 hrp report/serbiamo.html>.

2 Whilst the intervention was carried out by North Atlantic Treaty Organisation (NATO) forces, and certain states, notably the United States of America, played a greater role than others, the fact that NATO forces remained under the political control of the organisation, which acts by consensus, means that those member states are 'jointly and severally' responsible for the actions of NATO forces under international law.

3 NATO Press Release (1999) 040, 23 March 1999.

force to prevent humanitarian suffering.[4] Such altruistic interventions have traditionally gone under the *nom de guerre* of humanitarian intervention.[5] Whilst the doctrine is never explicitly invoked in the present instance, the humanitarian motives adduced by NATO States require us determine the legality of acts of humanitarian intervention more generally before considering its particular application here.

THE BACKGROUND TO A TRAGEDY

The roots of the 1998/9 humanitarian crisis in Kosovo may be traced directly to the large-scale offensives launched by the Serb authorities against the ethnic Albanian population in February 1998.[6] These

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[4] 'Intervention' is not limited, under international law, to military intervention; the term 'humanitarian intervention' is, however, "invariably" taken to mean intervention by "armed force": Verwey, "Humanitarian Intervention under International Law" (1985) XXXII *Netherlands International Law Review* 357 at 358 - 366.

The concern of this article is intervention by states and international organisations, not the actions of Non-Governmental Organisations in, for example, providing humanitarian aid to persons within a state without the consent of the government. See, on the latter issue, Weiss and Minear, "Do International Ethics Matter" (1991) 5 *Ethics and International Affa*irs 197 at 212.

[5] There is a wealth of literature on "humanitarian intervention": see, for example, Brownlie, "Humanitarian Intervention", in Moore (ed.) *Law and Civil War in the Modern World* (1974) 217; Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for a Constructive Alternative", in Moore (ed.), *id.*, 233; Brownlie, "Thoughts on Kind-Hearted Gunmen", in Lillich (ed.), *Humanitarian Intervention and the United Nations* (1973) 139; Fairley, "State Actors, Humanitarian Intervention and International Law: Reopening Pandora's Box" (1980) 10 *Georgia. J. Int'l & Comp. L.* 29; Fonteyne, "The Customary International Law Doctrine of Humanitarian Intervention: Its Current Validity Under the U.N. Charter" (1974) 4 *California Western International Law Journal* 203; Franck and Rodley, "After Bangladesh: The Law of Humanitarian Intervention by Military Force" (1973) 67 *AJIL* 275; Greenwood, "Is there a right to humanitarian intervention?", (February 1993) *The World Today* 34; Malunczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force* (1993); Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order* (1996); Nanda, "Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti – Revisiting the Validity of Humanitarian Intervention: Part I" (1992) 20 *Denver Jnl of International Law and Politics* 305; Sornarajah, "Internal Colonialism and Humanitarian Intervention" (1981) 11 *Georgia. J. Int'l & Comp. L.* 138; Tesón, *Humanitarian Intervention: An inquiry into law and morality* (1997, 2nd. ed.); Verwey, *supra* n. 4.

[6] The position of Kosovo within Serbia has for many years created political tensions, not only between the respective ethnic Serb and Albanian communities, but also between the Federal Republic of Yugoslavia and neighbouring States, particularly Albania. The primary cause of these tensions is the existence of a majority ethnic Albanian population within Kosovo, who, partly as a result of Serb mistreatment, demand independence from Serbia, integration into Albania or, as a minimum, the restoration of the special autonomous status granted to Kosovo under the 1974 (Socialist) Constitution of Yugoslavia removed under the regime of President Milosevic (who based his rise to power in Serbia/FRY on pursuing a policy of its removal): see, Mertus, "The Dayton Peace Accords: Lessons From the Past and for the Future", in

offensives resulted in hundreds of Kosovar Albanians being killed, thousands fleeing their homes and an armed reaction from ethic-Albanian irregular forces. [7] The military campaign "made no distinction between armed guerrillas and unarmed citizens. Whole villages were shelled, crops were burnt in the field and farm animals were incinerated in their barns. A quarter of a million people – a tenth of the entire population – [became] refugees" as a direct result of Serb actions.[8]

Whilst diplomatic attempts to resolve the crisis continued throughout 1998, predominately through the six-nation 'Contact Group',[9] the North Atlantic Treaty Organisation (NATO) made a determination that military force would be used if the Federal Republic of Yugoslavia did not comply with the demands of the international community to end the violence in Kosovo, bring about a lasting political settlement for the region and prevent the humanitarian crisis unfolding.[10] On 13 October 1998, activation orders (ACTORDs) were issued by NATO to allow it to carry out air strikes, if the Federal Republic of Yugoslavia continued to fail to comply with the demands of Security Council Resolution 1199.[11] Following the issuing of the activation orders, diplomatic efforts to resolve the Kosovo crisis intensified and air strikes were not, at that point, carried out; the ACTORDs remained in place, however, with their clear, albeit implicit, threat that military force would be used if President Milosevic, of the Federal Republic of Yugoslavia, refused to compromise on the issue of Kosovo.

The diplomatic efforts undertaken resulted in an agreement between Milosevic and the United States envoy, Richard Holbrooke,[12] under which the Federal Republic would allow NATO reconnaissance planes to overfly the region,[13] and the Organisation for Security and Co-Operation in Europe (OSCE) to deploy a 2,000 strong 'Kosovo Verification Mission' to monitor a cease-fire, agreed between the Yugoslav authorities and the Kosovo Liberation Army.[14] The final details of a political settlement, and of the deployment of an international monitoring force, were to be worked out at meetings between the Serb authorities and representatives of the Kosovar Albanian population at Rambouillet, France. The situation on the ground in Kosovo, however, continued to deteriorate, and when, after initially indicating its acceptance of the 'Rambouillet accord',[15] the

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Cumper and Wheatley (eds.), *Minority Rights in the 'New' Europe* (1999) 261, at 263 - 4; also Woodward, *Balkan Tragedy: Chaos and Dissolution After the Cold War* (1995), *passim*.

7 Caplan, "International Diplomacy and the Crisis in Kosovo" (1998) 74 *International Affairs* 745 at 745.

8 Foreign Secretary Cook, Statement to the House of Commons, HC Debs. 19 October 1998, col. 953.

9 France, Germany, Italy, Russia, the United Kingdom and the United States.

10 Meeting of the North Atlantic Council in Foreign Ministers Session, "Statement on Kosovo": Press Communiqué M-NAC-2(98) 143, 8 December 1998.

11 Statement to the Press by the Secretary-General of NATO: <http://www.nato.int/docu/speech/1998/s981013a.htm>.

12 S/1998/953, annex: 14 October 1998.

13 Agreement NATO-Yugoslavia: Kosovo Verification Mission S/1998/991 (23-10-98).

14 Agreement OSCE-Yugoslavia: Kosovo Verification Mission S/1998/978 (20-10-98).

15 "Interim Agreement for Peace and Self-Government in Kosovo", agreed at Rambouillet on 23 February 1999.

Federal Republic of Yugoslavia refused to sign the agreement, NATO commenced a military air campaign, which, in turn, precipitated an intensification of ethnic-cleansing by Serb forces in the region, and the creation of hundred of thousands of Kosovar Albanian refugees who fled to Albania and Macedonia.

After seventy-nine days of intensive NATO bombing, during which time three thousand separate bombing missions were flown, causing massive damage to the infrastructure of the Federal Republic, and numerous civilian deaths, agreement on a diplomatic initiative to end the crisis, and the NATO air campaign, was reached between western leaders and the Russian Federation at the 'G8' meeting on 6 May 1999.[16] Faced with a united international community, the indictment of Milosevic by the International Criminal Tribunal for the former Yugoslavia on charges of war crimes,[17] and the finalisation of plans for a massive ground invasion of Kosovo by a 170,000-strong force, the Federal Republic of Yugoslavia agreed to proposals presented to it by President Ahtisaari of Finland, representing the European Union, and Viktor Chernomyrdin, Special Representative of the President of the Russian Federation.[18] That agreement was endorsed by the Security Council in Resolution 1244,[19] with the Council demanding that the Federal Republic of Yugoslavia comply fully with the provisions in the Resolution.[20]

Resolution 1244, adopted under Chapter VII of the Charter of the United Nations, reflected the two primary objectives of the international community: first, the ending of the humanitarian crisis in Kosovo and provision for the "safe and free return of all refugees and displaced persons to their homes";[21] and, secondly, "the development of … democratic and autonomous self-government" for the Kosovo region.[22] In respect of the first objective, the Resolution demanded that the Federal Republic of Yugoslavia "put an immediate and verifiable end to violence

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A summary of the draft interim agreement (prepared by the FCO) is available in Youngs, Oakes, and Bowers, "Kosovo: NATO and Military Action", HC Paper 99/34 (1999), Appendix I.

16 S/1999/516.

17 The International Criminal Tribunal for the Former Yugoslavia, on 24 May 1999, indicted President Milosevic of the Federal Republic of Yugoslavia, and certain of his key allies, on charges which related to the deportation of 740,000 Kosovo Albanians and the murder of 340 others. Milosevic, the indictment alleges, was responsible for committing, planning, instigating, ordering and abetting war crimes and crimes against humanity, and, as the civilian leader of the military and police forces, for failing in his obligation to prevent those forces from committing atrocities: see, generally, Scharf, "The Indictment Of Slobodan Milosevic", June 1999:<www.asil.org/insigh35.htm>.

18 S/1999/649.

19 SC Res. 1244 (1999) at para. 1.

20 *Ibid* at para 2. This provision is significant given that international agreements concluded as a result of the use or threat of unlawful force are considered void *ab initio*: *Fisheries Jurisdiction (Jurisdiction) Case* ICJ Rep. 1973 14, and Article 52 of the Vienna Convention on the Law of Treaties 1969. The adoption of the agreement by the Security Council, in Resolution 1244, removes the possibility of the agreements between the Federal Republic of Yugoslavia and the international community being considered void, and therefore not binding on the Milosevic regime.

21 *SC Res. 1244 (1999)*, preamble.

22 *Ibid.* at para. 11.

and repression in Kosovo",[23] and withdraw all its forces from the region. Moreover, to prevent the return of Serb forces, and to provide a secure environment in which refugees and displaced persons could return, an international security presence in Kosovo (K-FOR) was established.[24] In respect of the second, an international civilian authority was established to provide interim governance for the region, "pending a final settlement, of substantial autonomy and self-government in Kosovo".[25] No move is indicated towards the recognition of independence for Kosovo,[26] and indeed Resolution 1244 does not contain the commitment to a referendum on the issue which was present in the Rambouillet accord.

THE USE OF FORCE TO PREVENT HUMANITARIAN SUFFERING

The military action undertaken by NATO was contentious to say the least, and opposed by certain States on the following bases: first, that the situation in Kosovo was an internal matter and not the concern of the United Nations, nor other States;[27] secondly, even if the situation in Kosovo was the legitimate concern of the international community, under the Charter of the United Nations, intervention by a state, group of states, or international organisation, by military force is unlawful unless authorised by the Security Council – irrespective of the humanitarian objectives adduced. As to the first objection, that the situation in Kosovo was an internal matter,[28] there is clear evidence that the obligation on states not to intervene in the internal affairs of other states is not applicable in instances of serious and widespread human rights abuses:

> "Contemporary international law establishes beyond any doubt that serious violations of human rights are matters of international concern . . . In the event of human rights violations which reach the magnitude of the Kosovo crisis, the developments in international law allow states, acting individually, collectively or though international organizations, to make use of a broad range of *peaceful* responses".[29]

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[23] *Ibid.* at para. 3.

[24] *Ibid.* at para. 9.

[25] *Ibid.* at para. 11(a).

[26] The Security Council reaffirms "the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia…": *ibid.*, preamble.

[27] "The question of Kosovo, as an internal matter of the [FRY], should be resolved among the parties concerned in the [FRY] themselves (Mr. Qin Huasun, China)": Security Council Debates, 24 March 1999, S/PV.3988.
The principle of non-intervention prohibits "dictatorial interference" (Oppenheim, *International Law* (1955, 8th ed.), p 305) in matters which "each state is permitted, by the principle of state sovereignty, to decide freely" (*Nicaragua Case (Merits)* ICJ Rep. 1986 14 at para 205). See, generally, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States (1970), GA Resolution 2625 (XXV), adopted 24 October 1970; see, also, Verwey, *supra* n. 4, at 358 - 366.

[28] This contention was rejected by a majority of States, and, interestingly, the Russian Federation did not make this argument. The dominant view was reflected in the remarks of the representative of the United States: "The actions of the [FRY] … violate its commitments under the Helsinki Final Act, as well as its obligations under the international law human rights. Belgrade's actions in Kosovo cannot be dismissed as an internal matter", S/PV.3988.

[29] Simma, "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 *EJIL* 1 at 1 - 2 (emphasis added). Indeed the initial response of European Govern-

The NATO intervention was, however, self-evidently not peaceful, and appears, *prima facie*, to involve a serious violation of the Charter of the United Nations' prohibition on the use of force in inter-state relations.[30] The Charter prohibits the use of military force "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations",[31] and considers any intervention in violation of this provision to be an unlawful, aggressive, action.[32] The only exceptions, explicitly provided by the Charter,[33] are acts of individual or collective self-defence,[34] which are not relevant to the situation considered here,[35] and military action authorised by the Security Council, under the provisions on collective security.

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ments to the Serb actions in Kosovo was to instigate a ban on all flights by Yugoslav carriers to EU States: (EC) Regulation 1901/98 concerning a ban on flights of Yugoslav carriers between the Federal Republic of Yugoslavia and the European Community OJL248/1, as amended by Regulation 214/99 OJL023/6.

30 Article 2(3), UN Charter.

31 Article 2(4). Interventions such as the one undertaken by NATO States may be contrasted with acts of 'humanitarian assistance': the provision of humanitarian aid, against the wishes of the sovereign state, on a small scale, to alleviate the suffering of persons. Whilst certain authors have suggested that acts of forcible humanitarian assistance should be subsumed under the general heading of humanitarian intervention (Gordon, "Humanitarian Intervention by the United Nations: Iraq, Somalia and Haiti" (1996) 31 *Texas International Law Journal* 43 at 45), they are best considered separately given that humanitarian intervention, proper, will inevitably involve a substantial encroachment of the sovereign rights of the target state, which may not be temporary in nature.
See, on the issue of humanitarian assistance: UK Foreign Office Memorandum to HC Foreign Affairs Committee, reprinted (1992) 63 *BYIL* 825; *Nicaragua Case (Merits)* ICJ Rep. 1986 14 at para 242; Article 59, (Fourth) Geneva Convention Relative to the Protection of Civilians in Time of War (1949); Cuny, "Dilemmas of Military Involvement in Humanitarian Relief ", in Gordenker and Weiss (eds.), *Soldiers, Peacekeepers and Disasters* (1991) 52; Helton, "The Legality of Providing Humanitarian Assistance Without the Consent of the Sovereign" (1992) 4 *International Journal of Refugee Law* 373 at 375; Arulpragasam, "International Agreements – *Indo-Sri Lanka Agreement* 1987" (1988) 29 *Harv. Int'l Law Jnl* 178; and, Chandrahasan, "Use of Force to Ensure Humanitarian Relief – A South Asian Precedent Examined" (1993) 42 *ICLQ* 664.

32 United Nations General Assembly Resolution on the 'Definition of Aggression' 1974: GA Res. 3314 (XXIX), 14 December 1974.

33 See, generally, Schachter, "Authorized Uses of Force by the United Nations and Regional Organizations", in Damrosch and Scheffer (eds.), *Law and Force in the New International Order* (1992) 65.

34 Article 51: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security".

35 *Cf*. the position of the Balkan Action Council, which has argued that the Kosovar people's right of self-determination gives them a right of collective self-defence, and that the NATO intervention is justified under the right of collective self-defence under Article 51, UN Charter: Williams, "Legal Basis for NATO Military Action Taken Against Serbia/Montenegro", Balkan Action Council, 1 April 1999 (document on file with author); see, also Kirgis, "The

The following sections consider, first, the role of the Security Council in the prevention of suffering to the human person, and secondly, whether NATO, as a mutual defence organisation, is able to defend the legality of its intervention in the Federal Republic of Yugoslavia by reference to the provisions on collective security in the Charter of the United Nations.

THE SECURITY COUNCIL AND INTERVENTION TO PREVENT HUMANITARIAN SUFFERING

One of the main criticisms levelled at the intervention by NATO States was that it had the effect of undermining the primacy of the Security Council, under the Charter of the United Nations, for the maintenance of international peace and security.[36] Moreover, at a time following the ending of the Cold War, when the Security Council was beginning to fulfil the role envisaged for it under the Charter, the intervention was seen as creating a dangerous precedent for future actions which might seek to circumvent the requirements for undertaking enforcement action.[37] If military force were to be employed, it was argued, it must, under the Charter, be authorised by the Security Council, either under the provisions of Chapter VII,[38] or under Chapter VIII, if the action was to be carried out by a regional arrangement or agency, as in this case.[39]

The Security Council is, however, unable to authorise the use of military force for humanitarian reasons *simpliciter*. Under the Charter of the United Nations, the Council may only authorise military intervention where it has determined that a given situation threatens international peace and security.[40] In the absence of such a determination, Security Council

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Kosovo Situation and NATO Military Action": <www.asil.org/insigh30.htm>; Verwey, *supra* n. 4, at 397 - 8; also Pomerance, *Self-Determination in Law and Practice: The New Doctrine in the United Nations* (1982), p 49).

It may also be possible to argue that those States (Albania and Macedonia) which suffered an influx of refugees, as a result of the actions of the Yugoslav authorities, could consider themselves subject to an 'armed attack' for the purposes of Article 51, and thus possessing an individual and collective right of self-defence. This argument would not find general support.

[36] "[Under Article 24 (1) of the Charter] it is the Security Council that bears primary responsibility for the maintenance of the international peace and security. And it is only the Security Council that can determine whether a given situation threatens international peace and security and can take appropriate action…(Mr. Qin Huasun, China)": S/PV.3988.

[37] "If we do not put an end to this very dangerous trend, the virus of illegal unilateral approaches could spread not merely to other geographical regions but to spheres of international relations other than questions of peace and security" (Mr. Lavrov, Russian Federation)": S/PV.3988.

[38] Article 42, UN Charter.

[39] Article 53, UN Charter. It is generally considered, under the Charter, that individual states, even acting collectively, are not permitted to undertake enforcement action without Security Council approval: *Certain Expenses of the United Nations Case* [1962] ICJ Rep. 151.

[40] Article 39, UN Charter. Whilst Article 39 grants the Council a wide discretion as to the situations in which it may become involved, that discretion is not "totally unfettered" (*Prosecutor* v *Tadic (Jurisdiction)* (1996) 35 *ILM* 35 at para. 29), and there must, in fact, exist a "threat to international peace and security". *Cf.* Fifoot, "Functions and Powers, and Interventions: UN Action in Respect of Human Rights and Humanitarian Intervention", in Rodley (ed.) *To Loose the Bands of Wickedness: International Intervention in Defence of*

involvement is precluded by Article 2(7) of the Charter,[41] and whilst violations of human rights, and humanitarian catastrophes, may entail a threat to international peace and security, they do not necessarily do so.[42] Significantly, in its resolutions on Kosovo,[43] the Security Council found that the deteriorating humanitarian situation did create a threat to peace and security,[44] and in Resolution 1199 demanded that all parties to the conflict "immediately cease hostilities"; that the authorities in the Federal Republic of Yugoslavia, and the Kosovan Albanian leadership, "take immediate steps to improve the humanitarian situation and avert the impending humanitarian catastrophe"; and that the parties "negotiate a political solution". Resolution 1199 did not, however, authorise the use of force, but determined that "should the concrete measures demanded in this Resolution . . . not be taken, [the Security Council would] consider further action and additional measures to maintain or restore peace and stability in the region".[45]

Human Rights (1992) 133, at 153. This limitation, on the right of the Security Council to intervene in situations where the rights of the human person are being violated, has not provided, in practice, an insurmountable encumbrance to Council intervention. An examination of the practice of the Security Council evidences a clear willingness, on its part, to authorise the use of force in circumstances where it is not obvious that a threat to international peace and security exists, most notably in the case of Somalia, where the Council responded to the "the magnitude of the human tragedy": Security Council Resolution 794 (1992). See, generally, Hutchinson, "Restoring Hope: UN Security Council Resolutions For Somalia and an Expanded Doctrine of Humanitarian Intervention" (1993) 34 *Harv. International Law Jnl* 624; Lewis and Mayall, "Somalia", in Mayall (ed.), *The New Interventionism: 1991-1994* (1996), p 94. See, also resolutions in respect of Albania (SC Res. 1101 (1997)); Haiti (SC Res. 917 (1994), SC Res. 940 (1994)); Rwanda (SC Res. 918 (1994), SC Res. 929 (1994)); and Sierra Leone (SC Res. 1132 (1997)).

41 See Delbrück, "A Fresh Look at Humanitarian Intervention Under the Authority of the United Nations" (1992) 67 *Indian Law Jnl* 887 at 891 - 896.

42 Higgins, "International Law in a Changing International System" (1999) 58 *Cambridge Law Journal* 78 at 95. The Security Council is, however, demonstrating an increased willingness to declare a threat to peace and security in circumstances where it is not clear, beyond the "widespread and flagrant violations of international humanitarian and human rights law" (SC Res. 1264 (1999)), that a threat to peace and security exists. Resolution 1264, establishing a multinational force, empowered to take all necessary means, to restore peace and security in East Timor, to protect and support the United Nations Mission in East Timor (UNAMET) and to facilitate humanitarian assistance operations, refers only to the worsening humanitarian conditions in East Timor and consequential impact on the civilian population and UN personnel; it does not indicate that any wider threat to peace and security exists.

43 See SC Res. 1160 (1998), SC Res. 1199 (1998) and SC Res. 1203 (1998).

44 The Council was particularly concerned with the "excessive and indiscriminate use of force by Serbian security forces", the displacement of an estimated 230,000 persons and the flow of refugees into neighbouring countries, the "rapid deterioration of the humanitarian situation … [and] impending humanitarian catastrophe", and reports of "increasing violations of human rights and of international humanitarian law": SC Res. 1199 (1998).

45 SC Res. 1199, at para. 16. The reasoning behind this refusal was the anticipated Chinese and Russian opposition to any attempt to authorise enforcement action against the Federal Republic of Yugoslavia. See, Youngs, "Kosovo: The

The adoption, by the Security Council, of a number of resolutions on Kosovo – and the Federal Republic of Yugoslavia's failure to comply with them – provided, in the view of a number of States, a certain degree of legitimacy for the NATO intervention,[46] and *de facto* limits on its extent;[47] the resolutions could not, however, provide any lawful authority for the intervention in the Federal Republic of Yugoslavia, given the absence of any express authorisation from the Council for the use of military force.[48] This absence of express authorisation did not, though, according to NATO States, create a categorical impediment to determining that military force could be employed in the circumstances:[49]

> "It goes without saying that a country – or an alliance – which is compelled to take up arms to avert such a humanitarian catastrophe would always prefer to be able to base its action on a specific Security Council resolution . . . If, however, due to one or two permanent members' rigid interpretation of the concept of domestic jurisdiction, such a resolution is not attainable, we cannot sit back and simply let the humanitarian catastrophe occur . . . ". (Mr. Van Walsum, Netherlands).[50]

NATO States clearly believed they enjoyed sufficient legal authority for the intervention without the express authorisation of the Security Council. A claim of legality does not, however, make the intervention lawful; we must consider both the collective nature of the intervention, and the relevance of arguments that would permit unilateral intervention to prevent a humanitarian catastrophe, or human rights violations.

Diplomatic and Military Options", HC Paper 98/93 (1998), fns 25 - 7, and accompanying text. See, also, *The Guardian*, 29 January 1999.

46 See, in particular, the views of Mr. Burleigh (United States of America); Mr. Fowler (Canada); and Mr. Dejammet (France): S/PV.3988.

47 "It is our expectation and belief that the action which is being undertaken *will be carried out strictly within the substantive parameters established by the relevant Security Council resolutions* (Mr. Türk, Slovenia)": S/PV.3988 (emphasis added).

48 A state may not rely on resolutions adopted by the Security Council which do not explicitly authorise the use of force to justify military intervention. See, for example, US and UK air strikes against Iraq, 16-20 December 1998, in response to the latter's failure to comply with Security Council Resolution 1154 (SC Res. 1154 (1998)). Whilst the resolution had threatened the "severest consequences" if Iraq did not comply with its demands, it could not be viewed as providing sufficient authority for the attacks. France, China and Russia, the other permanent members of the Security Council, argued that a further resolution was required prior to any attack: (1998) *Keesings Record of World Events* 42697-42700. See, Kirgis, "The Legal Background on the Use of Force to Induce Iraq to Comply with Security Council Resolutions" (1997): <http://www.asil.org/insigh12.htm>.

49 "There may be a moment in which it is necessary to act for humanitarian reasons, when a UN Security Council resolution will not be necessary or will not even be appropriate because the UN Charter does not contemplate humanitarian acts (NATO Secretary-General Solana)": *Financial Times* (London), 9 October 1998.

50 See, also the views of Mr. Türk (Slovenia), and Mr. Hasmy (Malaysia): S/PV.3988.

COLLECTIVE INTERVENTION UNDER THE CHARTER OF THE UNITED NATIONS

A role for international organisations, other than the United Nations, in the maintenance of international peace and security, is provided for by Chapter VIII of the Charter of the United Nations, which requires that "regional arrangements or agencies" make every effort to deal with an issue which threatens international peace and security before referring the matter to the Security Council.[51] The Security Council is directed to utilise such arrangements where appropriate, although enforcement action by a regional arrangement or agency may not be undertaken "without the authorization of the Security Council".[52] There are two issues for our consideration: first, whether NATO may be considered an appropriate regional arrangement or agency under Chapter VIII, and secondly, the relevance of Chapter VIII of the Charter, given the absence of explicit Security Council authorisation for the intervention.

Whilst the United Nations' Charter recognises, and indeed legitimates, the existence of regional arrangements or agencies, it provides no definition as to which international entities will constitute such an organisation,[53] although in *An Agenda for Peace*, the (then) Secretary-General argued for an inclusive understanding of the concept, extending to those "groups created to deal with a specific political, economic or social issue of current concern".[54] In the present case, we are faced with the further difficulty that NATO was not established as a regional arrangement or agency,[55] but, under the North Atlantic Treaty (1949), as a mutual assistance organisation, guaranteeing collective defence in the event of a military attack on a member State from a non-member.[56] Does the organisation, then, enjoy the right to undertake an armed intervention outside the territory of its members, or is such action to be considered *ultra vires* to the organisation's own objectives and Charter. In response, it might be noted that there appear to be few difficulties in accepting the right of member States to alter the nature of an organisation which, like NATO, reaches its decisions by consensus, "as long as all members agree";[57] more significantly, perhaps, in the particular case of NATO, the organisation has been undertaking such a role "uncontroversially under a direct UN mandate in Bosnia since 1995".[58]

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[51] Article 52 (2), UN Charter.
[52] Article 53(1).
[53] Article 52 (1).
[54] Boutros Boutros-Ghali, An Agenda for Peace (1992) SC Doc. S/24111, 17 June 1992.
[55] Higgins, *supra* n. 42, at 93.
[56] "[A]n armed attack against one or more [member State(s)] … shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence . . . will assist the Party . . . so attacked", North Atlantic Treaty (1949), Article 5. Moreover, NATO recognises the "primary responsibility of the Security Council for the maintenance of international peace and security", *ibid*., Article 7.
[57] Simma, *supra* n. 29, at 19.
[58] Weller, "UN Accepts That Humanitarian Ends Justify Military Means", *The Times* (London) 25 March 1999. Security Council Resolution 816 (1993) authorised NATO to shoot down aircraft violating the no-fly zone over Bosnian airspace (which NATO aircraft did in cases where the airspace was violated).

Even if, however, NATO may be considered a regional arrangement or agency for these purposes, the intervention in the Federal Republic of Yugoslavia was not expressly authorised by the Security Council, and the Charter of the United Nations "clearly stipulates that no enforcement actions shall be undertaken under regional arrangements without the authorization of the . . . Council".[59] Is such authorisation, though, required to be explicit, or indeed provided prior to any intervention; could it not be provided *ex post facto* or be implied by the Council's behaviour? Whilst such a "less-than-rigorous"[60] interpretation of the Charter may provide some legal basis for certain interventions, in the present case, it is clear that the opposition of China and Russia to any military intervention in the Federal Republic of Yugoslavia (over which they would have a veto, were the issue to come before the Council) would preclude us accepting that the action was authorised, even on a less than rigorous interpretation.

CASE CONCERNING LEGALITY OF USE OF FORCE

During the air campaign, the Federal Republic of Yugoslavia filed ten separate applications, simultaneously, against, respectively, Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States, with the International Court of Justice (*Case Concerning Legality of Use of Force*), requesting that the Court indicate the following measure:

> "[The respondent State] shall cease immediately its acts of use of force and shall refrain from any act of threat or use of force against the Federal Republic of Yugoslavia".

Whilst the jurisdictional issues were not the same in each case – indeed the Court dealt with them separately – the substantive issues were: the Federal Republic of Yugoslavia alleged that the NATO action constituted a violation of Article 2(4) of the Charter of the United Nations, which could not be justified by reference to self-defence or relevant Security Council resolution; nor could it be justified by reference to any doctrine of humanitarian intervention, which enjoyed no legal validity.[61]

The Federal Republic of Yugoslavia further alleged that not only did the means by which the air campaign was conducted violate international law,[62] but that the nature of the action, in particular the massive environmental damage caused and the use of depleted uranium in NATO weapons, violated the obligation incumbent upon states not to deliberately

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See, generally, Woodliffe, "The Evolution of a New NATO for a New Europe" (1998) 47 *ICLQ* 174 at 183 - 187.

59 Mr. Sharma (India): S/PV.3988.

60 Murphy, *supra* n. 5, at 346.

61 See Oral Pleadings, *Case Concerning Legality Use of Force*, 10 May 1999: <www.icj-cij.org>.

62 The Federal Republic of Yugoslavia alleged breaches of international obligations to spare the civilian population; not to commit any act of hostility against historical monuments or places of worship; not to use weapons (that is, cluster bombs) which cause unnecessary suffering; not to cause considerable environmental damage (in the bombing of oil refineries and chemical plants); not to use prohibited weapons or cause far reaching environmental damage (in the use of weapons containing depleted uranium); to respect the right of civilian persons to life, and to other human rights; and to respect freedom of navigation on international rivers (through the destruction of bridges): see, for example, *Case Concerning Legality Use of Force (Yugoslavia* v *Canada)* at para. 4, (1999) 38 *ILM* 1037.

inflict on a national group conditions of life calculated to bring about its physical destruction, in whole or part; that is, the Federal Republic contended that the military intervention by NATO States constituted a violation of the Convention on the Prevention and Punishment of the Crime of Genocide (1948). To some extent the allegation must be seen as 'procedural', given that it presented the Federal Republic with an alternate basis, under Article IX of the Genocide Convention, upon which to argue that the International Court enjoyed jurisdiction,[63] to that provided under the Statute of the Court itself.[64]

In its decision, on the issue of jurisdiction, the Court declared itself "deeply concerned with the human tragedy, the loss of life, and the enormous suffering in Kosovo . . . and with the continuing loss of life and human suffering in *all* parts of Yugoslavia",[65] and emphasised the requirement that "all parties appearing before it must act in conformity with their obligations under the Charter of the United Nations and other rules of international law, including humanitarian law . . . ".[66] The International Court concluded, however, that it lacked *prima facie* jurisdiction to consider the application, and could not, as a consequence, indicate the provisional measures requested by the Federal Republic of Yugoslavia.[67]

In reaching its decision, the Court determined that the threat or use of force against a state could not, in itself, constitute an act of genocide, within the meaning of Article II of the Genocide Convention; nor could

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[63] In relation to Spain and the United States, the Court determined that reservations entered, by the respective states, to Article IX of the Genocide Convention, precluded the Court exercising jurisdiction. The cases filed against Spain and the United States were removed from the Court's docket. The cases against the remaining eight States were ordered to remain, in relation to the accusation of genocide only; see *infra* n. 67 (and accompanying text).

[64] As against Belgium, Canada, the Netherlands, Portugal, Spain and the United Kingdom, the Federal Republic of Yugoslavia attempted to rely upon Article 36(2), Statute of the International Court of Justice: "The state parties to the present Statute may at any time declare that they recognise as compulsory *ipso facto* and without special agreement, in relation to any other states accepting the same obligation, the jurisdiction of the Court in all legal disputes…"; in respect of France, Germany, Italy and the United States, the application by Yugoslavia was transmitted to the States named as respondent, under Article 38 (5) of the ICJ's Rules of Court. However, as none of the States involved indicated that it accepted the Court's jurisdiction, the Court could not exercise jurisdiction. See, generally, *Case(s) Concerning Legality Use of Force*: (1999) 38 *ILM* 950; also, Bekker and Borgen, "World Court Rejects Yugoslav Requests to Enjoin Ten NATO Members from Bombing Yugoslavia", June 1999: <www.asil.org/insigh36.htm>.
As against Belgium, Yugoslavia's attempt to rely on Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Kingdom of Yugoslavia and Belgium (1930) was rejected by the Court, given that it had not been introduced until the second round of oral argument on a request for the indication of provisional measures: *Case Concerning Legality Use of Force (Yugoslavia* - v - *Belgium)* at para. 44: (1999) 38 *ILM* 950.

[65] See, for example, *Case Concerning Legality Use of Force (Yugoslavia* v *Canada)* Request for the Indication of Provisional Measures at para. 15, (1999) 38 *ILM* 1037 (emphasis added).

[66] *Ibid.* at para. 18.

[67] *Ibid.* at para. 29 and 40.

the bombings which formed the subject of the application be considered to "entail the element of intent . . . required by [Article II of the Genocide Convention]".[68] Furthermore, it could not be demonstrated that the jurisdiction of the Court had been accepted by all parties. Most significantly, the Federal Republic of Yugoslavia, had not accepted the compulsory jurisdiction of the Court, under Article 36(2) of the Court's Statute, until 26 April 1999. Given that the bombings had commenced prior to that date, on 24 March 1999, and had continued, without interruption, beyond the time of the acceptance, by the Federal Republic, of the Court's compulsory jurisdiction, the International Court of Justice considered that the legal dispute before it predated the acceptance, by all parties, of its jurisdiction.[69]

We must, then, examine the legality of the intervention by NATO States without the benefit of a determination by the International Court of Justice of certain of the principal legal issues involved.

THE LEGALITY OF THE NATO INTERVENTION

Examination of the provisions on the use of military force under the Charter of the United Nations has demonstrated that NATO is unable to justify its action by reference to the provisions on collective security, under Chapter VII and VIII of the Charter, or, as we have noted, by reference to the provisions on self-defence. Whilst there may be advantages to be gained, therefore, in undertaking an intervention under the auspices of a *de facto* collective security organisation, *viz.* NATO, rather than unilaterally – notably a greater perception of "impartiality and evenhandedness"[70] – NATO States will not enjoy any right of intervention collectively beyond that which they enjoy individually.[71] The intervention may only be considered lawful if each State acted according to a right of intervention which it enjoyed itself. Consequently, we must examine first, whether a general right of intervention to prevent a humanitarian catastrophe exists, under the Charter of the United Nations and general international law,[72] as an exception to the prohibition on aggressive intervention;[73] and, secondly, if such a right does exist, whether the NATO intervention may be considered a legitimate exercise of such a right.[74]

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[68] *Ibid.* at para. 39.

[69] *Ibid.* at para. 41. See, however, the strong dissent of Vice-President Weeramantry.

[70] Murphy, *supra* n. 5, at 336.

[71] ". . .[N]o unanimity of NATO members can do away with the limits to which these states are subject under peremptory international law (*jus cogens*) outside the organization, in particular the higher law (*cf.* Article 103) of the UN Charter on the threat or use of armed force": Simma, *supra* n. 29.

[72] See, generally, on this Verwey, *supra* n 4, at 378 - 388.

[73] In order to answer this question, we must accept that there is no lacuna, or *non liquet*, on this point of international law: Aznar-Gómez, "The 1996 Nuclear Weapons Advisory Opinion and *Non Liquet* in International Law" (1999) 48 *ICLQ* 3.

[74] *Cf.* "[T]hree sets of values underpin the overarching system of inter-state relations: peace, human rights and self-determination. However, any time that conflict or tension arises between two or more of these values, peace must always constitute the ultimate and prevailing factor": Cassese, "*Ex iniuria ius oritur:* Are we moving towards international legitimation of forcible humanitarian countermeasures in the world community?" (1999) 10 *EJIL* 23 at 24. See, also, Little, "Recent Literature on Intervention and Non-intervention",

HUMANITARIAN INTERVENTION

Prior to the adoption of the Charter of the United Nations, in the nineteenth and early twentieth century, the legitimacy of interventions such as that carried out by NATO States against the Federal Republic of Yugoslavia was considered by reference to the doctrine of humanitarian intervention. This right of intervention was invoked by States who sought to legitimise military action whose stated purpose was to put an end to atrocities being committed against a local population by the governing authorities[75] (in particular, in circumstances where the local population was under "alien" or "colonial" rule[76]). Whilst it is accepted that most instances of humanitarian intervention in this period were not genuine,[77] a right to intervene was recognised in response to atrocities which "shock[ed] the conscience of mankind",[78] reflecting an acceptance of universal principles of decency and humanity,[79] and limits on the "authority within which the sovereign [State] is presumed to act with reason and justice".[80]

There has been much discussion as to whether a right of humanitarian intervention survived the adoption of the Charter of the United Nations, although it is generally accepted, if it did, that, in its present formulation, humanitarian intervention involves:

> "the protection of fundamental human rights by a State or group of States . . . [through] the use or threat of force, [without] authorization by relevant organs of the United Nations nor upon invitation by the legitimate government of the [target] State".[81]

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in Forbes and Hoffman, *Political Theory, Intervention Relations and the Ethics of Intervention* (1993) 13, at 21.

75 "Until 1945, there was no customary international prohibition on the unilateral resort to force": Reisman, "Coercion and self-determination: Construing Charter Article 2(4)" (1984) 78 *AJIL* 642 at 642. This absence of a general prohibition has not, however, prevented authors considering the 'justness', or 'legitimacy', of interventions: Meron, "Common Rights of Mankind in Gentili, Grotius and Suárez" (1991) 85 *AJIL* 110.

76 Specifically, Christian populations under the authority of the Ottoman Empire. See, for example, interventions in Greece (1827 - 1830), Syria (1860 -1861), Crete (1866 - 1868), Bosnia, Herzegovina, and Bulgaria (1876 - 1878), and Macedonia (1903 - 1908, 1912 - 1913): Fonteyne, *supra* n. 5, at 207 - 214.

77 For a review of the literature on this point, see Donnelly, "Human Rights, Humanitarian Intervention and American Foreign Policy" (1984) 37 *Journal of International Affairs* 311, at 314 - 317; see, also, Pogany's examination of one of the alleged 'humanitarian' interventions: "Humanitarian Intervention in International Law, The French Intervention In Syria Re-Examined" (1986) 35 *ICLQ* 45.

78 ". . . when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to *shock the conscience of mankind*, intervention in the interest of humanity is legally permissible. . . ": Oppenheim, *International Law* (1955, 8th. ed.), p 312 (emphasis added).

79 Stowell, *Intervention in International Law* (1921), p 51.

80 *Ibid.*, p 53.

81 Verwey, *supra* n. 4, at 375. This understanding excludes military intervention to rescue nationals held abroad (Asrat, *Prohibition of Force Under the UN Charter: A Study of Art. 2(4)* (1991), p 184-5), although not all writers accept

Humanitarian intervention, then, provides a remedy of last resort in cases of serious and widespread abuses of the civil and political human rights.[82] There are, though, a number of difficulties with this approach, beyond the need to distinguish "tolerable [human rights] abuses from intolerable ones",[83] given that not every violation of a human right, even the right to life, could justify military intervention.

First, beyond the initial consensus that humanitarian intervention involves the use of force to prevent the violation of fundamental human rights, there is little agreement as to which particular human rights, if violated, will justify intervention:[84] different writers have referred, *inter alia*, to the

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such a distinction: Pease and Forsythe, *Human Rights, Humanitarian Intervention, and World Politics* (1993), p 298; Schachter, "The Right of States to Use Armed Force" (1984) 82 *Michigan Law Review* 1620 at 1628 - 1633. Rescue missions are properly considered as examples of self-help (Fonteyne, "Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations", in Lillich (ed.) *Humanitarian Intervention and the United Nations* (1973) 197, p 199), or self-defence (Nash, "Contemporary Practice of the United States Relating to International Law" (1979) 73 *AJIL* 122 at 124). This may be contrasted with humanitarian interventions, which may be considered, broadly, altruistic in nature. The United Kingdom Foreign Office considers them separately: Memorandum submitted by the Foreign and Commonwealth Office, "Kosovo: Legal Authority for Military Action", HC 118-i, at paras. 4 and 5.

This inquiry excludes from its consideration, then, as 'rescue missions': the Belgian and American interventions in the Congo (1960 and 1963); the initial phase of the United States intervention in the Dominican Republic (1965); and the Belgian and French intervention in Zaire (1978). On the legality of such interventions, see Jeffrey, "The American Hostages in Tehran: The ICJ and the Legality of Rescue Missions" (1981) 30 *ICLQ* 717.

82 A doctrine of 'human rights' intervention must be conceptually grounded in a view that sovereign rights are conditional upon a minimum respect for civil and political rights. There are a number of difficulties in this approach: first, it reflects the values of the occident, rejecting the pre-eminent concern of other states for respect for their sovereign independence (Kausikan, "Asia's Different Standard" (1993) 92 *Foreign Affairs* 24). Secondly, it ignores the fact that all human rights, including economic, social and cultural rights, are considered universal, indivisible, interdependent and interrelated and to be treated "on the same footing and with the same emphasis": World Declaration on Human Rights – The Vienna Declaration and Programme of Action (1993) at para 5. A doctrine of humanitarian intervention which, however, recognised the equal validity of civil and political rights and economic, social and cultural rights would be unable to distinguish between the NATO intervention in Kosovo and the intervention by Soviet forces, in 1968, to end the 'Prague spring' in Czechoslovakia: see, Laberge, "Humanitarian Intervention: Three Ethical Positions" (1995) 9 *Ethics and International Affairs* 15 at 21 - 22.

83 Laberge, *ibid.*, at 28; One contemporary approach argues that intervention by the United States should only be undertaken where the death rate in the target state, as a result of the relevant conflict, exceeds the murder rate in the US: Solarz and O'Hanlon, *Washington Post*, 7 February 1999.

84 "References are found to 'gross', 'massive', 'large-scale' or 'persistent' violations, of 'elementary' or 'fundamental' human rights, in such a way that 'atrocities', 'barbaric acts' or 'repulsive practices' are committed, which constitute 'crimes against (the laws of) humanity' or 'genocide', and are considered to 'shock the conscience of mankind' or 'flagrantly violate standards of

right to life,[85] in particular if violated on a massive scale;[86] acts of genocide, slavery or widespread torture;[87] and the arbitrary and systematic nature in which abuses are committed.[88] Given, however, that most human rights may be subject to certain restrictions in times of internal conflict or public emergency,[89] a right of intervention could only exist where the human rights violated could be considered both universal and fundamental,[90] with, according to Verwey, the right to life standing out "as the most prominent and undisputed human right protectable by humanitarian intervention".[91] Even this 'minimalistic' grounding of a right of humanitarian intervention is not, though, without difficulties: the right to life is not absolute;[92] further, in circumstances where an internal armed conflict exists, as in Kosovo, a determination as to whether a particular loss of life amounts to a violation of the human right to life requires consideration of the applicable law of armed conflict,[93] with the intervening State required to demonstrate a violation of the *jus in bello*, as a precondition to finding a violation of the right to life, to justify its intervention.[94]

A second difficulty in grounding a right of intervention in the violation of human rights is the requirement that the intervening State demonstrate a legal interest in the human rights violations in question. In our particular case, whilst the Federal Republic of Yugoslavia is party to a number of human rights treaties,[95] its obligation to comply with the relevant

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morality and civilization' singly or in combination of most definitions of humanitarian intervention": Verwey, *supra* n 4, at 368 – 369 (footnotes omitted).

85 Verwey, "Humanitarian Intervention", in Cassese (ed.), *The Current Regulation of the Use of Force* (1986) 57, p 59.

86 Bazyler, "Reexamining the Doctrine of Humanitarian Intervention in the Light of Atrocities in Kampuchea and Ethiopia" (1987) 23 *Stanford Journal of International Law* 547 at 598-601.

87 D'Amato, *International Law: Process and Prospect* (1987), p 226.

88 Donnelly, *supra* n. 77, at 313.

89 See Human Rights Committee General Comment 5, Article 4 of the International Covenant on Civil and Political Rights, (Thirteenth session, 1981), U.N. Doc. HRI\GEN\1\Rev.1 at 5 (1994).

90 Verwey, *supra* n. 4, at 410.

91 *Ibid*, at 369.

92 See, for example, Article 2(2), European Convention on Human Rights (1950).

93 *Legality of the Threat or Use of Nuclear Weapons Case* ICJ Rep. 1996 90 at para 25.

94 Common Article 3 of the Geneva Conventions of 1949: (First) Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field; (Second) Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; (Third) Geneva Convention Relative to the Treatment of Prisoners of War; (Fourth) Geneva Convention Relative to the Protection of Civilians in Time of War. See, also, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

95 These include, *inter alia*, the Convention for the Prohibition and Punishment of the Crime of Genocide (1948), Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (1984), the International Convention on the Elimination of All Forms of Racial Discrimination (1966), the International Covenant on Civil and Political Rights (1966), and the Framework Convention on National Minorities (1994).

international norms is owed to the other parties, and the appropriate international institution to the relevant covenant – not third states.[96] Further, the other State parties are required to utilise the mechanisms established by the treaty in cases of alleged violation.[97] Consequently, intervening states, to justify a general right of intervention, must rely on evidence of violations of human rights obligations owed *erga omnes*,[98] in whose protection all States, as members of the international community, enjoy a legal interest. It is, though, difficult to identify specific human rights norms of *erga omnes* character; moreover, the international community has proved reluctant to allow individual states to enforce obligations owed to the collective,[99] and, in any case, the International Court of Justice, in the *Nicaragua Case*, determined that "…the use of force could not be the appropriate method to monitor or ensure [respect for human rights]".[100]

These difficulties notwithstanding, the paradigmatic exposition of humanitarian intervention, as the protection of fundamental human rights through the use of military force, abides. Yet, despite a clear recognition that human rights were violated on a massive scale in Kosovo,[101] NATO States did not seek to ground their right of intervention in those human rights violations.[102] This has not, however, prevented attempts to analyse the intervention by reference to the previous understanding of humanitarian intervention, as intervention to protect human rights. Simma, for example, referring to a letter from NATO Secretary-General Solana, addressed to the permanent representatives of the North Atlantic Council, argues that NATO justified its intervention by reference to the Federal Republic of Yugoslavia's refusal to "desist from further massive violations of human rights".[103] Yet, the letter cited does not mention the violation of human rights in Kosovo, nor the need for intervention to prevent further violations.[104] Unless we "discount what States actually said

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96 *S.W. Africa Cases (Preliminary Objections*) *(Ethiopia and Liberia* v *South Africa*) ICJ Rep. 1962 319.

97 In cases of alleged violations of human rights standards which arise as a result of membership of an international organisation, such as the United Nations, only the organisation, and not individual member states, is empowered to monitor implementation. (In this case, the Federal Republic of Yugoslavia is not a recognised member of a relevant international organisation.) However, whilst the Charter of the United Nations, for example, requires respect for human rights, it "does not permit enforcement to ensure it": Higgins, *supra* n. 42, at 95.

98 See, Verwey, *supra* n. 4, at 374.

99 *South West Africa Cases*, *Second Phase* ICJ Rep. 1966 6.

100 *Nicaragua Case (Merits)* ICJ Rep. 1986 14 at para 268.

101 The UN Secretary General commented, "I am outraged by reports of mass killings of civilians in Kosovo": Report of The Secretary-General Prepared Pursuant To Resolutions 1160 (1998) And 1199 (1998) of The Security Council, S/1998/912, 3 October 1998 at para. 9.

102 Human rights violations are mentioned, briefly, by only two states in the Security Council debates on Kosovo: "What is at stake today is peace, peace in Europe – but human rights are also at stake": Mr. Dejammet (France); "The international community is facing a situation in which a Government in the heart of Europe is flouting the most fundamental rights of its citizens. . .": Mr. Fowler (Canada): S/PV.3988.

103 Simma, *supra* n 29, at 12.

104 The letter refers to the need for the FRY to comply with relevant Security Council resolutions; the danger of a humanitarian disaster; the continuation of

and rely on [our] own re-interpretation of the State practice",[105] we cannot consider the intervention by NATO States by reference to any right of intervention to protect human rights: the legality of the action may only be judged in the light of the justification adduced.

INTERVENTION TO PREVENT A HUMANITARIAN CATASTROPHE

Following initial confusion,[106] a clear and consistent justification as to the legal basis for the intervention by NATO States in the Federal Republic of Yugoslavia emerged:[107] the use of military force was permissible where force was the only method by which the intervening states were able "to avert a humanitarian catastrophe".[108] Is then humanitarian intervention the appropriate nomenclature for the action. Given the reliance, by the United Kingdom, on the "customary international law principle of humanitarian intervention"[109] to justify intervention on humanitarian grounds in Iraq, we should not preclude reference to it in this context – although we should recognise that humanitarian intervention involves, in this context, military intervention to prevent a humanitarian catastrophe, not the violation of fundamental human rights (although that will be one outcome of the intervention). This reconstituted understanding of humanitarian intervention is clearly controversial given the previous, human rights based, consensus. It does, though, accord with relevant state practice (*viz.* interventions in Liberia, Iraq and the Federal Republic of Yugoslavia), where a right of intervention has not been grounded in the manifest and serious violations of human rights.

THE DEBATES IN THE SECURITY COUNCIL

In the debates, in the Security Council, which followed the intervention in the Federal Republic of Yugoslavia, the representative of the United Kingdom, Sir Jeremy Greenstock, made the following assertion:

> "The [NATO] action taken is legal. It is justified as a exceptional measure to prevent an overwhelming humanitarian catastrophe . . . Every means

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the humanitarian catastrophe; the fact that the Security Council is unlikely to act; and the threat to regional peace and security. (Letter from Secretary-General Solana, addressed to the permanent representatives to the North Atlantic Council, dated 9 October 1998): see, Simma, *supra* n. 29, at 7.

105 Gray, "After the Ceasefire: Iraq, the Security Council and the Use of Force" (1992) 65 *BYIL* 135 at 163.

106 Initially, NATO States sought to justify their action by reference to relevant Security Council resolutions: Meeting of the North Atlantic Council in Foreign Ministers Session, "Statement on Kosovo": Press Communiqué M-NAC-2(98) 143, 8 December 1998.

107 Foreign Secretary Cook, Evidence to Foreign Affairs Select Committee, 22 February 1999, HC 188 - ii: "The legal basis for our action is that the international community of states do have the right to use force in the case of overwhelming humanitarian necessity. . . *[A]ll the legal advisors to the 19 Member States in NATO have come to the same conclusion*" (emphasis added).

108 Memorandum submitted by the Foreign and Commonwealth Office, "Kosovo: Legal Authority for Military Action" at para. 5 (emphasis added): HC 118-i.

109 Aust, Legal Counsellor, FCO, evidence to House of Commons Select Committee, reprinted "UK Materials in International Law" (1992) 63 *BYIL* 827.

> short of force has been tried to avert this situation. In these circumstances, and as a exceptional measure on the grounds of overwhelming humanitarian necessity, military intervention is legally justified".[110]

This argument was rejected by the Russian Federation: "Attempts to justify the NATO strikes with arguments about preventing a humanitarian catastrophe in Kosovo are completely untenable".[111] This divergence of views is representative of those evidenced in the Security Council in its meeting of 24 March 1999: Albania,[112] Bosnia and Herzegovina,[113] Canada, France, Gambia,[114] Malaysia,[115] the Netherlands, the United Kingdom, and the United States supported the military action; whilst Argentina,[116] Belarus,[117] Brazil,[118] China, Gabon,[119] India, Namibia,[120] the Russian Federation, and, naturally, the Federal Republic of Yugoslavia opposed it.

Significantly, however, two days later, a draft resolution, proposed by the Russian Federation, which condemned the NATO intervention as "a flagrant violation of the United Nations Charter" and demanded "an

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[110] S/PV.3988. See also the following:
> [W]e believe that [the] action is necessary to respond to Belgrade's brutal persecution of Kosovar Albanians, violations of international law, excessive and indiscriminate use of force, refusal to negotiate to resolve the issue peacefully and recent military build-up in Kosovo – all of which foreshadow a humanitarian catastrophe of immense proportions (Mr. Burleigh, United States of America). . . .
>
> NATO's objectives are to avert an ever widening humanitarian crisis… Humanitarian considerations underpin our action. We cannot simply stand by while innocents are murdered, an entire population is displaced, villages are burned and looted, and a population is denied its basic rights merely because the people concerned do not belong to the "right" ethnic group (Mr. Fowler, Canada).

[111] S/PV.3988.

[112] "The Republic of Albania totally supports the military action by [NATO]": Mr. Nesho (Albania).

[113] "Military action is never a welcome option, but it is sometimes the best, the only alternative among many bad options. It may be the only option available to save innocent lives": Mr. Sacirbey (Bosnia and Herzegovina).

[114] "It must be noted . . . that at times the exigencies of a situation demand, and warrant, decisive and immediate action. We find that the present situation in Kosovo deserves such a treatment": Mr. Jagne (Gambia).

[115] "We regret that in the absence of Council action on this issue it has been necessary for action to be taken outside of the Council": Mr. Hasmy (Malaysia):

[116] "The attacks by [NATO] against Serb targets . . . are a source of great concern for Argentina": Mr. Petrella (Argentina).

[117] "The President of Belarus issued earlier this morning a statement strongly denouncing the decision of [NATO] to use military strikes against a sovereign State": Mr. Martynov (Belarus).

[118] ". . . the Brazilian Government regrets that the escalation of tensions has resulted in recourse to military action": Mr. Enio Cordeiro (Brazil).

[119] "My Government is in principle opposed to the use of force to settle local or international disputes": Mr. Dangue Réwaka (Gabon).

[120] "[M]y delegation appeals for the immediate cessation of the ongoing military action and for the exhausting of all possible avenues for a peaceful resolution of the conflict": Mr. Andjaba (Namibia).

immediate cessation of the use of force against the Federal Republic of Yugoslavia",[121] was defeated by twelve votes to three (China, Russia and Namibia), with no States abstaining. It is clear that, between the initial meeting on 24 March and that on 26 March, at which the Russian resolution was rejected, opinion had hardened amongst States on the need for action to prevent the unfolding humanitarian tragedy, for which the States were holding the Federal Republic, and Milosevic, directly responsible.[122]

The rejection of the draft resolution proposed by the Russian Federation, although significant, is not conclusive in determining the legality of the NATO intervention. We must, at this point, examine the relevant state practice on the issue.

THE PRACTICE OF STATES

In the period of the Cold War, whilst a right of intervention on humanitarian grounds found support in the writings of certain academics,[123] a review of the issue by the United Kingdom Foreign Office concluded that the most favourable legal interpretation which could be advanced on behalf of relevant (humanitarian) interventions was that they could not be said to be "unambiguously illegal".[124] Those interventions most commonly considered are those by India in Pakistan/Bangladesh (1971),[125] Vietnam in Cambodia (1978),[126] Tanzania in Uganda (1979),[127] and France in Central Africa (1979). Significantly, however, there existed no clear invocation of a right of humanitarian intervention by the intervening States.[128] Consequently, in the view of the United Kingdom Foreign Office, the state practice, at that time, provided "an uncertain

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121 S/1999/328.

122 S/PV.3989. A similar change of emphasis is evidenced in the statements of the UN Secretary-General, who initially commented that the "[Security Council] should be involved in any decision to resort to the use of force"(SG/SM/6938), but later declared himself "deeply distressed by the tragedy taking place in Kosovo", and appeared to give some support to the NATO action by outlining certain conditions, following the acceptance of which, he would urge the leaders of the North Atlantic Alliance to suspend immediately the air bombardments upon Federal Republic of Yugoslavia" (SG/SM/6952).

123 See, for example, Lillich, "Humanitarian Intervention: A Reply to Ian Brownlie and a Plea for a Constructive Alternative", in Moore (ed.), *supra* n. 5, at 233; Tesón, *Humanitarian Intervention: an inquiry into law and morality* (1997, 2nd. ed.).

124 UK Foreign Office Policy Document No. 148 (1986) 57 *BYIL* 614.

125 See, generally, Franck and Rodley, *supra* n. 5. The General Assembly of the United Nations, in Resolution 2793, implicitly condemned the intervention calling on both sides to withdraw forces "on the territory of the other to their own side. . . ": A/RES/2793(XXVI), 9 Dec., 1971.

126 The intervention was condemned by the General Assembly, Resolution 34/22, which called upon all states to "refrain from any interference in the internal affairs of [Cambodia] in order to enable its people to freely determine their own future and destiny": GA Res. 34/22 (Nov. 14, 1979).

127 See, Chatterjee, "Some Legal Problems of Support Role in International Law: Tanzania and Uganda" (1981) 30 *ICLQ* 755.

128 Gray, *supra* n. 105, at 163. In questioning before the Select Committee on Foreign Affairs, UK Government Minister, Tony Lloyd, cited the Tanzanian intervention in Uganda as a precedent for the intervention in Kosovo: HC 118-i.

basis on which to rest such a right".[129] At least in the Cold War period, then, it appeared that the principle of non-intervention was held in higher regard than the need to prevent humanitarian suffering, or human rights abuses.[130]

In contrast, in the period since the ending of the Cold War,[131] we have witnessed three instances, generally accepted as legitimate by the international community, not authorised by the Security Council, of interventions in which clear humanitarian motives were adduced by the intervening States:[132] the ECOMOG intervention in Liberia (1990/1), the intervention to protect Kurdish and Shi'a populations in Iraq (1991/2), and the present NATO intervention to protect the people of Kosovo.[133]

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[129] UK Foreign Office Policy Document No. 148 (1986) 57 *BYIL* 614.

[130] Franck, "Of Gnats and Camels: Is There a Double Standard in the United Nations" (1984) 78 *AJIL* 811 at 831. During the period of the Cold War, the General Assembly criticised the US intervention in Grenada (GA Res. 38/7 (Nov. 2, 1983)); the Vietnam intervention in Kampuchea/Cambodia (GA Res. 34/22 (Nov. 14, 1978)); the Soviet Union intervention in Afghanistan (GA Res. ES-6/2 (Jan. 14, 1980)); the Indian intervention in Pakistan (GA Res. 2793 (XXVI) (Dec. 7, 1971); and the Indonesian intervention in East Timor (GA Res. 3485 (XXX) (Dec. 12, 1975). The only significant intervention in the Cold-War era not to receive the disapprobation of the General Assembly was the Tanzanian intervention in Uganda.

[131] We may question this difference: why accept the intervention in Liberia, a vicious, but not untypical civil war, but not intervention in Cambodia (1979), which brought an end to one of the most abhorrent regimes of the twentieth century. One clear distinction is the period in which they occurred: the intervention in Liberia was undertaken after the ending of the Cold War, and associated geo-political tensions, which followed the collapse of the Soviet Union.

Many writers have pointed to a paradigmatic shift in the norm on intervention, which has accompanied the ending of the Cold War: Kritsiotis refers to a "sea-change in the attitude of states" ("Review Essay: Developing Approaches Towards Legitimising Intervention on Humanitarian Grounds" (1997) 2 *Jnl Armed Conflict Law* 91 at 96), whilst the US Ambassador to the United Nations, at the time of the intervention to protect the Kurds, talked of a "shift in world opinion towards a re-balancing of the claims of sovereignty and those of extreme humanitarian need" (Speech to the US Council on Foreign Relations, 8 May 1991, quoted in Freedman and Boren, "'Safe-havens' for Kurds in post-war Iraq", in Rodley (ed.), *supra* n. 40, 43, at 82). A similar paradigm shift, in the international norm of (military) intervention, is thought to have accompanied the adoption of the Kellogg-Briand Pact of Paris 1928 (Brownlie, "Thoughts on Kind-Hearted Gunmen", in Lillich (ed.), *supra* n. 5, 139, at 142); the Pact was, however, a legal document, reflecting a shift in international legal relations. It is difficult to view the ending of the Cold War in the same light, and it may not be possible to identify legal developments which have effected an alteration of the paradigm of intervention.

[132] One should be cautious of giving too great a significance to previous instances of state practice: see Farer, "An Inquiry into the Legitimacy of Humanitarian Intervention", in Damrosch and Scheffer (eds.), *supra* n. 33, 185, at 194.

[133] The French intervention in Rwanda (1994) is discounted as it was seen by many to be primarily aimed at the protection of "francophonie", and France's fundamental interest against English speaking insurgents, and not humanitarian in its intentions: Bowring, "The 'Droit et Devoir D'Ingérence': A Timely New Remedy for Africa" (1995) 7 *RADIC* 493 at 506.

THE ECOMOG INTERVENTION IN LIBERIA (1990-1991)

In 1990, an insurrection against the regime of President Doe of Liberia appeared on the point of success. The rebel army of Charles Taylor, the National Patriotic Front of Liberia (NPFL), and a splinter group, the INPFL, led by 'Prince' Yormie Johnson, had advanced on the capital, Monrovia, with little opposition. Whilst, in present day terms, the number of casualties was not great, the randomness of the atrocities created a terror amongst the civilian population, leading to 500,000 people, some twenty per cent of the total population, fleeing abroad, and the displacement of a further million people within the country.[134] In response to the crisis, the Economic Community of West African States (ECOWAS) announced, on 6 August 1990, that, following an invitation from President Doe,[135] an ECOWAS Monitoring Group (ECOMOG) would enter the country with the aim of establishing a cease-fire and restoring law and order, in order to facilitate the holding of free and fair elections.[136]

The Economic Community of West African States had been established in 1975 to "promote co-operation and development in all fields of economic activity" between member States:[137] its concerns were primarily economic, not military. It had, though, developed a mutual assistance aspect, with elements of collective security,[138] although Member States agreed to refrain from any use of force "inconsistent with the Charter of the United Nations",[139] and from intervening where a conflict remained "purely internal" to a Member state.[140] In seeking to justify its intervention in Liberia, a member State of the organisation, the ECOWAS Standing Mediation Committee[141] pointed to the "state of anarchy and the total breakdown of law and order in Liberia", and argued that the contending

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134 *Keesings Record of World Events* (1990) 37644.

135 Letter addressed by President Doe to the Chairman and Members of the Ministerial Meeting of the ECOWAS Standing Mediation Committee, 14 July 1990, reprinted in Weller (ed.), *Regional Peace-Keeping and International Enforcement: The Liberian Crisis* (1994), p 60-61.

136 Article 2(2), ECOWAS Standing Mediation Committee, Decision A/DEC.1/8/90, on the Cease-fire and Establishment of an ECOWAS Cease-fire Monitoring Group for Liberia, 7 August 1990, reprinted in Weller (ed.), *Regional Peace-Keeping, ibid.*, p 67.
An interim government was established, along the lines of the Liberian Constitution, but without the support of all warring factions: Interim Government of National Unity of Liberia, Final Communiqué of the National Conference, 29 August 1990, reprinted in Weller (ed.), *id*., p 89 - 90.

137 Treaty of the Community of West African States, 28 May 1975, Article 2, (1975) 14 *ILM* 1200. The original member States were Benin, Burkina Faso, Cote d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo.

138 See Article 2 and 3, ECOWAS Protocol relating to Mutual Assistance on Defence, 29 May 1981, reprinted in Weller (ed.), *Regional Peace-Keeping*, *supra* n. 135, p 19.

139 Article 1, ECOWAS Protocol on Non-Aggression, 22 April 1978, reprinted in Weller (ed.), *ibid*, p 18.

140 Article 18 of the ECOWAS Protocol relating to Mutual Assistance on Defence, *supra* n. 138.

141 Established by Decision A/DEC. 9/5/90, 30 May 1990 by ECOWAS Heads of State and Government, reprinted in Weller (ed.), *Regional Peace-Keeping*, *supra* n. 135, p 38.

factions were "holding the entire population as hostage, depriving them of food, health facilities and the other bases necessities of life".[142] This, the Committee argued, justified the intervention by ECOMOG forces.

The legal basis for the intervention is not clear; although the absence of any express Security Council resolution authorising the ECOMOG action prevents us, on a rigorous interpretation, from justifying it under the provisions on collective security under the Charter of the United Nations. Whilst the Security Council did not authorise the intervention, it did, though, indicate its support for it,[143] notably in the adoption of Resolution 788, which imposed an arms embargo on all forces in Liberia – with the exception of the ECOWAS peacekeeping troops.[144] The absence of condemnation by the Council, and indeed its apparent tacit support, is not, however, conclusive in establishing the legality of the intervention; nor is the invitation by President Doe for ECOMOG forces to enter the country. The lack of control of any significant territory by the Government,[145] taken with the absence of any foreign assistance to the rebel forces, and the rejection of the ECOMOG intervention by the main rebel faction,[146] must lead us to question the right of the Doe regime to invite into the country external military forces. Moreover, in previous interventions, notably in the Congo[147] and Grenada,[148] the existence of an invitation by the Government to outside forces did not prove conclusive in determining the legality of the actions of the intervening States.[149]

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142 Para. 7, ECOWAS Standing Mediation Committee, Final Communiqué of the First Session, 7 August 1990, reprinted in Weller (ed.), *ibid.*, p 72 - 3.

143 See, Note(s) by the President of the United Nations Security Council, 2974th Meeting, 22 January 1991, S/22133, 3071st Meeting, 7 May 1992, S/23886.

144 SC Res. 788 (1992).

145 The position is unclear, with the rebel forces claiming to "dissolve" the Doe Government at one point (Report: Doe Government 'Dissolved', BBC Monitoring Report, 27 July 1990, reprinted in Weller (ed.), *Regional Peace-Keeping*, *supra* n. 135, p 62); yet, the same rebel forces later refused to accept a cease-fire unless Doe "resigned" (Report: NPFL Tells ECOWAS No Cease-fire Till Doe Goes, BBC Monitoring Report, 9 August 1990, reprinted in Weller (ed.), *id.*, p 62).

146 Report: Taylor Opposes Foreign Intervention, BBC Monitoring Report, 5 August 1990, reprinted in Weller (ed.), *Regional Peace-Keeping*, *ibid.*, p 63.
There has been a shift, in international practice, away from recognising governments, to dealing with those who have 'effective control' of the territory. Consequently, in considering the legality of a relevant intervention, we would be concerned with the consent, or absence thereof, of the governing authorities, not the government. We may note, for example, the need for the adoption of Security Council Resolution 940 (SC Res. 940 (1994)) to authorise military force to remove the *junta* which has seized power in Haiti; presumably, the authorisation of the legitimate President, Aristide, was insufficient to legitimise military intervention.

147 See, Franck and Rodley, *supra* n. 5, at 287.

148 The US intervention in Grenada was condemned by the General Assembly: GA Res. 38/7 (1983); *cf*. Moore, "Grenada and the International Double Standard" (1984) 78 *AJIL* 145 at 156.

149 See, Kirgis, "NATO Consultations as a Component of National Decisionmaking" (1979) 73 *AJIL* 372 at 398; *cf*. Bowett, "The Interrelation of Theories of Intervention and Self-Defence", in Moore (ed.), *supra* n. 5, 38 at 42.

The legality of the ECOMOG intervention in Liberia is, then, difficult to determine in the absence of a wider consideration of the relationship between the prohibition on aggressive intervention and the need to prevent humanitarian suffering.

THE ALLIED INTERVENTION IN IRAQ (1991/2)

In the aftermath of the defeat of Iraq by the allied coalition in 1991,[150] uprisings took place, against the regime of Saddam Hussein, in northern and southern Iraq, by Kurdish forces and Shi'a rebels respectively. Although initially enjoying some success, they were brutally suppressed by superior Iraqi government forces. In the north this resulted in over one million refugees fleeing towards neighbouring States, who refused them entry.[151] Responding to an impending "human tragedy of appalling dimensions",[152] created by the refugee crisis,[153] the United States, United Kingdom and France used military force to protect the Iraqi civilian population.[154]

Initially, the allied forces simply provided humanitarian assistance to the refugees;[155] subsequently, however, relief camps were established to encourage the, mainly, Kurdish refugees to return home,[156] and, finally, a "safe-haven"[157] and no-fly zone, north of the 36th parallel,[158] were established to protect the returning refugees from Iraqi forces. One year later, following reports of "systematic murder . . . genocide [and] . . . bombing by Saddam from the air",[159] a similar no-fly zone was introduced, below the 33rd parallel, to protect Shi'a and Marsh Arab populations in the south of the country. Iraq was warned that infringements of the safe-haven, or the no-fly zones, would not be tolerated, and military force would be used to protect the integrity of both.[160]

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150 The conflict concluded with the adoption, by the Security Council, of a cease-fire resolution (SC Res. 687 (1991)), which took effect on 11 April 1991.

151 See the comments of Turkey and Iran's representatives to the Security Council in the debate, on 5 April 1991, leading up to the adoption of Resolution 688: L. S.PV2982.

152 "Statement by the UK Prime Minister: A Safe Haven for the Kurds", reprinted in Weller (ed), *Iraq and Kuwait: The Hostilities and Their Aftermath* (1993), p 714.

153 See, Malanczuk, "The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War" (1991) 14 *EJIL* 114 at 118.

154 See, generally, Adelman, "Humanitarian Intervention: The Case of the Kurds" (1992) 1 *International Journal of Refugee Law* 4 at 19-23.

155 See "Statement by the UK Prime Minister", *supra* n. 152; also the Letter(s) from the Permanent Representative of Iraq to the United Nations which condemned the action as an infringement of Iraqi sovereignty: S/22459, 8 April 1991, reprinted, Weller (ed.), *Iraq and Kuwait*, *supra* n. 152, p 716.

156 See, on this point, US President's News Conference, 16 April 1991, Volume 27, No. 16, *Weekly Compilation of Presidential Documents*, reprinted in Weller (ed.), *ibid*., p 717.

157 The idea of 'safe-havens' was initiated by British Prime Minister Major at a meeting of EC Heads of Government in Luxembourg, 8-9 April 1991: "Statement by the UK Prime Minister", *supra* n. 152.

158 See, Malanczuk, *supra* n. 153, at 120.

159 Transcript of interview given by UK Prime Minister, John Major, 18 August 1992: reprinted in Weller (ed.), *Iraq and Kuwait*, *supra* n. 152, at 723.

160 Statement issued by members of the Coalition at New York, 26 August 1992, reprinted in Weller (ed.), *ibid.*, at 725. At the time of writing, US and UK

The legal basis for the intervention by allied forces has never been clearly articulated; indeed it has been suggested that "the underlying assumption of the USA, the UK and France seems to have been that this was a special situation of victorious powers acting against a defeated state and so no rigorous legal justification was needed".[161] Much was made, at the time, of the adoption by the Security Council of Resolution 688,[162] which "condemned the repression of the Iraqi civilian population. . . . the consequences of which threaten[ed] international peace and security".[163] The Resolution, adopted under Chapter VII of the Charter, clearly indicated the concern of the Council as to the position of the civilian population in Iraq;[164] it did not, however, authorise the use of force,[165] a fact recognised by the United Kingdom Foreign Office,[166] which, in contrast, has attempted to justify the intervention by reference to the customary international law principle of humanitarian intervention, which legitimates the use of military force "in cases of extreme humanitarian need".[167]

THE CRITERIA FOR INTERVENTION ON HUMANITARIAN GROUNDS

We have three clear instances of States intervening to prevent humanitarian suffering, and being prepared to ground their right to intervene in the need to prevent such suffering. Whilst we might be sympathetic to the claims of legitimacy for the interventions considered here, we should be wary of accepting any exception to the general prohibition on the use of armed force – and in particular any exception grounded in criteria as vaguely defined as the need to prevent a

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aircraft, patrolling the no-fly zones, continue to employ military force, in Iraqi airspace, when challenged by Iraqi forces: see, for example, *The Times*, 23 August 1999.

161 Gray, *supra* n 105, at 163.

162 UK Foreign Secretary Hurd talked of "proposals . . . to help provide emergency aid, as authorised by Security Council resolution 688": HC Debs. 17 April 1991, reprinted in Weller (ed.), *Iraq and Kuwait*, *supra* n. 152, at 720. (In December 1998, the British Defence Secretary relied upon Security Council Resolution 688 to justify the southern no-fly zones: *The Guardian*, 31 December 1998.) *Cf.* Gray: "Resolution 688, although referred to at the time by the States involved, does not authorize forcible humanitarian intervention", *supra* n 105 at 162.

163 SC Res. 688 (1991), adopted by ten votes to three (Cuba, Yemen, and Zimbabwe voting against; China and India abstaining).

164 Delbrück, *supra* n. 41, at 894-5, footnotes omitted.

165 Warbrick, "The Invasion of Iraq – Part II" (1991) 40 *ICLQ* 965 at 972; *cf.* Greenwood, "New World Order or Old? The Invasion of Kuwait and the Rule of Law", 55 *MLR* (1992) 153 at 177.

166 Aust, Legal Counsellor, FCO, evidence to House of Commons Select Committee, reprinted "UK Materials in International Law" (1992) 63 *BYIL* 828.

167 *Ibid.* at 826 - 7.

humanitarian catastrophe;[168] the intervening States are, after all, likely to be "the sole judge[s] of the necessity of the intervention" in question.[169]

There are a limited number of states with the military capacity to undertake such interventions, even at the regional level; on the global level the number is reduced to one: the United States.[170] A right of intervention without clear criteria for its application presents the real danger of legitimising aggressive intervention under the guise of humanitarian objectives.[171] In the present instance, NATO States did not seek to argue that they were the sole arbiters of the necessity of intervention:

> "a limited use of force [is only] justifiable in support of purposes laid down by the Security Council but without the Council's express authorisation, when that was the only means to avert a humanitarian catastrophe. Such cases would in the nature of things be exceptional and would depend on an objective assessment of the factual circumstances at the time and on the terms of the relevant decisions of the Security Council bearing on the situation in question".[172]

Thus, before an intervention could be undertaken, there would have to be a determination by the Security Council that the sufferings endured by human persons, in a given population, had reached such a magnitude as to constitute a threat to peace and security.[173] Only where the Security Council proved unwilling, or unable, to act, and following the exhaustion of all diplomatic efforts, could a determination be made to use military force.[174]

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168 Brownlie has described the (previous) definitions of humanitarian intervention as "woefully slack", leaving, in its application, the right wide open to abuse: Brownlie, "Thoughts on Kind-Hearted Gunmen", in Lillich (ed.) *Humanitarian Intervention and the United Nations* (1973) 139, at 146.

169 Fairley, *supra* n. 5, at 61.

170 See, as an example of military intervention by the United States in pursuit of its (self-interested) foreign policy, the cruise missile attacks, on 20 August 1998, against a plant suspected of making nerve gas in Sudan and a suspected terrorist base in Afghanistan. The justification given was the "imminent threat to US national security . . . [posed by] the bin Laden terrorist network": *Keesings Record of World Events* (1998) 42435. The attacks received only limited support from the international community, *ibid.*, 42436.

171 Most notoriously, Hitler referred to humanitarian motives to justify German interventions in Czechoslovakia and Poland: Franck and Rodley, *supra* n. 5, at 284.

172 Minister of State, Tony Lloyd, Minutes of Evidence to the Foreign Affairs Select Committee, 26 January 1999: HC 118-i. Security Council concerns are evidenced in the "Statement(s) by the President of the Security Council", on 19 January 1999, following the massacre at Racak (S/PRST/1999/2), and 29 January 1999 (S/PRST/1999/5).

173 *Supra* n. 42.

174 *Cf.*: "We do not have a formal set of criteria to apply in assessing whether or not the level of suffering in a particular emergency justifies intervention for humanitarian purposes": FCO Memorandum to HC Foreign Affairs Select Committee, reprinted "UK Materials in International Law" (1992) 63 *BYIL* at 826.

The creation of a right of intervention would not, however, create an obligation to intervene.[175] British Prime Minister Blair has outlined the criteria to be borne in mind in determining when and whether the United Kingdom should intervene to prevent humanitarian suffering:

> "First, are we sure of our case? . . . Second, have we exhausted all diplomatic options? . . . Third, on the basis of a practical assessment of the situation, are there military operations we can sensibly and prudently undertake? Fourth, are we prepared for the long term? . . . And, finally, *do we have national interests involved*? The mass expulsion of ethnic Albanians from Kosovo demanded the notice of the rest of the world. But it does make a difference that this is taking place in such a combustible part of Europe".[176]

Should, though, national interests be relevant in deciding when, and whether, to intervene on humanitarian grounds. Concern has arisen in the past from the selective application of the humanitarian interventions undertaken,[177] and the perceived 'real' motives of the intervening states; why intervention in the Federal Republic of Yugoslavia, but not, until recently, in support of the people of East Timor,[178] and not in the case of the suffering of the people of Ethiopia:[179] indeed, as Franck and Rodley note, "history is all too replete with instances in which one would have expected states claiming the existence of a right of humanitarian intervention to have sent their armies to the rescue", and where they did not do so.[180]

Selectivity of application is a feature of all legal systems, although it does create particular problems in a legal system which decentralises enforcement – as international law does. It is a matter of international realpolitik that a state will only elect to exercise a right of intervention where it views some benefit for itself in that intervention. This is not to suggest that selfish interests will inevitably outweigh humanitarian ones – simply that most cases of humanitarian intervention will be "mixed motive cases",[181] and certain motives may be less than altruistic. This is certainly the case in the present instance, with the US State Department being explicit in its acceptance that the intervention in the Federal Republic of Yugoslavia was a mixed motive case.[182] Might we not, though, given such

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175 *Cf.* Koroma, "Humanitarian Intervention and Contemporary International Law" (1995) 4 *SZIER* 409 at 413 - 4.

176 "Doctrine of the International Community", speech given in Chicago, USA, 22 April 1999: <www.number-10.gov.uk/public/news/index.html> (emphasis added).

177 Minear asks: "is not all human life deserving of protection?": "A Strengthened Humanitarian System for the Post-Cold War Era", in Minear, Weiss and Campbell (eds.), *Humanitarianism and War: Learning the Lessons from Recent Armed Conflicts* (Occasional Paper No. 8, Thomas J. Watson Jr. Institute for International Studies, Brown University) (1991) 29, at 38.

178 SC Res. 1264 (1999). See, generally, on the issues raised, Clark, "The 'Decolonization' of East Timor and the United Nations Norms on Self-Determination and Aggression" (1980) 7 *Yale Jnl of World Public Order* 2.

179 Bazyler, *supra* n. 86, at 618 - 9.

180 Franck and Rodley, *supra* n. 5, at 290.

181 Wright, "A Contemporary Theory of Humanitarian Intervention", 4 *Florida International Law Journal* (1989) 435 at 460.

182 "We have three strong interests at stake in the Kosovo conflict: averting a humanitarian catastrophe; preserving stability in a key part of Europe; and

an acceptance, question the humanitarian justification advanced; should not humanitarian interventions be undertaken "without self-interest or expectation of national, political, economic or military gain".[183]

The relative purity of the humanitarian motive adduced by the intervening state is, though, difficult, if not impossible, to determine. Consequently, whilst the intervening state would be required to advance humanitarian concerns in justifying its actions,[184] the veracity of that claim may only be judged by reference to factors surrounding the intervention: *inter alia*, was it undertaken unilaterally, or with the support of other states;[185] was it proportionate to the stated aims, and limited in time and scope to the achievement of those aims; and importantly, did it fall within the limits established by relevant Security Council resolutions. Moreover, whilst any act of humanitarian intervention will, *prima facie*, violate the sovereign rights of the target state, we should consider the extent to which the intervention sought to uphold the right of the people on whose behalf the intervention was nominally undertaken to self-determination:

> "[T]he rights enshrined by the UN should be enjoyed by peoples, and should not be confined to Governments. No Governments have the right to defend, on grounds of sovereignty, oppression of their people and ethnic cleansing such as occurred in Kosovo".[186]

Consequently, a lawful and legitimate act of humanitarian intervention would respect the right to self-determination of the people whose

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maintaining the credibility of NATO": "US and NATO objectives and Interests in Kosovo", Fact Sheet released by the U.S. Department of State, Washington, DC, March 26 1999: <www.state.gov/www/regions/eur/fs_990326_ksvobjectives.html>.

183 Wright, *supra* n. 181, at 459 (footnotes omitted).

184 If this requirement did not exist, we might find ourselves legitimising 'accidental humanitarian interventions'. For example, where an intervention was undertaken for the purpose of acquiring the territory of another state (clearly unlawful and 'aggressive'), and the invading forces engaged the target state's armed forces whilst the latter were *en route* to massacre one of the target state's minority communities, the intervention would clearly have humanitarian outcomes; it could not, however, be considered a 'humanitarian intervention'. See, for example, the Vietnamese intervention in Cambodia, which had self-evident humanitarian outcomes, but was undertaken with a view to furthering Vietnamese regional hegemony.

185 On the position in the pre-Charter era, see Liszt, *International Law in a Systematic Exposition* (1917), p 87, referred to in Kartashkin, "Human Rights and Humanitarian Intervention", in Damrosch and Scheffer (eds.), *supra* n. 33, 202, at 204. An exception existed only where the intervening state was authorised to do so by the international community; see, for example, the case of the French intervention in Syria (1860-1861): Fonteyne, *supra* n. 5, at 208 - 209.

Considering the United Nations era, we might note, as an example of the reluctance of the international community to endorse unilateral intervention, the negative reaction to the United States' cruise missile attacks on Iraq, which followed Iraqi military actions in the Kurdish safe area; this despite the humanitarian concerns adduced by the US: Symes, "Force Without Law: Seeking a Legal Justification for the September 1996 U.S. Military Intervention in Iraq" (1998) 19 *Michigan Jnl International Law* 581 at 598.

186 Robin Cook, HC Debs. 20 April 1999, col. 680.

liberation from humanitarian suffering is the very *raison d'être* of the intervention.[187]

HUMANITARIAN INTERVENTION AND SELF-DETERMINATION

Should a right of intervention on humanitarian grounds not, then, be grounded in the right to self-determination itself;[188] indeed, certain writers have argued that self-determination provides the basis of a right of "unilateral intervention…outside the collective framework of the Security Council" in circumstances where the rights of the human person are being violated.[189]

Such an approach should not be taken as suggesting that every instance of a violation of the right to self-determination would give rise to a right of intervention;[190] the failure, for example, of a government to introduce or restore democratic government would not justify military action against

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[187] The imposition of a government on that people would remove any claim for purity of motive, and semblance of legality. We may, then, discount the humanitarian claims of Indonesia's intervention in East Timor (1975) and South Africa's intervention in Namibia (1975). Such interventions were clearly aimed at violating the rights of the respective peoples to self-determination, *irrespective* of the human rights situation before and after the interventions.

[188] The legal right to self-determination is confirmed in the Charter of the United Nations (Articles 1 and 73). Its application to the independence of colonial peoples from the metropolitan state was affirmed by the United Nations General Assembly (GA Res. 1514 (XV), 14 December 1960, 'Declaration on the Granting of Independence to Colonial Territories and Peoples'), and by the International Court of Justice (*Western Sahara Case* ICJ Rep. 1975 12). However, the right is not restricted to colonial situations: Common Article 1, International Covenant on Civil and Political Rights, and International Covenant on Economic Social and Cultural Rights (1966)): "All peoples have the right to self-determination". This acceptance, of a right of 'all' peoples to self-determination, led to the recognition of an 'internal' aspect of the right: Cassese, *Self-Determination of Peoples* (1995) 101 - 40, *passim*.
Both the issue as to which groups constitute a 'people' (see, for example, *Final Report and Recommendations of an International Meeting of Experts on the Further Study of the Concept of the Right of People for UNESCO* (1990), SNS-89/CONF.602/7), and the content of the right remain highly contentious: see, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States, *supra* n. 27; the Human Rights Committee's General Comment 12, Article 1 (Twenty-first session, 1984), U.N. Doc. HRI\GEN\1\Rev.1 at 12 (1994); Pellet, "The Opinions of the Badinter Arbitration Committee – A Second Breadth for the Self-Determination of Peoples" (1992) 3 *EJIL* 178; McCorquodale, "Self-Determination: A Human Rights Approach" (1994) 43 *ICLQ* 857; and Quane, "The United Nations and the Evolving Right to Self-Determination" (1998) 47 *ICLQ* 537.

[189] Akhavan, "Lessons from Iraqi Kurdistan: Self-Determination and Humanitarian Intervention Against Genocide" (1993) 1 *Neths. Quarterly Human Rights* 41 at 61 - 2. On intervention in support of the right to self-determination, generally, see Walzer, *Just and Unjust Wars* (1978), p 87-91; Navari, "Intervention, Non-Intervention and the Construction of the State", in Forbes and Hoffman, *Political Theory, Intervention Relations and the Ethics of Intervention* (1993) 43.

[190] See, on this point, Bowett, "The Interrelation of Theories of Intervention And Self-Defence", in Moore (ed.), *supra* n. 5, 38, at 43-4.

that state.[191] Only in circumstances where a government turned savagely on its own people, and in which we might "doubt the very existence of a political community to which the idea of self-determination might apply",[192] would intervention be permitted.[193] This approach would provide a clear normative basis for humanitarian intervention, and clear limits on its application: intervention in support of an oppressed people, or minority people within a state, would be lawful; intervention in support of a minority group would not.[194] Nor would an intervention undertaken to protect a group of individuals from unjust execution be lawful, even if one of the individuals were Mahatma Ghandi;[195] nor a military operation to assassinate a political leader, including Milosevic, to prevent humanitarian suffering.[196]

Moreover, as a rule of *jus cogens* character,[197] the right to self-determination is in principle capable of modifying the prohibition on the use of force,[198] and instances of intervention in support of the right have enjoyed a certain degree of acceptability within the international community,[199] despite a less than upstanding record.[200] Consequently, we

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[191] *Cf.* "Self-determination postulates the right of a people. . . to determine its collective political destiny in a democratic fashion . . . ": Franck, "The Emerging Right to Democratic Government" (1992) 86 *AJIL* 86 at 52; see, also, the views of the UN Secretary-General, Kofi Anan, responding the removal of the democratic government in Sierra Leone: "Where democracy has been usurped let us do all in our power to restore it to the people", *The Guardian*, 3 June 1997.

[192] Walzer, *supra* n. 189, p 101.

[193] See, on this point, Arend and Beck, *International Law and the Use of Force* (1993), p 113. This view is contested by Donnelly, who contends that such an argument "confuses the injustice of the regime with the right of others to remedy the injustice": Donnelly, *supra* n. 77, at 319.

[194] A distinction is drawn, in international law, between the rights of 'peoples' and minority groups: see, respectively, Articles 1 and 27 of the International Covenant on Civil and Political Rights (1996). See, on this point, Mullerson, "Minorities in Eastern Europe and the Former USSR: Problems, Tendencies and Protection" (1993) 56 *MLR* 808, and Bothe, "The legitimacy of the Use of Force to Protect Peoples and Minorities", in C. Brölmann *et al*. (eds.), *Peoples and Minorities in International Law* (1993) 289, at 299.

[195] Wright, *supra* n. 181, at 462.

[196] See Brandenburg, "The Legality of Assassination as an Aspect of Foreign Policy" (1987) 27 *Va. J. Int'l Law* 655 at 671 - 680; although he notes: "It would be difficult to argue that the removal of Hitler before World War II would not have been justified to halt the Holocaust", *ibid*, at 695 (it would not, of course, on his analysis have been lawful).

[197] *East Timor Case* (*Portugal* v *Australia*) ICJ Rep. 1995 90 at para. 29.

[198] See, on this point, General Assembly Declaration on Principles of International Law Concerning Friendly Relations, *supra* n. 27: ". . . in pursuit of their exercise of self-determination, such peoples are entitled to seek and receive *support* in accordance with the purposes and principles of the Charter" (emphasis added).

[199] See, Adelman, *supra* n. 154, at 30. We might note the acceptance by the international community of India's intervention in Portuguese Goa in December 1961 (Pomerance, *supra* n. 35, p 49 - 50); and the United States' support of the Mujahadin rebels in Afghanistan following the Soviet intervention (Arend and Beck, *supra* n. 193, p 80-92).

might have expected NATO States to rely on the right to self-determination in justifying their intervention in the Federal Republic of Yugoslavia – particularly given that it is generally accepted that the failure of the Federal Republic to agree appropriate autonomy for Kosovo,[201] along the lines demanded by the Security Council,[202] amounted to a clear violation of the Kosovar people's right to self-determination.[203] As already noted, NATO States did not, however, seek to ground their right of intervention in the violation of this right;[204] they did, though, see its effective implementation as central to any effective settlement of the crisis.

The coupling of a right of intervention on humanitarian grounds with the right to self-determination has significant consequences for the scope of any proposed intervention. A right of humanitarian intervention *simpliciter* would only grant NATO States the right to intervene "insofar as it is necessary and proportionate for the purpose of humanitarian protection",[205] that is, the protection of the Kosovar Albanians from the unfolding humanitarian tragedy. A right of intervention on humanitarian grounds *simpliciter* could not justify two of the central objectives of the NATO intervention: the return the refugees to their homes, when those refugees were already safe in camps in Macedonia and Albania; and the establishment of self-government and autonomy for the Kosovo region.[206] In contrast, the coupling of humanitarian intervention with the right to self-determination would allow permit an intervention aimed at facilitating a right to return home, and the alteration of the structures of government or state, beyond that required for motives which were strictly

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[200] Self-determination is referred to, *inter alia*, by the United States and Soviet Union in justifying their interventions in Vietnam and Hungary respectively; in the case of Grenada, the Americans intervened (in part) to restore democratic government; and India referred to Pakistan's rule in East Pakistan (Bangladesh) as "colonial": Franck and Rodley, *supra* n. 5, at 276.

[201] See, generally, Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (1990).

[202] "[The Security Council agrees] without prejudging the outcome of that dialogue, with the proposal in the Contact Group statements of 9 and 25 March 1998 that the principles for a solution of the Kosovo problem should be based on the territorial integrity of the Federal Republic of Yugoslavia and should be in accordance with OSCE standards, including those set out in the Helsinki Final Act of the Conference on Security and Co-Operation in Europe of 1975, and the Charter of the United Nations, and that such a solution must also take into account the rights of the Kosovar Albanians and all who live in Kosovo, and expresses its support for an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration": S/RES/1160 (1998), para. 5.

[203] For consideration of whether the Kosovar Albanians constitute a people, see Caplan, *supra* n. 7, at 747 - 750.

[204] The application of self-determination requires a territory within which the defined people may exercise their right to self-determination. For our purposes, the defined territory would be the region of Kosovo and the relevant people the 'Kosovar people', not the 'Kosovar Albanians'. It is clearly vital, therefore, that the NATO intervention has the effect of guaranteeing human rights to all Kosovar peoples, including the minority Serb population.

[205] Kritsiotis, "Reappraising Policy Objections to Humanitarian Intervention" (1998) 19 *Michigan Journal of International Law* 1005 at 1038.

[206] Prime Minister Blair, "Doctrine of the International Community", *supra* n. 176.

humanitarian:[207] the establishment of an autonomous region under international supervision, beyond the control of the target state.[208]

THE NATO INTERVENTION IN THE FEDERAL REPUBLIC OF YUGOSLAVIA: A JUST WAR?

If, as has been suggested, the purpose of international law "is to assist in the achievement of an international stability that is consistent with justice and in the realisation of shared values",[209] the intervention by NATO States must give cause for concern, given the evident absence of shared values in the Security Council. Indeed the action may be open to the accusation of benign imperialism, and a return to the "civilized versus non-civilized nations"[210] divide implicit in pre-Charter instances of humanitarian intervention, as western values are imposed on other states by military force. This judgement is, however, on examination, difficult to sustain. Whilst the intervention was characterised by the British Prime Minister as a "…just war, based not on any territorial ambitions but on values",[211] those values were not archetypal western (liberal) ones such as those espoused by, for example, John Rawls[212] or Michael Walzer:[213] human rights and self-determination respectively.

NATO intervened in response to the inevitable humanitarian suffering in Kosovo which followed the adoption, by the Serb authorities, of policies of virulent ethno-nationalism,[214] and the repudiation by the Milosevic regime of universal standards established by the international community for respect for the human person.[215] In determining the legitimacy of the intervention by NATO States from an ethical viewpoint, this would not seem to be a "difficult case":[216] any genuine concept of transnational

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[207] Pease and Forsythe, *supra* n. 81, p 300; see, also, Gillespie, "Unwanted Responsibility: Humanitarian Military Intervention to Advance Human Rights" (1993) 18 *Peace and Change* 219 at 235-6.

[208] See, on this point the Declaration on Principles of International Law Concerning Friendly Relations, *supra* n. 27: "Nothing in the foregoing paragraphs shall be construed as authorising or encouraging any action which would dismember or impair. . . the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of . . . self-determination of peoples. . . ". In cases of 'federal' type states, the creation of a new state within the previous federal borders may be acceptable. See, generally, the opinions of the Badinter Committee on Yugoslavia, in Pellet, *supra*. n. 188. Such an argument would, for example, justify the actions of India in creating the new State of Bangladesh following its intervention in Pakistan (1971). In the present case, the international community is, for a number of reasons, opposed to independence for the Kosovo: Caplan, *supra* n. 7, at 755.

[209] Higgins, *supra* n. 42 at 95.

[210] Fonteyne, *supra* n. 5, at 227.

[211] Prime Minister Blair, "Doctrine of the International Community", *supra* n 176.

[212] Rawls, *A Theory of Justice* (1972).

[213] Walzer, *Just and Unjust Wars* (1978).

[214] See, generally, Brown, "Are there good and bad nationalisms?" (1999) *Nations and Nationalisms* 281.

[215] See, Foreign Secretary Cook, "It is fascism that we are fighting", *The Guardian*, 5 May 1999.

[216] *Cf.* Frost, *Ethics in International Relations: A Constitutive Theory* (1996), p 2 - 3.

justice would demand intervention.[217] Those commentators who have criticised the intervention must consider the extent of the humanitarian tragedy which would inevitably have followed the actions of the Serb authorities had NATO not acted, and the consequential animadversion directed at the organisation had the most powerful military alliance in the world stood idly by whilst the Milosevic regime ethnically cleansed the Kosovar Albanian population.

An acceptance of the legitimacy of the NATO action should not, though, blind us as to certain concerns as to the manner of its undertaking. As part of its submissions during the oral pleadings in *Case Concerning Use of Force*, the Federal Republic argued that, whatever the merits of the claimed right of intervention on humanitarian grounds, the modalities for the intervention selected by NATO disqualified this intervention as a humanitarian one. In support of this argument, the method of high level bombing, which created minimum risk for the aircrew, but maximum risk to the civilian population, and the bombing of populated areas with consequential civilian casualties, were highlighted.[218] There are, self-evidently, clear ethical and practical imperatives for conducting a humanitarian war by the least inhumane methods; it is, though, difficult to discern what legal requirements could be incumbent upon the intervening state, or states, beyond those found in the relevant Geneva Conventions, and in the laws and customs of war, for the conduct of an intervention which was specifically humanitarian.[219]

Whatever the ethical arguments which may be adduced in support of the NATO intervention, there are particular demands that military interventions, undertaken for whatever purpose, are subject to the rule of law.[220] Moreover, conclusions as to the legality of the NATO intervention cannot be derived from the "rhetorical persuasiveness"[221] of arguments which would seek to affirm a right of humanitarian intervention, *inter alia*, in utilitarian theories,[222] principles of natural law,[223] concepts of justice[224]or the "people's sovereignty":[225] "the *legal* debate on humanitarian intervention cannot be won on some moral high ground or on the sole basis of some fundamental humanitarian principle or ideal".[226] We

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[217] On the ethical arguments for accepting 'humanitarian intervention', see, Donnelly, *supra* n. 77, at 312.

[218] Oral Pleadings, *Case Concerning Legality Use of Force*, 10 May 1999: <www.icj-cij.org>.

[219] Uniquely, in the present case, an international tribunal, the International Criminal Tribunal for the former Yugoslavia, enjoys compulsory jurisdiction, under Article 1 of its Statute, to prosecute individuals for all breaches committed in "the territory of the former Yugoslavia" of the Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4), and crimes against humanity (Article 5): Statute of the International Criminal Tribunal for the Former Yugoslavia, Annex to SC Res. 827 (1993), (1993) 32 *ILM* 1203.

[220] Fairley, supra n. 5, at 62.

[221] Franck, "Conference Proceedings", in Lillich (ed.), *supra* n. 5, p 13.

[222] See, for example, the discussion in Wright, *supra* n. 181, at 445 - 6.

[223] See Meron, "Common Rights of Mankind in Gentili, Grotius and Suárez" (1991) 85 *AJIL* 110.

[224] Tesón, "The Kantian Theory of International Law" (1992) 92 *Colombia Law Review* 84; see also Laberge, *supra* n. 82.

[225] Reisman, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 *AJIL* 866 at 869.

[226] Kritsiotis, *supra* n. 205, at 1049 (emphasis added).

must concern ourselves with the relevant international law on the issue, and examine the intervention in the light of the law as we find it, not how we might wish it to be.[227]

CONCLUSION: THE LEGALITY OF THE NATO INTERVENTION

The range of human rights treaties adopted during the period of the United Nations and provisions on the treatment of civilian populations during periods of armed conflict evidence minimum standards for the treatment of, and respect for, the human person. No state may exclude the legitimate interests of the international community when it treats its population in the manner in which the Federal Republic of Yugoslavia treated the Kosovar Albanian population, or indeed the way in which the various Liberian factions treated the people of that State, or the Iraqi government the Kurdish, and other minority populations of Iraq: that much is clear in the international legal order. The key question, for this article, is whether those states who have intervened by military force, without Security Council authorisation, to end or prevent a humanitarian catastrophe, have acted in contravention of the Charter of the United Nations, given the provisions of Article 2(4).

In contrast to the preceding era, the post-Cold war period has evidenced acceptance by the international community of the legitimacy of instances of intervention by military force to prevent humanitarian suffering, where a humanitarian crisis reaches a point of such seriousness and magnitude to be recognised by the Security Council of the United Nations as constituting a threat to peace and security. A significant feature of these post-Cold War interventions has been the willingness of the intervening States to assert a right of intervention on humanitarian grounds; this may be contrasted with the Cold War period when a less contentious basis for the resort to armed force, such as self-defence, was invariably argued. This factor, taken with the acceptance of these interventions by the majority of States, requires us to recognise a paradigmatic shift in the international norm on the use of armed force under the Charter of the United Nations. It is now clear that a significant, but limited, exception to the prohibition contained in Article 2(4) exists: in circumstances where the Security Council has recognised that an existing, or impending, humanitarian catastrophe constitutes a threat to peace and security, a limited use of force is justifiable in support of purposes laid down in relevant Security Council resolutions, without the Council's express authorisation, where that is the only means by which the humanitarian catastrophe may be avoided.

In the present case, it is clear that the international community, and the Security Council, had recognised that a humanitarian catastrophe was imminent in Kosovo, as a direct consequence of the actions of the Serb authorities. NATO States, with long experience of dealing with President Milosevic, determined that military force was the only method by which the civilian population in Kosovo could be protected. This determination, and the military intervention itself, was, in general, supported by member States of the United Nations (with the clearest evidence of this being seen in the rejection of the Russian proposed resolution condemning the intervention). Moreover, the NATO intervention was undertaken with the aim of achieving the objectives laid out in the resolutions adopted by the Security Council on the issue. Consequently, the NATO action, undertaken to protect the Kosovar Albanian population from the

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[227] However, if a given act of humanitarian intervention were judged illegal, "[a] further question would be [in Kantian language] 'is the law just?'": Laberge, *supra* n. 82, at 15 - 16 (footnotes omitted).

humanitarian catastrophe unfolding around them, may be considered a clear instance of lawful humanitarian intervention in the post-Cold War era.

EXTENDING THE ROLE OF THE COMMITTEE IN AN UNINCORPORATED ASSOCIATION – A SEPARATE DUTY OF CARE TO MEMBERS AND VISITORS?

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INTRODUCTION

The potential liability of unincorporated associations to their members arose recently in the case of *Kinner* v *Trustees of West Belfast Pigeon Club.*[1] The legal problem that this causes is well established: the fact that a member of an unincorporated association cannot sue the association due to the fact that the latter has no legally recognisable identity independent of its members. The identity of the association is merely the totality of the members and the fact that a member would, in effect, be suing himself precludes such an action. In the present case, however, the plaintiff had a dual role in the West Belfast Homing Pigeon Society as a member and as an employee.[2] He alleged that he injured his back lifting a keg of beer while carrying out his duties as barman. The defendants[3] claimed that despite the plaintiff being injured while working in his role as barman the fact of his membership precluded him from suing the club. McCollum LJ ruled, however, that the plaintiff's membership of the club was not an immunity against actions and this was upheld by the Court of Appeal. Reference was made to the earlier case of *McKinley* v *Montgomery*[4] where a lady member of Eglinton Cricket Club, who was injured on club premises, claimed damages against the club under section 2(1) of the Occupiers' Liability Act (Northern Ireland) 1957 and common law negligence.[5] Shiel J held that the fact of her membership precluded her from successfully suing the respondents as the nominated representatives of her fellow members as there was no real distinction between them and, as such, she was owed no duty of care. This was upheld by the Court of Appeal. However, relying on earlier authority,[6] Hutton LCJ in the course of his judgment accepted that -

> "… whilst the mere fact of common membership of a club does not by itself give rise to a duty of care owed to one member by all the other members, none the less because of the special responsibilities undertaken by a member or a group of members, he or they may become liable under the principle of *Donoghue* v *Stevenson* to another member, and the duty of

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[*] This is the first of two conjoined articles. The second, '*Questioning the Legal Status of Unincorporated Associations*', will appear in the *Northern Ireland Legal Quarterly*, Spring 2000. I would like to thank David Capper and an anonymous referee for commenting on an earlier draft.

[1] [1998] 7 BNIL 91.

[2] The plaintiff was employed by the club as a barman.

[3] The defendants were identified as those members representing the club as employers other than the plaintiff himself.

[4] [1993] NI 93. See Capper, *'Negligence Actions Against Unincorporated Associations'* (1993) 44 *NILQ* 388 for a discussion of this case.

[5] The respondents to the action were members of the club sued as the nominated representatives of the club.

[6] *Jones* v *Northampton Borough Council* [1992] 156 L,G, Rev, 23

> care thereby arising cannot be excluded by the fact that the plaintiff and the defendant or defendants are members of the same club".[7]

The main question in *Kinner* v *Trustees of West Belfast Pigeon Club*[8] was whether this principle applied in a reverse context: in other words, whether a duty of care can be owed to a member due to the special responsibilities undertaken by him. MacDermott LJ held that the duty of care under *Donoghue* v *Stevenson*[9] may be owed to a club member undertaking special responsibilities as an employee, signifying an extension of the principle outlined by Hutton LCJ in *McKinley* v *Montgomery.*[10] However, this adds little to the debate regarding the rights of ordinary members of an association or club. Indeed, the established principle that there is no distinction between members of a club giving rise to a duty of care owed by certain members to others was supported and the application of this principle to the position of committee members was expressly upheld.[11] A distinction could be made in the present case between the plaintiff and the other club members as he was also employed by the club and it was in this capacity that he was injured. It seems, therefore, that two principles can be extrapolated from the *Kinner* case. First, there is no immunity for one member of a club against a claim by another member on the basis of their common membership of the club. If the required conditions of duty of care and consequent negligence are satisfied then an action can proceed. Secondly, ordinary employment law principles apply and the duties and responsibilities of an employer are not avoided in this type of case due to the employee's membership of the club or association. The fact of the plaintiff's membership did not preclude the action, but it did not give rise to the duty of care either. The liability of the defendant arose because of the duty which all employers owe to their employees both at common law and under the wide range of statutory provisions.

The diverse outcome of *Kinner* and *McKinley* illustrates the anomalous position of club members which justifies Lord Romilly's assertion that "*clubs are very peculiar institutions*".[12] On the bare facts of these two cases members were injured on club premises, one was owed a duty of care because he was injured in another capacity, the other was not. Several issues arise as a result of this, which will be discussed in this and a subsequent article.[13] The present article will consider the preliminary question of whether an ordinary member of an unincorporated association should be able to sue the association. If it is accepted that they should have such legal redress the next question concerns the legal basis facilitating this. In this context the role of the committee needs to be assessed to decide whether the principle of a member voluntarily undertaking special responsibilities as an officer of the club justifies the imposition of a duty of care on him. Alternatively, it will be discussed in the subsequent article whether tailor-made legislation giving non-profit associations separate legal personality should be introduced and, if so, on what basis? Finally, and in conjunction with this, is the question of whether an association of this nature could either limit or exclude liability under the Unfair Contract Terms Act 1977.

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[7] *Supra*, n 4 at 103. In *McKinley* it was not asserted that any servant or agent of the members was personally liable in negligence.

[8] *Supra*, n 1.

[9] [1932] AC 562.

[10] *Supra*, n 4.

[11] See *Prole* v *Allen* [1950] 1 All ER 476.

[12] *Hopinkson* v *Marquis of Exeter* (1867) L. R. 5 Eq. 67.

[13] L. Glennon, Questioning the Legal Status of Unincorporated Associations, Northern Ireland Legal Quarterly, Spring 2000.

SHOULD A MEMBER BE ABLE TO SUE THE ASSOCIATION?

The basis of this article is premised on the assumption that a member of an unincorporated association should be able to obtain redress from the association itself for injury caused while on the association's premises. However, an initial question that has to be asked is whether this is justifiable. If one considers the cases of *McKinley* and *Kinner* it becomes apparent that, in the absence of special circumstances[14], an injured member will have no legal redress if injured on club premises. It will be seen in the next section that the complexity involved in assessing the circumstances in which one member will owe a duty of care to the other club members makes it very difficult to state clearly to whom a duty of care will be owed, either under the Occupiers' Liability Act (Northern Ireland) 1957 or common law negligence. The unpredictability caused by this justifies legal intervention. However, an argument against a member being able to sue an association is that once a member pays his subscription all he is entitled to is use of the premises and facilities. On top of this is the economic argument that the possibility of legal action and awards of compensation is a financial burden some associations may not be able to withstand. The possibility of legal actions means that associations would be advised to obtain insurance to meet any costs. It is likely, however, that such a burden would be met by increased membership fees, so what members may possibly gain on one hand is lost on the other. Inextricably linked to these issues is the fact that unincorporated associations encompass a diversity of groups, each with varying degrees of transience[15]. This makes finding a solution to the problem an even more difficult task.

The anomalous position of club members, however, warrants a thorough examination into the ways in which their rights could be strengthened. The irony that visitors and trespassers[16] are better protected when they suffer injury on club premises begs the question why members should not enjoy comparable rights. The argument that the members' entitlement on joining a club or association is limited to the use of the club premises and facilities is a rather restrictive view of their reasonable expectations. Indeed, one could argue that it is not necessarily a well-established policy argument that precludes members from suing, but the legal technicality that an unincorporated association lacks a legal identity independent of its members. It does not seem unreasonable that someone should bear the

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[14] In *Kinner* the special circumstances were that that plaintiff member was injured in his capacity as a barman of the club.

[15] The implications of the diversity of unincorporated associations was outlined by Tritschler J. in *Tunney* v *Orchard* [1955] 3 D,L,R, 15 at 50: "The present state of the law may be attributed to a failure to recognise differences in fact among voluntary, unincorporated associations; a failure to see that some are entities in fact and some are not. There is a real distinction in fact between, on the one hand, a loosely associated religious order of 1800, whose members are scattered throughout the world …, or a propertyless, vaguely organized association to advance the interests of merchants in a section of Toronto … In the former there may be an entity in fact apart from its membership, with assets which can and ought to be applied to the satisfaction of the obligations incurred."

[16] The position of an occupier in relation to trespassers is found in the Occupiers' Liability (Northern Ireland) Order 1987. This provides that an occupier owes a duty of care to any person in respect of a risk against which he may reasonably be expected to offer that person some protection. The standard required is to take such care as is reasonable in all the circumstances.

responsibility of ensuring that club premises are safe and the technical argument precluding the unincorporated association being sued as a body does not justify the dichotomous legal treatment between the differing categories of plaintiff.

If one accepts the principle that members of unincorporated associations should have legal redress for injury one must decide against whom. The purpose of this article is to consider the possibility of extending the liability of the committee and other officers of the club to facilitate the claims of a member injured on club premises.

SUING THE COMMITTEE AS A SEPARATE BODY

The possible extension of a committee's liability raises the question of the role of the committee. It could be argued that the committee is a separate elected body with the implied responsibility of ensuring the safety of club premises. On this basis the holding of office is the distinguishing factor between a committeeman and the other ordinary members of the club. Of course it is open to the committee, as a body, to delegate certain responsibilities to individual officers, but in the absence of this the committee would be wholly responsible. However, this is not the present position. At present the committee is viewed as an agent of the club members. On this analysis it seems that it is the members collectively, acting through the committee, who are responsible for the management of the club –

> " … the management committee of the club were doing no more than acting as agents for all the members. They were elected by the members and they were exercising the powers of all the members as agents for those members. They were not a body with individual members nor had they any separate entity for the purpose of contracting with outsiders who came with members of the club".[17]

In the case of personal injury to members and non-members the Occupiers' Liability Act (Northern Ireland) 1957 imposes on occupiers a common duty of care to all visitors. On the basis that the management of the club is the responsibility of the members collectively, albeit acting through the committee, the 'occupier' for the purposes of the legislation is the collective body of members.[18]

This is not to say, however, that the committee, as a body, or individual officers will never be held personally responsible for the safety of the club's premises. The *de facto* immunity of the committee and club officers can be displaced by the individual officer undertaking special

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[17] *Shore* v *Ministry of Works* [1950] 2 All ER 228 at 231 per Tucker LJ. This is emphasised by Josling who says that " … the contract of membership is a contract among the members themselves and the committee of the club is not a principal party to it. The committee is the agent of the members of the club as a whole for purposes to be ascertained from the rules …". Josling, *Law of Clubs* (6th ed, 1987) at page 90.

[18] Warburton states that "A member injured as a result of the state of the associations' premises cannot sue the other members because he is as much an occupier as they are". Warburton, *Unincorporated Associations* (2nd ed, 1992) at page 74. It should be noted that the possibility of a member injured on club premises suing the management committee in contract has been thwarted by the decision of the Court of Appeal in *Shore* v *Ministry of Works* [1950] 2 All ER 228 which held that the contract of membership does not contain an implied term that the premises were and would be safe.

responsibilities as in *Prole* v *Allen*[19] where the club steward[20] was held responsible for ensuring the safety of the club premises for the members. Certain alterations had been carried out on some steps and the plaintiff member, unaware of this, fell down them and was injured. Prior to the accident the steward had switched off a light, which had been placed near the steps. It was held that the steward was liable as he had been given express responsibility for the condition of the club's premises by all the members acting through the committee.[21] This placed him under a duty of care, which he had breached.[22] Although the committee was responsible for the management of the club it was held that the committee members did not owe a duty of care to the plaintiff.

This can also be seen in the case of *Robertson* v *Ridley*[23] where the rules of the club provided that the club was to be run by the committee but that the secretary and the chairman were responsible in law for the conduct of the club. The question was whether the plaintiff member, injured when his motorcycle hit a pothole in the drive to the club, was owed a duty of care. The Court of Appeal held that the rules did not impose on those officers a responsibility for the condition of the club premises and construed them as merely indicating who was responsible for the club's liability. May LJ, who had reservations about the liability of the steward in *Prole* v *Allen*, held that the words "responsible in law for the conduct of the club" meant that the secretary and chairman were responsible for such duties the law already imposed on the club. Nourse LJ interpreted the words as meaning that the named officers were responsible in law for the conduct of the members as a group "observing the requirements of statute and regulation in the running of the club and perhaps as regards liability towards third parties as well".[24] On this interpretation it seems that it was anticipated that the two officers would be sued as representative members in the case of any liability against the club. If one accepts that the rules did not render the officers personally liable to the members, it seems logical to conclude that the wording would also have been insufficient to impose personal liability on the officers *vis-à-vis* visitors. On this analysis of the rules, a non-member would sue the named officers but responsibility would be on the members collectively.

The question of whether the rules would have imposed on the named officers a separate duty of care to visitors in *Robertson* v *Ridley*[25] is an interesting one. Whether or not the committee or individual officers personally owe a duty of care is to be decided on the rules of the

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19 *Supra*, n 11.

20 Who was also a member and committeeman of the club.

21 The steward admitted in his evidence that "It was my duty to open the club and to close it, to remain on the premises until everybody had left, and to put the lights on and to turn the lights off when and where necessary. It was my duty … to see that the premises were in as good order as they should be, and in a fit condition for use by members of the club …". *Supra*, n 11 at 478.

22 Pritchard J outlined the rationale for distinguishing between the role of the committee and the role of the steward in relation to the other members: "He was appointed by all the members, operating through the committee, and, in my judgment, he thereupon became the agent of each member to do reasonably carefully all those things which he was appointed to do, and in that way he came to owe a duty to each of the members to take reasonable care to carry out his duties without negligence". *Supra*, n 11 at 477.

23 [1989] 2 All ER 474.

24 *Ibid*, at 478.

25 *Supra*, n 23.

association and this assessment should not really differ whether the plaintiff is a member or a visitor. However, in *Prole* v *Allen*[26] on the issue of the liability of the committee Pritchard J opined that the decision of *Brown* v *Lewis*[27] was of no assistance as in that case the plaintiff was a stranger whereas the present case concerned an action by a member[28]. It could be argued, therefore, that the identity of the plaintiff affects the reasoning of the court.

The cases discussed illustrate that membership of a committee does not, by itself, give rise to a duty of care towards the other members. However, this does not mean that committee members have an absolute immunity against actions by fellow members.[29] The question that has to be considered, therefore, is the requirements necessary to give rise to this duty of care. If club rules delegate the general responsibility for the management of the club and its premises to the committee should this be sufficient to impose on that body a separate duty of care to both members and visitors?

A SEPARATE DUTY OF CARE TO MEMBERS AND VISITORS?

In the case of *Grice* v *Stourport Tennis, Hockey and Squash Club*[30] the plaintiff member injured his back as he was entering the clubhouse. He alleged negligence on the ground that the step leading into the clubhouse was sloping and that it had a smooth stainless steel surface. The plaintiff's solicitor issued proceedings against the club, citing the name of the club, which was an unincorporated association, instead of the representative members. The plaintiff issued a summons to amend the statement of claim adding two individuals as representative members, the trustees, the chairman of the ground and premises committee and the steward on behalf of themselves and all the other members. The summons was struck out on the ground that there was no cause of action. This was upheld by Bracewell J who opined that the plaintiff could not sue the representative members as he would, in effect, be suing himself. The plaintiff appealed on the ground that he could make amendments to his statement of claim. The appeal was allowed by the Court of Appeal holding that the statement

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[26] *Supra*, n 11.

[27] (1896) 12 TLR 455.

[28] Another reason cited by Pritchard J was that in *Brown* v *Lewis* no distinction was made between a committee member and an ordinary member of the club. However, on the facts the committee were held *personally* liable for employing an incompetent person to repair a stand which collapsed and injured a member of the paying public. Indeed, the action was originally brought against the members of the committee as representing the whole club, but Cave J held that the committee were the persons responsible. His Lordship said that the committee " … had the power and duty of providing a stand for the accommodation of visitors to the football ground. They employed an incompetent man to repair the stand, and an accident resulted. The persons to blame were the committee".

[29] In *Jones* v *Northampton Borough Council* Gibson LJ commented that " … there is nothing in the case of *Prole* or *Robertson* v *Ridley* upon which can be founded a form of immunity available in law to one member of a club against a claim by another member of the club, being an immunity based upon their joint membership if the claimant can demonstrate that, according to the ordinary principles of law, the defendant member of the club was under a duty of care in respect of the circumstances which caused the claimant's injury and that the defendant was guilty of negligence". *Supra*, n 6 at 29.

[30] Unreported, Court of Appeal 28 February 1997.

of claim could be amended to add representative members of the club to be sued on their own behalf and on behalf of all the other members.[31] In addition, the trustees, the chairman of the ground and premises committee and the steward could also be added as the law did not prevent a member of a club from suing his fellow members who adopted a responsibility which gave rise to a duty of care.

It is relevant that the court allowed the plaintiff to add the trustees, the chairman of the ground and premises committee and the steward.[32] An analysis of the rules provided evidence that certain officers of the club may have accepted responsibility for the safety of the club's premises. The rules of the club stated that the management of the club was vested in the executive committee. Furthermore, it was stated in rule 9 that the ground and premises committee were responsible for the management of all the club's grounds, buildings and equipment. The divergence of approach between Bracewell J and the Court of Appeal is indicative of the difficulty in maintaining consistency when rules are being interpreted. Bracewell J opined that rule 9 did not give rise to any obligation, simply referring to housekeeping matters as opposed to any responsibility for the safe condition of the premises. Beldam LJ, in the Court of Appeal, thought that this interpretation was too restrictive. Similarly, Otton LJ said that it was at least arguable that rule 9 showed that the members anticipated that the ground and premises committee were to be responsible for the management of club grounds, buildings and equipment. More significantly, it was held to be at least arguable that the responsibility delegated to the committee was a duty, not merely for the benefit of visitors to the club, but also for the benefit of the members. This is an important assertion which correlates with the point made earlier that there will often be a body of members, probably the committee or sub-committee, who will bear the responsibility of ensuring that the premises are reasonably safe for visitors. This begs the question of why a comparable duty should not be owed, by the same body of people, to club members.

In the course of his judgment Beldam LJ noted that the club's insurance was on a member to member basis. This meant that the insurance cover was not exclusively for guests or visitors on the premises, but covered the liability of one member towards another. While this would cover the situation where the negligence of one member caused injury to another, it also –

> " . . . would seem adequate to cover a situation in which one member or one or more members were entrusted by the other members as part of a committee to see that the property … was properly managed and maintained . . ." [33]

This position complemented rule 9 of the club regarding the acceptance of responsibility by the committee, thus adding credence to the argument that the committee's responsibility was not just for the benefit of visitors to the club but for the benefit of members. Such an acceptance of responsibility makes it reasonable for members to expect the committee to carry out their duties with the requisite care and skill. The fact remains, however, that a duty of care to members will not be implied and that the only authority acceded to a club's committee is that given expressly or by necessary

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[31] Applying *Murray* v *Hibernian Dance Club* [1997] P,I,Q,R, P46.
[32] Reference was made to *Jones* v *Northampton Borough Council*, *supra*, n 6.
[33] *Grice* v *Stourport Tennis, Hockey and Squash Club*, 28 February 1997.

implication in the rules.[34] This further adds to the disparity between cases as the rules of a club will vary from case to case. The rules may narrowly define the remit of the committee's responsibilities and the interpretation of those rules is, at the end of the day, a matter for the court.[35]

Members' reasonable expectations

Inextricably linked with this is the contractual question regarding the reasonable expectations of club members. It could be argued that extending the liability of committeemen and officers gives unreasonable expression to the members' expectations, especially in the case of small associations. That club members are not automatically entitled to expect club premises to be safe was beyond doubt in the case of *Shore* v *Ministry of Works*[36] where it was held that the contract of membership does not include an implied warranty that club premises were and would be safe. Jenkins LJ said that the members' rights include –

> " . . . the right from time to time to use the club premises, with all their defects or imperfections. There was nothing in the nature of a special contract between the plaintiff and the committee of management . . . " [37].

However, once a member subscribes to a club or association they are admitted to the club's membership on the terms of its rules. The expectations of the club's members will derive from the rules and if the management of the club is delegated to the committee it could be argued that the ordinary members are entitled to expect the requisite degree of care and skill from the elected committee who have accepted office on the terms of the rules. It is submitted that this general managerial responsibility encompasses, by implication, a responsibility for the safe condition of the club's premises. This argument is premised on the submission that a separate duty of care is owed not just to visitors but also to the ordinary members.

Facilitating a member's action against the committee may be in line with the test of 'occupation' under the Occupiers' Liability Act (Northern Ireland) 1957. It seems that occupation correlates with control over the premises, as noted by Lord Denning in *Wheat* v *E. Lacon & Co. Limited*[38] that the word occupier –

> " . . . was simply a convenient word to denote a person who had a sufficient degree of control over premises to put him under a duty of care towards those who came lawfully on to those premises".[39]

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[34] *Supra*, n 18 at page 87.

[35] *Lee* v *The Showman's Guild of Great Britain* [1952] 2 QB 329 at 344 Denning LJ said that "The rules are a contract between the members. The committee cannot extend their jurisdiction by giving a wrong interpretation to the contract, no matter how honest they may be. They have only such jurisdiction as the contract on its true interpretation confers on them, not what they think it confers. The scope of their jurisdiction is a matter for the courts, and not for the parties, let alone for one of them".

[36] [1950] 2 All ER 228.

[37] *Ibid*, at 232.

[38] [1966] AC 552.

[39] *Ibid*, at 577. Lord Denning quoted Salmond on Torts (14th ed, 1965), p 372: " . . . an 'occupier' is he who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons". Lord Denning thought that this was too narrow and said that a degree of control over the state

The inclusion of the control element of the occupation test serves as a ground upon which to develop the liability of the committee of the unincorporated association and to hold that the managerial responsibility of the committee makes them 'occupiers' for the purposes of the Occupiers' Liability Act (Northern Ireland) 1957.

The Bradley Principle

This pragmatic approach to the position of committee members is broadly in line with the words of Scott LJ in *Bradley Egg Farm* v *Clifford*[40] where the key question was the identity of the person with whom a third party made a contract in an unincorporated association. Scott LJ said that –

> "The law . . . has to choose from the various persons associated together under the umbrella of the society's name, those most concerned in the function of making contracts, those of the associated persons who were most directly concerned, and to discard those who were, for any reason, least directly concerned".[41]

Although this principle was stated in a contractual context it is a useful approach to adopt generally when considering the position of the committee in an unincorporated association. Indeed, in the Australian case of *Smith* v *Yarnold* [42] the reasoning utilised in *Bradley* was considered to be equally applicable to both contract and tort issues.[43] In this case the plaintiff, who was a spectator at a greyhound meeting at Taree Greyhound Racing Club, was injured when the grandstand collapsed. He sued the members of the committee of the club under an alleged breach of warranty as to the safety of the grandstand and for negligence. The New South Wales Court of Appeal, applying the reasoning used in *Bradley*, held the committee members liable. On this point Herron CJ concluded that –

> "The liability of the committee men of the Greyhound Racing Club does not depend wholly upon a logical approach to the law of contract or of tort, none the less it is the only method by which justice can be done towards the plaintiff who paid his admission fee and was entitled to expect the security which the invitation involved".[44]

This case was considered by the Supreme Court of Western Australia in *City of Gosnells* v *Roberts.*[45] The plaintiffs were injured when a horse strayed from land, owned by the City of Gosnells Council and occupied by an unincorporated polocrosse club, and collided with their motorcycle on a public road. The plaintiffs sued the owner of the horse, the City Council and the members of the committee at the time of the accident.[46] The trial judge found all the defendants liable to the plaintiffs. The Supreme Court

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of the premises will suffice for occupation. See also *Francis* v *Cockerell* (1870) L,R, 5 Q,B, 184.

40 [1943] 2 All ER 378.

41 *Ibid*, at 386.

42 (1969) 2 NSWR 410.

43 See Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986), p 136.

44 *Supra*, n 42 at 415.

45 [1994] A,T,R, 61-841.

46 They also sued the current members of the committee for the limited purpose of having access to the assets of the club.

of Western Australia upheld the appeal of the members of the committee[47] on the basis that the accident did not take place during a polocrosse match. The horse, which caused the accident, was being agisted on the polo grounds during the off-season and as this was outside the objects on the unincorporated body neither the members collectively nor the committee were responsible. Keeler rightly observes, however, that the court in this case was diverted from the key issue of who had the power of control over the land from which the pony strayed[48]. The fact that the activity causing the accident was outside the objects of the club should not have been the determining factor when answering this question[49]. It is notable, however, that Rowland J said that in accordance with the principle enunciated by Herron CJ in *Smith* v *Yarnold* committee members could, in certain circumstances, be primarily responsible in tort.[50] It is also interesting that the trial judge in this case held the committee liable saying that the law had taken a pragmatic approach to this question. Keeler suggests that it is likely that this is the correct choice –

> " . . . it seems likely that running its affairs between them, including ensuring that the playing fields were available and suitable for . . . use, seems to have been left to the committee . . . [which] is the body most likely to be responsible for seeing that [the fields] are cut, cleared, marked and looked after and these responsibilities would extend to their security as well as their general condition".[51]

Such an interpretation of the role of the committee, although discussed in relation to visitors injured on club premises, is similarly applicable when a member is injured on club premises. This is in line with the reasoning of *Grice* v *Stourport Tennis, Hockey and Squash Club*[52] that if the committee undertook and accepted managerial responsibility it is not unreasonable that a duty of care is owed to members as well as visitors. Indeed, in *Grice* Otton LJ cited and approved the words of Gibson LJ in *Jones* v *Northampton Borough Council* [53] –

> "It seems to me that it is open to the court to find that a duty of care existed where a club officer or member of a committee takes upon himself some task which he is to perform for other members of the club in the course of which he acquires actual knowledge of circumstances which he knows give rise to risk of injury to club members acting as he knows they will or may be expected to act if they are not told of the cause of danger".[54]

It is submitted that the appointment of committee members, a delegation of general managerial responsibility to them and their acceptance of this responsibility satisfy this requirement. This would give sufficient control

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47 The liability of the owner of the horse and the City Council was affirmed.

48 Keeler, *'City of Gosnells* v *Roberts: Coping with Unincorporated Associations'*, (1995) *Torts Law Journal*, Lexis 9.

49 Keeler states that " … the fact that agisting ponies during the off-season was outside the objects of the club is irrelevant to the identity of the persons having sufficient control over the land to be held responsible for the exercise of reasonable care to prevent harm to highway users". *Ibid*.

50 *Supra*, n 45 at 61-847. Pidgeon J. similarly considered that the reasoning of Herron CJ in *Smith* v *Yarnold* may be applicable to render the committee liable in negligence if a highway user was injured during a polocrosse game.

51 *Supra*, n 48.

52 *Supra*, n 30.

53 *Supra*, n 6.

54 *Ibid*, at 29.

to the committee over club premises to be responsible for their safety and condition for the benefit of both members and visitors. It seems, therefore, that when determining the identity of the occupier of club premises *Bradley Egg Farm* v *Clifford* [55] offers a sensible approach, that is looking at the various persons within the association to determine who is most concerned with ensuring that the club premises are in a safe condition. Generally, this is not the responsibility of the members who will have elected the committee to fulfil, *inter alia*, this task.[56]

CONCLUSION

This interpretation of the role of the committee would enable a member to obtain redress when injured on association premises, thus overcoming the present procedural difficulties. When questioning whether this is too onerous a duty in the context of negligence actions it should be remembered that the common duty of care is to take such care as is reasonable in the circumstances. For the purposes of the legislation the 'occupier' does not have to guard against improbable, even if foreseeable, events.[57] However, various arguments could be advanced against this development. One argument is that rendering the committee liable is too harsh a burden on mere volunteers, that the committee as a body do not enjoy the profits of the club, if there are any, so why should they carry the liabilities? Laski puts forth a similar argument about the case of *Brown* v *Lewis*[58]–

> " . . . sanity would appear to require that just as the club would have enjoyed the profits, so, on the collapse of the stand, it is right that it should suffer the penalties".[59]

However, a similar question can be asked from the point of view of the members. Why should the members collectively bear the responsibility of being 'occupiers' under the Occupiers' Liability Act (Northern Ireland) 1957 when they are not the body with control over the condition of the club's premises? When looking at this question it is interesting to consider the identity of the 'occupier' in other contexts. For the purposes of the General Rate Act 1967 the 'occupier' of land is liable to pay rates. The Court of Appeal in *Verrall* v *Hackney London Borough Council*[60] held that in the context of an unincorporated association, being a member

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55 *Supra*, n 40.

56 In *Smith* v *Yarnold* (1969) 2 NSWR 410 Herron CJ stated in the course of his judgment that as regards the liability of the committee the summations of the trial judge, who stated that the basis of the plaintiff's claim was the fact that the committee members were chosen to manage the affairs of the club and they accepted this situation, had been correct.

57 Jones, *Textbook on Torts*, (6th ed, 1998). See also *Bolton* v *Stone* [1951] AC 850.

58 *Supra*, n 27.

59 Laski, '*The Personality of Associations*', (1915-16) 29 *Harv. L. Rev.* 404 at 420. A similar argument can be advanced against imposing liability on trustees solely on the basis that they are the legal owners of the club's property. There is at present no basis on which to hold trustees liable to either members or non-members and it seems that a stronger case could be made for rendering the committee liable than the trustees on the grounds that the former generally will be elected by the members to carry out the management of the club.

60 [1983] 1 Q,B, 445.

is insufficient by itself to render a person an occupier for these purposes. May LJ stated, *per curiam*, that –

> "Most unincorporated associations, such as clubs or charities, have trustees, or a committee, legal persons with funds available to pay the rates which it is recognised will have to be paid. It is these persons who, as a matter of law, usually occupy the relevant premises which are used for the purpose of their club or charity and are liable as such occupiers for the general rates".[61]

However, one practical difficulty, which cannot easily be overlooked, is that usually the committee of a club will be unpaid volunteers and to extend their liability may have the effect of reducing the number of volunteers willing to undertake this role.[62] Furthermore, the rules of the club will continue to be the starting point for determining the liability of committee members and as the rules will vary from club to club inconsistencies are inevitable. An economic argument is that it may be advisable to purchase insurance to cover the committee and other officers of the club against potential liability. This cost would probably be met by the members as subscriptions would increase to meet this extra financial burden. These points may weigh in favour of the second option, statutory incorporation of clubs and associations. This would answer Laski's claim that –

> " . . . it would appear to the man in the street more equitable to make the club pay for that which it enjoys the benefit . . . ".[63]

A second article, therefore, will consider the mechanics of conferring a separate legal identity on clubs and associations. It will be argued that such statutory incorporation would not merely solve the present issue of

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[61] *Ibid*, at 462. See Fletcher, *The Law Relating to Non-Profit Associations in Australia and New Zealand* (1986), p 137.

[62] One option open to office holders of this kind, however, is to attempt to limit or exclude liability by use of a public notice or by inserting an exclusion clause into the club's rules. The enforceability of such a term depends on the application of the Unfair Contract Terms Act 1977, section 2(1) of which prohibits businesses from excluding liability for death or personal injury and from excluding liability for other damage beyond a point which is reasonable. Non-business entities, however, are not bound by the restraints of the 1977 Act. The question, therefore, depends on the interpretation of 'business'. There is little guidance as to what constitutes a 'business' under the Unfair Contract Terms Act, section 14 of which defines a business as including "a profession and the activities of any Government department or local or public authority". Section 1(3) of the Unfair Contract Terms Act 1977, amended by article 4 of the Occupiers' Liability (Northern Ireland) Order 1987, excludes from 'business liability' a duty regarding the dangerous state of premises towards a person gaining access for recreational or educational purposes, unless the granting of access falls within the business purposes of the occupier. When dealing with the liability of individual committee members, it is likely that their activities within the club would not be regarded as business for the purposes of the Unfair Contract Terms Act 1977, thus enabling them to exclude liability unfettered by the restraints of this Act. While this would defeat the claims of a member injured on club premises, all members would have notice of the clause and, as such, their reasonable expectations would not be infringed.

[63] *Supra*, n 59 at 420.

the rights of members injured on club premises, but would regulate the internal and external affairs of such associations and reduce considerably the complexity of the current law.

THE POLITICS OF LEGALITY

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> "Even lawyers must recognise that history cannot simply be sealed off when a chapter such as the one we are leaving comes to an end, and certainly not when to do so would be to ignore the suffering and injustice done to millions"[1]

INTRODUCTION

It is well established that all analysis and criticism of law rests on a normative framework that is either implicit in a work or explicitly defended. Arguments over the precise meaning of legality are not novel and patterns of legal argumentation often have remarkable continuity. The aim in this article is to examine a debate that has re-emerged among those unsympathetic towards legal positivism. An interesting dispute has resurfaced over the precise uses of legality and its determinacy or indeterminacy. The theoretical controversy has practical implications which are particularly evident in societies where law is under stress. The principal purpose here is to tell a different story about "critical" traditions in legal scholarship than is familiar: for the thesis is that the resources of the democratic tradition in modern law have not been exhausted. This scholarship offers a perspective on legality which has real explanatory power and critical potential.[2] In particular I focus throughout on the work

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* This article is an extended review of Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998) which tries to locate his work in a wider body of scholarship on democratic understandings of legality. Some of the research for this article was carried out while I was a Visiting Research Scholar at the University of Michigan Law School.

1 Asmal, "Victims, Survivors and Citizens-Human Rights, Reparations and Reconciliation" (1992) 8 *South African Journal of Human Rights* 491, p 493.

2 See, for example, in the US context Michelman, "Brennan and Democracy" (1998) 86 *California Law Review* 399, p 424; in relation to the persistent debate on the legitimacy of the judicial role he argues that the first and constant requirement of democratic justice would be: "Decisions that have to be reached about the rightness of basic political arrangements, that cannot be consensually reached, are nevertheless reached by institutions that are always effectively subjugated to the pressures of a public opinion-in-formation that is bent on democratizing itself and the legal and social conditions of its production." On the republican revival see Michelman, "Law's Republic" (1988) 97 *Yale Law Journal* 1493, pp 1526-1527: "Given plurality, a political process can validate a societal norm as self-given law only if (i) participation in the process results in some shift or adjustment in relevant understandings on the parts of some (or all) participants, and (ii) there exists a set of prescriptive social and procedural conditions such that one's undergoing, under those conditions, such a dialogic modulation of one's understandings is not considered or experienced as coercive, or invasive, or otherwise a violation of one's identity or freedom, and (iii) those conditions actually prevailed in the process supposed to be jurisgenerative." See also Sunstein, "Beyond the Republican Revival" (1988) 97 *Yale Law Journal* 1539. For criticism see Bell and Bansal, "The Republican

of Dyzenhaus. The intention is to provide both an extensive introduction to the thought of this important legal theorist and defend the trend of which his work is a part. The suggestion is that his work is an important contribution to the debate. But more importantly it forms part of an emerging neo-republican or social democratic body of legal scholarship which is deeply sceptical about both naïve liberal triumphalism and the direction in which some "critical" legal scholarship has gone. This neo-republican revival comes at an important time in the debate on constitutionalism in the United Kingdom. It is essential that the insights gained are fed into the current disputes on constitutional change. A distorted, and thus partial, conceptual framework will impact severely on the terms in which this debate is conducted.

My argument is that this neo-republican framework is of use to constitutional lawyers approaching the difficult task of mapping the "unwritten constitution" in the fragmented context of multi-layered governance. How else do we begin to map the transnational conversations involving judges, politicians, non-governmental organisations and corporations which are altering the way we think about legal and political discourse? My thesis is that the democratic concept of legality outlined here should underpin this process.

I defend this thesis in two basic stages. First, I trace the development of Dyzenhaus's understanding of legality and his contribution to the broader debate on law and democracy. This includes an examination of: legality and legitimacy; law in the Weimar Republic; and the law and politics of justification. His is a valuable contribution to a body of contemporary work that expresses unease about aspects of critical legal scholarship. What is important is that this criticism does not come from the usual quarters. The work claims that a critical tradition of social democratic scholarship is being neglected and thus the intellectual resources it provides ignored. This is a critical tradition with practical implications for "real-world" legal contexts. Second, I examine Dyzenhaus's recent work on South Africa, specifically his exploration of the Legal Hearing of the South African Truth and Reconciliation Commission (TRC). This includes: an outline of the work of the TRC; and thoughts on the judicial role. The theoretical argument advanced in this article speaks directly to the dilemmas faced by constitutional lawyers in states where law is under stress. The case-study is a useful way of testing some of the claims advanced about legality. As he has noted, all South African lawyers who opposed apartheid faced the question of how, or if, law could be used to resist law.[3] This is precisely the issue that confronts all critical scholars who do not believe that "really existing liberal democracy" is the end of the story or the "end of history".

Revival and Racial Politics" (1988) 97 *Yale Law Journal* 1609. For a republican concept of the legitimacy of law see Pettit, *Republicanism: A Theory of Freedom and Government* (1997), pp 252-253.

[3] Dyzenhaus, "Law as Justification: Etienne Mureinik's Conception of Legal Culture" (1998) 14 *South African Journal of Human Rights* 11. In South Africa this was translated into the question of whether the common law "gave judges a genuine resource to *interpret statute law* in ways that modified the oppressive intentions of the legislators", p 13.

LEGALITY AND LEGITIMACY

Judging and Argumentation

In any political struggle a time comes when thought must be given to law's potential for achieving change. Most individuals and groups making interventions in the public sphere will consider the available legal mechanisms. If a government has proved resistant to legislative reform then the political struggle may enter the courts. While this raises numerous practical questions for the participants it also raises fascinating issues for legal scholars considering law's potential for making a political and legal difference. In this context the movement in constitutional thinking toward models of legal argumentation is helpful.

Debates about the rule of law are commonplace in legal scholarship, yet these are arguments which go beyond the law school. Dyzenhaus's work can be usefully understood as part of a democratic defence of legality and indirectly as a critical response to modern trends in "critical legal scholarship." There is growing concern that exposure of radical indeterminacy does not lead to politically progressive results. Scholars have, for example, shown that indeterminacy has been used in the past by right-wing authoritarians to undermine constitutional regimes. If there is a theme that dominates Dyzenhaus's work it is that legal positivism, and with it the plain fact approach to law, does not encourage sound legal practice. It is the argument that a theoretical position about the nature of law can have a practical impact on how judges do their work. The focus is on adjudication and, like Dworkin, he views judges as central to legal practice.[4] One can take issue with this, and Dyzenhaus does recognise that judges should not have the last word on how to describe their social practice. [5] This remains a narrow focus and it is important to remember other strands of legal thought that explore the way legality is constructed in wider society and therefore far removed from the courtroom.

There are several difficulties faced by those who reject positivism but wish to retain a concept of legality. The most serious problem for those anti-positivists who defend a substantive concept of legality is the "wicked legal system": in other words, states that use law primarily for the purpose of oppression. The modern debate on this subject can be traced to Hart and Fuller's exchanges on the contribution made by legal positivism to national socialism in Germany.[6]

Dyzenhaus has gone to some lengths to demonstrate the validity of his thesis. In his first major work he used a case-study of judicial interpretation of apartheid laws to examine the arguments of legal positivists and their critics.[7] It is necessary to summarise his earlier

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[4] Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991), p 269. See also Dyzenhaus, "Judges, Equity and Truth" (1985) 102 *South African Law Journal* 295; Dyzenhaus, "The Disappearance of Law" (1990) 107 *South African Law Journal* 227.

[5] *Ibid*, (1991), p 213. See also Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1994), pp 179-193.

[6] See Hart, "Positivism and the Separation of Law and Morals" reprinted in Hart, *Essays in Jurisprudence and Philosophy* (1983), p 49; Fuller, "Positivism and Fidelity to Law: A Reply to Professor Hart" (1958) 71 *Harvard Law Review* 630.

[7] *Op cit*, n 4. For criticism see Hartney, "Dyzenhaus on Positivism and Judicial Obligation" (1994) 7 *Ratio Juris* 44; Sypnowich, "Social Justice and Legal

position. Circumstances in South Africa brought these debates into sharp focus and more detailed consideration is given to the issue below. The South African government placed great emphasis on its use of legalism. Legality could potentially offer a cloak of respectability for apartheid and where possible the government used it in this way. Serious questions were thus raised for the legal profession and the judges who participated in this legal order. The judges have been extensively criticised for their executive-mindedness. Dyzenhaus attributes this to the dominance of the plain fact approach to interpretation. The decisions "greased the wheels of racial segregation and they allowed the security arm of government to suppress political opposition to that policy unhindered by judicial review".[8] His reference to Cover's work on the role of the judges in enforcing the Fugitive Slave Law in the United States is of interest.[9] Cover's argument is that judges held onto a mechanistic interpretation as a comfort when they faced moral problems with the law they were being asked to confront.[10] Formalism offers comfort to judges when presented with serious moral problems about the activity they are engaged in. This mechanistic approach need not, however, promote restriction. As Abel has noted, in the South African context, most judges honoured clear statutory language even though it lead to conflict with the government and did not accord with their political preferences.[11] Dyzenhaus argues that it is legal positivism which plays the key part in the reasoning of judges who adopt this approach. In his early work he makes a spirited defence of the common law tradition and suggests that the approaches of Fuller, Dworkin and Habermas are the most convincing. It is to Dworkin that he looks for an adequate critique of positivism.[12] The Dworkinian approach did, however, face a particularly acute problem when applied to the South African legal order: for if the role of the judge is to provide the best coherent justification of constitutional values then many judges might have found themselves extending, rather than eroding, apartheid. Legal positivists argue, with some justification, that Dworkin's is yet another romantic attempt to revive the common law tradition. One potential consequence is that judges may gain legal authority for a decision that is not merited. Through a historical analysis of South African law Dyzenhaus tries to shed some light on this debate with the aim of defending the potential of the common law tradition. The claim made against the plain fact approach is a serious one: it lends legitimacy to executive policies which would be illegal if judged by substantive legal

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Form" (1994) 7 *Ratio Juris* 72. And for a response see Dyzenhaus, "The Legitimacy of Law: A Reply to Critics" (1994) 7 *Ratio Juris* 80.

[8] *Op cit*, n 4, p 214.

[9] Cover, *Justice Accused: Anti-Slavery and the Judicial Process* (1975). See generally Minow, Ryan and Sarat (eds) *Narrative, Violence, and the Law: The Essays of Robert Cover* (1995).

[10] *Ibid*, (1975). See Sebok, "Legal Positivism and American Slave Law: The Case of Chief Justice Shaw" in Dyzenhaus (ed), *Recrafting the Rule of Law: The Limits of Legal Order* (1999), p 113; he rejects Cover's emphasis on formalism and suggests it was a much more subtle form of legal positivism. *Cf* Nelson, "The Impact of the Anti-Slavery Movement Upon Styles of Judicial Reasoning in Nineteenth Century America" (1974) 87 *Harvard Law Review* 513.

[11] Abel, "Legality Without a Constitution: South Africa in the 1980s" in Dyzenhaus (ed) *op cit*, n 10, p 66, p 73.

[12] Despite the many limitations of his work Dworkin remains the leading contemporary critic of legal positivism, see Dworkin, *Law's Empire,* (1986); Dworkin, *Taking Rights Seriously*, (1978).

standards.[13] These substantive legal standards are to be found within the common law tradition. Demonstrating that a jurisprudential position is directly responsible for particular outcomes is not easy. There are many factors which impinge upon the decision-making process. Much weight is placed on the practical implications of the plain fact approach and in particular it is suggested that judicial creativity is blocked.[14] Even contemporary legal positivists, such as Raz, do not escape the accusation that their interpretation encourages the plain fact approach. No doubt an activist judiciary, spurred on by progressive legal scholars, might have offered some form of meaningful resistance to the apartheid legal order. In the United Kingdom those inspired by Dworkin's argument have had some success within the context of a political movement to encourage a more activist judiciary. Ultimately one is still left wondering whether this is the best way to promote democratic values or discourage apathy and quietism. This is not to deny the power of this concept of legality but to caution against an exaggerated belief in the judicial role. It is in rather more mundane locations that one suspects the most important action happens.

Life Beyond Dworkin

The understanding that emerges in Dyzenhaus's early work is perhaps over indebted to Dworkin's insights on interpretation and legal theory. It is in the combination of perspectives (Fuller, Habermas and Dworkin) that a more persuasive democratic argument surfaces. Fuller's interactive understanding of legality as a relationship between the citizen and the state, when linked to Habermas's work on the legitimacy of legality, is promising.[15] The reason is that they have constructed strong arguments for a democratic understanding of law. In other words, they are able to defend a critical understanding of legality against legal positivism. In this model justification, argumentation, contestation and the provision of reasons assume priority. As Dyzenhaus notes, adopting this conception of legality means that the debate does not end with the primary legislative decision.[16] The emphasis is on encouraging judicial creativity by stressing the nature of the common law tradition as a process of contestation. This is similar to Habermas's critique of Weber's understanding of law. Habermas argues that Weber linked modern law to enactment and thus broke any connection to rational agreement.[17] What Weber misses with his narrow positivism is a conception of rational justification. The concept of legitimacy is thus tied to a form of "decisionism" and a belief in the legality of enacted rules and the right of those who rise to positions of authority to issue commands.

Dyzenhaus's early work has attracted criticism. Many would question the centrality accorded to the courts and the veneration of the common law tradition. By placing adjudication and creative interpretation at the heart of a concept of legality he invites the fairly obvious criticism that the life of law appears in practice to happen at some distance from the appellate courts. Critics will find much support for the argument that the common

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13 *Op cit*, n 4, p 209.
14 *Ibid*, p 247.
15 See Fuller, *The Morality of Law* (1964).
16 *Op cit*, n 4, p 267.
17 Habermas, *The Theory of Communicative Action Vol. 2: Lifeworld and System: A Critique of Functionalist Reason* (1987), p 263. Habermas is another in a line of theorists to have given serious thought to the nature and role of modern law; see Symposium Issue, "Habermas on Law and Democracy: Critical Exchanges" (1996) 17 *Cardozo Law Review* 767-1684.

law does not impress as a vehicle for the promotion of progressive politics. The welfare state is a creature of legislation and its creation met with some judicial resistance. In other words, it is to statute law that we most often turn for concrete defences of values such as equality. Dyzenhaus's response is inadequate. He argues that we do not have a problem defending parliamentarism even though there were past exclusions. Parliamentary democracy rests on a foundation of democratic principle: an element of legitimacy which the common law tradition notably lacks. He is, of course, aware of this problem. That is precisely why Dworkin, Fuller and Habermas prove so attractive. Each of these theorists recognise and attempts to answer, in different ways, this problem of legitimacy and justification. Dworkin and Habermas are relevant for another reason which will become apparent – for when we talk of the role of interpretation, and its centrality for legal theory, we are faced with the problem of how creative we want our judges to be.

More than Words? Legal Interpretation and the Life of the Law

The linguistic turn in philosophy has had an impact on many disciplines, including legal scholarship.[18] Placing language at the centre of argumentation has a serious impact on traditional understandings of some of the basic building blocks of legal scholarship. For example, take Rorty's position on truth:

> "Truth cannot be out there – cannot exist independently of the human mind – because sentences cannot so exist, or be out there. The world is out there, but descriptions of the world are not. Only descriptions of the world can be true or false. The world on its own – unaided by describing activities of human being – cannot."[19]

Rorty is interested in metaphor, conceptual novelty and self-invention and suggests that a liberal utopia would be a poeticised culture.[20] The languages of law are revived by metaphorical tropes and processes of redescription rather than external changes in the world. To try to understand what this might mean in practice think of the recent debate on human rights in the United Kingdom.[21] Rorty might see the arguments

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[18] See generally Rorty, *Philosophy and the Mirror of Nature* (1980). For an introduction to hermeneutics see Grondin, *Introduction to Philosophical Hermeneutics* (1994).

[19] Rorty, *Contingency, Irony and Solidarity* (1989), p 5. For criticism see Habermas, *On the Pragmatics of Communication* (Cooke ed, 1998), pp 343-382.

[20] *Ibid*, (1989), p 65. For an interesting exchange of views see Baker, " 'Just do it': Pragmatism and Progressive Social Change" (1992) 78 *Virginia Law Review* 697; Rorty, "What can you Expect from Anti-Foundationalist Philosophers?" (1992) 78 *Virginia Law Review* 719, p 719: "Good prophets say that if we all got together and did such and such, we would probably like the results. They paint pictures of what this brighter future would look like, and write scenarios about how it might be brought about. When they're finished doing that, they have nothing more to offer, except to say 'Lets try it!' (a phrase I prefer to 'Just do it!')."

[21] Much has been written on this development see, for example, Feldman, "The Human Rights Act 1998 and Constitutional Principles" (1999) 19 *Legal Studies* 165; Young, "The Politics of the Human Rights Act" (1999) 26 *Journal of Law and Society* 27; Leigh, "Horizontal Rights, the Human Rights Act and Privacy: Lessons from the Commonwealth" (1999) 48 *International and Comparative Law Quarterly* 57; Ewing, "The Human Rights Act and Parliamentary

over the Human Rights Act 1998, and the political movement using these discourses, as attempts at metaphorical redescription of constitutional law and practice. The arguments that eventually are successful are not those that can claim validity against some external check but rather those that "work". Constitutional change initiated by the United Kingdom government is simply the replacement of old metaphors with a new revived self-image. It is important to stress that Rorty would not criticise this as inauthentic for this is precisely how change occurs for him. Rorty's focus on the contingency of language is a deliberate attempt to undermine any claim to universal validity and thus stands in sharp contrast to Habermas. Basically Rorty is arguing that we must still hold onto and argue for what we believe in on the basis that it runs no deeper than "contingent historical circumstance".[22] He is worried about the type of "prophet" who thinks of herself as a messenger from somebody or something:

> "Such prophets think of themselves as not just one more voice in the conversation, but as representative of something that is somehow *more* than another such voice."[23]

What does this mean for human solidarity?[24] For Rorty the key is not to search for something shared but rests with "the imaginative identification with the detail of others' lives".[25] The sense of solidarity is stronger the more local the "one of us" is. Solidarity is best defended, he argues, by extending the "us" and not arguing from "humanity". The argument is that this process of extension is best achieved by empirical descriptions of particular forms of pain and not by philosophical treatises. One can therefore understand why Rorty views all forms of literature as a part of this process. Rorty's pragmatism is a useful example of where the linguistic turn can lead. The left have found this version of pragmatism frustrating and some believe that it is a rather complacent perspective.[26] Rorty's response is surprise at the "radical" belief that a "really powerful philosophy could break down all the resistance to radical social change by dissolving all the old fears and prejudices".[27] He thinks that the left's turn to theory is motivated largely by despair. He may well have a point.

Given the place of textual interpretation in legal scholarship it is not difficult to see why the linguistic turn has proved so attractive to traditional and critical legal scholars. Critical scholars have joined analytic

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Democracy" (1999) 62 *Modern Law Review* 79; Bamforth, "Parliamentary Sovereignty and the Human Rights Act 1998" [1998] *Public Law* 572; Hunt, "The 'Horizontal Effect' of the Human Rights Act" [1998] *Public Law* 423. For a welcome note of caution see Tomkins, "Of Constitutional Spectres" [1999] *Public Law* 525, p 539: "The Human Rights Act 1998 and the devolution arrangements will alter the balance of power in the constitution, enhancing the position of the judiciary at the expense of Parliament, but the Crown's government marches on. The Crown remains the constitutional powerhouse… Until that is changed… any new constitutional order will look remarkably like the old one."

22 *Op cit*, n 19, p 189.

23 *Op cit*, n 20, p 719.

24 For a critical perspective see Geras, *Solidarity in the Conversation of Humankind: The Ungroundable Liberalism of Richard Rorty* (1995).

25 *Op cit*, n 19, p 190.

26 See, for example, Hutchinson, "The Three 'R's': Reading/Rorty/Radically" (1989) 103 *Harvard Law Review* 555.

27 *Op cit*, n 20, p 723.

philosophers in "colonising" linguistic philosophy and, while welcoming the recognition that Hart and Dworkin have given to the importance of language, continue to reject their arguments. From a critical perspective the constructed nature of legal discourse offers new clothes for a very old argument. There is a problem for critical scholars wishing to pursue this agenda. It can be demonstrated briefly by mentioning some arguments advanced by Fish.[28] Fish argues that law cannot have a purely formal existence as any specification of what the law is will be infected by interpretation and thus challengeable. What is interesting is that Fish does not then proceed, as critical scholars do, to debunk the indeterminate and incoherent nature of legal discourse. Instead Fish marvels at law's ability to create and recreate itself out of the very materials it pushes away. It is inescapably pragmatic and inconsistency is what makes law work.[29] The beauty of law for Fish is precisely this process of self-creation. He is not troubled by the insight. In fact he revels in law's mechanisms for replicating itself. This conservative response blunts the critical nature of scholarship that highlights indeterminacy. Accepting Fish's view of things would change the focus towards the local conditions of persuasion, the reasons that work and the leverage that can be achieved in practice by invoking law's normative claims.[30] But even this is to go beyond what Fish would accept.[31] The reason for introducing this is to suggest why Dworkin and Habermas are of such interest. They are leading critics of this style of relativism and sceptical thinking and have, I believe, demonstrated its flaws. Both Dworkin and Habermas, however, recognise the importance of this turn to language and construct their arguments within it. Habermas in particular has engaged extensively in this debate and his work will be of interest to those who are initially suspicious of "linguistic idealism". I suggest that this is why Dyzenhaus has found the work of these scholars so attractive for they provide the critical tools to address the challenge of some strands of critical legal scholarship.

Criticism of this democratic understanding is not confined to postmodern theory. Legal positivists are also critical because he appears to be making a very old mistake. Fagan, for example, argues that there is no connection between legal positivism and the plain fact approach and therefore that the critique is a non-starter.[32] He rejects the assumption that the validity of a legal theory should be dependent on the desirability of its practical effect.[33] Dyzenhaus's focus can also be contrasted with that of Abel's work on the use of law in the struggle against apartheid[34] and Lobban's examination of the work of the courts at trial level.[35] These are discussed in more detail below.

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[28] See, for example, Fish, *There's No Such Thing as Free Speech and its a Good Thing, Too* (1994).

[29] *Ibid*, p 169.

[30] *Ibid*, p 171.

[31] See Fish, "Liberalism Doesn't Exist" (1987) 6 *Duke Law Journal* 997; Fish, "Still Wrong After all These Years" (1987) 6 *Law and Philosophy* 401; Fish, "Anti-Professionalism" (1986) 7 *Cardozo Law Review* 645; Fish "Wrong Again" (1983) 62 *Texas Law Review* 299; Fish, "Working on the Chain Gang: Interpretation in Law and Literature" (1982) 60 *Texas Law Review* 551.

[32] Fagan, "Delivering Positivism from Evil" in Dyzenhaus (ed) *op cit*, n 10, p 81, at p 103.

[33] *Ibid*, p 111.

[34] Abel, *Politics by Other Means: Law in the Struggle Against Apartheid* (1995).

[35] Lobban, *White Man's Justice: South African Political Trials in the Black Consciousness Era* (1996).

Dyzenhaus's defence of a democratic understanding of law has taken him squarely into modern critical debates in legal theory. Some trends in modern legal and political theory reject key elements of the modernist enterprise which underpin traditional legal theory. There are a variety of ways to respond to this modern intellectual trend. One is to view it as irrelevant and ignore it. While at times understandable this rests uneasily with claims that dialogue and rationality are central to modernism. Another, and more challenging, task is to recognise the limitations of traditional notions of rationality and construct a model that is more resilient and provides a basis for continuing critique. This has the advantage of demonstrating that the understanding of reason in contemporary theory is inadequate but, as Habermas's energetic efforts have demonstrated, it is not without its difficulties and can present formidable challenges.[36] Allied with this defence of rationality are those which highlight the worrying parallels between some modern intellectual trends and theorists from the past. Linking current arguments to events from other periods of history has a number of advantages but also poses significant problems. On the positive side it can help to show that no matter how many inflated claims to novelty, the old and familiar controversies reappear. More problematic is any suggestion that a particular theoretical position necessarily has deleterious consequences. Legal theorists of contingency and indeterminacy are motivated by genuine concerns about orthodox models of rationality. Critical legal scholars highlight the role of indeterminacy as an empowering notion. The contingency of legal discourse is viewed as having potential for political struggle. Critical scholars believe that legality may simply mask unjust social relations. The emphasis on indeterminacy is not intended to encourage the violent overthrow of the current constitutional legal order, as is at least implied by Scheuerman's use of analogy, but to empower groups to see law as a contingent resource, the utility of which is dependent on context. This allows political engagement with law to take place but discourages romantic myths about law's imperial ambitions. The difficulty for critical scholars who decide that this is their preferred approach is how precisely they intend to avoid Fish's conservative conclusions. When responding it is worth remembering Cover's view:

> "When interpreters have finished their work, they frequently leave behind victims whose lives have been torn apart by these organized, social practices of violence. Neither legal interpretation nor the violence it occasions may be properly understood apart from the other."[37]

There is a danger that Fish's rather attractive view of legal discourse will encourage paralysis. For the asylum-seeker or the prisoner, or any other vulnerable group, law's words have more than purely aesthetic meaning and function. The words of the law can inflict, and authorise the infliction of, real pain.[38] This is why our concepts must enable critical practice rather than stifle it.

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[36] See Habermas, *The Theory of Communicative Action Vol. 1: Reason and the Rationalization of Society* (1984); Habermas *op cit* n 17. For an accessible guide see Dryzek, "Critical Theory as a Research Program" in White (ed), *The Cambridge Companion to Habermas* (1995), pp 97-119. A more detailed examination of communicative rationality can be found in Cooke, *Language and Reason: A Study of Habermas's Pragmatics* (1994).

[37] Cover (1993) *op cit*, n 9, p 203.

[38] *Ibid*: "Legal interpretation takes place in a field of pain and death."

RECONSTRUCTING LEGALITY: LAW AND POWER IN THE WEIMAR REPUBLIC

It is difficult to understand the work of Habermas without recognising that the ghost of the collapse of the Weimar Republic haunts virtually all of his endeavours.[39] The failure of constitutionalism in Weimar has left a legacy that flows through many important strands of political and legal theory. History offers important lessons for modern debates in legal theory. Much of what is now regarded as novel is the legacy of past struggles. As technological progress pushes us into new fields of scholarship, arguments still seem to oscillate between core positions which are familiar and can be easily charted historically. This is not to suggest that there is "nothing new under the sun". It is to argue that there are patterns of thought which are in tension. Fragmentation, diversity and difference are the themes which dominate discussions in modern democracies. The "fact of pluralism"[40] raises the old problem of social order and the place of law in securing it. By returning to other periods when similar themes were openly discussed it is possible to achieve a measure of distance from modern-day argument while also gaining valuable insights. This is precisely the direction Dyzenhaus has gone in his recent work and it is thus necessary to explore this debate here.

Constitutional theorists are naturally drawn to different historical periods and the experience of constitutionalism in other societies to test their arguments. Both South Africa and the Weimar Republic in Germany have proved attractive to contemporary scholars of constitutional law and history. The problems experienced by the Weimar regime, and the role of leading German intellectuals in this, has drawn much recent attention. Rawls in the introduction to the paperback edition of *Political Liberalism* argues that one cause of the fall of Weimar's constitutional regime was that the "traditional elites of Germany" did not support its constitution and were not prepared to "make it work".[41] In the end these groups "no longer believed a decent liberal parliamentary regime was possible".[42]

A recurring theme in Dyzenhaus's work is his belief that law can constrain power. In other words, that law can make a difference. In trying to defend this he has confronted perhaps the most persistent apologist for the ubiquity of power and strategic manipulation in law and democracy: Schmitt. There is growing interest in Schmitt's work in critical quarters. One reason is the strength of his critique of liberalism. Another, and as noted by Mouffe, is that to advance a theory of liberal democracy that might prove persuasive to citizens theorists need to engage with those who have challenged the fundamental tenets of liberalism.[43] This will allow us to acknowledge what Schmitt claims is a paradox inscribed in liberal democracy.[44] The renewed interest in Schmitt is intriguing for surely he is not the intellectual figure to lead us into the next century.

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[39] McCormick "Max Weber and Jürgen Habermas: The Sociology and Philosophy of Law During Crises in the State" (1997) 9 *Yale Journal of Law and the Humanities* 297, p 298. He also notes that Habermas's work cannot be understood without acknowledging the framework that Weber left behind.

[40] Rawls, *Political Liberalism* (1996). See also Rawls, "The Idea of an Overlapping Consensus" (1987) 7 *Oxford Journal of Legal Studies* 1.

[41] *Ibid*, (1996), lxi.

[42] *Ibid.*

[43] Mouffe, "Carl Schmitt and the Paradox of Liberal Democracy" in Dyzenhaus (ed) *Law as Politics: Carl Schmitt's Critique of Liberalism* (1998), p 158.

[44] *Ibid.*

In an attempt to explore these subjects Dyzenhaus has examined debates in German constitutional law and history. The German constitutional context has provided fertile ground for thinking on constitutionalism in recent years, in particular among those interested in the fate of social democratic law and politics. By looking again at the debate concerning legal positivism and Nazism in detail Dyzenhaus hopes to defend his thesis that "positivism discourages sound legal practice".[45] He also wants critical scholars to make use of the resources available within social democratic political and legal theory. These debates are specific to the constitutional context of the society studied. It is, however, evident that there are similarities with current work in Anglo-American legal theory. That there is no necessary link between work which seeks to expose the indeterminacy of law and progressive politics is one immediate lesson. The post cold-war era has brought in its wake not the "end of history", or a new world order, but the assertion of often aggressive forms of identity and group life. Globalisation is being met with new and familiar forms of exclusion. In this context it is worth asking whether a persistent emphasis on indeterminacy and contingency is helpful. The rise of neo-conservatism in social and political theory in modern times is another notable trend. A number of critical traditions in modern legal theory stress the inherently political nature of law and unearth the strategic power struggle which is claimed to lie behind law's pretensions. There is little that is particularly new in this claim.[46] But it is against these scholarly trends that Dyzenhaus and others are reacting.

From Dyzenhaus's work interesting connections can be made to modern trends in legal theory.[47] Dyzenhaus views Schmitt's thought as paving the way for the coming to power of the Nazis. His position is similar to that of Scheuerman who argues that Schmitt's marriage to national socialism resulted from core elements of his jurisprudence.[48] Scheuerman, however, argues that the political direction was dictated by Schmitt's attempt to "solve" the indeterminacy dilemma.[49] In other words, Schmitt became frustrated with the failure of liberal law to offer determinate outcomes. There are two ways of reading this. The first is that this is the problem with seeking to follow the formalist quest and the second is that Schmitt simply pushed the radical indeterminacy thesis to its limits. Scheuerman, as well as Dyzenhaus, clearly believes the second to be more persuasive. This is a serious assertion which is not accepted as fair or accurate by some.[50] What is accepted by a number of scholars is that much can be

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45 Dyzenhaus, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Germany* (1997), p 1. See also *op cit*, n 4.

46 *Cf* Griffith "The Political Constitution" (1979) 42 *Modern Law Review* 1.

47 Note in this respect Salter's review of Dyzenhaus's book [1998] *Public Law* pp 340-342.

48 Scheuerman "After Legal Indeterminacy: Carl Schmitt and the National Socialist Legal Order" (1998) 11 *Cardozo Law Review* 1743. See also Scheuerman "Constitutionalism and Difference" (1997) XLVII *University of Toronto Law Journal* 263; Scheuerman "Free Market Anti-Formalism: The Case of Richard Posner" (1999) 12 *Ratio Juris* 80, p 94: "As the ideal of the rule of law loses its status as an icon in American Jurisprudence, those who traditionally have benefited most from it - the pariah, the economically vulnerable, the criminally accused, the dissenter - are now likely to suffer most."

49 *Ibid.*

50 See Goldberg, "Let Liberals Be Liberals" (1998) 61 *Modern Law Review* 899. For a critical view of the work of Scheuerman, Dyzenhaus and others see Ulmen " 'Integrative' Jurisprudence and Other Misdemeanors" (1999) 77 *Texas*

learned from the work of this corrosive critic of liberal democracy.[51] At the centre of Schmitt's political theory is a conception of the friend/enemy distinction which he maps onto the idea of the culturally homogeneous nation state.[52] Schmitt develops this into a substantial critique of liberal democracy. His critique of liberalism, and what he views as its inherent contradictions, has a modern resonance. The claim is that liberalism is an avoidance of political decision that is an enterprise in concealment. Liberalism presents itself not as one ideology among many but as the natural state of affairs and in an important sense as an apolitical ideology. The contradiction of being anti-political and inherently political is the predicament of liberalism. Rather than reject Schmitt's argument Dyzenhaus, as with Mouffe, sees valuable lessons for liberalism in it, notably, "liberalism has yet to show that it can offer a convincing account of democratic citizenship".[53]

Schmitt is notorious for what Habermas calls his "spectacular support for the Nazis".[54] His anti-Semitism cannot be brushed aside in any consideration of his life and work.[55] Nevertheless his critique of liberalism remains important for friends and enemies of liberalism alike.[56] In *The Concept of the Political*[57] Schmitt makes his famous statement that "[t]he specific political distinction to which political actions and motives can be reduced is that between friend and enemy".[58] The essence of the political is thus the ability to make this distinction. A community is no longer a politically free people if it allows the distinction to be made by others. [59] The target of this work is liberalism. It is accused of equivocation and a general inability to make such distinctions.[60] Claimed neutrality is problematic from a number of perspectives. First, it masks the way

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Law Review 1107. See also Neumann, *Behemoth: The Structure and Practice of National Socialism 1933-1944* (1963), p 463: "It is true that relativism and pragmatism contain authoritarian elements. By denying the validity of objective truth, they may pave the way for the adoration of the existing. But at the same time they are debunking theories; they are critical doctrines, deflating the arrogant claims of post-Kantian idealism... *No philosophy can be held responsible for National Socialism* [emphasis added]."

51 See, for example, Mouffe, "Carl Schmitt and the Politics of Liberal Democracy" in Dyzenhaus (ed), *Law As Politics: Carl Schmitt's Critique of Liberalism* (1998), p 159.

52 See Dyzenhaus, " 'Now the Machine Runs Itself' Carl Schmitt on Hobbes and Kelsen" (1994) 16 *Cardozo Law Review* 1.

53 *Ibid*, p 19.

54 Habermas *op cit*, n 17 p 108; Habermas, *The New Conservatism: Cultural Criticism and the Historians' Debate* (1989), pp 128-139. See also Arendt, *The Origins of Totalitarianism* (1951), p 339: "[t]otalitarianism in power invariably replaces all first-rate talents, regardless of their sympathies, with those crackpots and fools whose lack of intelligence and creativity is still the best guarantee of their loyalty." In a reference she notes the case of Schmitt "whose very ingenious theories about the end of democracy and legal government still make arresting reading."

55 Dyzenhaus *op cit*, n 45, pp 98-101.

56 Or as Dyzenhaus puts it "liberalism. . . can learn from one of its most implacable enemies" *op cit*, n 45, p 38.

57 Schmitt, *The Concept of the Political* (1996).

58 *Ibid*, p 26.

59 *Ibid*, p 49 .

60 It is evident that Mouffe is influenced by his critique, see Mouffe, "Political Liberalism: Neutrality and the Political" (1994) 7 *Ratio Juris* 314.

liberalism deals with those who do not wish to follow its doctrine. Second, it cannot defend itself from intervention by rival interest groups and is thus prone to capture by these forces. For Schmitt there is no rational way to judge between competing ideologies. What is required is a choice. He accuses liberalism of failing to offer any systematic treatment of the state or politics, and thus as purely concerned with individual freedom and private property. The critique is familiar, liberalism is criticised for its exclusive interest in individualistic notions of freedom, with the role of the state limited to securing the conditions for liberty to exist and blocking any infringements on freedom.[61] Schmitt's fear appears to be that liberalism will succeed in "depoliticising" life in the political community. A further aspect of his work is his emphasis on the "we" that is, the importance of a well-defined and homogeneous community. The enemy in the friend/enemy distinction is thus *our* enemy. By focusing on context, and the concrete, the ambition of his work is to reject forms of rationality which seek justification in universal moral principles. These principles are simply masks for strategic manipulation and power relations. On state theory Schmitt was firmly opposed to the pluralism defended by Laski, among others. Because of its power over the physical life of people to declare the enemy the political community is dominant over all other associations in society.[62] In dealing with the enemy, and this includes physical killing, there can be no rational justification or normative basis. Enemies which pose an existential threat to the political community can only be dealt with politically. There is no issue of justice which arises in war. Any notion of a just war simply disguises a political purpose. Schmitt appears to be making the "realist" point that this struggle is a fact which will not disappear simply because individuals wish to disguise reality with idealistic abstractions. For Schmitt then:

> "If a people no longer possesses the energy or the will to maintain itself in the sphere of politics, the latter will not thereby vanish from the world. Only a weak people will disappear."[63]

He is also critical of the use of humanity as a justification for war. To refer to humanity is for Schmitt simply an attempt to adapt a useful tool for self-serving purposes. By waging conflict in the name of humanity the most inhumane tactics become permissible. He draws upon Hobbes' argument that the belief that each side is in possession of the true, the just and the good gives rise to the worst types of conflict.[64] In this critique of humanitarianism Schmitt has the League of Nations in his sights. Many of the themes raised again have a contemporary resonance.

In his attempt to become the twentieth centuries' Hobbes, Schmitt worked from a definition of sovereignty famously tied to the exception.[65] The sovereign is he who decides on whether an extreme emergency exists and what is to be done about it. The exception here defined is not just any emergency but one of unlimited authority when the entire existing order is suspended.[66] While the law disappears the state remains. Legal order is here not based on a norm but on pure decision. The absolute decision

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61 *Op cit*, n 57, p 71.
62 *Ibid*, p 47.
63 *Ibid*, p 53.
64 *Ibid*, p 65.
65 Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (1985), p 5. See also Schmitt, *The Leviathan in the State Theory of Thomas Hobbes: Meaning and Failure of a Political Symbol* (1996).
66 Schmitt (1985) *ibid*, p 12.

removes itself from all normative ties.[67] For legal order to exist there must be a normal state of affairs and the sovereign is the entity that decides whether this exists. The reason for placing emphasis on the exception for Schmitt was that it conflicted with rationalist attempts (Kelsen's in particular) to make the law appear as a gapless unity. The exception thus becomes the rule and shows the reality ready to break through rationalist legal theory. On this Schmitt identifies Kelsen as the leading exponent of liberal legal theory. He finds Kelsen's pure theory problematic. Kelsen's legal science cannot be normative because the jurist can only make use of values which already exist.[68] The unity and purity of the system only seems plausible because everything that would contradict it is effectively excluded.[69]

Other aspects of Schmitt's thought of particular interest include his belief that liberalism and democracy are fundamentally opposing concepts:[70] an argument which was first worked out fully in *The Crisis of Parliamentary Democracy*.[71] That such a tension exists will come as no surprise to public lawyers. Much of the scholarly debate today in public law still reflects the variety of ways of addressing this issue.[72]

There is much to learn from Schmitt's assault on liberalism. His critique of liberal legalism in particular bears similarities to recent trends in critical scholarship. There has been a revisionist attempt to rescue his reputation by casting him as someone alive to the problems of liberal democracy and thus concerned to show how it might be defended against its enemies. Although superficially plausible, it does not bear much scrutiny. Schmitt has been subjected to severe attack from those who find his politics detestable and his theories lacking in sophistication. Dyzenhaus is critical of those who are little more than apologists for Schmitt's political beliefs and activity, but recognises the strength of his critique of liberalism. It is worth noting that the power of Schmitt's criticism has been questioned. The arguments are so focused on Kelsen that one wonders about their general applicability to the variety of forms of liberalism that exist. It is also not always clear that contradiction causes liberalism the sort of problems Schmitt (and others) think it does. However, Dyzenhaus's willingness to take his arguments seriously has obviously been advantageous for the purposes of constructing a democratic defence. More importantly it has focused attention on those German social democratic theorists who had a different constitutional vision.

BUILDING A POLITICAL AND LEGAL CULTURE OF JUSTIFICATION

The Trouble with Proceduralism

If Schmitt's critique of liberalism has some of the strengths claimed for it then what repairs might be made to the edifice. It is suggested in this article, and in the work of a growing number of legal scholars, that the key lies in the construction of a democratic understanding of legality. Dyzenhaus looks to Habermas as the modern leading critic of Schmitt. As

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67 *Ibid.*
68 *Ibid*, pp 20-21.
69 *Ibid*, p 21.
70 For critical comment on this see Dyzenhaus *op cit*, n 45. *Cf* Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (1996).
71 Schmitt, *The Crisis of Parliamentary Democracy* (1985).
72 See Loughlin, *Public Law and Political Theory* (1992).

he notes, Habermas's critique of the "remnants of the unreason of Nazism in Germany" is important, as is his attempt to show how the undermining of legal order helped pave the way for the Nazis.[73] In this he has, somewhat controversially, described Schmitt as a legitimate pupil of Weber. Habermas's work delivers a rich understanding of democracy precisely because, unlike political liberals, he welcomes democracy for non-instrumental reasons.[74] It is the only way to sustain the "culture of justification" on which the legitimacy of law rests.[75] Dyzenhaus ultimately finds what he terms Habermas's "transcendentalism" problematic.[76] He argues that Habermas steps outside law and politics in order to construct a grounding for these.[77] The result is numerous problems particularly with regard to his co-originality thesis.[78] Habermas's settled position on the connected nature of the rule of law and democracy is attractive for constitutional lawyers in particular. He dissolves the tension in an ambiguous way by claiming that they arise together in the rational reconstruction of the constitutional state. In other words, citizens must choose what rights to grant one another when deciding to regulate their common existence in accordance with law. The precise nature of this link is not altogether clear and Alexy has rejected the argument that it resolves the collision between public and private autonomy in practice.[79] Habermas, however, argues that the relation results from the concept of modern law itself and the fact that law can no longer draw its legitimacy from a higher law:[80]

> "Modern law is legitimated by the autonomy guaranteed equally to each citizen, and in such a way that private and public autonomy reciprocally presuppose each other."[81]

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[73] Dyzenhaus *op cit*, n 45, p 235. See also Dyzenhaus, "The Legality of Legitimacy" (1996) XLVI *University of Toronto Law Journal* 129, p 134: "While his academic work is usually so abstract and complex as to defy easy comprehension, let alone obvious contact with reality, we can make this contact by understanding his work as a response to the way in which Weber's account of law and politics had some part to play in undermining the role of legal order as a potential bulwark against the Nazi seizure of power."

[74] *Ibid*, p 244.

[75] *Ibid.* See also Mureinik, "Emerging from Emergency: Human Rights in South Africa" (1994) 92 *Michigan Law Review* 1977. *Op cit*, n 73, p 162: "On Habermas's view, what is important about democracy is not that it makes possible positive law which reflects desires and preferences. Rather what democracy makes possible is positive law that is the result of citizens' deliberating about their desires and preferences by seeking to justify to each other what should be done in the name of the common good. Claims to rightness or truth about what I believe to be the case are then not mere cloaks for my brute desires, but claims that I am prepared to justify in public debate. I should be open to changing my views about what is right for me as well as for others in the light of deliberation."

[76] *Ibid*, pp 248-49.

[77] *Cf* Rawls *op cit*, n 40, pp 372-434.

[78] *Ibid*, p 249.

[79] Alexy, "Basic Rights and Democracy in Habermas's Procedural Paradigm of Law" (1994) 7 *Ratio Juris* 227, p 237.

[80] Habermas, *The Inclusion of the Other: Studies in Political Theory* (trans. Cronin, 1998), p 254.

[81] *Ibid. Cf* Raz, *The Morality of Freedom* (1986).

The important point to note is that because private and public autonomy mutually presuppose each other then neither human rights[82] nor popular sovereignty can claim primacy over the other.[83] For rights in the private sphere to be adequately protected individuals must come forward into public life and explain and justify their problems and needs. If one is seeking equality through law then the basis on which equal treatment is to be granted must be assessed through public discussion.[84] The legal regulation of the private and the public is thus connected. This linkage of public and private autonomy is most evident in the law and politics of equality. But there is reason to share Alexy's concern that in practice the two will continue to collide. When collisions do occur it is not evident that the co-originality thesis will assist a decision maker charged with reaching a substantive conclusion. If this is the case then it casts some doubt on the practical value of the procedural model that Habermas advances.

There is good reason to retain the broad thrust of Habermas's thesis on modern law. To be sure, Habermas's philosophical position is complex, and he takes a rather long road to defend his understanding of rationality, but it is questionable whether it can be said to be completely "outside" law and politics. By highlighting what is taken for granted in any attempt to reach understanding, the theory finds its way into any legal and political context. These are the normative presuppositions which are there in any attempt to reach agreement. The difficulty is that the practical implications can be far from clear. This is one of the most frequently heard criticisms of Habermas's argument yet it misses what is at the core of his project. By offering only a highly minimalist approach he is being true to his commitment to substantive proceduralism. In other words, it is no longer the place of the philosopher to offer a substantive theory of justice to be imposed on participants. This contrasts sharply with Dworkin's result-oriented view of law and democracy.[85]

The philosophical reference to proceduralism in Habermas's work is often seriously misunderstood. It is nothing to do with promoting a substance-less legal or political theory or with a formalistic understanding of legal procedures. The commitment is in fact to a radical and dynamic understanding of law and democracy which fully reflects familiar social democratic legal and political positions. Legal authority here rests on interaction between citizens and government and not in a hierarchical top-

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[82] For an attempt to ground a justification of human rights from discourse theory see Alexy, "Discourse Theory and Human Rights (1996) 9 *Ratio Juris* 209. See also Alexy, "Rights, Legal Reasoning and Rational Discourse" (1992) 5 *Ratio Juris* 143, p 151: "Discourse theory is no machine which determines the weights of rights exactly, objectively, and definitely, *but it shows that rational argument about rights is possible* (my emphasis)."

[83] *Ibid*, p 261. See also Habermas, "Human Rights and Popular Sovereignty: The Liberal and Republican Versions" (1994) 7 *Ratio Juris* 1.

[84] *Cf* Dworkin, *A Matter of Principle,* (1985), p 32: "I may have made it seem as if democracy and the rule of law were at war. That is not so; on the contrary, both of these important political values are rooted in a more fundamental ideal, that any acceptable government must treat people as equals."

[85] Dworkin, *Freedom's Law: The Moral Reading of the American Constitution,* (1996), p 34: "I see no alternative but to use a result-driven rather than a procedure driven standard…The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with these conditions."

down model. However, solutions to concrete problems can only be worked out by participants themselves in real-world dialogue. Like Rorty he is not convinced that theory can offer a substantive conception of the good life to be imposed on citizens. He departs from Rorty by claiming universal validity for the communicative model of rationality. Habermas's contribution is to show that there is more to all this than Weberian instrumental reason. The theorist can reconstruct the normative presuppositions which this dialogue always and everywhere implies but this is as much as can be done. This minimalism can be frustrating and has led to suggestions that it is empty of ethical content or that it is so abstract from any concrete positions that it provides no reason to act in one way or another.[86] Dyzenhaus finds the universalism inherent in his work problematic. Although recognising the contribution to a democratic understanding of law he finds his universalism "potentially dangerous".[87] This is where the German constitutional context again becomes important. Habermas does not want his theory to be dependent on the peculiarities of one particular political community. His understanding of rationality is intended to be universal in its scope. And this is where one suspects that the Nazi experience in Germany looms large. To abandon universalism to the contingency of current democratic practices leaves insufficient space for challenge to the rise of reactionary movements. In contrast to this, Dyzenhaus wants Habermas to accept the contingency of law and morality and their links to deliberation in the national context.

Heller and Social Democratic Law

Although convinced by aspects of Habermas's argument he ultimately rejects it. Dyzenhaus chooses to return to a previously neglected figure. He regards the work of Heller as useful for the purpose of confronting his reconstruction of Schmitt's thought.[88] As he acknowledges, Heller's work is little known outside Germany. He was in fact a minor figure in comparison to Kelsen and Schmitt and he died young in exile in Republican Spain. However, he argues that his theory solves many of the problems which plague Habermas's transcendentalism. Here we must rely on Dyzenhaus's translation of Heller's work. Heller defends the legitimacy of law on the basis of a connection between law and morality.[89] The moral value served by law is that of collective self-government.[90] The value of self-government is not solely about individual self-ownership. It concerns citizens deciding together on the rules to govern their collective existence.[91] The concept of autonomy is one which encompasses both the

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[86] White, *The Recent Work of Jürgen Habermas: Reason, Justice and Modernity* (1988), p 69.

[87] *Ibid*, p 177.

[88] *Ibid*, pp 161-217, pp 247-258. See also Dyzenhaus, "Hermann Heller and the Legitimacy of Legality" (1996) 16 *Oxford Journal of Legal Studies* 641; Kennedy, "The Politics of Law in Weimar Germany" (1999) 77 *Texas Law Review* 1079; MacCormick, "Jurisprudence, Democracy and the Death of the Weimar Republic" (1999) 77 *Texas Law Review* 1095.

[89] *Ibid*, p 253.

[90] Kennedy *op cit*, n 88, p 1091: "Heller's third way, then, adds this possibility for solving the crisis of law and politics in a democracy: the people are sovereign through processes of political conflict and debate institutionalised in parties and parliament. But this sovereignty must have a real basis in citizenship, which, for Heller, meant the material conditions of equality."

[91] *Ibid*. Note Dyzenhaus *op cit*, n 88, p 653: "Politics for him [Heller] is conflict but a conflict whose precondition is the renunciation of physical force as the means for settling disputes. The political is the struggle between conflicting

public and the private. This act of self-government is not one exercised in any once and for all way, but always in the knowledge that revision is possible. At the centre of this conception of legality and legitimacy is the citizen. However, as Dyzenhaus states:

> "The conscientious citizen is the guardian of legitimacy, but the conscientious citizen is first and foremost a democrat, not a liberal".[92]

He puts considerably more weight on the strength of Schmitt's critique of liberalism than some would agree that it merits.[93] This impacts on his conclusion, which is that liberalism's fall need not be into the abyss of a "god on earth".[94] It must simply "accept its fall into democracy".[95] Liberalism is a political position which is open for public debate within democracy.Reason and truth are not about solitary individual enlightenment but public debate within a process of dialogue. It is in an active understanding of citizenship that an adequate democratic concept of legality must rest.

As I suggest in this article Dyzenhaus's work is best regarded as part of a debate on legality presently re-emerging. The patterns of thought may be familiar but the context is constantly altering. Globalisation and the Europeanisation of law are two contexts that spring immediately to mind. Many of the themes which are prominent in Dyzenhaus's work can also be found in the writings of Scheuerman.[96] He too is concerned about the recent interest in Schmitt and reconstructs the work of some early Frankfurt school theorists (Neumann and Kirchheimer) to defend a democratic understanding of the rule of law. Scheuerman follows others in making the link between Schmitt's writings on constitutionalism and

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parties to influence or determine the terms of social co-operation. And that requires in turn that disputes are settled on a basis which justifies a description of the state's decisions as securing co-operation and not mere co-ordination."

92 *Ibid,* p 254. Habermas's position is similar. For thoughts on the judiciary as citizens see McCormick "Habermas's Discourse Theory of Law and Democracy: Bridging Anglo-American and Continental Legal Traditions" (1997) 60 *Modern Law Review* 734, p 742: "Habermas' radical conclusion is that even the most egalitarianly inclined liberal theorists of judicial decision making, such as Rawls and Dworkin, are potentially authoritarian. . . through their insistence on a single judicial mind, rather than one that communicates with, and can persuade, and be persuaded by other rational minds."

93 See Goldberg *op cit,* n 50.

94 *Ibid,* p 257

95 *Ibid.*

96 See Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (1994), p 7: "an examination of Neumann and Kirchheimer is absolutely indispensable if we are successfully to take on the intimidating intellectual and political figure of Carl Schmitt, who was not only Weimar Germany's premier right-wing authoritarian political thinker but an active Nazi after 1933 and an important theoretician of many facets of fascist law." Note the following comment: "Schmitt's embrace of German fascism was anticipated by key elements of his thinking about the dilemma of legal indeterminacy – well before Hitler's rise to power", Scheuerman, "Legal Indeterminacy and the Origins of Nazi Legal Thought: The Case of Carl Schmitt" (1996) XVII *History of Political Thought* 571.

modern "deconstructive" criticism.[97] He finds Schmitt's critique of liberal constitutionalism untenable and points to a general lack of precision in his work. Part of the problem, he suggests, is Schmitt's exclusive concentration on Kelsen. While Kelsen is one of the leading figures in legal positivism he is not the sole exponent of the theory. However, by taking on Kelsen he felt he had defeated liberal constitutionalism. The reality, however, is that he "reproduces the weaknesses of a highly idiosyncratic. . . version of modern liberal jurisprudence. . . [and] surrendered its most worthwhile achievements".[98] It is beyond the bounds of this article to go into detail on Neumann and Kirchheimer's intellectual development. It is sufficient to note that they can be located within that body of social democratic theory which is highlighted in this article. Scheuerman's point is that their work has been neglected and that it offers an instructive social democratic alternative to Schmitt's authoritarianism. In this he is in agreement with Dyzenhaus who believes that theorists of the left have not made adequate use of these intellectual resources. Scheuerman's arguments are interesting critical alternatives to what is becoming the norm in critical legal scholarship. He questions some of its central tenets. Key themes which emerge in Scheuerman's analysis include the suggestion that legal regulation is not bound to fail because of complexity or indeterminacy. This casts doubt on the argument that deregulation can be justified purely because of complexity. He suggests that it is too easy to use social complexity as an excuse for yet another vague standard in the legal system.[99] The more likely explanation, suggested in his work, is that formal law confronts powerful forces in favour of deformalisation. The disadvantaged gain nothing from this trend. For Scheuerman, it is no coincidence that many "blanket clauses" which invite informalism are to be found in highly contested spheres of social and economic life. In the context of regulation, and the need for the legislature to decentralise activities, the phrase "no regulation without representation" (which he uses) is particularly apt.[100] Again the concept of the rule of law advanced in his work is a democratic one grounded, as with Dyzenhaus and the theorists that he uses, in the notion of self-government. The social democratic understanding of law that emerges from this diverse body of work is persuasive. If there is a criticism it is the failure to address in a specific way the critical tendencies they mention. Dyzenhaus remedies this problem to some extent with his engagement with scholars such as Schmitt and Habermas. Habermas, in particular, has constructed a formidable defence of modernity against contemporary postmodernists and poststructuralists. The concept of legality that he advances is more robust precisely because of the willingness to acknowledge current critical scholarship. What this suggests is that critical scholars must have a secure normative basis for their critique of empirical developments if the critical project is to offer a meaningful challenge to traditional versions of constitutionalism. As I have demonstrated in this section of the article this critical project must be able to take legality, and its potential to control arbitrary power, seriously.

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[97] Scheuerman, "Carl Schmitt's Critique of Liberal Constitutionalism" (1996) 58 *Review of Politics* 299, p 300. See Scheuerman (ed.) *The Rule of Law Under Siege: Selected Essays of Franz L. Neumann and Otto Kirchheimer* (1996).

[98] *Ibid*, (1996), p 322.

[99] *Op cit*, n 96, p 212.

[100] *Op cit*, n 96, p 216.

LAW, TRUTH AND RECONCILIATION IN SOUTH AFRICA

In the remaining sections of this article the critical understanding of legality as examined is put to work exploring a particular issue. The aim is to see what light this casts on the truth commission debate: in particular the question of how we judge the judges in a process of transition. For the sake of protecting judicial independence should they remain free of scrutiny or does the theoretical position defended here mandate us to view them as accountable citizens in a democratic polity? South Africa provides a useful case-study because the TRC there held a Legal Hearing to assess in practice many of the issues which inform this article. Dyzenhaus recognised the potential for a concrete assessment of his own ideas and it is his work on the TRC that is the specific focus here.

How to deal with the past is a question which confronts individuals and societies. For the individual, and from a psychoanalytic perspective, addressing the past can be part of a therapeutic process of healing. The healing element arises from its internal and not purely external aspect.[101] It works effectively only as an internal process of self-reflection. This is about assuming responsibility for the self-deceptions we have allowed to dominate our lives and shaping a coherent sense of selfhood. In postmetaphysical modern conditions this search for self-understanding is a part of everyone's life. In the absence of a master plan, applicable for and to all, we can only orient ourselves in the world through self reflection. This can be mapped onto modern societies struggling to "work off" the past by moving from the "I" to the "we" of modern citizens. How should, for example, societies emerging from conflict deal with the past? Can the healing process work for societies as well as individuals? One option is to try to forget the past, and with it any attempt to acknowledge the truth on an official basis, by viewing the new beginning as a fresh start where backward glances only re-ignite the controversies which fuelled the conflict. In practice the trend in many states is to establish a truth commission. There are a number of reasons for this. As a preliminary point, it is important to stress that a truth commission, if created, is only one part of a process of transition. It does not eradicate the need for institutional reform. The establishment of a truth commission need not be inconsistent with domestically conducted criminal prosecutions. Therefore, although the grant of amnesty was a matter for the truth commission in South Africa there is no necessary connection between the two issues.

The establishment of some form of truth commission is becoming a regular feature of transitional justice.[102] The latest report has come from the Historical Clarification Commission in Guatemala[103] and there are calls for the establishment of a truth commission in, for example, Rwanda.[104] The usefulness of a body like this in a transitional period is not immediately obvious. Utility is not how they necessarily should be

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[101] Habermas, *A Berlin Republic: Writings on Germany* (1998), p 17. See also Ignatieff, *The Warrior's Honor: Ethnic War and the Modern Conscience* (1998), pp 168-178.

[102] States that have established a commission include: Argentina; Bolivia; Chad; Chile; El Salvador; Germany; Guatemala; Haiti; Nigeria; Philippines; Sierra Leone; South Africa; and Uganda.

[103] Historical Clarification Commission, *Guatemala: Memory of Silence*, http://hrdata.aaas.org/ceh/index.html.

[104] Sarkin, "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda" (1999) 21 *Human Rights Quarterly* 767.

assessed and in practice they tend to be justified for a mixture of instrumental and non-instrumental reasons. In addition, it is difficult to imagine how one would measure the success or failure of a truth commission. The lack of precision makes it problematic for any political community to judge whether a truth commission is something it should have.[105] Popkin and Arriaza argue that perhaps the greatest achievement in the Latin American context was getting an official presentation of an authoritative history which confronted the previous regime's account.[106] The human rights community in particular has some reason to be cautious. First, there is a danger, evident in the more spirited defences of these bodies, of infusing the search for truth with mythical or religious significance. This can be troubling for the secular human rights movement. Second, it raises a question about international law and the grant of amnesty. For example, Sarkin argues that international law would not permit the granting of amnesties for the crimes committed in Rwanda.[107] This is part of a trend to place international legal obligations on states to prosecute those responsible for gross violations of human rights. But if a political community opts for a democratically-mandated amnesty how should international lawyers respond?

So given these cautious words, what reasons might be advanced to justify the creation of a truth commission? Asmal has suggested the following: (1) recognition of the illegitimacy of the previous regime; (2) avoidance of sanitised history; (3) neglecting history now will only rekindle resentment; (4) confrontation with the roots of violence; (5) if a new order is being borne, can reconciliation flow simply from the bare assertion of the new order's existence?; (6) avoidance of revenge; (7) truth and justice matter and reparations are not enough.[108] These are powerful arguments. There are, however, few straightforward answers to the many issues which arise in the field of transitional justice.[109] While it is in the institutional nature of law to construct its self-image on principle, in practice pragmatism often underpins the difficult task of crafting the transition to democracy.[110]

The Origins, Structure and Work of the TRC

The process of officially investigating the human rights abuses of the past is being undertaken in an increasing number of countries.[111] One way the truth can be investigated is by the creation of a commission to examine past abuses and report on its findings. The South African example is of particular interest to legal scholars because of the well-known debate there

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105 See Huyse, "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past" (1995) 20 *Law and Social Inquiry* 51.

106 Popkin and Arriaza "Truth as Justice: Investigative Commissions in Latin America" (1995) 20 *Law and Social Inquiry* 79.

107 *Op cit* n 104.

108 Asmal *op cit*, n 1, pp 492-499. See also Asmal, Asmal and Roberts, *Reconciliation Through Truth: A Reckoning of Apartheid's Criminal Governance* (1996), pp 6-11.

109 See Méndez, "In Defense of Transitional Justice" in McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (1997), p 1.

110 Berat and Shain, "Retribution or Truth-Telling in South Africa? Legacies of the Transitional Phase" (1995) 20 *Law and Social Inquiry* 163.

111 Hayner, "Commissioning the Truth: Further Research Questions" (1996) 17 *Third World Quarterly* 19.

on the role of the judges and the legal profession. As Malleson has noted, the South African judiciary have benefited significantly from the "constitutional redistribution of power in the new South Africa".[112] The Bill of Rights and the new Constitutional Court have raised the profile of the judiciary. There are other reasons why the judiciary have attracted attention. The one of interest here is their relationship to the truth commission.

Reference to the idea can be traced to the final clause in the interim Constitution of 1993. More precisely, it can be linked to the internal politics of the African National Congress (ANC). As Hayner has noted, the ANC is the only known example of a non-government entity which has established its own commission to examine and report on past human rights violations.[113] The criticism (which eventually led the ANC to create a commission to examine abuses that were taking place in detention camps) came from a group of formally active ANC members who had been detained by the organisation.[114] While Mandela accepted collective responsibility for the ANC leadership the movement did raise questions about the accuracy of the report of the first commission. A new commission was appointed shortly after the first completed its work and its report called for the creation of a truth commission to examine abuses by both sides during the conflict.[115]

The interim Constitution directed the Parliament to adopt a law which would provide a mechanism for granting amnesty for conduct "associated with political objectives and committed in the course of the conflicts of the past".[116] The type of justice involved in this instance was reconstructive

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[112] Malleson "Assessing the Performance of the Judicial Service Commission" (1999) 116 *South African Law Journal* 36, p 36. See also Sarkin "The Political Role of the South African Constitutional Court" (1997) 114 *South African Law Journal* 134.

[113] Hayner, "Fifteen Truth Commissions – 1974-1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* 597, p 625.

[114] *Ibid.*

[115] *Ibid*, p 633.

[116] "This Constitution provides a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace require reconciliation between the people of South Africa and the reconstruction of society. The adoption of this Constitution lays the secure foundation for the people of South Africa to transcend divisions and strife of the past, which generated gross violation of human rights, the transgression of humanitarian principles in violent conflicts and a legacy of hatred, fear, guilt and revenge. These can now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimisation. In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date which shall be the date after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed. With this Constitution and

justice "a mode of justice which seeks institutional transformation through the examination of the wrongs of the past".[117] Its creation was marked by a widespread process of consultation making it a novel exception to similar ventures in other states.[118] The TRC was established by the Promotion of National Unity and Reconciliation Act 1995.[119] Its objectives were "to promote national unity and reconciliation in a spirit of understanding which transcends the conflicts and divisions of the past".[120] This was to be achieved by: establishing "as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date. . .";[121] facilitating the granting of amnesty "to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective. . .";[122] establishing the whereabouts of victims and giving them an opportunity to tell their own stories;[123] and compiling a comprehensive report on its activities.[124] There were three committees created to carry out the tasks of the TRC. First, the Committee on Human Rights Violations was responsible for the conferral of victim status and for government reparations.[125] Second, the Committee on Amnesty is responsible (the work of this Committee is still ongoing) for assessing amnesty applications from those who have committed gross human rights violations. It has the power to grant immunity from civil and criminal liability.[126] This is noteworthy because the issue has usually been divorced from the prosecution versus amnesty debate in other jurisdictions. Third, the Committee on Reparations and Rehabilitation was responsible for the preparation of a report which formed the basis for reparations and rehabilitation to victims and advice to the President.[127] The TRC has extensive powers under the Act (as amended[128]) to initiate and coordinate inquiries into, for example, the identity of persons involved in gross violations of human rights and accountability for such violations.[129] It began its work in December 1995 and in October 1998 presented its final comprehensive report to the President. Perhaps the most problematic aspect of its work has been the grant of amnesties from

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these commitments we, the people of South Africa, open a new chapter in the history of our country;" – extracted from the epilogue to of the South African Interim Constitution 1993. See P. Parker, "The Politics of Indemnities, Truth Telling and Reconciliation in South Africa: Ending Apartheid Without Forgetting" (1996) 17 *Human Rights Law Journal* 1: "No transfer of power could have taken place had some variant of a war crimes tribunal or Nuremberg proceedings been envisaged."

117 Dyzenhaus, *Judging the Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (1998), p 6.

118 Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* (1998), pp 53-5.

119 s 2(1).

120 s 3(1).

121 s 3(1)(a).

122 s 3(1)(b).

123 s 3(1)(c).

124 s 3(1)(d).

125 s 3(3)(a) and Chapter 3.

126 s 3(3)(b) and Chapter 4.

127 s 3(3)(c) and Chapter 5.

128 Promotion of National Unity and Reconciliation Second Amendment Act 1997, Promotion of National Unity and Reconciliation Amendment Act 1997, Promotion of National Unity and Reconciliation Amendment Act 1995.

129 ss 4(a)(iii) and (iv).

civil and criminal liability.[130] The trading of truth for amnesty did not go unquestioned. This is unsurprising given the emphasis in international law, and within the international human rights community, on accountability and the prosecution of those responsible for serious human rights violations.[131] The grant of amnesty to participants in governmental and non-government entities has proven to be one of the more controversial aspects of transitional justice. It raises, in a stark manner, the pragmatic measures that are regarded as necessary in processes of conflict resolution. Members of the families of murdered political activists decided to launch a challenge to rules on amnesty.[132] The applicants argued that the amnesty provisions of the 1995 Act were not authorised by the Constitution because they denied their right, under Section 22 of the interim Constitution,[133] to have justiciable disputes settled by a court of law or other impartial forum. The Constitutional Court ruled that the epilogue to the Constitution sanctioned a limitation to the right of access to the court in accordance with the Constitution. To summarise, amnesty for criminal liability was permissible because it would be difficult to find the truth without it and this would assist in the process of reconciliation and reconstruction. As Mahomed DP noted:

> "Even more crucially, but for a mechanism providing for amnesty, the 'historic bridge' itself might never have been erected. For a successfully negotiated transition, the terms of the transition required not only the agreement of those victimised by abuse but also those threatened by the transition to a 'democratic society based on freedom and equality'. If the Constitution kept alive the prospect of continuous retaliation and revenge, the agreement of those threatened by its implementation might never have been forthcoming. . . (footnotes omitted)."[134]

He recognised that South Africa was not alone in dealing with these issues and referred to Chile, Argentina and El Salvador.[135] But the comparison only served to confirm, in the Court's view, that there was no single or uniform international practice in relation to amnesty.[136] The Court concluded that the amnesty provisions were a key element of the final settlement and it might not have been achieved without them.[137] The

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130 By December 7, 1998, 7,124 applications for amnesty had been received. At this stage in proceedings 216 had been granted amnesty.

131 See Dugard, "Retrospective Justice: International Law and the South African Model" in McAdams (ed) *op cit*, n 83, p 269.

132 *Azanian Peoples Organisation (Azapo) and others v The President of the Republic of South Africa* 1996 (4) SA 671 (CC).

133 The relevant section provided: "(e)very person shall have the right to have justiciable disputes settled by a court of law or where appropriate, another independent or impartial forum."

134 *Op cit* n 132, p 685.

135 *Ibid*, p 686.

136 *Ibid*, p 687.

137 *Per* Mahomed DP p 698: "In the result I am satisfied that the epilogue to the Constitution authorised and contemplated an 'amnesty' in its most comprehensive and generous meaning so as to enhance and optimise the prospects of facilitating the constitutional journey from the shame of the past to the promise of the future."

judgment has been criticised for its treatment (or, more accurately, its lack of treatment) of international law.[138]

There were a number of other challenges to the work of the TRC which are outlined in Volume One Chapter Seven of the Final Report. The challenge of the National Party with respect to the impartiality of the TRC was eventually settled but the strategy provided a valuable insight into the way some political actors were prepared to make use of an understanding of legality to call into question the work of the TRC. In this instance the chairperson and vice chairperson had expressed views on the testimony of De Klerk which angered the National Party.

JUDGING LAW'S COMMUNITY

Judging the Judicial Role

The democratic understanding of legality has clear implications for how the judicial role is conceived. The intention here is not to engage in a detailed assessment of political and legal conditions in South Africa. The explicit aim is to see what light Dyzenhaus's treatment of the TRC in *Judging the Judges, Judging Ourselves* casts on the issues raised in this article. The political situation and the historical debates on constitutional law, as with other societies emerging from conflict, offer a useful testing ground for fundamental questions about law. Law is the tool through which repressive policies are legitimised and implemented. The question faced by progressive social movements in such situations is whether law can be used to resist law. Are there substantive values embedded in the concept of legality or is it a purely neutral and formal concept?[139] Does the absence of a higher constitutional law mean that the judges are forced to adopt an executive-minded approach to interpretation?[140] It should be apparent that an adequate answer to any of these questions must rest on a secure normative basis.

The apartheid order was enforced through law and the judiciary naturally played a part in this. There is extensive literature on the role of the courts in the South African legal order. Much of this is critical of the judicial role. Forsyth, for example, is critical of the executive-mindedness of the

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[138] Dugard, "Is the Truth and Reconciliation Process Compatible with International Law? An Unanswered Question" (1997) 13 *South African Journal of Human Rights* 258; Motala, "The Constitutional Court's Approach to International Law and its Method of Interpreting the '*Amnesty Decision*': Intellectual Honesty or Political Expediency?" (1996) 21 *South African Yearbook of International Law* 29.

[139] For discussion see Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] *Public Law* 467.

[140] See Rawls *op cit*, n 40, p 237; with reference to the US Constitution he states that it "is not what the Court says that it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say what it is". But what does this mean in cases where there is no democratically mandated higher law? See *R v Secretary of State for the Home Department, ex p. Simms* [1999] 3 All ER 400, *per* Lord Hoffman p 412: "In the absence of express language or necessary implication to the contrary, the courts. . . presume that even the most general words were intended to be subject to the basic rights of the individual. In this way the courts of the United Kingdom, though acknowledging the sovereignty of Parliament, apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document."

Appellate Division although he does note that the retreat from judicial control was not uniform.[141] The important point is that in the cases examined by Forsyth the judges were not compelled to reach the conclusion they did. They chose to interpret statutes in an executive-minded way and thus bear some responsibility for the harm done. However, as a legal positivist Forsyth does not agree with Dugard (and Dyzenhaus) that it was in some sense responsible as a jurisprudential position. In fact he argues that Dugard is a legal positivist.[142] The problem, he argues, is not the adoption of "vulgar austinianism" and the answer does not lie in "improvement in... jurisprudential knowledge".[143] The argument casts doubt on the usefulness of studies such as those conducted by Dyzenhaus. The real problem, Forsyth suggests, lies in the context of judging, such as the political conditions in South Africa.[144] Mechanistic interpretation is only the symptom and not the cause of the problem. Others have acknowledged the problems which inhere in the task of judging the judges. Sachs' criticism is measured and thoughtful yet penetrating.[145] He argues that the judges lent legitimacy to the regime though "polite and elegant language" and used their prestige to pursue injustice.[146] On executive-mindedness the following from the International Commission of Jurists and Bindman is relevant:

> "The judges said that they saw their role as giving effect to the true intention of the legislature as expressed in statutes. The judges deny that they have any choice, and they claim that they merely do what the legislature has commanded them to do".[147]

The editors rejected this view noting that the judges were free to interpret with reference to common law rules of interpretation and thus with established presumptions.[148] While acknowledging that the executive did impose limitations they were not prepared to accept those that were self-imposed. On the vexed question of judicial resignation they stated that this was a moral question for each individual and they would express no conclusion on it.[149] However, where a judge decided to remain on the Bench there was no excuse for failing to exercise choices in favour of individual liberty.[150] Their conclusion that a "literal or positivist" approach resulted in a failure to interpret legislation in conformity with human rights standards raises many of the issues addressed above. The conclusion accords with Dyzenhaus's assessment and can be contrasted with that of Forsyth. Responsibility rested not exclusively in the wider social context but in the mindset of the South African judiciary and their approach to legal interpretation.

It is at this point that a certain dissatisfaction might be expressed about the rather narrow focus of these scholars. Adjudication remains only one part of the bigger picture about the South African legal order. The work of

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141 Forsyth, *In Danger for their Talents: A Study of the Appellate Division of the Supreme Court of South Africa from 1950-1980* (1985).
142 *Ibid*, p 229.
143 *Ibid*, p 230.
144 *Ibid*.
145 Sachs, *Justice in South Africa* (1973).
146 *Ibid*, p 262.
147 International Commission of Justice and Bindman (eds), *South Africa: Human Rights and the Rule of Law* (1988), pp 109-118, p 109.
148 *Ibid*, p 110.
149 *Ibid*, p 113.
150 *Ibid.*

Dyzenhaus and others can be usefully contrasted with Abel's research on the use of law in the struggle against apartheid.[151] Abel's focus is on how law was used in practice during the political struggle. He studiously avoids excessive abstraction and generalisation in order to highlight the particular role of law in the South African context. His gaze is directed to the political context of law rather than on adjudication. While he cautions against inflated claims about law's political usefulness in achieving social change he acknowledges that it does make a clear difference.[152] One of his more interesting insights is the role of unofficial actors in triggering engagement with law. Standard accounts of legality tend to overestimate the role and importance of official actors. His affirmation of law's role in political struggle is a cautious and empirically grounded one. Law had its limitations, most notably in the fact that the government made the rules. However, in seeking authority for its actions the government resorted to legality and thus found itself ensnared within the constraints of this ideal.[153] Lobban has also sought to widen the field somewhat by examining the construction of facts and evidence at trial level.[154] Things can look rather different from this perspective. While the legal reasoning of the Appellate Division may be elegant, an exclusive focus on the higher courts can neglect how the other courts facilitated the state in many areas. The process of finding facts and the social and political prejudices which underpinned this are important.[155] Prejudice played a part in the reading of evidence with judges viewing "black youths as untrustworthy terrorists".[156]

The Many Voices of Law's Community: The Legal Hearing of the TRC

The TRC Legal Hearing can be considered as another contribution to the established debate on the role of the legal community.[157] As Dugard has noted, most of the injustices committed between 1948 and 1990 were in the name of the law.[158] The issue which is central to Dyzenhaus's work in

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[151] Abel *op cit*, n 34
[152] *Ibid*, p 523.
[153] *Ibid*, p 541.
[154] Lobban *op cit*, n 35.
[155] *Ibid*, pp 252-253.
[156] *Ibid*, p 257.
[157] See generally "The Truth and Reconciliation Commission and the Bench, Legal Practitioners and Legal Academics: Written Presentations" (1998) 115 *South African Law Journal* 15-106. Other submissions were subsequently published: see "Representation of the Association of Law Societies of the Republic of South Africa to the Truth and Reconciliation Commission" (1998) 115 *South African Law Journal* 373-378; Cameron, "Submission on the Role of the Judiciary under Apartheid" (1998) 115 *South African Law Journal* 436-438. See also Mahomed, "The Role of the Judiciary in a Constitutional State" (1998) 115 *South African Law Journal* 111; Mahomed, "The Independence of the Judiciary" (1998) 115 *South African Law Journal* 658; Corbett, "Writing a Judgment" (1998) 115 *South African Law Journal* 116; Hlophe, "The Role of Judges in a Transformed South Africa–Problems, Challenges and Prospects" (1995) 112 *South African Law Journal* 22.
[158] Dugard *op cit*, n 131, p 270.

this context is how law might be used against law. In order to make this argument one must possess a sufficiently robust concept of legality. It should be apparent from this article why the democratic understanding of legality is so attractive to Dyzenhaus. While he adopts a critical concept of legality his work does not highlight the purely strategic uses of law. As should be apparent from the examination of his earlier work his ambition is the construction of a democratic understanding of legality that has intrinsic, and not merely instrumental, merit. It is therefore not difficult to understand why TRC's Legal Hearing was of interest. This provided a forum for assessing the role of the legal community. One part of the mandate of the TRC, which proved to be controversial, was the special hearings for business, the churches, the judiciary, the legal and medical professions, and the media.[159] Dyzenhaus's work is an account of the three days of the Legal Hearing before the TRC.[160] However, what makes Dyzenhaus's work of more general interest is not the description of events (impressive in itself given the number of submissions and the problems of summarising the positions advanced) but the author's own thoughts on the process and its context. It is much more than a simple description of what occurred. He outlines the multiple wrongs of the apartheid regime and makes it clear that all this was known by those who did not choose to close their eyes and ears.[161] The work of the TRC has not been without controversy. However, he accepts that the process went a long way toward opening white South Africa up to its past.[162] There were, however, powerful interests in South African society uncomfortable with the idea of a truth commission.

The problems of making a reasonable assessment of the judicial role have already been mentioned. The argument most frequently heard is that judicial independence is compromised in any attempt to probe in practice (and not exclusively within legal scholarship) the role of the judges. Judges and the legal profession try to insulate themselves directly from the political process and find the concept of independence particularly useful. There are important reasons for this. Reliance on the independence of lawyers can be essential for many who wish to continue to operate during a conflict. It is, however, evident that in the South African context there was simply no way in which the legal community could be immune from the wider political context. The idea that the judicial role stands above the fray of politics is, as Dyzenhaus notes, driven by a political choice that this is the appropriate position to adopt.[163] It is a mistake to think that this political element can be avoided. Dyzenhaus turns to Nietzsche noting that not all of our past holds up to critical scrutiny and forgetting is necessary on occasions if only to allow individuals to live unshackled by it.[164] A

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[159] See Guelke "Truth for Amnesty? The TRC and Human Rights Abuses in South Africa" paper presented at *Human Rights in the Twenty First Century*, Royal Irish Academy February 12, 1999. Note the following pp 14-15: "There was a reluctance on the part of many of those who gave evidence in these hearings to accept the proposition that they or the sector they were speaking on behalf of had contributed to the shoring up of apartheid through actions or inactions. Some commentators regarded the hearings as an attempt to impose collective guilt on these generally white-led and white-dominated institutions. Others saw the behaviour of the witnesses themselves as an example of the problem of non-co-operation, particularly by whites."

[160] *Op cit*, n 89.

[161] *Ibid*, p 7.

[162] *Ibid*, p 12.

[163] *Ibid*, p 22.

[164] *Ibid*, p 23.

limit is required but Dyzenhaus is rightly sceptical of those who would adopt a restrictive approach. All these issues arose during the Legal Hearing.[165]

His criticism of law's community is damning. On legal education he notes how it failed "to make apartheid and its law part of the curriculum, and also [it] did not generally give students the critical tools for understanding their society".[166] At the Hearing two questions were put to those who "staffed the legal order":

> "How was it that you implemented without protest, and often with zeal, laws that were so manifestly unjust? And how was it that when you had some discretion as to how to interpret or apply the law, you consistently decided in a way that assisted the government and the security forces?"[167]

On the process itself Dyzenhaus charts the response of the lawyers. The first problem was that most of those who had carried out the work of making apartheid law work refused to make written submissions or attend the Hearing.[168] The General Council of the Bar, after some hesitation, presented a three-volume written submission and participated in the Hearing. Some of the judges displayed a resistance to the work of the TRC. Judge David Curlewis dismissed his invitation referring to it as "three pages of waffle".[169] Archbishop Tutu's response to this was to note that during the apartheid era the judges had made the wrong moral choices and this was yet another example of their lack of judgement. The response reflected a judicial mindset significantly out of step with the political changes in South Africa. In their absence they were often quite severely criticised during the course of the Hearing. They were roundly condemned in the oral submissions and questions were raised about their complicity in gross violations of human rights.[170] This element of confrontation was clearly fuelled by the impression given that the judges regarded themselves as somehow "above" the process of the TRC: an impression that is fostered by other approaches to the concept of legality.

Why does Dyzenhaus insist on focusing on the judges? Dyzenhaus's response is that the tension between law and justice is magnified in adjudication, especially in cases where the law is placed in the service of injustice. He notes the terms of the oath of office taken by members of the South African judiciary in particular. He makes use of Cover's work on anti-slavery to probe what is going on when judges opt for the plain fact approach.[171] He believes that the oath to "administer justice" to all persons went beyond a duty to implement the interests of the powerful. On justifying this emphasis on the judges it might have been more appropriate just to acknowledge this as an interest rather than viewing it as the field where the tension between law and justice is best manifested. It could, for example, be argued that it is in the more mundane fields of law application and administration that this tension is meaningfully revealed. This would, however, involve using research tools which go beyond doctrinal analysis. This is perhaps an unfair point to raise for he clearly does not intend to take this path and his theoretical position supports his chosen method. Dyzenhaus work is centred on normative legal and political theory. The

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165 *Ibid*, p 25.
166 *Ibid*, p 27.
167 *Ibid.*
168 *Ibid*, p 29.
169 *Ibid*, p 30.
170 *Ibid*, p 31.
171 *Ibid*, p 34.

interest of the legal and political theorist is sparked by the fact that the judges give reasons for the conclusions that they reach. Legal judgments are based on justification through reasons for substantive positions adopted. In the debates from South Africa Dyzenhaus, rightly I believe, sees familiar arguments from legal theory. The written submissions of some of the judges are of interest to those who want to understand the relationship between law and justice in this context. Dyzenhaus's view is that the connection between the two is intrinsic. In other words, law is not solely an instrument of brute force and coercion; it is also a site of interpretative struggle where resistance to power is possible. This insight is confirmed in practice in some of the written responses to the TRC.

The sections on the Hearing make for interesting reading. The submissions to the Hearing offer a rare glimpse into how the judiciary view law abstracted from everyday adjudication. Corbett, the former Chief Justice of South Africa, had a number of objections to the Hearing and the thinking underpinning it.[172] Two general concerns are evident. One (the pragmatic concern) was that it was simply impracticable in the sense that all prior legal proceedings would need to be assessed in order to evaluate the judicial role properly. Here we can note that legal scholars have already undertaken some of this task. The other objection was one of principle. The Hearing would compromise the principle of judicial independence. To be sure, this was always going to be an issue but one wonders in what sense appearing before the TRC would have compromised this principle. This stance may be contrasted with his successor Chief Justice Ismail Mahomed's statement that the judges were free to appear before the TRC. Resort to a purely formal concept of independence is unacceptable if viewed within a concept of legality anchored in a culture of justification. A worthwhile process of reasoning would have to follow public discussion in which the judges were also engaged. While judges must give reasons for their decisions, and thus can be distinguished from many other public officials, it is a mistake to regard this as in itself sufficient. Although there are risks, judges should be encouraged to participate in discussion in the public sphere. Judges, as citizens working within a democratic state, must also participate in it. It is the plain fact approach (as advanced by traditional and critical scholars) which encourages us to think otherwise.

Corbett's substantive point was that the judges did not have a choice for they were required to dispense justice in accordance with the law.[173] In particular he drew the attention of the TRC to the difference between the old oath of office and the new one.[174] The new references to fundamental rights and the Constitution indicated that old forms of judicial deference were no longer appropriate and that the judges were now free to take a different approach.[175] Corbett's argument will be familiar to constitutional

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[172] *Ibid*, pp 37-38

[173] *Op cit*, n 157, p 18.

[174] *Ibid.* The old oath contained in s. 10(2)(a) of the Supreme Court Act 59 of 1959 required judges to: "…administer justice to all persons alike without fear, favour or prejudice, and… in accordance with the law and customs of the Republic of South Africa." The new oath contained in Schedule 3 of the interim Constitution required him or her to: "… uphold and protect the Constitution of the Republic and the fundamental rights entrenched therein and in doing so administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the Law of the Republic."

[175] *Ibid.* p 19: " Of course the position is very different today. Parliament is no longer supreme. Its laws and the laws passed by previous Parliaments can be tested against the so-called Bill of Rights contained in chapter 3 of the interim

lawyers in the United Kingdom. It is that Parliament is supreme and the courts can only do so much to remedy the flaws in this fundamental constitutional structure. Corbett suggests that the courts did make a contribution to the struggle within the set limits.[176] In this he is supported by the memorandum submitted by Chaskalson *et alios* on the development of the legal system in South Africa from 1964-1994.[177] In a section addressing resistance to apartheid and the use of law they state:

> "For all the deep injustices perpetuated by law, there remained a real sense in which the techniques and procedures of law remained independent of the gross manipulation of the executive and in which justice was sometimes seen to be done. No account of these years would be accurate if it were not accepted that justice was done and seen to be done in some cases. In this way, principles and values central to the rule of law and a just legal system were not entirely lost."[178]

The factors in the legal system which they identified as contributing to the violation of human rights were: the absence of full democracy and the exclusion this entailed; the principle of Parliamentary sovereignty; legal positivism;[179] and the appointments process.[180] For the future they recognised the importance of law schools in the development of a "democratic legal system founded on freedom, equality and human dignity".[181] This submission to the TRC stands out as a thoughtful reflection on the role of the judges.[182] The problems it identifies and the solutions offered speak directly to any system where Parliamentary sovereignty is the dominant constitutional concept. It confirms much of the thesis defended in this article and thus the fundamental importance of a rich concept of democratic legality.

Gaining an insight into the internal politics of the judiciary can prove difficult. The written submissions are helpful in this regard. It is evident from Dyzenhaus's work that the internal politics of the judiciary in South Africa is divisive. There is clearly an uneasy truce between the "old and the new orders". The argument was that there was a chance that if they had appeared before the TRC then this truce may have collapsed. An indication of the depth of the problem can be seen in the opposition to the appointment of the new Chief Justice by the "old order" in the Supreme Court of Appeal.[183] Perhaps less obvious to those with an understanding of the abuses of the apartheid regime, many of the "old order" felt there was simply nothing for them to apologise for.

Constitution and, if found wanting, be declared invalid by the Constitutional Court. And the same position will obtain under the new Constitution which will come into operation next year."

176 *Ibid.*

177 *Ibid,* p 21. The memorandum was signed by Chaskalson, Mahomed, Langa, van Heerden and Corbett.

178 *Ibid,* p 29. *Cf* Submission by the National Association of Democratic Lawyers, *ibid.* pp 86-100.

179 *Ibid,* p 32: "Until the late 1970s, most law schools provided students with a monotonous diet of black-letter law. What is more, the primary emphasis in most law degrees was on private law, in particular the Roman-Dutch law and its development. Without doubt these law schools produced technically competent lawyers, but their education lacked an important component."

180 *Ibid,* pp 32-33.

181 *Ibid,* p 34.

182 This contrasts with the submission of Smallberger *et al, ibid,* pp 42-50.

183 *Ibid,* pp 39-40.

The case of Zondo is referred to on several occasions in the course of the work. He had the death penalty imposed on him by the allegedly "liberal" Judge Leon. Zondo was found guilty of planting a limpet mine which killed five civilians.[184] He was 19 years old when the event occurred. Leon found no extenuating circumstances, stating that his youth was not a compelling factor and that taking all matters into account they did not amount to extenuating circumstances.[185] Corbett's response to Govender's submissions in relation to this case is again revealing and confirms the general perspective outlined above. Another case noted is that of Tsafendas.[186] He had assassinated the Prime Minister of South Africa, Verwoerd, in 1969. At trial he was found to be unfit to plead because of an alleged mental disorder. He has since been detained "at the State President's pleasure". Corbett took exception to the description of Tsafendas as a "victim of apartheid" regarding the suggestion as "bizarre".[187] Dyzenhaus's account of the famous debate initiated by Wacks on the responsibility of the judiciary is instructive.[188] The option that Wacks suggested was judicial resignation, an offer that was refused by the judges and criticised by some scholars. It is of interest that the submission by Chaskalson *et alios*, which is acknowledged by Dyzenhaus to be impressive, avoided the issue which this debate raised that is, whether lawyers should have accepted appointment to the Bench during apartheid. One particularly amusing comment in the submission, noted by Dyzenhaus, is that if they had refused appointment the Bench would have ended up being staffed with "political puppets".[189] This begs the question. Although it is relatively easy to be critical it is clear from the submissions that particularly acute moral problems did arise for the "liberal" judges especially following Wacks public call for them to resign.[190] In response to this call Dugard noted that in "his haste to transplant Dworkin's views in the South African judicial process, he has overlooked the very nature of the South African legal system".[191] Dugard emphasised the role of common-law principles and the argument that the judges could allow themselves to be guided by these principles. Room for judicial creativity had simply not been blocked.[192] Dugard argued that the judges should not resign because they had a clear role in the development of the common law and thus with using the room that existed to protect human rights.[193]

Of course some members of the judiciary were not particularly bothered by these ethical objections. Some displayed worrying signs of anti-intellectualism and berated academics for their critical comments. Dyzenhaus cites the example of Thompson who in *S* v *Van Niekerk*[194] effectively engaged in the punishment of an academic "for drawing [his]

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184 *Ibid*, p 41.
185 *Ibid.*
186 *Ibid*, pp 43-44.
187 *Ibid*, p 44.
188 *Ibid*, p 56-57
189 *Ibid*, p 58.
190 Wacks, "Judges and Injustice" (1984) 101 *South African Law Journal* 266. It is clear from the written submissions to the TRC that members of the judiciary were troubled by this particular problem. See, for example, Submission by Justice Richard J Goldstone *op cit*, n 157, pp 55-56.
191 Dugard, "Should Judges Resign–A Reply to Professor Wacks" (1984) 101 *South African Law Journal* 286.
192 *Ibid*, p 291.
193 For the response see Wacks, "Judging Judges: A Brief Rejoinder to Professor Dugard" (1984) 101 *South African Law Journal* 295.
194 (972) 3 SA 711 (A).

attention to a conception of the rule of law to which [he was] arguably beholden".[195]

It is important at this point to stress what Dyzenhaus's narrative is not. It is not a full-frontal assault on the judiciary and the legal profession for their inadequacies and failures based on the view that it is "all about power anyway". It is a critique which rests on an expansive understanding of the rule of law. Thus he recognises that judges do need to be free from political influence and independent if the job is to be done properly. In the South African context the concept of independence was, however, so empty as to be meaningless and did little to challenge the resort to a plain fact approach. The failure of members of the judiciary to present themselves before the Legal Hearing excluded the possibility of a meaningful dialogue about what judicial independence really means under such conditions. In this sense the refusal is peculiarly anti-modern in that the judges were not prepared to offer a rational justification for their past actions. In modern constitutional democracies this ability to be able to justify through reasons is central to the existence of legitimate public authority. Such aristocratic disdain for democracy is not confined to the South African context. A point often forgotten is that the judges, unlike numerous members of the security forces, had access to all the reasoned arguments as well as exposure to a wealth of scholarly writing:

> "[People] needed to know how men in so privileged a position, with such an important role, and with so much space to do other than they did, made the wrong moral choice. . .".[196]

Dyzenhaus adopts Adorno's famous phrase on managing public memory as a motif. It is not an unconscious process, it is a decision made by those who do remember.[197] Much of what follows is a detailed analysis of how the various members of the legal community attempted to carry out this exercise. The exploration of the role of particular individuals is difficult to evaluate from an "outsider's perspective". What is evident is that the internal politics of the legal profession had significant practical implications. The submission of the General Council of the Bar was one made in the face of considerable internal opposition.[198] It included an apology from the Pretoria Bar Council which had been notable for its failure to join others in their condemnation of apartheid. The oral submission revealed, yet again, worrying levels of anti-intellectualism within the Bar and an unwillingness to engage with the questions of the TRC.[199] Dyzenhaus is right to note how the culture of the Bar contributed to a misguided sense of superiority. Too much faith was placed during the submissions on unreflective views of the importance of an independent Bar of advocates. As with the judges a dialogue on the meaning of independence is avoided:

> "But the great majority of men at the Bar said "yes" to apartheid, proving themselves content to support and reap the benefits of South African society which, to adapt a phrase from an influential feminist thinker, was designed as an affirmative action plan for white men."[200]

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195 *Op cit*, n 117, p 72.
196 *Ibid*, p 90.
197 *Ibid*, p 92.
198 *Ibid*, pp 67-86.
199 *Ibid*, p 102.
200 *Ibid*, p 110.

What about the teachers?[201] As the group responsible for teaching the future members of law's community it was entirely appropriate that they were asked to participate. The problem revealed is a failure, prior to the 1980s, of academics to engage in criticism of apartheid. A damaging deference to authority was nurtured and pervaded areas of legal education. Dyzenhaus is unsparing in his criticism of South African academics who failed "to take up [the] role of critics of the law and of the legal institutions of their society".[202] Dyzenhaus's work is testament to the many who made the wrong moral choices and who, for a variety of reasons, should have known better. If there is a lesson from this section it is that legal education needs to instill a sense of critical awareness in its students and to ensure that they do not defer to unjustified and illegitimate authority.

The final chapter on the politics of the rule of law is the most satisfying. It in here that Dyzenhaus has the space to evaluate some of the central claims used to justify the inadequate responses to injustice. The claim of independence is one most often cited, yet seldom explored in any depth. One of the welcome results of the judges' unwillingness to come before the TRC was that it sparked a public debate on judicial accountability. He clearly believes that the bare assertion of independence is not enough, we have to ask what independence is for:

> "A democratic society needs independent judges for the same reasons it needs independent lawyers. Their independence provides the potential to bring the government – the state in practice – into line when it oppresses the people whose interests it is meant to serve. In fulfilling that potential, judges and lawyers play a crucial role in ensuring the democratic accountability of state institutions."[203]

The reasoning which Dyzenhaus adopts to defend his position is persuasive and, as indicated elsewhere in this article, has been constructed after considerable scholarly reflection. This again is best viewed as part of a contemporary school of thought which is critical of some of the more exotic trends in critical legal scholarship. In other words, it is a concept of legality for those who have not given up on constructive critical engagement with law's community. The legal community has nothing to fear from the concept of independence he advances if it is committed to the rule of law, human rights and democratic governance. If judges become complicit in state oppression then it is no use seeking refuge in an empty and purely formal concept of independence. Again one cannot fully understand Dyzenhaus's position without grasping the concept of legality with which he is working. At its core this is an understanding of legality which sets limits on Parliamentary sovereignty. The majority of judges simply refused to confront the state with the constraints of legality. In this there was a dereliction of duty and the judges failed to give voice to a "constitutional vision" of legality.[204] As he stresses, however, it would be naïve to overestimate the judicial role in this context or the tragic moral choices that had to be made. And it is on this issue that his work might attract criticism. Is it the case that Dyzenhaus places too much store by what judges can and cannot do even under an expansive understanding of legality? Whatever view is taken of the role of the judges in a democratic legal order they exist in an institutional context which demands some form

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[201] See Submission by the Society of University Teachers of Law and Certain Law Schools *op cit*, n 157, pp 101-106.
[202] *Op cit*, n 117, p 119.
[203] *Ibid*, p 146
[204] *Ibid*, p 160.

of justification. This justification rests on an understanding of legality which can remain submerged but can always be reconstructed from substantive commitments and positions. Critics of Dyzenhaus's understanding must meet it with a competing understanding of legality which can account for the social practice in a convincing way.[205] As I argue in this article the concept of legality which emerges in his work is an attractive one. The focus on adjudication may be narrow and partial but as long as the judicial role continues it will require a paradigmatic understanding through which to orientate judicial practice. The democratic understanding defended in the writings of scholars mentioned in this article is I suggest a persuasive one. As Dyzenhaus notes, the failure of the judges to appear before the Hearing demonstrated that they still did not conceive of themselves as citizens within a democracy.[206] This was a perfect opportunity which was missed for the judges to engage in a public discussion of the legitimacy of their work in the new South Africa.

Since *Judging the Judges, Judging Ourselves* was completed the TRC has issued its Final Report. Its findings on the Legal Hearing are contained in Volume Four Chapter Four. The TRC expressed its disappointment that judicial officers (both judges and magistrates) declined to attend. The Chapter describes the argument of the establishment bodies and the counterargument, much of which has been examined above. The TRC outlined the assumptions upon which its findings were based and which "enjoy relatively widespread acceptance".[207] These may be summarised as follows: (1) judges had a choice in almost all circumstances; (2) the values inculcated by communal culture and the culture of the Bench and the Bar are important; (3) where no choice existed other steps were open to the judiciary; (4) the appointment process and execution of court decisions raised questions about independence; (5) there needs to be substance to the concept of independence and the space which it opens must be used to "preserve basic equity and decency in a legal system";[208] (6) the appearance of judicial independence and adherence to legalism can legitimise an unjust government; (7) and "[n]o one who participates in an evil system can be entirely free of responsibility for some injustice".[209] It concluded this section with the following:

> "Law and justice are by no means co-extensive although, at a fundamental level, their interests and constituent elements are likely to coincide. [An] uncritical acceptance of promulgated rules of law is unlikely to contribute to the achievement of justice in any more than the formal sense."[210]

As it stressed, the purpose of this part of the Report was not to attribute guilt but to draw on the lessons of the past for the purpose of transforming the legal process in the future. As to the findings the Report noted that the National Party craved the legitimacy which the concept of legality brought with it. In the 1980s however even this adherence to a purely formal

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[205] See, for example, Ewick and Silbey, *The Common Place of Law: Studies From Everyday Life* (1998), p 23: "we conceive of legality as an emergent structure of social life that manifests itself in diverse places, including but not limited to formal institutional settings. *Legality operates, then, as both an interpretative framework and a set of resources with which and through which the social world (including that part known as the law) is constituted* (my emphasis)."

[206] *Op cit*, n 117, p 171.

[207] Para 22.

[208] Para 27.

[209] Para 29.

[210] Para 30.

concept of legality was abandoned.[211] A list of examples is provided to demonstrate that the courts and the legal profession "generally and subconsciously or unwittingly connived in the legislative and executive pursuit of injustice".[212] For all this the TRC recognised that a few lawyers (judges, teachers and students) were prepared to break with the norm. This group worked ceaselessly in this effort and the TRC acknowledged the courage, strength and perseverance which this demanded. On the persistent references to the Westminster model as justification for submissive deference, the TRC found this to be a flawed argument, even referring to Dicey to defend its position.[213] The further argument about independence was again not accepted as convincing by the TRC. Although unreservedly accepting the importance of the principle of independence the TRC expressed its deep disappoint-ment. It could not see how an appearance before the TRC could compromise independence. This was a unique event that was unlikely to create any kind of precedent:

> "The Commission was thus denied the opportunity to engage in debate with judges as to how the administration of justice could adapt to fulfil the tasks demanded of it in the new legal system; not so as to dictate or bind them in the future, but so as to underline the need urgently to re-evaluate the nature of the judiciary. In some ways, it seems that the judicial non-appearance indicated a reluctance to consider alternatives to the conventions of the past, many of which might be conducive to justice, but which would clearly hinder the attainment of the type of society envisaged by the Constitution".[214]

It is evident from the Findings that the TRC was irritated by the judiciary's refusal to engage with it and it is arguable that history will judge them harshly. The section of the Report makes for dispiriting reading for those who wish to see judicial recognition of their responsibilities to citizens within a constitutional democracy and who view accountability as internally connected to a substantive under-standing of independence. This is not true, however, of all the submissions. Some provide evidence of a high level of careful thought by members of the judiciary about their role in the new South Africa. These submissions are encouraging and lessons can be drawn from the thinking that is contained in them.

CONCLUSION

Any assessment of the role of the legal community has a normative basis. In other words, all legal scholars function with an understanding of legality. This is either explicitly defended in their work or is implied in their argument or method. Too often, in the United Kingdom at least, thinking on constitutional law is blighted by a partial frame of conceptual reference which then distorts reflection on constitutionalism in practice. This is apparent in the current debates on constitutional restructuring. In this article I defend a democratic understanding of legality based on a reading of the work of Dyzenhaus among others. There is much humbug talked about legality. While reflection on its normative basis, and its general qualities, is essential, it is important that context informs the analysis. To think critically about legality is to reflect on the ways it can

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[211] Para 32.
[212] Paras 33-34.
[213] Para 41.
[214] Para 44.

be used by participants in law's community to uphold important democratic and other values. Social movements, for example, will wish to know how legality can be used to advance political goals. This assessment will have much to do with strategy and tactics and how the rhetoric of law can be used to get results. The concept of legality examined in this article has a value which goes beyond the instrumental. Although legal discourse involves contestation this does not mean that participants should not expect the institution of law to deliver reasoned results. The argumentative model of legality focuses primarily on justification through the provision of reasons that are aimed at persuading all participants. By advancing a model founded upon argumentation and a culture of justification there is room to view legality not as a closed book but as a *continuing conversation*. To those who regard this level of contestation and argument as troubling I would suggest that they instead focus on those who seek final closure of the debate.[215] What citizens can expect from this concept of legality is reasoned justification for determinate outcomes in particular cases. This is, however, only a contingent interpretation that is open to re-negotiation. This pragmatic concept of legality also supplies the tools of critique. Far from encouraging apathy and quietism a dynamic concept of legality might encourage political and legal engagement: for a purely formal concept of legality misses the point. The reason for my emphasis on a relational understanding is to ensure that the people who make change happen are not left out of the equation. For legality to fulfil a useful function (as well as its intrinsic conceptual merit) it must be used in argumentation by institutional actors, social movements and individuals. As this article has tried to indicate, it is in political struggles where law is under stress that legal theory can ground useful insights into the nature of legality. This anti-positivist concept of legality encourages us to view formal enactment of law as a beginning and not an end to the argument. The progressive belief which underpins this is that law can constrain arbitrary power and thus can be a tool in the struggle for social justice and against the neo-liberal free market hegemony. It is a concept of legality without illusions that restores a dynamic concept of law to its place in encouraging argumentation within a revived public sphere.

Many of these issues arise in transitional societies. The South African TRC and its assessment of the legal community is intrinsically interesting but is particularly valuable for the light it sheds on the debates explored here. What is fascinating about this is that, as Dyzenhaus states, the "legal order was put on trial–law found itself before a tribunal".[216] The purpose of this was not to pour scorn but "to engage the most important legal actors in both the old and new orders in a constructive debate, one which would resonate outside the Hearing...".[217] As he notes:

> "Law. . . can make a difference, even under the very unpromising conditions of apartheid South Africa, and this goes a long way to show that legal order or legality places constraints on the powerful which at bottom are political and moral constraints–the constraints of commitment to a community of free and equal citizens."

It is difficult to avoid drawing comparisons even if events must be considered in their highly specific contexts.[218] It is clear that much can be

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[215] *Cf* Connolly, *The Terms of Political Discourse* (3rd ed. 1993) p 213.
[216] *Op cit*, n 117, p 182.
[217] *Op cit*, n 117, p 182.
[218] On the role of the courts in the Northern Ireland context see S. Livingstone, "The House of Lords and the Northern Ireland Conflict" (1994) 57 *Modern Law Review* 333.

learned from the South African experience. The examination of these issues in the Northern Ireland context is for another day.[219] Nevertheless, it will be interesting to see whether a public debate emerges on the role of the judiciary and the legal profession. Will the judicial role undergo the same transformation as is taking place in other areas of society? If it does not, to what extent can the judiciary be said to have faced up to their responsibilities as citizens within a democratic polity? If the proposed constitutional reforms become a reality, then many aspects of the settlement and its meaning may find their way into the courts. Are we satisfied that the courts in Northern Ireland have adjusted adequately to the changing constitutional context? If not, what is to be done?

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[219] See Hamber (ed), *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition* (1998); Bloomfield, *We Will Remember Them: Report of the Northern Ireland Victims Commissioner* (1998). See also Fay, Morrissey and Smyth, *Northern Ireland's Troubles: The Human Cost* (1999).