

CONTENTS

How Near is a Written Constitution? (*Rodney Brazier*) ..... 1

Co-ownership of Matrimonial Property: Radical Proposals for Reform  
(*Lorna Fox*) ..... 20

Quasi-Legislative Devolution: Powers and Principles  
(*Richard Rawlings*) ..... 54

Frustration of Leases – The Hazards of Contractualisation  
(*Warren Barr*) ..... 82

Transfer of Undertakings Law: Back to Confusion (*Paul Buggy*) ..... 98

BOOK REVIEWS

John Greed: *View Point: A Point of View on Rights of View* ..... 103

Michael Twomey: *Partnership Law* ..... 104

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

ISSN 0029-3105



# HOW NEAR IS A WRITTEN CONSTITUTION?

*Rodney Brazier, Professor of Constitutional Law,  
University of Manchester*

## I. CONSTITUTION-MAKING

Politicians are the midwives of constitutional change. Reform cannot come about unless a political party delivers it while in government. All the reforming energies of those outside government are of limited practical significance until that happens. Constitutional change and the political will to achieve it came together when the Labour Party swept to power in May 1997. The Labour Government will take pride in subsequently achieving so much of its constitutional reform programme within the first three sessions of the 1997 Parliament. On a checklist of items derived from its manifesto commitments, everything can receive a tick as having been done or begun. Critics may say with some justice that such a broad-brush conclusion masks the fact that some achievements are rather limited, especially stage one of Lords reform (which was the easy part),<sup>1</sup> or may point out that nothing has been done about changing the voting system for Westminster beyond commissioning the Jenkins Report.<sup>2</sup> Moreover, for a Government with the largest parliamentary majority in ordinary peacetime conditions at any time in the twentieth century, legislative success in the House of Commons should scarcely be a cause for inordinate congratulation or surprise. Even so, Ministers must have been greatly relieved by the ease with which they achieved their constitutional goals in a largely hostile House of Lords. But it would have been difficult for Conservative peers – who before November 1999 were then the effective majority in that House – to vote down Labour’s Bills which had been endorsed by the voters at the General Election, and indeed the Salisbury convention required that they should not do so.<sup>3</sup> True, Opposition peers tried to delay the passage of the measure of most direct concern to them, the House of Lords Bill. But despite the occasional blustering of the Lord Chancellor and the Leader of the House of Lords about the number of unhelpful amendments that were tabled to that Bill, and the time which it took to deal with them, resort to the Parliament Acts to secure the measure never seemed close, even though (or perhaps because) the Labour Party had obtained manifesto authority to do so if necessary.<sup>4</sup> The Government’s acceptance of the Weatherill amendment which exempted 92 hereditary peers from the axe unquestionably played its part.<sup>5</sup> And in relation to devolution the Conservative Party’s teeth had been drawn by the

---

<sup>1</sup> House of Lords Act 1999.

<sup>2</sup> Report of the Independent Commission on the Voting System, Cm 4090 (1998). As will be explained later, the Government has distanced itself from the Commission’s main recommendation.

<sup>3</sup> Brazier, “Defending the Hereditaries: The Salisbury Convention” [1999] *PL* 371.

<sup>4</sup> *New Labour: Because Britain Deserves Better* (Labour Party, 1997).

<sup>5</sup> Perhaps the Government procured that amendment, rather than just accepted it. The amendment seems to have been arrived at by Lord Irvine and by Lord Cranborne for the Conservative peers, and was then put to Lord Weatherill to present: Andrew Rawnsley, *Servants of the People* (2000), p 203.

electoral endorsements of the Government's proposals at the Scottish and Welsh referendums. For on what democratic basis could the Opposition try to thwart plans which had received electoral approval *twice*, once in Labour's General Election manifesto, and then at referendums?

But at the time of writing (January 2001) the next General Election is almost upon us. Ministers will be giving increasingly more attention to the contents of the manifesto.<sup>6</sup> From Ministers' perspectives it would be understandable if the material in the manifesto about the constitution offered no more than a period of consolidation rather than further significant reform. In essence, Ministers could assert with some justice that so much has been done in such a short time that the new dispensations should be given time to bed down, and that other reforms need more time for completion. After all, power has been diffused from Westminster to Belfast, Cardiff, Edinburgh, and London – but it is still too early to know how complete or final those devolutions may be;<sup>7</sup> citizens have easier access to enforcing their rights – but the exact limits of those rights remain tantalizingly unclear;<sup>8</sup> Labour's century-old wish to “do something” about the House of Lords has been granted – but work is still needed to arrive at a final settlement; and so on. Further legislative adjustments to a number of statutes may be needed to reflect experience of the new arrangements, and time is needed to allow that experience to be appreciated. A further scaling-down or reorganization of national ministerial dispositions may be required following the experience of government in Scotland and Wales, involving perhaps the merger of the Scotland Office and the Wales Office under a single Secretary of State.<sup>9</sup> The bedding-down argument is likely to be strengthened – at any rate to the satisfaction of Ministers and the Labour Party more generally – by a certain fatigue with constitutional matters. Much time – including, in relation to Northern Ireland, the Prime Minister's time – has been expended on constitutional change in Labour's first term. The prospect of taking on anything like similar commitments during a second term in government may be unattractive, especially because not even Ministers claim that constitutional reform excites voters or garners their support. And so on a purely political level the Government may wish to reassure the electorate that its energies in the next Parliament will indeed be concentrated on what new Labour dubs the people's priorities such as health, education, transport, and crime, and Ministers may prefer to deliver that message clearly, unencumbered by further grand constitutional plans. If that overall assessment is right then a commitment – either in the forthcoming General

---

<sup>6</sup> The latest comprehensive statement of Labour Party policy is contained in *Building a Future for All: National Policy Forum Reports to Conference* (Labour Party, 2000). The document was approved at the party's annual conference in autumn 2000. It is from that paper that most material for the next General Election manifesto will be drawn.

<sup>7</sup> Several Orders in Council have been made already under the devolution statutes to adjust powers further between London and the other capitals.

<sup>8</sup> See, eg, Hunt, “The ‘Horizontal Effect’ of the Human Rights Act” [1998] *PL* 423.

<sup>9</sup> *Delivering Constitutional Reform* (Constitution Unit, 1996). The number of junior Ministers in those two Offices has been reduced already to take account of the reduced workload in Whitehall. The Northern Ireland Office with its own Secretary of State is, however, likely to be needed for the indefinite future given the uncertainty which remains over the stability of the Good Friday agreement.

Election manifesto, or subsequently – to work towards a written constitution might seem hopelessly unlikely. Or is it? The purpose of this article is to try to answer that question.

## II. REFORMING THE FORM OF THE CONSTITUTION

One of the lasting achievements of the 1997 Labour Government will be its constitution-making, primarily of course in the sense of giving effect to new constitutional dispensations, but also in the narrow, technical sense of producing new legal rules which prescribe how the state is to be governed. The former is more important in practical and political terms than the latter, but the effect of the latter on the form of the British constitution deserves to be assessed.

As every schoolchild is supposed to know, the United Kingdom does not have a written constitution.<sup>10</sup> A British citizen has to seek the rules of the constitution in a daunting number of places – legislation, judicial decisions, statements about constitutional conventions, the law and practice of Parliament, European Community law, and so on. It is hardly surprising that the interested citizen will normally leave those sources to one side and rely instead on books written by authoritative writers, and those who aspire to be authoritative. But just listing the primary materials which form the constitution demonstrates the extent to which the British constitution is largely a written one. Indeed, all the sources exist as official statements made by organs of the state, except for conventions, most of which have been reduced to writing only by the unofficial efforts of constitutional commentators.<sup>11</sup> The British constitution is written, but it is not codified into a single official document, or limited number of such documents, setting out those legal rules which prescribe how the state is to be governed.<sup>12</sup>

In implementing its range of reforms the Labour Government has caused Parliament to enact an additional and substantial corpus of statute law of a constitutional character. While, therefore, the United Kingdom still lacks a codified constitution, it has been given rather more of a written constitution by the addition of sixteen Acts of Parliament which, in whole or in part, add to the British constitution.<sup>13</sup> Perhaps most importantly towards that end, the

---

<sup>10</sup> For an analysis of that term see Munro, “What is a Constitution?” [1983] *PL* 563.

<sup>11</sup> For an overview see Jaconelli, “The Nature of Constitutional Convention” (1999) 19 *Legal Studies* 24. Official statements of constitutional conventions include parts of the preamble to the Statute of Westminster 1931, parts of the *Ministerial Code* (Cabinet Office, 1997), statements in various White Papers confirming the status of Northern Ireland within the United Kingdom, and the devolution conventions arrived at between the British Government and the devolved authorities and published in *Memorandums of Understanding*.

<sup>12</sup> For descriptions of its characteristics, including its “unwritten” nature, see eg S.A. de Smith and R. Brazier, *Constitutional and Administrative Law* (8th ed, 1998), chapter 1; A.W. Bradley and K. Ewing, *Constitutional and Administrative Law* (12th ed, 1997), chapter 1; E. Barendt, *An Introduction to Constitutional Law* (1998), chapter 1.

<sup>13</sup> As in constitutional law generally, describing a statute as one of constitutional import can be a matter of choice. But the principal Acts are the Referendums (Scotland and Wales) Act 1997, the Data Protection Act 1997, the Scotland Act 1998, the Government of Wales Act 1998, the Northern Ireland Act 1998, the

United Kingdom now has the kind of Bill of Rights which features prominently in so many national constitutions, supplied by the Human Rights Act 1998.<sup>14</sup> The lacuna which had existed in the enforcement of civil rights has now been filled. The devolution statutes have answered – at least for the time being – many long-standing queries about the appropriate relationships between the various parts of Great Britain, and with luck of the United Kingdom, and have redefined the juridical balance between them;<sup>15</sup> the composition of the national legislature has been radically altered by the House of Lords Act 1999; and so on. There has been an exponential growth in the body of constitutional statute law since 1997, and because statute overrides case law and convention in the constitutional order the new laws represent some of the ground work which would be required for the production of a codified constitution. When it was still in opposition the Labour Party recognized that its legislative programme would have that effect in the narrower sense of the phrase constitution-making. In what was then its main constitutional policy document, *A New Agenda for Democracy*, adopted four years before coming to power, the party claimed that its changes would be a significant step in the direction of a written constitution, and the paper stated that the party would leave open the question of whether at a later stage progress should be made towards formal codification.<sup>16</sup> Now that statement needs to be put into context. On the one hand, it was the first move – however tentative – by either of the two big political parties towards the idea of constitutional codification.<sup>17</sup> On the other hand the statement did not really take account of all the other areas of the constitution which Labour’s proposed changes would not affect but which would have to be reassessed and considered for inclusion in any constitutional code. For even after Labour’s current reform programme has been fully implemented it would leave vital matters untouched, such as the monarchy, prerogative powers enjoyed by Ministers, the powers of the House of Commons, and the judicial system. Clearly, too, that statement in the policy paper was over-terse, in that it ignored other important matters which would be crucial in any codification exercise, such as how and by whom it would be undertaken. Nor did the comments about codification find any place in Labour’s 1997 General Election manifesto. Whatever the Labour Party had in mind about revising the formal state of the constitution in 1993, the question which should be addressed now that so much of the party’s constitution-making is

---

Greater London Authority (Referendum) Act 1998, the Human Rights Act 1998, the Regional Development Agencies Act 1998, the European Parliamentary Elections Act 1999, the Greater London Authority Act 1999, the House of Lords Act 1999, the Local Government Act 1999, the Regulation of Investigatory Powers Act 2000, the Political Parties, Elections and Referendums Act 2000, the Disqualifications Act 2000, and the Representation of the People Act 2000.

<sup>14</sup> Effect had been given to the European Convention on Human Rights in municipal law in Scotland by the Scotland Act 1998, s 57, in Wales by the Government of Wales Act 1998, s 107, and eventually in Northern Ireland by the Northern Ireland Act 1998, s 24.

<sup>15</sup> See Brazier, “The Constitution of the United Kingdom” [1999] *Cambridge Law Journal* 96.

<sup>16</sup> *A New Agenda for Democracy* (Labour Party, 1993), p 44.

<sup>17</sup> The Liberal Democrats, following the policy of their predecessors, want to see a written United Kingdom constitution. See *Reforming Governance in the UK: Policies for Constitutional Reform* (Policy Paper No 40, 2000).

in place is what could be done with the legal form of the United Kingdom constitution.

In considering that question four options emerge. The most conservative course – and the one which has been followed for the whole of English and British constitutional history – would be to continue to build on the laws and conventions already in place, altering them only as and when required. Constitutional change has happened in fits and starts, with occasional bursts of legislative activity which has usually been caused by events which forced Governments to act. In the last century it was such reaction which produced, for example, the Parliament Act 1911, votes for women, a new constitution for Ireland (and later Northern Ireland), and so on. That method is reactive and ad hoc, Ministers and Parliament responding to pressure and producing pragmatic solutions as needed. It has been exceptional for one of the two main political parties to go into a General Election offering planned constitutional measures: the present Government is the most notable exception.<sup>18</sup> It would be perfectly possible for that reactive method to continue to be followed. A second option, however, would be build on the Labour Government's constitution-making through a programme of consolidation. That could be a traditional exercise in statutory consolidation, that is, bringing all related statutory rules together in one statute (or, more likely, a series of statutes).<sup>19</sup> Such consolidation might be the first step towards the apparent aspiration indicated in Labour's 1993 policy document of working towards a written constitution. There has been little attempt to consolidate constitutional statutes,<sup>20</sup> the only recent examples being the Representation of the People Act 1983,<sup>21</sup> the Parliamentary Constituencies Act 1986,<sup>22</sup> and the European Parliamentary Elections Bill 1999–2000.<sup>23</sup> Consolidation work is usually carried out by the Law Commission, with parliamentary time being found for consolidation Bills only where there is a clear need to help the user of the statutes affected. It is hard to make a particularly strong case for constitutional consolidation on that ground. Indeed, depending on how extensive the consolidations were to be,<sup>24</sup> issues of principle would be thrown up which went way beyond a technical improvement exercise. For instance, would the present controversial religious tests for accession to the Crown be consolidated when there is a

---

<sup>18</sup> Indeed, the only two other main examples are the October 1974 Labour commitment to bring devolution to Scotland and Wales, and the 1983 Conservative pledge to abolish the Greater London Council and the metropolitan county councils.

<sup>19</sup> The essence of consolidation is the rational ordering of existing legal rules: it is not to bring about changes to the substance of those rules.

<sup>20</sup> See Brazier, "Enacting a Constitution" [1992] *Statute Law Review* 104 at pp 125–127.

<sup>21</sup> The Act provided a consolidated statement of electoral law for both parliamentary and local government elections.

<sup>22</sup> The purpose of the statute was to consolidate the rules under which parliamentary constituency boundaries are determined.

<sup>23</sup> The Bill was designed to bring together all the rules on United Kingdom elections to the European Parliament: it lapsed on prorogation in 2000.

<sup>24</sup> There are, for example, about twenty principal Acts relating to Parliament, twelve concerning the Crown, and seven dealing with ministerial offices, which would all be candidates for consolidation.

principled case for abolition? Consolidation of constitutional law would disclose many similar problems. Overall, the case for simple consolidation is weak.

A third possibility would be codification, not of the whole constitution, but of suitable or desirable areas.<sup>25</sup> By codification is meant the reduction to coherent legal rules, in a logical and structured form, of all the source material on a given topic, changing the substance where necessary to meet contemporary requirements. In that sense, constitutional codification would be similar to such law reform exercises in other areas, but there would be significant differences. One would be that – unlike all other areas of law – the question would have to be addressed of what to do with relevant and important non-legal rules.<sup>26</sup> No other area of law in the United Kingdom has such a rich gloss of non-legal rules which in practice modify the operation of those rules. In a limited codification, it is true, the problem of how to codify conventions could be avoided by starting the exercise in areas untouched by convention. Another factor which would distinguish constitutional codification from others is the deeply political and sometimes controversial nature of parts of constitutional law. For that reason the task could not be the equivalent of a Law Commission enterprise.<sup>27</sup> Yet another distinction is that, for codification to be a worthwhile task, the subject-matter needs to be fairly well settled. If there is a prospect of significant subsequent change a resulting code will gather statutory accretions which would spoil the elegance of the final product.<sup>28</sup> It might be said that the British constitution is too unstable at present for even limited codification to be embarked on now, especially because there are too many key areas (such as the form of the second chamber, and voting reform) which are still in a state of uncertainty.

The fourth and final and the boldest option for the reform of the technical form of the constitution would be to achieve *complete* codification, that is, a written constitution properly so-called.<sup>29</sup> Were that to be done the United Kingdom would leave that very exclusive club whose members are the developed states which lack a codified national constitution. New Zealand resigned its membership in 1986 when it passed its Constitution Act; only Israel and the United Kingdom remain in it. I want now to examine in some

---

<sup>25</sup> The merits and demerits of complete as against partial codification (not in the specific context of constitutional law) are examined in J.H. Farrar and A.M. Dugdale, *Introduction to Legal Method* (2nd ed, 1984), chapter 11. On that issue in the context of criminal law see A.T.H. Smith, “Codification of the Criminal Law: (1) The Case for a Code” [1986] *Criminal Law Review* 285.

<sup>26</sup> This question will be considered in more detail later.

<sup>27</sup> For an analysis of the advantages and drawbacks of codification of criminal law (which has resonances with constitutional law in this context) see the Law Commission, *A Criminal Code for England and Wales* (HC 299 (1988-1989)), paras 2.1–2.28.

<sup>28</sup> Of course, all constitutions attract amendments, but it is fair to say that when a national constitution is adopted it is hoped that the substance of its main provisions represent the settled will of its adopters.

<sup>29</sup> I have examined at length the technical legislative techniques which would be relevant to the enactment of a codified constitution for the United Kingdom in “Enacting a Constitution” [1992] *Statute Law Review* 104.

detail the issues involved in producing a constitutional code for the United Kingdom.

### III. A CONSTITUTIONAL CODE?

The advantages for a state having a fixed, though amendable, constitution are well-known and need not be rehearsed in any detail.<sup>30</sup> They include the fulfilment of a natural expectation that the main rules which regulate the governance of a state should be knowable to any citizen, the certainty which flows from having formally-stated and binding rules of constitutional law,<sup>31</sup> the ability to see the importance of constitutional rules over other rules in a legal system, and usually the protection of those rules, by entrenchment, from what would otherwise be the effective control of the Government of the day through the passage of ordinary legislation. But so far those attributes have not been sufficiently attractive to either of the two main political parties to persuade them to embark on such a momentous reform of the British constitution. Why is that?

Like everyone else the political parties are products of their country's past. English and British constitutional history has brought heavy baggage to be borne by policy-makers and citizens alike. Obviously, no events in that historical sweep have unavoidably required the adoption of a written constitution. Equally obviously, cataclysmic episodes have certainly occurred, such as the triumph of Parliament in the English civil war, and the later crowning of parliamentary sovereignty in 1688; and the state itself has been radically altered by the merger of England and Scotland, and Great Britain with Ireland.<sup>32</sup> But looked at from the limited perspective of forces which might have produced a written constitution, England and Britain went through such tremors as much as a century too soon. The idea that a state should possess a document containing its basic constitutional rules did not form until the late eighteenth century. France and the American colonies underwent their constitutional upheavals as statesmen came to recognize that such events required the adoption of written statements about a country's constitution, often to be drafted in order to prevent the kind of abuses which had precipitated revolution. Had the seventeenth-century English civil war and revolution occurred a hundred years later, England just might have been swayed by the intellectual movement which saw the necessity for constitutional codes, and she might have resorted to a similar constitutional prescription. But by (say) 1700 the main constitutional arrangements in

---

<sup>30</sup> The case for a new written constitution for the United Kingdom has been argued, *inter alia*, by Lord Hailsham, *Elective Dictatorship* (1976) and *The Dilemma of Democracy* (1978) – although he was less sure by the time he published *On The Constitution* (1992); Lord Scarman, “Bill of Rights and Law Reform” in R. Holme and M. Elliott, *1688–1988: Time for a New Constitution* (1988); the Liberal Democrats, “*We the People. . .*” – *Towards a Written Constitution* (1990), and *Reforming Governance in the UK*, para. 2.2.2; Institute for Public Policy Research, *A Written Constitution for the United Kingdom* (1993).

<sup>31</sup> Indeed, without such a text it is “. . . difficult to decide what counts as constitutional law in the United Kingdom”: Eric Barendt, *An Introduction to Constitutional Law* (1998), p 28.

<sup>32</sup> The composition of the state was, of course, further altered in 1922, but that was after the period under discussion.

England had been settled, albeit that parliamentary democracy was limited. The formal constitutional instruments adopted abroad later that century were viewed by the English elite as the work of revolutionaries – and England had done with revolutions.<sup>33</sup> Subsequent constitutional change, including the creation of Great Britain and later of the United Kingdom, and the extension of parliamentary democracy, could be and were achieved through ordinary exercises of parliamentary sovereignty, that is through the passage of ordinary legislation.<sup>34</sup>

Yet what may be seen now as a misalignment between, on the one hand, seventeenth and eighteenth century English political history and, on the other, the development of ideas about constitution-making was to be exacerbated by parliamentary developments in the nineteenth century. The party whip system ensured with increasing effectiveness that each political party in the House of Commons was loyal to its leaders and malleable. The absence of restraining constitutional rules was highly convenient for successive British Governments, which knew that they were able to deliver whatever they had promised in their election manifestos (and more) without having to make sure that their commitments were consistent with superior legal rules, and having to abandon any which were not. It is not too cynical to say that the absence of a codified constitution – which would be likely to limit the powers of Ministers and Parliament – came to be seen as agreeable to modern Governments: why should they risk that power by embarking on the search for a limiting constitution?<sup>35</sup> Now politicians might find the argument a touch embarrassing expressed in that way, and it can be cast very differently. A codified constitution, it can be asserted, can be undemocratic, unlike the British arrangement which is wholly democratic. A political party can present its wares to the electorate at a General Election: if sufficient voters buy them, the resulting Government can cause Parliament to give legal force to them.<sup>36</sup> This is the majoritarian argument writ large: that which most voters want they must be given, and no constitution must prevent it. By contrast, if the United Kingdom were to have a constitutional code which restricted the ability of the parties to offer exactly what they wished, then some policies might only be brought about if a constitutional amendment could be carried – a process which in most constitutions is notoriously hard to achieve.<sup>37</sup> For instance, it might have been that some of the late Conservative Government's policies could not, through ordinary legislation,

---

<sup>33</sup> See generally Linda Colley, *Britons: Forging the Nation 1707–1837* (1992), chapter 4.

<sup>34</sup> The term ordinary, or simple, legislation is used here to denote legislation enacted by the normal legislative process, as distinct from legislation designed to amend a constitution and which usually requires some form of special process.

<sup>35</sup> This worry coloured Conservative and Labour attitudes to the incorporation of the European Convention on Human Rights. The Labour Party was concerned initially that the Convention might affect its ability to nationalize industry. The party's attitude to incorporation did not alter until the 1990s.

<sup>36</sup> It is true that Parliamentary Counsel were directed to ensure that Bills were consistent with the European Convention on Human Rights. Parliament's sovereignty remains – at least in strict legal form – after the passage of the Human Rights Act (and related measures in Scotland, Wales, and Northern Ireland). But see note 76.

<sup>37</sup> See note 40.

have been implemented, such as the abolition of tiers of local government;<sup>38</sup> nor might the present Labour Government have been able, by ordinary legislation, to have put into place most of its great constitutional reform programme. In that theoretical and alternative constitutional world those Governments might well have had to crank into operation the amendment mechanism which was provided, whether referendums<sup>39</sup> or special parliamentary majorities.<sup>40</sup>

Now that defence of the status quo is based on the assumption that a codified United Kingdom constitution would *necessarily* involve significant limitations on government. Such limitations are generally considered to be desirable. But it would be possible to write a constitution for the United Kingdom which broadly preserved the balance of powers obtaining before its adoption. As such it would be conservative codification, a legal restatement of the constitutional status quo ante which did not alter its main provisions. The same point applies in relation to concerns about entrenchment. There is no ineluctable reason why a constitution must be entrenched against easy amendment or repeal, although again normally they are. It all depends on what decisions in principle are taken and what the resulting constitution prescribes: there is, of course, no template of a model constitution which must be followed slavishly. Once that fairly obvious fact has been asserted opponents of codification of the British constitution sometimes then switch the argument about entrenchment. They say that a written constitution is only worth having if it is entrenched, and then they assert the old point that it would be legally impossible to entrench a British constitution, given the unique nature of parliamentary sovereignty in the United Kingdom.<sup>41</sup> In that case (the argument runs) what would be the point of subjecting the political process to the great effort of codifying an ancient constitutional settlement when the result could be altered by any Parliament through ordinary legislation at the behest of a subsequent Government? Attempts have been made to counter this canard:<sup>42</sup> there are at least five ways through the constitutional conundrum.<sup>43</sup> Indeed, in the contemporary political context

---

<sup>38</sup> The Liberal Democrats would entrench local power in their proposed constitution: *Reforming Governance in the UK*, para. 2.2.2.

<sup>39</sup> The Labour Government offered referendums on devolution to Scotland, Wales, and Northern Ireland, and to London, although it was not, of course, constitutionally required to do so; but no referendum was offered, *eg*, on House of Lords reform or the incorporation of the European Convention on Human Rights.

<sup>40</sup> Typically the majority required may be a minimum of two-thirds of the membership of the relevant chamber of the legislature, as is the case in Germany (Basic Law for the Federal Republic of Germany, article 79(2)) and the United States of America (Constitution, article V). Even with its 179-seat majority, the Labour Government would be over 40 seats short of such a requirement in the House of Commons, and has had no majority at all in the House of Lords.

<sup>41</sup> For an excellent survey of recent developments in the doctrine see A.W. Bradley, "The Sovereignty of Parliament – Form or Substance?" in J. Jowell and D. Oliver, *The Changing Constitution* (4th ed, 2000).

<sup>42</sup> They are summarized, and my own suggestions to that end are made, in R. Brazier, *Constitutional Reform* (2nd ed, 1998), pp 149–156.

<sup>43</sup> They include imposing a legal requirement on Ministers that they declare if any Bill would be incompatible with the constitution (*cf* the Human Rights Act 1998, s 19); or introducing an entrenchment mechanism and relying on Parliament to consider itself honour-bound to follow it; or using various legislative techniques

the Labour Government's principal constitutional measures enjoy a form of protection, at least from possible assault by a non-Labour Government. No political party is likely to appeal to the voters with the battle-cries of "Abolish the Scottish Parliament, repeal the Human Rights Act, restore the hereditary peers!"<sup>44</sup> Those, and other measures, enjoy the sanctity of the populist appeal represented by such things as the extension of national aspirations, or the protection of civil liberties, or the abolition of privilege. The Conservative Party has acknowledged that political entrenchment by, in effect, guaranteeing that the essence of those dispositions would remain undisturbed by a Conservative Government.<sup>45</sup>

The reluctance of the Labour and Conservative Parties to embrace full-blown constitutional codification does not seem to be based on concerns about the methodology which would be appropriate to the enterprise.<sup>46</sup> Neither party has articulated concerns about how a code would be produced. But it is a vitally-important question which must be considered in this context. In part this is an issue of mechanics: how would a draft be arrived at, and how would it be approved? Resort could be had to an independent body which could prepare a text,<sup>47</sup> or to a specially-elected constituent assembly of some

---

(such as the doctrine of implied repeal, or a direction to the judges to interpret legislation compatibly with the constitution, if possible (*cf* the Human Rights Act 1998, s 3)); and so on. Sir William Wade has suggested the simple idea of requiring all judges to take a new judicial oath which would oblige them to enforce an entrenchment provision: *Constitutional Fundamentals* (1989), chapter 3.

<sup>44</sup> Perhaps from caution the rather weaker position of the Welsh Assembly should be mentioned. Given that, on a turnout of only 51.3%, the people of Wales voted by only 50.3% to 49.7% in favour of the Assembly, it did not start its life with the same undeniable popular support as its Scottish or Northern Irish counterparts. It is conceivable that the Welsh Assembly may not survive.

<sup>45</sup> This was the position taken by William Hague early in his leadership of the party, and confirmed recently: see his speeches "Change and Tradition" (Conservative Central Office, 1998) and "A Conservative View of Constitutional Change" (Conservative Central Office, 2000). He has given notice in that latter speech, however, that the Conservative Party will keep a close eye on the operation of the Human Rights Act, which he fears will undermine Parliament and give the judiciary too much power.

<sup>46</sup> The Liberal Democrats have considered this question: see especially *Here We Stand: Proposals for Modernizing Britain's Democracy* (Liberal Democrat Federal White Paper No 6, 1993).

<sup>47</sup> A Royal Commission would be the obvious vehicle: the Australian Constitutional Commission would provide an apt model: see note 84.

kind,<sup>48</sup> or the task could even be done within government.<sup>49</sup> Once a text had been produced it could then be adopted by Parliament alone, although there would be a natural expectation (given in particular the use of referendums since 1997) that a national referendum would be held.<sup>50</sup> While that mechanical question is very important, the more significant issue is rather different. Ideally a national constitution should be brought forth by national consensus, itself forged by a national purpose resulting from, for instance, the recognition that fundamental constitutional change is necessary,<sup>51</sup> or the adoption of a new settlement on gaining independence, or the renewal of a state after collapse,<sup>52</sup> or the confirmation of a fundamental change in the basis of the state.<sup>53</sup> Through broad consensus among the people and political parties in a state the text should achieve a legitimacy which is denied to legislation passed by any transient parliamentary majority, and it should have greater durability, too. Similarly, the new constitution should achieve a special place in the legal system, marked out from other laws; any proposed changes to it will be recognized as raising constitutional, and not just political, issues; and, through entrenchment, it may be made legally more difficult to alter it. The paradigm case is that of the Constitution of the United States of America.<sup>54</sup> It is my view that constitution-making *ought* to proceed by consensus if possible.<sup>55</sup> But I am forced to acknowledge that no such national consensus or national purpose is likely to emerge in foreseeable circumstances in the United Kingdom.<sup>56</sup> The political parties disagree on matters which would be the bases for crucial parts of the text. The Conservative, Labour and Liberal Democrat Parties disagree, for example, on the appropriate voting system for the House of Commons;<sup>57</sup> the

---

<sup>48</sup> Constituent assemblies, elected especially to draft a new constitution for a state, are a common device when a whole new constitution is required, rather than just reconsideration of part of an existing constitution.

<sup>49</sup> The fundamental objections to such a course are that it would not be seen as open, inclusive, transparent, or cross-party.

<sup>50</sup> Approval of constitutional change by referendums is a common feature of national constitutions, especially in continental Europe and in several Commonwealth states, including Australia.

<sup>51</sup> The adoption of a new South African Constitution post-apartheid is an example of that.

<sup>52</sup> As in France in 1958 following the collapse of the Fourth Republic.

<sup>53</sup> Such as the joining of two states into one, as in the case of Malaysia in 1963, and Tanzania in 1964.

<sup>54</sup> Indeed, in the United States respect for the Constitution has, for many, become reverence. That makes amendment of it even more difficult to achieve than the formal amendment mechanism implies.

<sup>55</sup> For the argument see Brazier, *op cit* note 42, chapter 2.

<sup>56</sup> It is possible that a Government, minded to move towards constitutional codification, might seek all-party talks about it, but all-party agreement would be another matter.

<sup>57</sup> The Liberal Democrats remain wedded to the goal of STV (see *Reforming Governance in the UK*, para 2.2.6). The Conservatives will defend first past the post in the last ditch. The Labour Government remains committed to the holding of a referendum before any change is made, but it will wait for the other voting systems introduced in the United Kingdom since 1997 to become familiar, and will allow time for all their consequences to be felt; consultations within the party disclosed “serious concerns” about the Jenkins Commission’s AV–Top-up system

Conservatives opposed reform of the House of Lords, and now that the first stage of it has been completed all the parties have different views on what proportion of the replacement body should be elected;<sup>58</sup> the Conservatives oppose further devolution to England,<sup>59</sup> whereas the Labour Government is taking it forward, slowly, while the Liberal Democrats cherish the ideal of a federal United Kingdom; the Liberal Democrats want a reduction in the constitutional power of the Monarch, but the other two parties do not; and so on. It is of course true that there has been much common ground between Labour and the Liberal Democrats since the mid-1990s on constitutional reform, leading to a joint body which published an agreed programme in 1997;<sup>60</sup> and this co-operation carried over into the new Labour Government in the form of an unprecedented Joint Consultative Committee of the Cabinet on which Liberal Democrats sat with senior Ministers.<sup>61</sup> But the question of a codified constitution does not appear to be one that has engaged them. That which still divides the three main political parties would make the sort of political consensus that I have described unachievable.<sup>62</sup>

But might there be a fall-back, or second-best, position? Could the ideal of a broadly-based acceptance of a text be brought about despite the divergence of views between the main political strands in the United Kingdom? The manner of adoption of the Constitution of the Fifth French Republic is instructive in this context.<sup>63</sup> It was drafted largely to reflect the wishes of Charles de Gaulle in a body in which the representatives of the parties of the right were dominant. That draft was opposed by the Communists and by some Socialists, particularly on the ground that, unlike the Constitution of the Fourth Republic, the balance of power would be tipped decisively in favour a strong executive at the expense of a weaker legislature. In the subsequent national referendum held on the text some 79% of the French

---

(see *Building a Future for All*, p 159). Rumour has it that the choice to be offered will be between the status quo and the straight alternative vote.

<sup>58</sup> The Liberal Democrats want to see an elected Senate (*Reforming Governance in the UK*, para 3.4); the Labour Government prefers a relatively small elected element (65 members) in an otherwise nominated second chamber (*Building a Future for All*, p 157); the Conservatives want a larger elected element than Labour (see William Hague, "A Conservative View of Constitutional Change").

<sup>59</sup> They propose "English votes for English laws" at Westminster as the answer to the West Lothian question, that is that MPs representing English and Welsh constituencies alone should vote on Bills affecting England and Wales only (Hague, *ibid*).

<sup>60</sup> Report of the Joint Consultative Committee on Constitutional Reform (Labour Party and the Liberal Democrats, 1997).

<sup>61</sup> According to Sir Paddy Ashdown that Joint Consultative Committee was an idea proposed by one of his advisers and suggested by Ashdown to Tony Blair, an idea which the new Prime Minister accepted. Indeed, according to Ashdown he and Tony Blair agreed until the day of the 1997 General Election that had Labour emerged as a minority party or one with only a small overall majority there would have been a Labour-Liberal Democrat coalition Government, an idea from which they both shrank at the last minute. See Paddy Ashdown, *The Ashdown Diaries* (2000), pp 493 *et seq*.

<sup>62</sup> See further Brazier, *op cit* note 42, pp 5–7.

<sup>63</sup> John Bell, *French Constitutional Law* (1992), chapter 1. For the political context as seen by a biographer of de Gaulle see Jean Lacouture, *De Gaulle: The Ruler 1945–1970* (English ed, 1991), pp 193–206.

people who voted approved it. When Francois Mitterand was elected some twenty years later as the first Socialist President of the Fifth Republic he made no attempt to alter the fundamentals of the Gaullist Constitution, which remains in its essentials as it was at its adoption over forty years ago. It could be argued that that Constitution had achieved the consensus in the referendum which politicians had failed to secure during the writing of it. That is a possible model for the adoption of a new Constitution of the United Kingdom. Those who opposed the draft might accept defeat gracefully, falling in with the people's wish if it were that the text should be adopted, just as happened in France.<sup>64</sup> Indeed, there is a modern British analogy for such acquiescence: this is what the Conservative Party has done since 1997, accepting not only the Labour Government's constitutional changes which had been approved at referendums but also those that had not been. The Conservatives fought that Election as determined champions of the then status quo,<sup>65</sup> which was a principled stance which had been taken by the party since it took its modern form in the nineteenth century. But they recognized after the Election that they had lost the argument.

Such a neat solution to the search for consensus, however, omits a possible prior political decision by the main Opposition party. Might it not so oppose the codification exercise that it would refuse to take any part in the process? Might it boycott the search for a text, whether that quest was to be conducted through Parliament itself or through a specially-convened commission or elected constituent assembly? After all, that is precisely what the Conservative Party, together with the Scottish Nationalists, did when they were invited to join the Scottish Constitutional Convention which went on to write detailed plans for what became the Scottish Parliament.<sup>66</sup> Indeed, Conservative-Labour co-operation on constitutional matters has not been seen since 1936, when Stanley Baldwin ensured that all three party leaders took the same approach towards the abdication crisis – although wherever possible all Prime Ministers have tried to ensure that the constitutional problems of Northern Ireland have been approached on an all-party basis.<sup>67</sup> A refusal to join a codification exercise would preserve the party's ability to fight the text in the last ditch, if necessary, but whether to do so would be a matter of political judgement. It would retain the purity of its opposition: but it would lose any ability to influence the resulting text, which for all the party could know might prove acceptable to voters.

The issue of whether to codify the United Kingdom constitution inevitably raises the question of what would be done in that process with constitutional

---

<sup>64</sup> But it has been said that the 1975 referendum on continued membership of the European Community did not cause all those on the losing side to accept the result with good grace: Dawn Oliver, *Government in the United Kingdom* (1991), p 108. Many Eurosceptics still oppose membership, and there remain gradations of opposition to the European Union.

<sup>65</sup> The essence of their case was that the constitution was working perfectly adequately, and that as and when a problem was identified it could be corrected by legislation passed for the purpose.

<sup>66</sup> McFadden, "The Scottish Constitutional Convention" [1995] *PL* 215.

<sup>67</sup> Michael Heseltine offered all-party talks on a replacement for the poll tax, but Labour refused to take part: see Michael Heseltine, *Life in the Jungle* (2000), pp 388–389.

conventions. This is a particular problem for the United Kingdom because of the heavy reliance which is placed on those non-legal rules, although even written constitutions attract conventions to them. If a codified constitution for the United Kingdom were to be embarked on a number of possibilities would present themselves to deal with the conventions.<sup>68</sup> The easiest by far would be to leave them (or at least most of them) outside the code, so that they would continue to enjoy the same status and functions as now. To the extent that any existing convention was later discovered through experience to be incompatible with the new constitution, it would disappear just as any redundant convention disappears. The principal drawback with such a solution, however, is that the present disadvantages of constitutional conventions – imprecision, the room for disagreement whether a convention exists and if so what it ordains, and inaccessibility – would remain. Alternatively, some of the most important conventional rules could be incorporated into the constitutional code, leaving others outside it. Again, in theory all the principal conventional rules could be reduced to rules of law (whether in the constitutional code itself or in statute). But that would be unwise: it would introduce certainty while sacrificing the flexibility which is rightly claimed as an advantage of constitutional conventions, and it would also open the door to justiciability of issues many of which are overwhelmingly political and not suited to judicial intervention.<sup>69</sup> Lastly, therefore, some other authoritative, but non-legal, statement might be made of the major United Kingdom constitutional conventions. That would be my preferred option.<sup>70</sup> This is what was done in Australia, which has a formal but non-justiciable statement of the main constitutional conventions concerning federal government.<sup>71</sup> There is no dearth of answers to the question of what to do with conventional rules in any constitutional codification process, and the conventions do not erect a barrier to such an enterprise.

#### IV. PROSPECTS FOR A NEW CODE

The Labour Party is the odds-on favourite to win the forthcoming General Election. For that reason its likely attitude to a grand project of working towards a constitutional code for the United Kingdom is clearly worth examining more closely.

As has been indicated, there are undoubtedly those in the Labour Party and the Government who think that, shortly put, “We have done enough constitutional reform”. Certainly, the party cannot be accused of giving insufficient priority, in terms either of parliamentary time or of parliamentary

---

<sup>68</sup> See Brazier, “Enacting a Constitution”, 112–113.

<sup>69</sup> There is an important precedent in which the judiciary recognized that some matters are best left in the political arena rather than being subjected to judicial review: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (aspects of the royal prerogative: national security, and matters such as the dissolution of Parliament and the grant of honours).

<sup>70</sup> Brazier, *op cit* note 42, pp 27–28.

<sup>71</sup> Sampford, “‘Recognize and Declare’: An Australian Experiment in Codifying Conventions” (1987) 7 *Oxford Journal of Legal Studies* 369. In 1983, 33 conventions were formally declared in writing. Inevitably the statements of some of the conventions were more helpful than others.

priority, to constitutional change.<sup>72</sup> This Government already has a place in the constitutional history of the United Kingdom for producing within a few years of one Parliament more constitutional law of basic importance than any other Government or Parliament before it. Even those who have opposed the substance of that record must give credit to the Government for according constitutional affairs the serious consideration which they deserve. There are, too, Labour people who believe, rather grudgingly, that constitutional reform has enjoyed the place it has in the work of the present Labour Government partly as a legacy of John Smith's leadership,<sup>73</sup> especially in relation to devolution, and they will probably think that any debt to him has been fully paid already. There is also the view that enough is enough simply because, in terms of party advantage, some of the changes have backfired, and that it would have been better to have left some of the old constitutional rules alone. It is clearly the case that the Labour Party has ceded political power away from Westminster, and that it has not done well wherever the voting system has been altered from first past the post to any more proportional system. Not only has legislative authority been "lost" to Edinburgh and Cardiff,<sup>74</sup> but the party has had to form coalitions with the Liberal Democrats in the Scottish Parliament and in the Welsh Assembly (having failed to keep a minority Labour administration going in Cardiff), all thanks to the use of the additional member system of elections.<sup>75</sup> The Government's European Parliamentary Elections Act 1999 resulted in the Conservatives doing well in the elections of that year under the regional list system. The Government's candidate for London Mayor was trounced in part because of the supplementary vote provided under the Greater London Authority Act 1999. Parliament itself will lose further power – this time to the judges – as a result of the Human Rights Act.<sup>76</sup>

But even Ministers who might wish to avoid further constitutional change will have to accept a number of other constitutional initiatives in the next Parliament. Stage two of Lords reform will be controversial both inter-party and intra-party, and significant amounts of parliamentary time will be needed for the legislation.<sup>77</sup> There may, too, have to be debates about, and possibly

---

<sup>72</sup> Indeed, the first Bill introduced into Parliament by the new Labour Government in 1997 was the Referendums (Scotland and Wales) Bill.

<sup>73</sup> He was passionately committed to devolution, and became a champion of the incorporation of the European Convention on Human Rights.

<sup>74</sup> This sort of analysis does not apply to Northern Ireland, for all the main London parties have accepted that some form of devolution of power to Belfast is essential.

<sup>75</sup> Scotland Act 1998, ss 1, 2 and Schedule 1; Government of Wales Act 1998, ss 1, 2 and Schedule 1. Proportional representation was well-known in Northern Ireland, and the use of it for elections to the Northern Ireland Assembly was unexceptional as well as essential.

<sup>76</sup> Although declarations of incompatibility are only advisory, in practice the Government will be under considerable political pressure to legislate to make the law compatible with declared Convention rights. Perhaps parliamentary sovereignty in this context has been passed, in effect, to the judges by sleight of hand under the regime adopted in the Human Rights Act.

<sup>77</sup> The legislation will be preceded by a joint select committee of both Houses. The Government started negotiating its terms of reference with the Opposition and other parties in the summer of 2000, but no agreement was reached before the end of the 1999–2000 session. The Government says that it will proceed on the basis

legislation to provide for, a referendum on a different voting system for Westminster.<sup>78</sup> Depending on circumstances, legislation might also be required to allow for a referendum on whether the euro should be adopted.<sup>79</sup> Accordingly, a new Labour Government, whether certain Ministers liked it or not, would have a significant constitutional reform agenda before it. That would mean that a constitutional codification project would have to compete with unavoidable constitutional work. That said, no legislation about a new constitution would be needed before, at the earliest, late on in the next Parliament, or more likely until a subsequent Parliament, because of the preparatory work which would have to precede it.<sup>80</sup>

Any likely codified constitution would probably contain provisions which would be inconvenient for any Government. Of course, this point is wholly dependent on what went into the text, but it seems more likely that if the United Kingdom went back to first principles<sup>81</sup> there would be some transfer of power away from the central executive. Take, for instance, the matter of the royal prerogative.<sup>82</sup> It is notorious that many powers exercised by Ministers are prerogative-based, and that Parliament has precious little control over the use of such powers. Is it credible that a codification would confirm that massive accretion of power in the hands of the Government, without at the very least the introduction of greater democratic control?<sup>83</sup> The analysis of the current situation which a codification would require would at the very least further expose this imbalance of authority and require Ministers to try to defend that which is difficult to defend. That would be uncomfortable for the Government, and thus for a likely Labour Government in its second term.

Over any suggestion of a full-blown codification would be cast the prudent eyes of the Treasury. Accurate costings are impossible to suggest, for they would depend on exactly how the process was to be conducted. If, for example, something along the lines of the work of the Australian Constitutional Commission<sup>84</sup> were to be employed to do the detailed work on

---

of consensus and consultation, and that the timing of further progress will depend on the outcome of it: *Building a Future for All*, p 157.

<sup>78</sup> See note 57.

<sup>79</sup> See note 87.

<sup>80</sup> That point will be looked at shortly.

<sup>81</sup> It is perhaps more accurate to speak of addressing first principles for the first time, given that at no stage in the constitutional development of the United Kingdom has any comprehensive consideration of the constitution been undertaken.

<sup>82</sup> See A. Tomkins, "Crown Privileges" and R. Brazier, "Constitutional Reform and the Crown" in M. Sunkin and S. Payne (eds), *The Nature of the Crown* (1999); R. Blackburn and R. Plant, "Monarchy and the Royal Prerogative" in Blackburn and Plant (eds), *Constitutional Reform: The Labour Government's Constitutional Reform Agenda* (1999). For a ministerial defence of the use by Governments of the royal prerogative see 223 HC Debs 489–494 (21 April 1993).

<sup>83</sup> Two existing drafts of a possible United Kingdom Constitution would deal with prerogative powers by (i) making the proposed new text the sole source of power in the state, (ii) then conferring specific powers on (for example) the head of state or the Prime Minister, and then (iii) abolishing the prerogative as a source of legal authority. See Institute of Public Policy Research, *A Written Constitution for the United Kingdom* (1993), article 1; Liberal Democrats, *Here We Stand*.

<sup>84</sup> Australian Constitutional Commission, *Final Report* (1988).

a possible draft, involving the appointment of an independent body, consulting widely, the use of expert committees, publication of consultation documents, and consequent referendums, then millions of pounds would be needed.

It is easy to see why some commentators have viewed the adoption of a codified United Kingdom constitution as unlikely.<sup>85</sup> Some people have argued against trying to achieve it because doing so would divert energies from the reform of particular constitutional rules, which they say is a more urgent cause.<sup>86</sup> That second point – quite right when deployed even a few years ago – has been weakened by Labour’s constitution-making since 1997. The Labour Government *has* devoted energy to specific projects of constitutional change where it judged the most necessary work was needed. And so how, in today’s circumstances, can the argument for a codified constitution be expressed?

Once again it makes the most practical sense to consider that question primarily from the perspective of the Government: what, politically, might Labour have to gain from a commitment to such a grand project? First, such an initiative would be an historic one, confirming the Labour Government’s modernizing credentials. For the first time a Government would promise a fundamental review of the historic constitution, free from the exigencies of awkward political events that heretofore have forced piecemeal changes. In the process some of the Liberal Democrats’ clothes would be stolen, and the Conservative Party would receive a fresh challenge to its constitutional conservatism. Secondly, such a policy would not in fact commit the Government to very much in practical terms. It would be a long time before Ministers had to react to any result of a comprehensive review. Because of the scale of the enterprise no action would be required to give effect to any recommendations for a number of years. And it must always be kept in mind that very few advisory inquiries bind a Government for political reasons to act on their recommendations. Depending on the methodology, no text might be ready for public or parliamentary consideration even in the next Parliament; if the drafting were to be conducted outside Parliament the result would have to be assessed by Parliament, whether by a joint select committee of both Houses or otherwise. Then there might be a referendum on the text, but even that might be made conditional on the Government feeling able to commend the draft to the nation, rather like Ministers’ attitude to the possible adoption of the euro.<sup>87</sup> A referendum would require legislation to provide for it. In short, a commitment to see what a codified

---

<sup>85</sup> For instance, Dawn Oliver, *Government in the United Kingdom*, pp 200–201: “The reality of the matter is that the adoption of a Constitution is unlikely to become politically attractive for many years, if at all. . .”; Robert Hazell, “The New Constitutional Settlement” in Hazell (ed), *Constitutional Futures: The History of the Next Ten Years* (1999), pp 239–240: “[The Labour Government’s constitutional reforms] amount to a series of steps towards a written constitution, . . . [but they are] not likely to result in a written constitution, in the sense of a single codified document.”

<sup>86</sup> For example, Oliver, *ibid*.

<sup>87</sup> The Government describes the adoption of the euro as being subject to triple approval, of the Government, Parliament, and the people (through a national referendum).

United Kingdom constitution might look like would require the Government to agree to little more in practical terms than to initiate an inquiry and to find out; if the result were not to Ministers' tastes they could decline to take the matter any further. A third party-political point is that Labour Ministers would avert any danger that the Conservative Party might outflank the Government and make such a project its own.<sup>88</sup> While such a move by the Conservatives might seem unlikely, it might be adopted in part as a desire to limit the power of government – a policy that could appear increasingly attractive the longer a Labour Government was in power. A final party point is that, while an outright Labour victory at the next General Election appears likely, support from the Liberal Democrats might be desirable or even essential if there were a close result or a hung Parliament. The Liberal Democrats have already embraced the codification ideal, and they would find such a commitment by Labour attractive, although admittedly not as attractive as moves towards a more proportional voting system for Parliament.

For the sake of completeness, it can be noted that membership of the European Union is unlikely to affect the prospects for a codified United Kingdom constitution. In making up its mind whether to take such a project further, the European Union will be a neutral factor for the Government. European Union membership has not required, and will not require, member states to do things to the *form* of their national constitutions that they would not otherwise have done. Of course, making European Community law sovereign over national law was a supremely important matter, in the United Kingdom as elsewhere. Other laws have been given force in member states as a consequence of membership, but by and large they are not of a constitutional character.<sup>89</sup> The acceptance of a single currency, too, has been a major constitutional matter – and an unprecedented one, given that sovereign states who have adopted it have harmonized their money before they have adopted a common constitution, thus putting economics before politics.<sup>90</sup> But membership of the European Union is unlikely to require any state to alter the format of its national constitution: the United Kingdom is not likely to move towards a codified constitution solely or even primarily as a result of that membership.

The old arguments about whether the British constitution should be codified, or whether its sources should be left just as history has made them, are well-

---

<sup>88</sup> There is no evidence currently in the public domain that the Conservative Party would initiate such a policy. But there is an intriguing passage in William Hague's speech "A Conservative View of Constitutional Change". In the context of wishing to reserve certain powers for the British Parliament as against the European Union he spoke of writing into law the powers and rights we hold today and which would be reserved permanently to the United Kingdom. That could be done by amendments to the European Communities Act 1972; it could hint at something more radical.

<sup>89</sup> There are examples of new constitutional laws which have been adopted to reflect the obligations of membership, such as providing for a common system to elect Members of the European Parliament.

<sup>90</sup> This is why comparisons with the states of the United States enjoying a common currency with benefits for all of them is fallacious: federation preceded the acceptance of the dollar, not the other way round.

known, and they remain. But those arguments were rebalanced somewhat at the turn of the last century. A reforming Government altered many constitutional rules, and thereby added to the statute-base of the British constitution. In doing that, significant parts of any constitution – such as a Bill of Rights, and the legal delineation of power between different geographic parts of the state – have been added to the constitution of the United Kingdom. In doing all that, the apparent taboo which had seemed to prevent British Governments from making planned changes to the constitution was broken. Someone contemplating a wager on whether the United Kingdom might give itself a codified constitution in the foreseeable future would have to weigh the historical evidence against recent developments such as those before deciding whether to risk a bet. The odds are still against a new constitutional code, but perhaps it can be said that they have shortened.

## CO-OWNERSHIP OF MATRIMONIAL PROPERTY: RADICAL PROPOSALS FOR REFORM

*Lorna Fox, Lecturer in Law, Queen's University Belfast\**

### 1. INTRODUCTION

In December 2000, the Law Reform Advisory Committee for Northern Ireland (the LRAC) issued its Final Report on *Matrimonial Property*.<sup>1</sup> This paper proposed a scheme of radical and far-reaching reform in respect of the law governing the ownership of the family home, and of household goods and housekeeping money, between spouses and cohabitants. The LRAC's Final Report recommended that, in respect of the joint residence of spouses or 'qualifying cohabitants',<sup>2</sup>

Where one transfers property to the other, or one transfers property to both, or where one purchases property or both purchase property, the beneficial ownership of that property will vest in both spouses or cohabitants as joint tenants unless the parties agree otherwise expressly *in writing*.<sup>3</sup>

Similar proposals were lodged in respect of housekeeping money and household goods.<sup>4</sup> Although the concept of statutory co-ownership of matrimonial property has been raised as a possible policy alternative in England and Wales and in the Republic of Ireland, initiatives to introduce

---

\* I would like to thank the Editor and the anonymous referee, both of whom made helpful comments on an earlier draft. I am also grateful to Judith Fox, who discussed with me some of the issues considered in this article. All property in errors remains with the author.

<sup>1</sup> *Matrimonial Property*, Law Reform Advisory Committee Report No 10, (LRAC No 8, 2000), hereafter 'Final Report'. This report followed, and should be read in conjunction with, the Committee's 1999 Discussion Paper on the subject, Discussion Paper No 5, Law Reform Advisory Committee for Northern Ireland, (1999), hereafter 'The Discussion Paper'.

<sup>2</sup> The Final Report defined 'qualifying cohabitants' as partners who: ". . . (i) have been living together in the same household for at least a total of two years within the period of the three years preceding the property transaction effectively as husband and wife though not being married; or (ii) have had a child by the relationship and have been living together in the same household effectively as husband and wife though without being married."; Chapter 6, Recommendation 3. Although the Recommendations include property acquired by parties prior to becoming spouses whenever such property was acquired or transferred in contemplation of marriage for the purposes of their principal joint residence (Recommendation 2), the provisions only extend in the case of 'qualifying cohabitants' to include property acquired after the cohabitants have become qualifying cohabitants.

<sup>3</sup> See Final Report, Recommendations 1 and 3.

<sup>4</sup> Money transferred from one spouse to another, or used to buy property for common purposes would be jointly owned subject to a contrary intention on the part of either spouse, made known to the other spouse at the time of acquisition or transfer; see Final Report, Chapter 3 and Recommendations 4–7, also Discussion Paper, paras 6.8–6.9, 6.12–6.13. This article will focus on the implications of the proposals in respect of the joint residence.

statutory co-ownership between spouses in these jurisdictions have run aground. The Northern Ireland proposals, if enacted, would therefore represent a significant policy departure.

These Recommendations, if enacted, would not only have serious implications for the ownership of matrimonial assets, real and personal, between spouses and 'qualifying cohabitants', but would also affect dealings with third party creditors or purchasers concerning such property. This article considers the proposals of the LRAC, and the policy which its recommendations endeavour to promote. The comparison drawn by the Committee<sup>5</sup> between Northern Ireland and other Commonwealth jurisdictions will also be reviewed. This will be followed by analysis of comparable legislative initiatives in England and Wales and in Ireland, and the reasons for the rejection of these initiatives. Finally, the implications of the proposed Northern Ireland reforms will be assessed, in terms of both the ownership of matrimonial property between the partners themselves, and in respect of their dealings with third parties.

## **2. MATRIMONIAL PROPERTY – THE NORTHERN IRELAND PROPOSALS**

The LRAC has recommended that:

“ . . . in the case of a joint residence (or if the parties have more than one residence in the case of their primary residence) where the spouses are living together and:

one spouse transfers the property to the other;

one spouse transfers the property to both spouses jointly;

one spouse purchases the property; or

both spouses jointly purchase the property

the spouses should be entitled as joint tenants in equity to the beneficial interest in the property unless the parties agree otherwise in writing.”<sup>6</sup>

This principle is extended to include property acquired or transferred prior to the parties becoming spouses where the property is acquired or transferred in contemplation of marriage for the purposes of their principal joint residence.<sup>7</sup> The Report has also recommended that the same principle apply to 'qualifying cohabitants', so long as they are living together, and the property is acquired after the cohabitants become qualifying cohabitants.<sup>8</sup> Although based on proposals made in respect of statutory co-ownership of matrimonial assets by the English Law Commission in 1988,<sup>9</sup> the Northern Ireland Report goes much further than the antecedent English recommendations.

The Northern Ireland proposals are more radical than those recommended (but not yet adopted) in England and Wales, in two main respects. First, the

---

<sup>5</sup> See Discussion Paper, Chapter 4.

<sup>6</sup> Final Report, Recommendation 1.

<sup>7</sup> Final Report, Recommendation 2.

<sup>8</sup> See Final Report, Recommendation 3.

<sup>9</sup> *Family Law: Matrimonial Property*, Law Com No 175 (1988).

Northern Ireland proposals purport to affect not only property ownership between spouses, but also between ‘qualifying cohabitants’. ‘Qualifying cohabitants’ are defined in the Final Report as parties who:

“(a) have been living together in the same household for at least a total of two years within the period of the three years preceding the property transaction effectively as husband and wife though not married; or

(b) have had a child by the relationship and have been living together in the same household effectively as husband and wife though without being married.”

Furthermore, whilst the English Law Commission confined its recommendations to housekeeping money and household goods,<sup>10</sup> the Northern Ireland proposals encompass both the personal property of spouses and qualifying cohabitants, and their ‘joint residence’.

These proposals would clearly have a significant impact on both the ownership of property as between the partners,<sup>11</sup> and with regard to external dealings which concern matrimonial property and third party purchasers or creditors. This section therefore begins by considering the reasoning of the LRAC, and the arguments which the Committee has proffered in support of its proposals for the reform of matrimonial property.

### **(a) The reasoning of the LRAC: deficiencies of the present position**

When introducing the proposed reforms, the LRAC clearly identified the mischief at which the initiative was directed. The Committee expressed concern about the lack of legislative provision for the ‘special needs’ of spouses and cohabitants, and the fact that:

“[t]he ownership of the family home in Northern Ireland is governed by essentially the same principles as apply to the ownership of any other real property.”<sup>12</sup>

It was noted that while the court has power to re-distribute assets between *spouses* in divorce, nullity and judicial separation proceedings,<sup>13</sup> there is no judicial discretion to re-allocate property interests in respect of non-legal title holding cohabitants in the event of separation.<sup>14</sup> The LRAC was also

---

<sup>10</sup> See Law Com No 175 (1988), para 4.3.

<sup>11</sup> The term ‘partners’ will henceforth be used to refer to spouses and ‘qualifying cohabitants’.

<sup>12</sup> Final Report, para 2.1. See also Discussion Paper, para 3.1. “The *legal* ownership of land is determined by the names on the title deeds, in the case of unregistered land, and by the names appearing on the folio in the case of registered land. The *beneficial* ownership of land is determined in accordance with the principles of equity”; *ibid.*

<sup>13</sup> Matrimonial Causes (NI) Order 1978. See Final Report, para 2.7; Discussion Paper, para 3.7.

<sup>14</sup> “The adjustative powers of the Court in divorce and related proceedings under the Matrimonial Causes (NI) Order 1978 enable the Court to achieve a balanced and just result between the spouses in the event of the marriage being terminated. No such powers are available to the Court as between cohabitants. Thus in a

concerned about the property implications following the death of one partner when the family home is not co-owned, since Northern Ireland law does not presently provide that property should necessarily pass to the surviving partner on death.<sup>15</sup> Finally, while non-owning spouses were given a statutory right of occupation against their partner by the Family Law (Miscellaneous Provisions) (NI) Order 1984,<sup>16</sup> extended by the Family Homes and Domestic Violence (NI) Order 1998 to include cohabitants, the ‘matrimonial home rights’ conferred under this order are only effective against third parties if registered, and only *spouses* are entitled to *register* matrimonial home rights.<sup>17</sup> The Committee concluded that, for both spouses and cohabitants: “. . . there remain areas of potential injustice.”<sup>18</sup> It was suggested that the nature of property in the *family home* and other matrimonial assets justified the development of a special set of rules to govern its ownership; that: “. . . the home of a couple in a particular type of relationship. . .”<sup>19</sup> ought to be accorded a special status over other types of property.<sup>20</sup>

The Committee proceeded by considering the equitable principles which, in the absence of specific statutory provisions, currently govern the acquisition of ownership interests in matrimonial (and other) property. Since the decision of the Northern Ireland Court of Appeal in *McFarlane v McFarlane*<sup>21</sup> it has been firmly established that a non-legal title holder can only acquire an equitable interest in property<sup>22</sup> where he or she has made a direct contribution to the purchase price of that property, or where there has been some ‘agreement, arrangement or understanding’ that he or she would acquire an ownership interest, supported by ‘detriment’ in the form of direct or indirect contributions. The net result has been that, in the absence of some ‘agreement, arrangement or understanding’, non-financial contributions, such as those which might be made by a spouse or cohabitant in respect of caring for children of the relationship, or labour in the home, are not taken into

---

breakdown in their relationship the parties’ rights would be determined in accordance with the ordinary proprietary interests. . .”; Discussion Paper, para 4.3.

<sup>15</sup> “There exists no presumption that the family home is jointly owned by the husband and wife, let alone that such ownership is equal and that the home should devolve automatically to the survivor”; Discussion Paper, Preface, p iv; see also Preface to Final Report.

<sup>16</sup> The provisions of the Family Law (Miscellaneous Provisions) Order 1984 provided that a ‘non-owning spouse’ who had registered a right of occupation could retain occupation of the home against a purchaser from or creditor of the owning spouse.

<sup>17</sup> Family Homes and Domestic Violence (NI) Order 1998, Articles 5 and 6.

<sup>18</sup> Discussion Paper, Preface, p iv. The Committee added that: “One such area would be where a marriage has not broken down, but a third party, such as a creditor, seeks to enforce rights against the family home. In such circumstances the wife would require to establish an interest in accordance with the law as it now stands, otherwise her home and that of the entire family would be vulnerable”; *ibid.*

<sup>19</sup> See Preface, Final Report.

<sup>20</sup> The Committee added that: “There is also the argument that the nature of the property which is being considered – the family home and its contents – requires its ownership to be placed on a settled and equitable basis which is clear and known to all parties from the outset”; Discussion Paper, Preface, p iv.

<sup>21</sup> [1972]NI 59. This NI decision was endorsed by the House of Lords in *Lloyd’s Bank v Rosset* [1991]1 AC 107.

<sup>22</sup> Under a resulting or a constructive trust.

account by the court when assessing whether a beneficial interest has been acquired by a non-title holder.<sup>23</sup> Even where the non-legal title holder has made indirect financial contributions, for example, paying household bills, thereby enabling the legal title holder to apply his or her assets towards mortgage payments,<sup>24</sup> recognition of an interest in the property has depended upon proof of an ‘agreement, arrangement or understanding’. In the context of personal relationships, evidence of such agreement can often prove elusive.<sup>25</sup>

The Committee asserted that the existing law in relation to the acquisition of ownership interests in the matrimonial home: “. . . produces an unsatisfactory and unconvincing result.”<sup>26</sup> Aside from the general observation that “[t]he decisions [in *McFarlane v McFarlane* and *Lloyd’s Bank plc v Rosset*] are premised on the proposition that the question of beneficial ownership between spouses should be determined on the same basis as if they were strangers.”;<sup>27</sup> the Committee was concerned about the specific difficulties which this need for direct contributions or evidence of agreement presents in relation to matrimonial property, since:

“[t]he nature of the relationship between spouses and cohabitants differs from that between parties acting at arms length because it is of the very nature of such spousal and quasi-spousal relationships that the parties, while the relationship subsists, more frequently than not do not focus on the consequences of their actions.”<sup>28</sup>

The informality with which partners to a domestic relationship tend to arrange their affairs<sup>29</sup> was posited as a factor in support of developing

---

<sup>23</sup> Such factors may, however, influence the *extent* of any equitable interest, once the claim has been established; see *Midland Bank v Cooke* [1995]4 All ER 562.

<sup>24</sup> In *McFarlane v McFarlane*, *op cit*, the court recognised that: “. . . there can be no doubt that the wife, by keeping down the household expenses, and even more, by the services she rendered in connection with the insurance broking business, had made a substantial, if indirect, contribution to the balances out of which the two properties were purchased.”; *ibid*, at 65. Nevertheless, without an express agreement, arrangement or understanding, these indirect contributions did not support the acquisition of a beneficial interest in the property.

<sup>25</sup> This has led the courts, in some circumstances, to infer ‘agreement’ from somewhat tenuous facts, see *Eves v Eves* [1975]1 WLR 1338; *Grant v Edwards* [1986]Ch 638. In *Lloyd’s Bank plc v Rosset*, Lord Bridge commented that: “Spouses living in amity will not normally think it necessary to formulate or define their respective interests in property in any precise way. The expectation of parties to every happy marriage is that they will share the practical benefits of occupying the matrimonial home whoever owns it. But this is something quite distinct from sharing the beneficial interest in the property asset which the matrimonial home represents”; [1990]1 All ER 1111 at 1115.

<sup>26</sup> Discussion Paper, para 6.15.

<sup>27</sup> *Ibid*.

<sup>28</sup> *Ibid*.

<sup>29</sup> “It is a reality of life that parties normally enter into marriage or cohabitation relationship without any precise appreciation of the legal consequences of the relationship or on their property rights and this continues during the subsistence of the marriage”; *ibid*.

separate principles to govern the ownership of matrimonial property.<sup>30</sup> The Committee therefore proceeded to review the options for reform.

### **(b) The reasoning of the LRAC: Commonwealth comparisons**

The LRAC compared the present position in relation to matrimonial property law in Northern Ireland with the equitable principles which have been adopted in some other jurisdictions to govern the beneficial ownership of the family home.<sup>31</sup> The Committee focused on the more flexible means by which proprietary interests are acquired under trusts in the Republic of Ireland, Canada, Australia and New Zealand.<sup>32</sup> It was suggested that the slightly more flexible approach taken in Ireland,<sup>33</sup> and the remedial constructive trust which has been developed elsewhere in the Commonwealth,<sup>34</sup> enabled their courts to reach more satisfactory results in

<sup>30</sup> “The difference between spousal and quasi-spousal relationships on the one hand and other ordinary commercial and social relationships on the other calls for a difference of approach in relation to determining their intentions or to ascribing presumed or deemed intentions to them”; *ibid.*

<sup>31</sup> See Discussion Paper, Chapter Five.

<sup>32</sup> The Committee did not, however, examine the New Zealand experience of statutory co-ownership. The New Zealand legislature has implemented two separate models of statutory co-ownership in connection with matrimonial property. The Joint Family Homes Acts 1950 and 1964 introduced a scheme of statutory co-ownership between spouses, with additional protections against creditors. This legislation differed from the Northern Ireland proposals, however, as the co-ownership scheme was ‘opt-in’ rather than ‘opt-out’. Spouses were required to register their property as a joint family home in order to benefit from beneficial co-ownership and the other protections provided under the Acts. The failure of many spouses to take the positive step of registering their properties as joint family homes led to the introduction of an alternative scheme, in the Matrimonial Property Act 1976. Under the 1976 Act, the beneficial interest of all matrimonial properties (*ie*, that of spouses) whether registered or not, is jointly owned. A significant difference between this scheme, and that proposed in Northern Ireland, however, is that co-ownership under the New Zealand Matrimonial Property Act does not crystallise until the partners separate or one partner dies. Acquisition of a proprietary interest is delayed until the court makes an order recognising the parties’ joint interests. In this respect it is a ‘remedial’ form of statutory co-ownership. The New Zealand legislature is currently debating proposals to extend the automatic operation of the MPA to cohabitants and same-sex partners, by virtue of the De Facto Relationships (Property) Bill. It is suggested that the MPA 1976 will subsequently be known as the Relationships (Property) Act. See further, *Fisher on Matrimonial Property* (2<sup>nd</sup> ed, 1984, Wellington: Butterworth New Zealand) and looseleaf version. The LRAC did acknowledge that: “[s]everal state legislatures in Canada have moved from the traditional principle of the separation of property to a variety of systems involving some aspect of community of property”; Discussion Paper, para 5.4, but these systems were not considered by the Committee.

<sup>33</sup> The Discussion Paper noted that: “After *McC v McC* ([1986] ILRM 1) it appears that indirect contributions will give rise to an equity without agreement and it has been held that non-financial contributions to a husband’s business. . . or managing a block of rented flats. . . will give rise to an equity”; *ibid.*, para 5.2.

<sup>34</sup> The Discussion Paper referred, *inter alia*, to *Pettkus v Becker* [1980]2 SCR 834; [1980] 117 DLR (3d) 257. *Sorochan v Sorochan* [1986]2 SCR 36 and *Peter v Beblow* [1993]1 SCR 980 (Canada, unjust enrichment, see paras 5.4–5.10); *Baumgartner v Baumgartner* [1987]164 CLR 137; *Millar v Sutherland*

disputes involving the ownership of matrimonial property than the principles which currently govern the acquisition of interests in Northern Ireland. There are, however, some important distinctions to be made between the proposals put forward by the Committee for reform of the law in Northern Ireland, and the remedial constructive trust developed in the Commonwealth jurisdictions, and referred to in the Discussion Paper.

First, the Commonwealth approaches, whereby a non-owning partner can acquire an equitable interest in property under a constructive trust when the legal title holder has either acted unconscionably, or has been unjustly enriched at the expense of the non-legal title holder, generally involve some element of fault on the part of the legal title holder, and detriment suffered by the non-owning partner. The Commonwealth courts have taken account of indirect and/or labour contributions when assessing detriment. Nevertheless, a constructive trust will not arise unless certain criteria are met.<sup>35</sup> In the Commonwealth jurisprudence considered by the LRAC, there has remained some element of *quid pro quo* between the parties. Although criticisms of the Northern Ireland<sup>36</sup> approach have tended to focus on the lack of consideration given to indirect and labour contributions,<sup>37</sup> the Northern Ireland proposals have sidestepped the issue of contributions – direct, indirect or labour – altogether. Whilst in the Commonwealth examples cited it remains necessary for individual spouses or cohabitants to establish an interest under a constructive trust on a case-by-case basis,<sup>38</sup> the proposed reforms would confer property rights<sup>39</sup> on qualifying partners on the basis *only* of their relationship with the legal title holder. The LRAC has suggested that a joint beneficial interest should accrue to the non-owning spouse (or qualifying cohabitant), regardless of whether or not *any* contribution, direct, indirect or non-financial, is made by the non-owning

---

[1991]DFC 95; *Hibbertson v George* [1989]DFC 95 064 (Australia, unconscionability, see paras 5.11–5.14); *Hayward v Giordani* [1983]NZLR 140; *Gillies v Keogh* [1989]2 NZLR 327 (New Zealand, unjust enrichment, see paras 5.15–5.16).

<sup>35</sup> In Canada, and to some extent New Zealand, the courts have developed the constructive trust on the basis of ‘unjust enrichment’: “. . . an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment”; *Pettus v Becker* (1980)117 DLR (3d) 257 at 274, see also *Gillies v Keogh* [1989]2 NZLR 327, where the court also referred to ‘reasonable expectations’. In Australia, the focal point has been ‘unconscionability’: “. . . equity will not permit the other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him to do so”; *Muchinski v Dodds* [1985]160 CLR 583.

<sup>36</sup> And of the similar position in England and Wales, since the House of Lords followed the decision of the Northern Ireland Court of Appeal in *McFarlane v McFarlane* [1972]NI 59 in *Lloyd’s Bank v Rosset* [1991]1 AC 107.

<sup>37</sup> See, for example: “Acquiring an interest in another’s property”, Dixon, [1991] *Cambridge LJ* 38–40; “A woman’s work. . .”, Gardner, [1991] *MLR* 126–129; “*Lloyd’s Bank Plc v Rosset – McFarlane v McFarlane* revisited”; O’Hagan, [1991] *NILQ* 238–245; “The home: excuses and contributions (Parts 1&2)” (1995) 145 *NLJ* 6688 pp 423 *et seq.*; (1995) 145 *NLJ* 6689 pp 456 *et seq.*

<sup>38</sup> Albeit under more flexible equitable principles than those which have been applied in the Northern Ireland courts.

<sup>39</sup> In the absence of contrary agreement recorded in writing.

spouse or cohabitant. The basis of the proposed reforms is the *relationship* between the partners, rather than the conduct of one or both of them.

Another distinguishing factor rests with the *remedial* nature of the Commonwealth constructive trust. As a *remedial* rather than a substantive device, any trust arising under these principles does not take effect until the court declares its existence. The interest of a beneficiary under such trust does not therefore crystallise until the court recognises his or her claim. This is of particular importance in relation to dealings with third parties which have taken place prior to the litigation and which, under the remedial constructive trust, are not affected by the non-owning partner's claim. The Northern Ireland proposals, on the other hand, would involve the conferral of *substantive* property rights on spouses and qualifying cohabitants, which could affect the priority of third parties, thereby requiring them to investigate the possibility of such claims prior to engaging in any dealings involving matrimonial property.<sup>40</sup> In this respect, therefore, the Northern Ireland proposals would have a substantially different effect with regard to dealings with third parties in comparison with the Commonwealth examples considered in the Discussion Paper.

### **(c) The reasoning of the LRAC: the proposed solution for Northern Ireland**

The proposals of the LRAC are based on the recommendations of the English Law Commission in its 1988 report, '*Family Law: Matrimonial Property*'.<sup>41</sup> The Northern Ireland proposals, however, go much further than the Law Commission's 1988 recommendations,<sup>42</sup> which were confined to ownership of household goods,<sup>43</sup> and which applied only between spouses.

---

<sup>40</sup> Under the usual provisions, that is: Land Registration Act (NI) 1970, Schedule 5, para 15 for registered land; 'reasonable inspections and inquiries' for unregistered land. See below, section 4 (a).

<sup>41</sup> Law Com No 175 (1988). The Law Commission's 1988 proposals were in turn based on an earlier report, '*Third Report on Family Property: the Matrimonial Home (Co-ownership and Occupation Rights) and Household Goods*', Law Com No 86 (1978). See further below, section 3(a). The English Law Commission has approached issues of family property from a proprietary perspective since its first Working Paper and Report on Family Property, *A New Approach*, Law Com WP No 42 (1971) and Law Com No 52 (1973).

<sup>42</sup> That is, that: ". . . in future the purchase of property (with some exclusions) by one or both spouses for their joint use or benefit should give rise to joint ownership of that property subject to a contrary intention on the part of the purchasing spouse, known to the other spouse [and]. . . that the transfer of property by one spouse to the other for their joint use or benefit should give rise to joint ownership of that property subject to a contrary intention on the part of the transferring spouse, known to the other spouse."; Law Com No 175 (1988), para 5.1, 5.2.

<sup>43</sup> See Law Com No 175 (1988). The policy of the Law Commission in excluding real property was acknowledged by the LRAC, Discussion Paper, para 6.20, although the LRAC stated that it was: ". . . presently not convinced that these are compelling reasons to justify treating the joint residence differently from other property which would be covered by the recommended changes in the law which we provisionally propose in respect of personal property"; para 6.21. The exclusion of the family home by the English Law Commission in 1988 is considered further below, see section 3(a).

The inclusion of cohabitants is one of the more radical aspects of the Northern Ireland Report. Where property is transferred between cohabitants, or purchased by both *or by one cohabitant*, the beneficial interest will be vested in both partners as joint tenants unless they expressly agree otherwise in writing. The introduction of these recommendations would reverse the current position, whereby a cohabitant (or spouse) cannot acquire a proprietary interest in property without ‘opting-in’ to co-ownership either expressly<sup>44</sup> or impliedly.<sup>45</sup> The proposals set out in the LRAC’s Final Report would operate conversely, so that where property was acquired or transferred by one (or both) qualifying partner(s), both partners would become beneficial joint tenants unless they expressly agreed to the contrary.

The proposals, which operate to introduce joint beneficial ownership where A transfers property to B, or to A and B, would also remove the common law presumption of advancement when property is transferred from husband to wife.<sup>46</sup> The Committee described the presumption as outdated,<sup>47</sup> particularly with regard to its gender bias.<sup>48</sup> Furthermore, the Final Report recognised the potential difficulties presented by the presumption of advancement in respect of Article 5 of Protocol 7 of the European Convention on Human Rights.<sup>49</sup> The Committee considered whether to abolish the presumption, or to provide an equivalent presumption in favour of husbands, concluding that:

“In the light of our proposed recommendations which deal with many aspects of matrimonial property but exclude other assets such as business assets or secondary residence we consider that there no longer remains any pressing need to retain any presumption of advancement.”<sup>50</sup>

The policy of the LRAC’s proposals is, in this respect, very much in line with current thinking regarding the presumption of advancement. Although the presumption continues to apply in England and Wales, the English Law Commission recommended its abolition in 1988,<sup>51</sup> and the presumption has

---

<sup>44</sup> By taking joint legal title over the property, or expressly creating an interest under a trust.

<sup>45</sup> By agreeing, arranging or understanding that the ownership of the property is to be shared, or by direct financial contribution.

<sup>46</sup> Final Report, para 5.38.

<sup>47</sup> “The presumption of advancement is itself nowadays a somewhat fictional implication as indeed is a presumption of a resulting trust which contradicts the apparent legal title”; Discussion Paper, para 6.17.

<sup>48</sup> The Discussion Paper noted that: “[t]his presumption of advancement, which still applies, has been criticised as being an outdated inference of a fact which ‘an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era’”; para, 3.19; quoting Lord Diplock in *Pettitt v Pettitt* [1970]AC 777.

<sup>49</sup> Article 5 of Protocol No 7 provides (*inter alia*) that: “Spouses shall enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage, and in the event of its dissolution.” Although Protocol 7 has not yet been ratified, the Committee noted that since: “. . . the United Kingdom appears to wish to ratify the protocol any new law should comply with the protocol”; Final Report, para 5.38.

<sup>50</sup> Final Report, para 5.38.

<sup>51</sup> “We proposed in the working paper [*Transfer of Money between Spouses*, (1985), Law Com WP No 90] and our proposal was generally liked, that the presumption

been statutorily removed in both Australia and New Zealand.<sup>52</sup>

The decision to include ‘qualifying cohabitants’<sup>53</sup> within the scope of the reform initiative was based upon the Committee’s prediction that although: “. . . cohabiting relationships are not as common in Northern Ireland as in England and Wales and the vast majority of couples living together do so in a formal spousal relationship.”;<sup>54</sup> the increase in cohabiting relationships in other European Union states supported an inference that: “[t]he number of such relationships in Northern Ireland is likely to grow (with the consequence that that will have in relation to property disputes).”<sup>55</sup> The Committee, in formulating its policy towards cohabitants, considered the social arguments against extending the protections proposed for spouses to cohabitants, that is, that:

“. . . by applying those protections and drawing those inferences, society would or might be perceived as equating the cohabitation relationship with marriage, thereby further weakening the stable family unit which draws it (*sic*) full strength only from the married state. Society, it would be argued, would be placing cohabitation on the same moral and functional plane as marriage.”<sup>56</sup>

The LRAC assumed that ‘qualifying cohabitants’ could be regarded as: “. . . living in a committed and stable relationship to the extent of sharing their lives and pooling their financial, emotional and physical resources in the

---

of advancement should apply to both spouses. The detailed recommendation amounts to something slightly different from a straightforward extension of the presumption of advancement. If one spouse transfers money or property to the other not for joint purposes, it is to be presumed that a gift is intended, in the absence of evidence to the contrary. This change will remove a discriminatory aspect of the law, and do so in such a way as to reflect what is believed to be the wishes of most married couples. It will not force a spouse to make a gift. The transferring spouse can bring evidence. . . to show that he or she intended to retain ownership and that the receiving spouse was to be a trustee or an agent and that the receiving spouse knew of this. . . . We suspect that this recommendation will make relatively little change in practice, as the evidence at present required to prove a gift where property is transferred from wife to husband is not very great, but will avoid doubt and make the law more certain”; Law Com No 175 (1988), para 4.19.

<sup>52</sup> The common law presumption of advancement between husband and wife was abolished in New Zealand in 1976, see Matrimonial Property Act 1976, section 4(2). The Married Person’s Property Act 1986, section 9 was of similar effect in Australia.

<sup>53</sup> See generally, Final Report, Chapter 4.

<sup>54</sup> Final Report, para 4.5, see also Discussion Paper, para 4.5.

<sup>55</sup> *Ibid.* “There are a number of reasons why such relationships are likely to continue to increase. The fall-off in religious observance, a less religious view of matrimony, the increase in divorces and separations, the changes that have occurred in respect of the permanence of marriage and the marriage commitment, the perceived lack of any great financial or fiscal advantage in marriage as opposed to cohabitation, the increase in the number of economically active women and the changes in the pattern of child-bearing have (*inter alia*) contributed to an increase in the number of such quasi-spousal cohabitation relationships. These factors will apply in Northern Ireland as elsewhere in the United Kingdom”; *ibid.*

<sup>56</sup> Final Report, para 4.9.

common venture of living together as a unit. . .”;<sup>57</sup> and that consequently, it was: “. . . difficult to justify treating their property rights and interests differently from spouses.”<sup>58</sup>

The LRAC suggested that the introduction of its proposals would: “. . . approximate more closely to the intention of the parties who, according to the statistics, when they actually consider the question of title to the matrimonial home, normally decide to have it vested in joint names.”<sup>59</sup> Although the committee does not state the source of these ‘statistics’, the research on which this proposition is based may be that referred to earlier in the Discussion Paper,<sup>60</sup> presumably the survey carried out by J E Todd on behalf of the English Law Commission in 1972.<sup>61</sup> If this is the case, it is significant to note that the findings of that study were based upon the opinions of surveyed *spouses*, and that the views of cohabitants were not canvassed. The Discussion Paper presumed that similar outlooks would prevail amongst unmarried cohabitants, and that such partners would be likely to perceive and organise their relationships in the same manner as spouses.<sup>62</sup> It was therefore concluded that: “If the existing law produces potentially unfair and unreal results so far as married couples and particularly wives are concerned, then the results so far as cohabitants are concerned are likely to be equally unfair and unreal.”<sup>63</sup> It is interesting to note, however, that proposals in New Zealand to extend statutory co-ownership under the Matrimonial Property Act 1976<sup>64</sup> to cohabitants and same-sex couples have prompted a dramatic increase in ‘pre-nuptial’ pacts.<sup>65</sup> It has been reported that while: “. . . the majority seem to be glad their relationships are getting some recognition at last. . . they do not see why Parliament should interfere with their lives.”<sup>66</sup> One practitioner was quoted as reporting that property sharing pacts had trebled in the preceding three-month period. Another added that: “*De facto* couples are definitely concerned. They want to defend

<sup>57</sup> Final Report, para 4.10.

<sup>58</sup> *Ibid.*

<sup>59</sup> Discussion Paper, para 6.23.

<sup>60</sup> “As long ago as 1972 research found. . .”; Discussion Paper, para 6.1.

<sup>61</sup> *Matrimonial Property* (1972, London: HMSO).

<sup>62</sup> “Their intentions are likely to be the same and the organisation of their financial affairs will be unlikely to differ to any material degree”; Discussion Paper, para 4.10, also Final Report, para 4.10.

<sup>63</sup> Discussion Paper, para 4.10. “The extension to cohabitants of the protection and inferences which we provisionally recommend in respect of spouses is not intended to represent a moral judgment on the status of cohabitation as compared to marriage. In reality our provisional recommendations would represent an enhancement of the position of women in relationships. It would be hard to justify the strengthening of the position of women in marriage relationships and leave untouched the position of women in unmarried relationships who are already in a weaker more vulnerable position than wives, in view of the absence of the presumption of advancement and in view of the lack of availability of any appropriate adjustment powers which the Court may exercise in a divorce context”; *ibid.*, para 4.11, Final Report, para 4.13.

<sup>64</sup> See above, footnote 32.

<sup>65</sup> Without the nuptials!

<sup>66</sup> Anne Beston, *New Zealand Herald*, 7/10/00, available on-line at: [www.nzherald.co.nz](http://www.nzherald.co.nz).

their property interests.”<sup>67</sup> Such anecdotal evidence provides a pertinent reminder of the property owner’s perspective. The proposals for reform in Northern Ireland would not be ‘automatic’, but triggered by a conveyance, at which time the partners may agree in writing to opt-out. Nevertheless, the onus would be placed on a property owner who wished to retain sole legal and beneficial ownership – and in the context of, for example, a cohabiting relationship of two years, where the partners have not chosen to marry, this certainly seems to be a plausible sentiment – to take the positive step of opting-out, with all the possible adverse implications which this might have on the relationship.

When addressing the issues surrounding the inclusion of cohabitants within the Recommendations, the Final Report also considered the impact of the European Convention on Human Rights,<sup>68</sup> particularly Article 8, which protects, *inter alia*, ‘family life’, and Article 14, which prohibits discrimination.<sup>69</sup> The Report asserted that: “Unmarried cohabitants have a family life for the purposes of Article 8.”<sup>70</sup> Although it was acknowledged that: “[h]eretofore arguments that they are discriminated against in areas of the law other than the law relating to children have not found much favour in the Strasbourg jurisprudence.”;<sup>71</sup> the Committee emphasised that: “[t]he Convention. . . is a living document and as societal norms change distinctions between the rights and expectations of spouses and quasi spouses may become more difficult to justify.”<sup>72</sup> The Final Report referred also to section 75 of the Northern Ireland Act 1998, which the Committee described as: “. . . requir[ing] equality of opportunity between spouses and parties irrespective of their marital status.”<sup>73</sup> It was suggested that:

“Consideration of any law reform proposal which impacts on either married or cohabiting couples should include consideration whether the proposal would discriminate against either and if so whether this discrimination is justified.”<sup>74</sup>

It is noteworthy, however, that while the Recommendations clearly refer to qualifying cohabitants as persons living ‘as husband and wife’, nowhere in the Final Report, or in the Discussion Paper which preceded it, does the Committee address the question of same-sex cohabitants, nor give any reason

---

<sup>67</sup> *Ibid.* The effect of the New Zealand legislation would however be automatic, in the sense that the Irish proposals would have been, see footnotes 136-138 and associated text. The Northern Ireland proposals would not be ‘automatic’ in this strict sense; see further, below.

<sup>68</sup> Substantially given effect in Northern Ireland by the Human Rights Act 1998, see further, below, section 4(b).

<sup>69</sup> Article 14 provides that: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

<sup>70</sup> Final Report, para 4.11.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Final Report, para 4.11.

<sup>74</sup> *Ibid.*

for their exclusion from its proposals.<sup>75</sup> This is particularly pertinent, since section 75 of the Northern Ireland Act 1998 actually places a statutory duty on public authorities when carrying out their functions to: “. . . have due regard to the need to promote equality of opportunity [*inter alios*] . . . between persons of different . . . marital status or sexual orientation. . .”<sup>76</sup>.

Another question concerned the definition of ‘qualifying cohabitants’. The Committee acknowledged that the broad category of cohabiting relationships encompasses a vast array of arrangements, from the most casual, to those which appear to emulate the marriage relationship.<sup>77</sup> The statutory definition of *qualifying* cohabitants was, therefore, essentially a ‘matter of judgment’. It was suggested, however, that the minimum threshold ought to involve ‘a stable relationship with a degree of permanence.’<sup>78</sup> The Committee recommended that ‘qualifying cohabitants’ must either:

- “(a) have lived together for a continuous period of at least two years<sup>79</sup> within a period of the last three years in the same household; or
- (b) have lived together in the same household and have had a child of the relationship.”<sup>80</sup>

---

<sup>75</sup> The approach taken by the Committee, as defined in the Preface to the Final Report, was confined to heterosexual relationships. Furthermore, the Committee clearly anticipated itself as providing protection for the vulnerable *woman* in such relationships: “Married couples are not the only vulnerable people. Couples who set up home together frequently do so usually without providing financial protection for the woman who more often than not looks after the children and the home. In the event of the home being in the sole name of the man, the woman will be in the same position as the married woman in regards of providing a right in the home and is therefore subject to the same risks from third parties as the married woman. However, in addition to these difficulties, in the event of that relationship of cohabitation breaking down, the woman has none of the protection of the 1978 Order”; Preface, pp(ii)–(iii).

<sup>76</sup> Northern Ireland Act 1998, section 75(1)(a).

<sup>77</sup> “Relationships of cohabitation do not conform to an identical pattern. At one end of the spectrum is the case of a couple who live together effectively as husband and wife in a joint family home with a child or children. At the other end may be the case of a couple sharing a sexual relationship, perhaps sharing a base from which to conduct that relationship but primarily leading separate lives, possibly with spouses and children of their own”; Final Report, para 4.6. “In the case of the former example it would seem likely nowadays that society would regard such a committed relationship as equivalent, or at least very close, to a state of marriage. In the case of the latter example society would still consider such a relationship as irregular and that neither party needs or merits any special legal protection so far as their property rights are concerned”, *ibid*, para 4.7.

<sup>78</sup> Discussion Paper, para 4.13.

<sup>79</sup> The period of two years appears to have been based on the provisions of the Inheritance (Provisions for Family and Dependants) (Northern Ireland) Order 1996, whereby a cohabitant can be recognised as a dependant for the purposes of family provision on the basis of two years cohabitation; see Discussion Paper, para 4.2. The Final Report also referred to the provisions of various Australian states where legislation has been enacted to protect the interests of cohabitants, and where the qualifying period is between two and three years; see Final Report, para 4.15.

Although it is arguable that partners who have had a child together are already bound up in joint financial responsibilities, a filter mechanism based on the time scale of the relationship alone appears to be a clumsy method by which to distinguish between those relationships where the parties are *likely to intend* that their proprietary interests be treated with mutuality, and those in which cohabiting partners might prefer to retain financial independence. The two-year qualification suggested by the LRAC takes no account of the nature of individual cohabiting relationships which, as the Committee has acknowledged, can vary from the *quasi*-spousal to much more casual relationships. The definition of ‘qualifying cohabitants’ clearly values certainty over subtlety. The proposals as they stand would, however, have the advantage of enabling both partners and practitioners to predict accurately the operation of the provisions. In contrast to this, a qualification based on the actual relationship between two individuals would require the court to make a value judgment at the litigation stage, and would introduce further issues regarding dealings with third parties.<sup>81</sup>

The Committee also makes recommendations in its Final Report in respect of situations involving spouses and cohabitants, which fall outside the qualifying criteria.<sup>82</sup> The Committee considered within this category, existing property relationships between qualifying partners,<sup>83</sup> situations where the parties agree to opt-out of statutory co-ownership, but one partner subsequently makes direct or indirect contributions, and cohabitants who do not yet qualify as partners to a ‘presumed stable relationship’. In respect of such parties, the Final Report proposed that: “. . . the court should have greater flexibility in determining whether and to what extent a party has an equitable claim to a beneficial interest in the joint residence.”<sup>84</sup> The Report listed a number of factors<sup>85</sup> to be taken into account by the court, concluding that:

---

<sup>80</sup> Discussion Paper, para 4.13. It was also noted in the Final Report, that the Australian states had no required time period where the cohabitants had a child of the relationship. The Committee clearly excluded same-sex relationships: “We are. . . of the view that our provisional recommendations should apply to cohabitants who are living in a quasi-spousal relationship, that is to say in a relationship in which a man and woman live together as if they are husband and wife though without having married”; *ibid*, para 4.12.

<sup>81</sup> The issues which *ex post facto* recognition of a qualifying relationship would have raised are similar to those which have been raised in comparisons between substantive and remedial constructive trusts; see section 2(b), above.

<sup>82</sup> See Final Report, paras 5.26 *et seq*.

<sup>83</sup> Since the proposed reforms are not to operate retrospectively, see further, below.

<sup>84</sup> Final Report, para 5.34.

<sup>85</sup> The contribution in money and money’s worth, direct and indirect, made by the parties towards the cost of acquiring, maintaining, repairing and improving the premises; the contribution in money or money’s worth, direct and indirect, made by the parties towards the costs of discharging any debt secured on the premises; any agreement, understanding or arrangement, express or implied, made by the parties in respect of their beneficial interest in the premises whether prior to the acquisition of the premises or during the parties’ occupation of them or which they might reasonably be expected to have been made in the circumstances if they had considered the question of beneficial ownership; the degree of economic integration of the parties; the degree of permanence of the relationship between the parties (in the case of parties who are not married); the reasonable expectations of

“. . . the factors which the court would take into account are closely akin to the matters which the courts take into account in Canada and Australia which apply the principles of unjust enrichment and unconscionability.”<sup>86</sup>

The Committee added that: “The Canadian and Australian experiences do not appear to suggest that our recommendation would be either unworkable or create undesirable litigation.”<sup>87</sup> The Committee did not, however, appear to make much of the distinction between the remedial constructive trust which arises under the Commonwealth doctrines at the date of the court’s judgment, and the substantive trust which would come into effect in Northern Ireland, with the capacity to bind the interests of third parties.<sup>88</sup>

Although the Northern Ireland reform initiative has tended to focus primarily on the issue of shared ownership between partners themselves, rather than the implications of the proposed statutory co-ownership on dealings with third parties involving matrimonial property, the impact of the reforms must be assessed from both viewpoints, not least because any provision which has an adverse affect on the interests of third parties may inhibit dealings with matrimonial property to the disadvantage of the partners themselves. Before proceeding to address these implications from a Northern Ireland perspective, it is useful, however, to consider some of the issues which have been raised, and which have proved problematic when statutory co-ownership of matrimonial property has been mooted in other jurisdictions.

### 3. PROPOSALS FOR STATUTORY CO-OWNERSHIP IN OTHER JURISDICTIONS

Although the Discussion Paper considered the *equitable principles* developed in some Commonwealth jurisdictions,<sup>89</sup> the report does not refer to or assess the fate of similar proposals for *statutory co-ownership* in other jurisdictions,<sup>90</sup> nor does it evaluate the difficulties which have characterised attempts to introduce such a principle in respect of matrimonial property in England and Wales, and in Ireland. The Irish Parliament and the Westminster legislature have both considered, but failed to enact, proposals which would have introduced statutory co-ownership between spouses. Although the measures attracted substantial support in the legislatures of both jurisdictions, in both cases issues arose which rendered the policies either ‘too controversial’ or unconstitutional. In the light of the proposals

---

the parties in all the circumstances of the case; any benefit accruing to the party with the legal title from other contributions in money or money’s worth, direct or indirect, made by the other party; any representations, express or implied, made by either party to the other relating to the title or beneficial ownership of the premises before the acquisition of the premises or during the occupation of them; see Final Report, para 5.34.

<sup>86</sup> Final Report, para 5.35.

<sup>87</sup> *Ibid.*

<sup>88</sup> See section 2(b), above.

<sup>89</sup> See Discussion Paper, Chapter Five.

<sup>90</sup> Although the Committee stated that: “Several state legislatures in Canada have moved from the traditional principle of the separation of property to a variety of systems involving some aspect of community of property”; see Discussion Paper, para 5.4; the mechanics of these systems were not discussed.

which are currently under discussion in Northern Ireland, it is useful to consider the reasons for the failure of these policy initiatives.

### **(a) England and Wales: the Matrimonial Homes (Co-ownership) Bill 1980**

In England and Wales, the Law Commission has, on a number of occasions, considered the introduction of statutory co-ownership between spouses as a solution to the difficulties presented by family property.<sup>91</sup> In its 1973 report, the Commission stated the ‘main case for reform’ to be that:

“ . . . any law determining ownership on the basis of financial contribution necessarily applies inequitably between husband and wife, because their different roles in marriage do not give them equal opportunities to make financial contributions to the acquisition of the home. It is said that it is unfair and unrealistic to concentrate on financial contribution and to take no account of a spouse’s efforts in caring for the home and family.”<sup>92</sup>

This was described as a ‘more serious objection’ than the arguments which had been raised in relation to the ‘technicalities and uncertainties’ of the present law. The Law Commission’s recommendations in relation to statutory co-ownership<sup>93</sup> were re-iterated in its 1978 report,<sup>94</sup> and finally presented to Parliament in the Matrimonial Homes (Co-ownership) Bill 1980. Although the House of Lords appeared to embrace the policy of statutory co-ownership, the Bill was withdrawn following the decision in *Williams & Glyn’s Bank Limited v Boland*.<sup>95</sup> The subsequent recommendations of the Law Commission in 1988, referred to in the Northern Ireland Discussion Paper,<sup>96</sup> took a somewhat narrower approach, and did not extend the principle of co-ownership of matrimonial property to land. Whilst the Law Commission has subsequently indicated that the principle of statutory co-ownership between spouses remains a preferred policy alternative, the Government has not attempted to re-introduce a measure giving effect to this position.

It is pertinent to consider, first, the policy behind the (more extensive) proposals which formed the basis of the Matrimonial Homes (Co-ownership) Bill 1980. The Law Commission’s Bill, introduced by Lord Simon in the House of Lords in 1980,<sup>97</sup> provided that husband and wife would become statutory co-owners of land owned by either of them, which they occupied as a matrimonial home.<sup>98</sup> It was clear that the Law Commission was influenced

---

<sup>91</sup> Law Com WP No 42 (1971), Law Com No 52 (1973), Law Com No 86 (1978), Law Com No 175 (1988).

<sup>92</sup> Law Com No 52, para 14.

<sup>93</sup> “ . . . that the interest in a matrimonial home should by law be shared equally between husband and wife unless they agree to the contrary”; Law Com No 52, para 20.

<sup>94</sup> Law Com No 86.

<sup>95</sup> [1981]AC 487.

<sup>96</sup> See also Final Report, Chapter Five.

<sup>97</sup> 404 HL Deb (5<sup>th</sup> Series) col 282 (17 January 1980).

<sup>98</sup> Clause 6 provided that where husband and wife become statutory co-owners:–

by the importance which, it was argued, ought to be attached to the matrimonial home.<sup>99</sup> The rationale of the proposed co-ownership was derived:

“ . . . not from any financial contribution, nor from any contribution to the interests of the family, nor from any other factors to be assessed by the court, but from the marriage relationship itself.”<sup>100</sup>

As with the Northern Ireland proposals, the basis of the property interest to be acquired by the non-owning partner was his or her *relationship* with the legal title-holder.<sup>101</sup> The Law Commission reasoned, as did the LRAC, that the matrimonial home is: “. . . a unique item of property, and one to which a unique law of co-ownership should apply.”<sup>102</sup>

Although the provisions of the Bill were well received in the House of Lords<sup>103</sup> on the basis that they would:

“ . . . not only amount to an advance in the rights of marital partners and in marital justice, they also actually enhance and help to cement the state of matrimony, marriage itself, and, through that, help to promote and safeguard the family and family life – one of the fundamental bastions of civilised society”,<sup>104</sup>

the provisions of the 1980 Bill were less momentous than they would *prima facie* appear to be, particularly in relation to dealings with third parties. While the 1980 Bill would have introduced a scheme of statutory co-ownership between spouses, the acquisition of an equitable interest by a

if the interest is a legal estate, it shall become subject to a trust for them as beneficial joint tenants; and if the interest is not a legal estate, it shall vest in the two of them as beneficial joint tenants. Clause 11 gave the spouses the right to exclude property from statutory co-ownership by written agreement signed by both husband and wife; see Law Com No 86, Appendix to Book One.

<sup>99</sup> “Not only is it becoming more common for families to buy their own homes, but in many cases the home is the only substantial asset of the family. Rapidly rising house prices have emphasised its position as the major family asset”; Law Com No 52, para 12.

<sup>100</sup> Law Com WP No 42, para 0.28.

<sup>101</sup> “Husband and wife each contribute to the home in their different ways – the wife’s contributions are no less real because they may not be financial – and the home is essential to the well-being of the family as a whole.”; Law Com No 86, para 0.9.

<sup>102</sup> Law Com No 86, para 0.9. Furthermore, as Lord Scarman would assert in the House of Lords, this protection was considered to be necessary because of the difficulties encountered by: “. . . the feckless, the inadequate, the uneducated, the ignorant, the helpless woman; one can apply all those adjectives to an absolutely darling person of great virtue who needs help and protection, if you like, against her own inexperience in the wiles of the world”; 405 HL Deb (5<sup>th</sup> Series) col 130, (12 February 1980). Although the Bill was not gender-specific, it was clearly intended to protect not only the family stake in the matrimonial home, but to bolster the protection of the vulnerable woman, who was unable to protect her own interests.

<sup>103</sup> “I sense the feeling of the House moving strongly in favour of this Bill”; 405 HL Deb (5<sup>th</sup> Series) col 128, (12 February 1980) Lord Scarman.

<sup>104</sup> 405 HL Deb (5<sup>th</sup> Series) col 118, (12 February 1980) Lord Boston.

spouse was not, in that pre-*Boland* era, considered to entitle such a spouse to assert any claim against third parties who dealt with the matrimonial property. In *Bird v Syme-Thomson*<sup>105</sup> the court had described the occupation of a co-owning spouse as merely a ‘shadow’ of the legal owning spouse’s occupation. This was crucial for the purposes of priority between the equitable owning spouse and third parties dealing with the property, for without judicial recognition of his or her independent occupation, the equitable co-owner could not utilise the protection of section 70(1)(g) of the Land Registration Act 1925.<sup>106</sup>

Lord Scarman indicated that where the spouses themselves opted, in the usual way, for joint legal ownership and had their property conveyed into their joint names:

“ . . . then both of them, husband and wife, have their names on the legal title to the home; everyone who deals with them, whether he be a purchaser or someone about to lend money on the house, will have notice under the machinery of the law that they are there.”<sup>107</sup>

If the spouses were not legal joint owners, the non-owning spouse would, under the provisions of the Bill, have automatically acquired a beneficial interest. That beneficial interest would not, however, have affected the priority of third parties unless it had been registered.<sup>108</sup> Although the Bill purported to confer rights of ownership on non-owning spouses, the primary significance of those rights would have been on divorce or death. In relation to debt, the non-owning spouse was still required to *register* a claim in order to over-ride the proprietary interest of the secured creditor. Third parties such as creditors would not have been adversely affected with constructive notice of the spouse’s beneficial interest, but simply required to carry out standard investigations of title and perusal of the registers. No additional burden of inquiry would have been placed on creditors dealing with matrimonial property held under statutory co-ownership.

Although it was not anticipated when it was first drafted that the Matrimonial Homes (Co-ownership) Bill 1980 would have adversely affected third party purchasers, the decision of the House of Lords in *Williams & Glyn’s Bank Limited v Boland*,<sup>109</sup> which was handed down during the course of legislative debate on the 1980 Bill, clarified the law in respect of the requirements placed on third parties when dealing with *equitable co-owning spouses* in occupation of matrimonial property. The court held that third parties *are*

---

<sup>105</sup> [1979]1 WLR 440.

<sup>106</sup> Section 70(1)(g) protects against subsequent purchasers: “. . . the rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry was made of such person and the right not disclosed.” The equivalent Northern Ireland provision is to be found in Schedule 5 to the Land Registration Act (NI) 1970, para 15.

<sup>107</sup> 405 HL Deb (5<sup>th</sup> Series) col 129, (12 February 1980) Lord Scarman.

<sup>108</sup> “. . . suppose that. . . although co-ownership has occurred by operation of the law the wife’s name has not come on to the property, then this Bill cunningly produces the necessary result. She can get a land charge registered if it is unregistered land and that is notice to the world of her interest”; *ibid*.

<sup>109</sup> [1981]AC 487.

required to investigate beneficial co-ownership between spouses. The enactment of the 1980 Bill, with its provision that the beneficial interest of a statutory co-owner would not bind third parties unless it was registered, was therefore inconsistent with the protection afforded by the House of Lords in *Boland*. The 1980 Bill was subsequently withdrawn by Lord Simon<sup>110</sup> in order to facilitate a reconsideration by the Law Commission in the light of the *Boland* decision.<sup>111</sup> Lord Simon added that although: “. . . there have been misgivings that a reference back to the Law Commission might be simply a manoeuvre to stifle the Bill”;<sup>112</sup> he had: “. . . been assured by the chairman of the Law Commission that there is no question of going back on the principle of co-ownership which has been accepted since 1973.”<sup>113</sup>

The issue of statutory co-ownership of matrimonial property was not raised again until the Law Commission’s 1988 report.<sup>114</sup> The 1988 report, however, proposed statutory co-ownership between spouses in respect only of personal property. The Commission justified the exclusion of land on the basis of expediency:

“Our main reason for excluding land is that we believe that if we make a recommendation which has the effect of extending joint ownership of the matrimonial home, our basic principle will be seen to be controversial and may attract inappropriate opposition.”<sup>115</sup>

Although the Law Commission was still in favour of extending the principle of statutory co-ownership to land,<sup>116</sup> it was suggested that, following the *Boland* decision:

“. . . virtually all matrimonial homes are now purchased in joint names. It is also true that the spouses are more likely to receive legal advice when purchasing their home than when purchasing other property.”<sup>117</sup>

Nevertheless, the Law Commission continued to regard statutory co-ownership as the preferred solution to the challenges presented by matrimonial property. Although the Commission felt that: “[t]his further statutory intervention may not be needed”;<sup>118</sup> it was concluded, on balance, that:

---

<sup>110</sup> On 6 October 1980.

<sup>111</sup> 413 HL Deb (5<sup>th</sup> Series) col 113 (6 October 1980) Lord Simon.

<sup>112</sup> *Ibid*, col 114.

<sup>113</sup> *Ibid*. Lord Simon claimed that: “As I understand it. . . the task of the Law Commission will be to see whether the machinery of the Bill needs any reconsideration in the light of the *Boland* case. My own view is that it can only have the slightest repercussion”; *ibid*.

<sup>114</sup> Law Com No 175 (1988). The 1988 report is referred to in the Northern Ireland Discussion Paper, para 6.4–6.5, and in the context of the recommendations in the Final Report, see Chapter Five.

<sup>115</sup> Law Com No 175, para 4.3.

<sup>116</sup> “Nevertheless, most of us would support the extension of the principle of this Bill to land”; *ibid*, para 4.4.

<sup>117</sup> Law Com No 175, para 4.4.

<sup>118</sup> *Ibid*.

“[w]hile such an extension, for the reason given above, would not have a major practical impact, it would be of assistance in cases where, despite the parties regarding the home as joint, it is in one name only.”<sup>119</sup>

The Law Commission has, however, remained silent on the subject of statutory co-ownership since 1988, and Parliament has shown no further indication that it is likely to enact the Commission’s earlier recommendations.

### **(b) Ireland: the Matrimonial Homes Bill 1993**

Whilst the English proposals for statutory co-ownership were stalled by concerns regarding the implications which equitable co-ownership between spouses would have on third parties,<sup>120</sup> this particular issue has not presented an obstacle in respect of legislation relating to matrimonial property in the Republic of Ireland. The Family Home Protection Act 1976 imposed a requirement on all purchasers in dealings involving a ‘family home’ to obtain the *consent* of a non-transacting spouse, regardless of whether such spouse has any property interest in the home. Purchasers are therefore required to investigate the matrimonial status of the transacting party, and to locate and obtain consent from his or her spouse, in order to complete a valid title.<sup>121</sup> This legislation clearly protects the position of non-owning spouses *vis-à-vis* third parties on the basis of the marriage relationship, and *whether or not* that spouse has any ownership interest in the property. The Irish legislature was not deflected by arguments that third parties would be required to carry out onerous investigations into the matrimonial relationships of vendors.<sup>122</sup> The provisions of the 1976 Act did not, however, confer any substantive proprietary interest on the non-owning spouse, but merely an effective right of veto over dealings by the legal title-holder with third party creditors or purchasers. The 1976 Act, which focused on dealings with third parties, rather than ownership between the spouses, did not address the position of a non-owning spouse in circumstances of separation or death. It was these gaps in the protection of the spouse which prompted the introduction of proposals for statutory co-ownership of matrimonial property in the Matrimonial Homes Bill 1993.

The concept of statutory co-ownership between spouses had been considered in Ireland as a possible policy alternative prior to the enactment of the Family Home Protection Act 1976, and was re-considered in 1993. In debates preceding the 1976 Act, its provisions were regarded as a first step towards community of property. It was noted that the Commission on the Status of Women had:

---

<sup>119</sup> *Ibid.*

<sup>120</sup> Following the *Boland* decision.

<sup>121</sup> Failure to comply with the provisions of the 1976 Act does not merely affect the purchaser’s priority, but renders the transaction *void*.

<sup>122</sup> It was suggested of creditors that: “[w]hen they put their money into bricks and mortar and tiles. . . [they] must understand that what is going to be making use of that is not just somebody else making money but a complex human organism which we recognise to be the foundation stone of society, namely, the family”; 291 *Dail Eireann Debates* (27 May 1976) col 369, Mr Kelly.

“. . . recommended that a system of community of property be examined [and]. . . as a short term idea, they recommended the introduction of a system of protection against vindictive sales that would require the husband to consult with his wife before disposing of the home.”<sup>123</sup>

It was apparent, however, that even when enacting the 1976 Act, the Irish Parliament considered statutory co-ownership to represent the ultimate solution to the family home question.<sup>124</sup> In debates on the 1993 Bill, the Family Home Protection Act 1976 was described as a ‘stop-gap’ measure which, although giving the non-owning spouse: “. . . no interest at all. . . at least. . . gave them the right to object to the mortgaging or sale of the house.”<sup>125</sup>

The Matrimonial Homes Bill 1993 purported to go beyond these provisions by conferring on spouses equal rights in the family home,<sup>126</sup> through automatic joint beneficial ownership of the property.<sup>127</sup> In this sense, the Matrimonial Homes Bill would have conferred a different type of protection from that provided by the Family Homes Protection Act 1976.<sup>128</sup> Whilst:

“[t]he Family Home Protection Act was a very important measure. . . its effect was limited in a negative kind of way. It did not actually vest any ownership interest or take a proactive position in actually changing an ownership of the matrimonial home and vesting an actual property right in the wife.”<sup>129</sup>

The interests of non-owning spouses *vis-à-vis* third parties had been addressed in the 1976 Act, but the 1993 proposals would have altered the

<sup>123</sup> 291 *Dail Eireann Debates*, (25 May 1976) col 74.

<sup>124</sup> “The ideal is joint ownership of the family home. This is essential to the partnership which exists in marriage, to the dignity of both parties to the marriage, and essential to basic justice”; 291 *Dail Eireann Debates*, (25 May 1976) col 110, Mrs Desmond. “Every encouragement should be given to have joint ownership, because it is the easiest way of protecting the wife and of ensuring that a house will not be sold over a wife’s head”; *ibid*, col 115, Mr Collins.

<sup>125</sup> 433 *Dail Eireann Debates* (7 July 1993) col 1600, Mr D Ahern. “It was badly drafted legislation and I agree with some speakers here who have said we ought to take our time with this”; *ibid*. Mr Ahern also indicated that neither the 1976 Act, nor the Bill under debate took account of the position of cohabitantes. He added that: “I accept that it could have very significant implications for our social legislation, but as a compassionate race we should look at it. We have to accept that there are many unions which do not get the protection of legislation put through this House”; *ibid*, at 1600–1.

<sup>126</sup> “The object of this Bill can be simply stated. It is to give spouses equal rights in the ownership of the matrimonial home”; 433 *Dail Eireann Debates* (7 July 1993) col 1552, Minister for Equality and Law Reform (Mr Taylor).

<sup>127</sup> As with the Northern Ireland proposals, spouses could elect to opt-out of the statutory co-ownership scheme and make independent arrangements.

<sup>128</sup> “The thrust of the Matrimonial Homes Bill has some features in common with the Family Home Protection Act but it is an advance in a different direction. It gives different protections in different kinds of situations”; 434 *Dail Eireann Debates* (13 October 1993) col 1046, Mr Taylor.

<sup>129</sup> *Ibid*.

ownership of the property between the spouses, thereby ensuring that the non-owning spouse would be protected in the event of death or divorce.

Although the Bill passed successfully through the Dail, the Irish President referred it to the Supreme Court to test its constitutionality.<sup>130</sup> The Supreme Court held that, although:

“ . . . the provisions of this Bill are directed to encourage the joint ownership of matrimonial homes and . . . such an objective is clearly an important element of the common good conducive to the stability of marriage and the general protection of the institution of the family. . . it is the opinion of the court that the right of a married couple to make a joint decision as to the ownership of a matrimonial home is one of the rights possessed by the family which is recognised by the State in Article 41.1.1 of the Constitution.”<sup>131</sup>

The Supreme Court held that spouses had a Constitutional right to make joint decisions in relation to their family property, and that the Bill’s application of joint ownership to all married couples interfered with the right to make their own decisions in respect of family life.<sup>132</sup> Although Finlay CJ claimed that:

“[t]he court accepts, as it has indicated, the advantages of encouraging by any appropriate means joint ownership in family homes as being conducive to the dignity, reassurance and independence of each of the spouses and to the partnership concept of marriage which is fundamental to it”,<sup>133</sup>

it was held that this did not justify: “. . . the potentially indiscriminate alteration of what must be many joint decisions validly made within the authority of the family. . .”<sup>134</sup> The Supreme Court therefore held that the Matrimonial Homes Bill was unconstitutional.

---

<sup>130</sup> *In the Matter of Article 26 of the Constitution and in the Matter of the Matrimonial Homes Bill 1993* [1994]ILRM 241, Supreme Court.

<sup>131</sup> *Ibid.*, at 252–3, *per* Finlay CJ. Article 41.1.1 of the Irish Constitution provides that: “The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.”; while Article 41.1.2 states that: “The State, therefore, guarantees to protect the Family in its constitution and authority, as the necessary basis of social order and as indispensable to the welfare of the Nation and the State.” The significance of the home in this context is recognised in Article 41.2.1: “In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.”

<sup>132</sup> “In some instances the net effect of these legislative proposals would be automatically to cancel a joint decision freely made by both spouses as part of the authority of the family and substitute therefore a wholly different decision unless the spouses can agree to a new joint decision to confirm the earlier agreement or unless the owning spouse can succeed in obtaining a court order pursuant to section 6”; *ibid.*, at 254, *per* Finlay CJ.

<sup>133</sup> *Ibid.*

<sup>134</sup> *Ibid.*

There are a number of crucial distinctions to be made between the provisions of the Irish Matrimonial Homes Bill 1993, and the current proposals of the Law Reform Advisory Committee (Northern Ireland). The first, and most obvious distinction, is that while the Northern Ireland provisions extend to include ‘qualifying cohabitants’,<sup>135</sup> the 1993 Bill was limited to spouses. Of more significance, however, are the mechanics of the respective systems. Whilst the Northern Ireland recommendations propose to introduce a joint tenancy between partners on the occurrence of a specified event, the Irish provisions would have introduced ‘automatic’ co-ownership in its true sense. Section 4 of the 1993 Bill provided that:

“Where, upon the commencement of this section, either or both of the spouses concerned is or are entitled to an interest to which this section applies in a matrimonial home, thereupon, the interest shall, subject to the provisions of this Act, vest in them as joint tenants.”<sup>136</sup>

The vesting of the property in spouses as joint tenants was to be automatic on the commencement of the Bill, and did not depend upon being triggered by a conveyance of property.<sup>137</sup> Furthermore, the vesting of matrimonial property in spouses as joint tenants was to be of both prospective and retrospective effect.<sup>138</sup>

It was the automatic and retrospective nature of this vesting which led the Irish Supreme Court to reject the 1993 Bill as unconstitutional. The court held that it:

“. . . accept[ed]. . . the advantages of encouraging by any appropriate means joint ownership in family homes as being conducive to the dignity, reassurance and independence of each of the spouses and to the partnership concept of marriage which is fundamental to it. It [was] not, however, satisfied that the potentially indiscriminate alteration of what must be many joint decisions validly made within the authority of the family concerning the question of the ownership of the family home could reasonably be justified even by such an important aspect of the common goal.”<sup>139</sup>

---

<sup>135</sup> See section 2(c), above.

<sup>136</sup> Section 4(3) of the 1993 Bill recited a similar provision in respect of property which either or both of the spouses became entitled to after the commencement of the Bill. Section 4(4) provided that the interest vested would be an equitable interest.

<sup>137</sup> “The provisions of the Bill do not seek to apply to particular categories of cases only, or to particular instances of the acquisition and ownership of matrimonial homes only, but rather are applied to each and every category and instance falling within the time scale provided for in the Bill with a right of defeasance (s7)”; [1994]1 ILRM 241 at 253, *per* Finlay CJ.

<sup>138</sup> “The mandatory creation of joint equal interests in the family home also applies to every dwelling occupied as a family home irrespective of when it was first acquired by the married couple concerned and irrespective therefore of the time at which a freely arrived at decision between them may have been made as to the nature of the ownership and in whom it should rest”; [1994]1 ILRM 241 at 253, *per* Finlay CJ.

<sup>139</sup> *Ibid*, at 254, *per* Finlay CJ.

Although the Constitutional provisions offended by the 1993 Bill are specific to Ireland, the LRAC has indicated its awareness of a comparable issue, that is, the possible human rights implications of statutory intervention with matrimonial property law in the manner proposed.<sup>140</sup> These issues, and other implications of the Northern Ireland proposals, are considered below.

#### **4. IMPLICATIONS OF STATUTORY CO-OWNERSHIP IN NORTHERN IRELAND**

The proposals of the LRAC(NI)'s Final Report would, if introduced, effect a dramatic shift in the balance of rights, both 'internally', between spouses and qualifying cohabitants themselves, and in relation to 'external' dealings with third parties involving matrimonial property. Although the Committee looked favourably on the development of equitable principles in other Commonwealth jurisdictions, the recommendations it has made take a very different approach to the perceived inadequacies of the present law in Northern Ireland. While the Westminster and Irish legislatures have considered and attempted to adopt similar policies, the introduction of a scheme of statutory co-ownership of matrimonial property in Northern Ireland would represent an unprecedented departure within the United Kingdom and Ireland. The following section therefore considers some practical implications of the Northern Ireland proposals.

##### **(a) External affairs: the implications of the proposals on dealings involving third parties**

Although the Discussion Paper<sup>141</sup> appears to be directed primarily towards addressing the difficulties often encountered by non-owning spouses and cohabitants in the circumstances of death, divorce or relationship breakdown, the proposals would have an obvious effect on dealings with third parties involving the joint residence of spouses and qualifying cohabitants. The legislative history of the English Matrimonial Homes (Co-ownership) Bill 1980 highlights the implications of statutory co-ownership on dealings involving third parties. The withdrawal of the English proposals, which would have required a benefiting spouse to *register* his or her beneficial interest in order to secure priority over third parties, was prompted by the decision in *Williams & Glyn's Bank v Boland*.<sup>142</sup> The decision in *Boland* indicated that third parties dealing with matrimonial property are required to investigate the occupation of equitable co-owning *spouses* to the same extent as the interests of all other persons 'with an interest. . . in actual occupation'. Although the Northern Ireland proposals would not directly affect the interests of third parties, the extension of equitable co-ownership to *all* spouses (and, in the Northern Ireland provisions, to qualifying cohabitants) would obviously increase the number of spouses (and cohabitants) with such interests, and consequently also the number of cases in which a third party

---

<sup>140</sup> See Discussion Paper, para 6.25.1.

<sup>141</sup> And (arguably) to a lesser extent the Final Report, see para 5.36.

<sup>142</sup> [1981] AC 487.

would stand to lose priority to such a claim unless appropriate investigations and inquiries were made.<sup>143</sup>

Nevertheless, concerns regarding the burden of inquiry placed on third parties by these proposals are not convincing. The immediate alarm which followed the *Boland* decision<sup>144</sup> has been quelled in the twenty years which have since passed, as conveyancers have learnt to live with the requirement that they make inquiries from *all* occupiers.<sup>145</sup> As the law presently stands, third parties may lose priority to any person with an interest, who is in 'actual occupation' of land,<sup>146</sup> or where the third party fails to make 'reasonable inspections and inquiries' prior to the transaction.<sup>147</sup> It is therefore a matter of conveyancing practice that the occupation of property (including, as a result of the decision in *Boland*, the occupation of spouses or cohabitants) is investigated, to ensure priority over possible equitable claims. These proposals would not augment the burden of inquiry already imposed on third parties by general conveyancing principles. Although a greater proportion of spouses and cohabitants would actually acquire equitable ownership interests, those interests would continue to bind third parties only if the partner was in 'actual occupation' (registered land) or if the third party had failed to make 'reasonable inspections and inquiries' (unregistered land).<sup>148</sup>

The Committee's proposals may, however, introduce an additional difficulty in respect of third parties, particularly secured creditors, who seek to realise

<sup>143</sup> The Northern Ireland proposals do not, as was the case in the English Matrimonial Homes (Co-ownership) Bill 1980, depend on registration by the non-owning spouse for effectiveness against third parties.

<sup>144</sup> The decision in *Boland* provided the subject matter for two Law Commission Reports, '*The Implications of Williams & Glyn's Bank Ltd v Boland*' Law Com No 115 (1982), and '*Third Report on Land Registration*' Law Com No 158 (1987); as well as spawning an extensive body of commentary; see for example, Beaumont, "Mortgage Fraud, Equitable Priorities and Overriding Interests" [1989] *Conv* 158; Bright, "Lenders and Overriding Interests" (1988)138 *NLJ* 685; Deech, "Williams & Glyn's and Family Law" (1980)130 *NLJ* 896; Freeman, "Wives Conveyancers and Justice" (1980)43 *MLR* 692; Russell, "Williams & Glyn's Bank v Boland & Brown: The practical implications" (1981)32 *NILQ* 3; also Lewis (1986)136 *NLJ* 459; Luxton (1986)136 *NLJ* 771; Sparkes [1989]*Conv* 342.

<sup>145</sup> Members of the House of Lords (sitting in its legislative capacity) have suggested that: ". . . conveyancers have come to terms with it. . . the world has not come to an end as a result of the decision in *Boland*. . ."; 437 HL Deb (5<sup>th</sup> Series) col 662 (15 March 1982), Lord Hailsham, LC; see also 460 HL Deb (5<sup>th</sup> Series) col 1270 (5 March 1985), Lord Mishcon.

<sup>146</sup> If the property is registered.

<sup>147</sup> If the property is unregistered, a purchaser will be bound by constructive notice of claims which could have been discovered by making reasonable inspections and inquiries. An example of the operation of this principle in the context of the matrimonial home can be found in *Kingsnorth Finance Co Ltd v Tizard* [1986]2 All ER 54.

<sup>148</sup> It is arguable that the burden which this would impose would be lower than that which currently applies in the Republic of Ireland. Under the Family Home Protection Act 1976 s2(1), the interests of spouses are protected even though the non-transacting spouse may no longer be in occupation of the property, rendering him or her much more difficult to discover.

the capital tied up in the matrimonial or *quasi*-matrimonial home. One of the implications considered by the Committee was the question, left open in *Ulster Bank v Carter*,<sup>149</sup> as to whether the court could decline to make an order for partition of property, or sale in lieu, under the Partition Acts 1868 and 1876 in the case of an application by a spouse, or the mortgagee or chargee of a spouse. The Final Report has proposed that a provision should be included in any forthcoming legislation to the effect that:

“ . . . in the case of applications brought by spouses or cohabitants or the mortgagee or chargee of spouses or cohabitants under the Partition Acts 1868 and 1876 the court should have a general power to decline to make an order at all.”<sup>150</sup>

The Committee added that:

“[I]n exercising its power the court should be directed to take into account a number of factors:

the intentions of the persons when the joint interest was created or arose;

the purposes for which the property subject to the joint interest is held;

the welfare of any minor who occupies or might reasonably be expected to occupy any land as his home;

the interests of any secured creditor of either of the joint owners;

when the application is brought by a secured creditor, whether the co-owner against whom an order is sought was a party to the security or agreed to creation and if so whether his or her consent was freely and advisedly given; and

where the application is brought by a secured creditor whether any creditor has any other reasonable means of recovering the secured debt.”<sup>151</sup>

These factors are presented in the context of justifying the court’s decision to decline to order sale. Whilst it may be arguable that a partner who acquires a beneficial interest in property without making any contribution (direct, indirect, or even through labour in the home) ought not to be permitted to force the sale of that property against the wishes of the legal title holder, the inclusion of mortgagees and chargees would raise obvious and reasonable

<sup>149</sup> High Court (NI) Unreported, 29 January 1999.

<sup>150</sup> Final Report, para 5.36; see also Discussion Paper, para 6.26.

<sup>151</sup> Final Report, para 5.36. The Committee claimed that this recommendation reflected developments in English land law under section 15 of the Trusts of Land and Appointment of Trustees Act 1996, and in respect of the decision in *Mortgage Corporation Ltd v Shaire* [2000] Fam Law 402; see Fox, “Living in a Policy State: from trust for sale to trust of land” [2000] *Liverpool Law Review* 59–88. It is noteworthy, however, that the comparable English provisions are not linked to any scheme of statutory co-ownership, but apply only where partners acquire legal or equitable proprietary interests by virtue of the traditional methods.

concerns amongst creditors, and could have an adverse effect on the marketability of (*quasi-*) matrimonial property as a security asset. In this respect the LRAC have tended to focus on the proposed reforms as a means of achieving ‘fairness’ between spouses and qualifying cohabitants, without dwelling on the implications of its recommendations on the balance of interests between partners in (*quasi-*) matrimonial property and third parties, or on the function of the property as a capital asset.

### **(b) Internal interests: the implications of the proposals between partners**

The introduction of the LRAC’s proposals would transform the manner in which property is held by spouses and ‘qualifying cohabitants’, and the operation of the presumption which these proposals would introduce raises a number of social and moral issues. Although the Committee asserted that it was not seeking to make a moral judgment,<sup>152</sup> the basis on which the law regards a partnership as being of a sufficiently permanent nature to attract protection is likely to provoke considerable debate, as are the necessary implications of defining the type of family unit brought within the proposals. Another likely bone of contention could arise from opinions regarding the balancing of family interests and property interests. Whilst some will accept the propositions asserted by the Discussion Paper and the Final Report, which appear to favour ‘fairness’ towards non-owning partners, others will certainly take issue with the implications of the proposals from the property owner’s perspective. This section, however, focuses on some of the legal and practical challenges such a presumption might present.

First, it is important to consider some timely questions from a human rights’ perspective surrounding the legitimacy of this statutory interference with both property rights and family life. The proposals, if enacted, would involve statutory interference with the property interests, and to a certain extent, with the arrangement of family affairs, of spouses and partners to cohabiting relationships of two years or more. The provisions of the European Convention on Human Rights which have been given effect in Northern Ireland law by virtue of the Human Rights Act 1998<sup>153</sup> include Article 1 of the First Protocol, which protects the right to property,<sup>154</sup> and

---

<sup>152</sup> “The extension to cohabitants of the protection and inferences which we recommend in respect of spouses is not intended to represent a moral judgment on the status of cohabitation as compared to marriage.”; Final Report, para 4.13; see also Discussion Paper, para 4.11.

<sup>153</sup> The Human Rights Act 1998 was commenced in full on 2 October 2000, although certain provisions of the Act, sections 6(2)(c), 24(1) and 71, as well as Schedule 10, were given effect on devolution by the Northern Ireland Act 1998, Schedule 14. See Article 1(1) of the Human Rights Act 1998, which defines the ‘Convention Rights’ for the purposes of the Act. Section 22(6) extends the Act to Northern Ireland.

<sup>154</sup> “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the

Article 8 of the Convention, which guarantees the protection of, *inter alia*, the family.<sup>155</sup> The Northern Ireland Act 1998 provides that legislation emanating from the Northern Ireland Assembly will be invalid if it is incompatible with any of the Convention rights.<sup>156</sup> The Assembly is obliged to ensure that any measures which it enacts are compatible with the 'Convention rights'. It would therefore be necessary for the Assembly to consider whether the proposals under discussion for the reform of matrimonial property law meet these requirements before any provisions could be enacted.

Article 1 of the First Protocol comprises three distinct rules.<sup>157</sup> The first rule states the principle of peaceful enjoyment of property. The second rule covers deprivation of possessions, and subjects it to certain conditions. The third rule recognises that states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for that purpose. The second rule is relevant when there has been a *deprivation* of possessions, in the sense of a formal taking or expropriation,<sup>158</sup> while the third rule applies where the interference in question is *intended* to control the use of property.<sup>159</sup> Where an interference does not amount to a taking, and is not *intended* to control the use of property, but nevertheless has the effect of interfering with the use or enjoyment of property, the first rule may be relevant. Nevertheless, even when an 'interference' has been established, it may be justified on the basis

---

payment of taxes or other contributions or penalties.”; *European Convention on Human Rights*, Protocol One, Article 1.

<sup>155</sup> “1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”; *European Convention on Human Rights*, Article 8. The effect of Article 8 has been explained thus: “Interference by the State with a person’s private and family life, home, or correspondence must be justified by one of the exceptions detailed in Article 8(2) and must be the minimum necessary to obtain the legitimate aims. Only these exceptions, along with the restrictions in Article 17 are allowed. Once the state has identified a legitimate objective, prescribed by law, the Court focuses on proportionality. The Court will ask whether this interference serves a ‘pressing social need’.”; Wadham and Mountfield, *Blackstone’s Guide to the Human Rights Act 1998* (1999), p 92.

<sup>156</sup> Northern Ireland Act 1998, section 6(1) provides that: “A provision is not law if it is outside the legislative competence of the Assembly”; while section 6(2)(c) lists amongst the factors bringing provisions outside the legislative competence of the Assembly, incompatibility with any of the Convention rights. Article 24 of the Northern Ireland Act 1998 adds that: “A Minister or Northern Ireland department has no power to make, confirm or approve any subordinate legislation, or to do any act, so far as the legislation or act (a) is incompatible with any of the Convention rights. . .”.

<sup>157</sup> *Sporron and Lonnroth v Sweden* (1982)5 EHRR 35, E Ct HR.

<sup>158</sup> For example, compulsory purchase.

<sup>159</sup> For example, planning controls.

of public interest. The over-riding principle of proportionality also applies.<sup>160</sup>

A finding of interference with the ‘right to peaceful enjoyment of possessions’<sup>161</sup> under Article 1 of the First Protocol is usually made when the state interferes *directly* to expropriate or control the use of property.<sup>162</sup> It has generally been accepted that: “...private law restrictions are deemed to be defining of, rather than interferences with, property/possessions.”<sup>163</sup> It is therefore unlikely that the recommendations of the Final Report, which would affect property rights between private individuals in certain circumstances, would be considered as constituting an ‘interference’ with the right to property under Article 1 of the First Protocol. It is also significant that the reforms proposed in the Discussion Paper would not affect (*quasi-*) matrimonial property automatically on the commencement of the Act, but on a transfer of property between parties, or acquisition of property by one or both of them. Furthermore, the proposals of the LRAC would not effect a *compulsory* re-allocation of the ownership of the relevant property in these circumstances, since the affected parties would retain the right to opt-out of the co-ownership provisions.

In addition, it is noteworthy that even when an interference is established, a number of justifications, for example, pursuance of the public interest, may bring the alleged breach outside the remit of Article 1 of the First Protocol.<sup>164</sup> In *James v United Kingdom*<sup>165</sup> the European Court of Human Rights held that the: “. . . taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being in the public interest.”<sup>166</sup> In this respect, it is significant that:

“[s]tates have a broad margin of discretion both in deciding what are the interests of the community in any given situation, and in striking the appropriate balance. The Court will only intervene where the measures in question are manifestly unreasonable.”<sup>167</sup>

Consequently, “. . . findings of violations under Article 1/1 are comparatively rare.”<sup>168</sup> It is submitted that the proposals of the LRAC(NI) are unlikely to be considered to be ‘manifestly unreasonable’ within the terms of Article 1 of the First Protocol.

<sup>160</sup> That is, there must be a reasonable degree of proportionality with the extent of any interference, and the object or purpose of that interference.

<sup>161</sup> The expressions ‘possessions’ and ‘property’ are treated as interchangeable for the purposes of this Article.

<sup>162</sup> See Starmer, *European Human Rights Law*, (1999, LAG), pp 636 *et seq.*

<sup>163</sup> Starmer, *op cit*, p 641. See *X v UK* (1978)14 DR 234.

<sup>164</sup> “Measures which interfere with property rights must have a legitimate aim, and must be proportionate. They must also strike a fair balance between the rights of the individual and the general interest of the community. . . .”; Coppel, J, *The Human Rights Act 1998: Enforcing the European Convention in the Domestic Courts* (Wiley: Chichester, 1999), para 14.8.

<sup>165</sup> (1986)8 EHRR 123.

<sup>166</sup> *Ibid*, para 41; see Starmer, p 639.

<sup>167</sup> Coppel, J, *op cit*, n 164 para 14.8.

<sup>168</sup> *Ibid*.

Under Article 8(1) of the European Convention on Human Rights, every individual is guaranteed the right to respect for, *inter alia*, his private and family life, and his home.<sup>169</sup> Although the proposals of LRAC(NI) in respect of (*quasi*-) matrimonial property may initially appear to constitute a *prima facie* interference with family life, on similar grounds to those raised in respect of the Irish Matrimonial Homes Bill 1993 which were held to contravene respect for the family under the Irish Constitution,<sup>170</sup> it is important to distinguish between the Irish provisions, which applied automatically and retrospectively, and the proposals for reform in Northern Ireland. The LRAC referred in the Discussion Paper to the implications of the European Convention on Human Rights when considering whether the proposals ought to be of retrospective effect.<sup>171</sup> If the Northern Ireland proposals were to be of retrospective effect,<sup>172</sup> arguments could have been raised regarding interference with decisions which had already been made in respect of the home under Article 8, similar to those arguments which defeated the Irish 1993 Bill.<sup>173</sup> The Final Report indicated, however, that the recommendations were not to apply retrospectively.<sup>174</sup> The proposals would not therefore involve any interference with decisions which had already been made in the context of the family. Furthermore, spouses and qualifying cohabitants may, if they wish, opt-out of the co-ownership regime. The recommendations made in the Final Report do not therefore offend the rights of family members to reach their own decisions, and consequently are unlikely to be regarded as interfering with family life to a disproportionate degree.

Another important practical issue stems from the fact that the proposed statutory co-ownership would be operational at the stage of one of the specified conveyances, and qualifying partners would have an option to opt-out of the provisions at this stage. Since the vesting of the property in joint owners is triggered by a conveyance, it is likely that the partners, or the transacting partner at least, would have legal advice at this point. Even in the case of an acquisition by one partner, where it might be argued that the non-

---

<sup>169</sup> See above, footnote 155 for text of Article 8.

<sup>170</sup> *Bunreacht na hEireann*, Article 41. See footnote 131 for excerpts from Article 41. Although Article 41 is not co-extensive with Article 8 ECHR, both deal in substance with the protection of the family. Article 41 protects the Family, and particularly the contribution made by 'woman' by 'her life within the home'. Article 8 of the European Convention on Human Rights protects, *inter alia*, 'private and family life', and the home.

<sup>171</sup> "... retrospectively depriving parties of their legal and beneficial rights and property without compensation would be a major interference with the private rights of property and may well represent a disproportionate interference which would be unlawful under the European Convention on Human Rights."; Discussion Paper, para 6.25.1.

<sup>172</sup> A matter on which the Committee had not reached a provisional view prior to publication of the Discussion Paper, see para 6.25.1.

<sup>173</sup> That is, that the proposals would unjustifiably alter joint decisions which had already been reached within the family.

<sup>174</sup> Final Report, para 5.25. The Committee's reasoning in reaching this conclusion included consideration of the prospect that retrospective effect could render the proposals open to challenge on the basis of non-compliance with Article 1 of the First Protocol, by interfering with existing rights to property, rather than Article 8.

transacting partner will not necessarily be a party to, or aware of the conveyance, it would be the transacting partner (who will usually require the services of a conveyancer) who would stand to 'lose' by the operation of the proposed provisions. The Northern Ireland proposals differ in this respect from the 'automatic' co-ownership proposed in Ireland. The mechanics of the Northern Ireland proposals have the advantage of indirectly introducing the necessity for legal advice at the point when the provisions become operative (that is, at the time of the conveyance).

Nevertheless, the mere provision of legal advice does not necessarily ensure that a written agreement to opt out, or a private agreement between partners *not* to opt out, is completely voluntary. It has been accepted by the courts that parties engaged in an emotional and sexual relationship are more likely than others to be vulnerable to undue influence.<sup>175</sup> Illegitimate pressure could operate in a number of ways: *either* the transacting partner could be pressured, explicitly or implicitly, into completing the conveyance without objecting;<sup>176</sup> *or* the non-transacting partner might be pressured or unduly influenced into agreeing to opt out of the provisions. Even where there is no direct application of pressure, it may be difficult for a purchasing partner to express a desire to retain ownership of the property which he or she has paid for at the risk of 'upsetting the apple cart', and damaging the relationship with his or her partner.

To date, the law concerning undue influence has tended to focus upon the mere provision of legal advice as a panacea to illegitimate pressure,<sup>177</sup> although the *effect* of that advice may not have been to relieve the pressure exerted over the victim.<sup>178</sup> This issue was not addressed by the LRAC, although it could arguably provoke a considerable amount of litigation.<sup>179</sup> In

<sup>175</sup> Although the court rejected a presumption of undue influence between spouses, it was conceded that: "... sexual and emotional ties between parties provide a ready weapon for undue influence: a wife's true wishes can easily be overborne because of her fear of destroying or damaging the wider relationship between her and her husband if she opposes his wishes"; *Barclay's Bank plc v O'Brien* [1994] 1 AC 180 at 190.

<sup>176</sup> A partner may feel that it would be detrimental to the relationship to request the non-transacting partner to agree to opt out of the provisions.

<sup>177</sup> In the context of surety transactions, the courts have tended to regard third parties as having discharged any duty of inquiry which might arise as a result of notice (actual or constructive) of undue influence so long as the surety has been advised to take independent legal advice: see *TSB Bank Plc v Camfield* [1995] 1 All ER 951; *Bank of Baroda v Shah* [1988] 3 All ER 24; *Lloyd's Bank plc v Egremont* [1990] 2 FLR 351; *Midland Bank v Massey* [1995] 1 All ER 929; *Bank of Baroda v Rayeral* [1995] 2 FLR 376; *Midland Bank plc v Serter* (1994) 26 HLR 612.

<sup>178</sup> This approach has been criticised as "... focus[ing] on the issue of the victim's comprehension but completely ignor[ing] the primary issue of influence"; Oldham, "Neither a Borrower nor a Lender be" – the life of *O'Brien* (1995) *Child and Family Law Quarterly* 104 at 118. See also *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144.

<sup>179</sup> The Committee considered the possible operation of undue influence only at the later stage of application for sale by a secured creditor, and regarding the subsequent agreement to use the property as security, not the decision whether to opt-out of statutory co-ownership. One of the proposed factors to be considered by the court when exercising its power under the Partition Acts to refuse sale is: "... whether the co-owner against whom an order is sought was a party to the

contrast, the Irish proposals considered above<sup>180</sup> included a requirement that parties choosing to opt out of the (proposed) scheme of statutory co-ownership must have received legal advice.<sup>181</sup> Furthermore, it was also provided that: “. . . in this subsection ‘lawyer’, in relation to advice to a spouse, does not include a lawyer who is acting on behalf of the other spouse. . . .”<sup>182</sup> Although it is tempting to suggest that similar provisions ought to accompany the introduction of the Northern Ireland recommendations, it is also important to bear in mind that legal advice does not necessarily solve the problem of undue influence. Whilst the Committee’s proposals may, from some perspectives, herald the introduction of a fairer system in respect of property interests in the joint residence between partners, the nature of the relationship may also, in some circumstances, cause the proposals to lead to unfair results.

## 5. CONCLUSIONS

The proposals made by the LRAC for reform of the law relating to joint residences in Northern Ireland would effect a radical transformation, encouraging co-ownership of the joint residence between not only spouses, but also cohabiting partners after only two years. The proposed reforms are intended to promote a system of matrimonial property law which produces: “. . . a fair and equitable result between husbands and wives (and, we would argue, cohabitants) but also one which is fair to wives as a class.”<sup>183</sup> Nevertheless, the presumption of beneficial co-ownership, regardless of who pays for the property, will be a matter of concern in the eyes of those who consider the issues addressed by the Discussion Paper and the Final Report from the point of view of the property owner. Although the proposed provisions allow partners to opt out by agreement in writing, this places a burden on the property owning partner to take action ‘against’ his or her spouse or cohabitant if he or she wishes to retain sole ownership.

If these proposals are introduced, it is arguable that a substantial proportion of this burden could fall on the solicitors who advise such individuals. Legal advisers will be required to inform spouses and qualifying cohabitants (once the solicitor has probed the extent of their relationship) of the nature of the transaction, and its consequences, and to explain the implications of the

---

security or agreed to its creation and if so whether his or her consent was freely and advisedly given”; Final Report, para 5.38.

<sup>180</sup> See section 3(b).

<sup>181</sup> “A declaration under subs (1) shall be void unless, before making it, the spouse concerned has received advice from a lawyer in relation to the declaration and its effect”; Matrimonial Homes Bill 1993, s 7(2)(a). S 7(1)(a) contained a provision by which property could be ‘opted-out’ if the spouse who would benefit made a declaration in writing to that effect.

<sup>182</sup> “. . . or who is a member of a firm of lawyers which, or another member of which, is so acting or has so acted”; Matrimonial Homes Bill 1993, s 7(2)(c). It is noteworthy that this provision went somewhat beyond the existing English common law position on the subject of legal advice and undue influence, whereby the burden of ‘independent legal advice’ can be discharged even though the same solicitor acts for surety and principal debtor, *Midland Bank v Massey, supra*, or for all three relevant parties, surety, debtor and creditor, *Midland Bank plc v Serter, supra*.

<sup>183</sup> Discussion Paper, para 6.18.

various available alternatives: sole or joint legal title, sole or joint beneficial ownership, statutory co-ownership and the consequences of opting-out.<sup>184</sup> Much will depend on the quality of advice given to transacting partners, and solicitors will have to be vigilant regarding the possibility of undue influence.<sup>185</sup>

There will also still be cases to be dealt with according to established (resulting and constructive) trust principles. The main proposals apply only to spouses and *quasi*-spouses or ‘qualifying cohabitants’, and even in these cases, only to their primary residence. Although there is also a second layer of proposals, these do not encompass property held by same sex couples, nor by homesharers who are not involved in a sexual relationship. The proposals also extend only to property occupied as a residence. Traditional trust principles will therefore continue to govern a significant number of cases, which fall outside the second layer of proposals (dealing with (1) non-qualifying heterosexual cohabitants, (2) agreement to legal title in one name followed by detriment which would *not* under the existing law give rise to an interest under a trust, and (3) property already vested).<sup>186</sup> This would result in three different regimes governing equitable interests in real property: statutory co-ownership for qualifying partners, with a provision to opt-out, the second layer of proposals, which deal with additional specified situations, and those cases falling altogether outside the recommendations,<sup>187</sup> which will continue to be governed by traditional trust principles.

The general policy of the Committee’s proposals echoes the memorable sentiment in support of joint legal ownership expressed by Lord Scarman in 1982. His Lordship suggested that:

“ . . . we should encourage young married people to go round the corner to the solicitor, or, if we could establish one, the legal clinic, to talk about the legal problems of marriage just as they go to the medical clinic to discuss the medical problems associated with what is euphemistically called family planning.”<sup>188</sup>

Although the proportion of partners opting for joint legal title has increased exponentially since then, the proposals for reform in Northern Ireland seek to ensure that those who have not taken this positive step will be encouraged to ‘turn their minds’ to the question of their respective interests in the joint residence. By providing that the beneficial ownership of property would be vested in both partners as joint tenants, not by action but by passive inaction, the introduction of these proposals would change the shape of matrimonial property ownership. It is also clear, however, that for those interested in protecting not only the family interest, but their individual property interests

---

<sup>184</sup> See footnotes 82-88 and associated text.

<sup>185</sup> See Morris, “Wives are told: don’t blame the bank, sue your solicitor” (1999) *Feminist Legal Studies* 193, for analysis of the implications of developments in undue influence in relation to surety transactions on practitioners.

<sup>186</sup> See Final Report, para 5.34, and footnote 85, above.

<sup>187</sup> That is, property which is not occupied as a (*quasi*-) matrimonial home as defined in the Report.

<sup>188</sup> 437 HL Deb (5<sup>th</sup> Series) col 652 (15 December 1982) Lord Scarman.

also, the conversations which they will need to have with their solicitors will become not only more significant but considerably more complex.

There can be no doubt that the issues raised by this Report will provoke debate, and arguably controversy, both within and outside of the legal professions. To a certain degree, such debate would be an end in itself, since difficulties often arise in this area due to the fact that parties involved in personal relationships may neglect to arrange their affairs, particularly in respect of the ownership of property, in any formal manner. It is also encouraging to note that the Law Reform Advisory Committee (Northern Ireland) have recommended further research and review into the law concerning cohabitation,<sup>189</sup> and more general issues concerning co-ownership.<sup>190</sup> In the meantime, if these reform proposals encourage greater awareness of the need for homesharers to ‘turn their minds’ to the question of property rights in the home, and consequently to make arrangements which reflect their intentions, this could only be welcomed.

---

<sup>189</sup> “We consider that the time is ripe for a wider review of the law relating to cohabitants”; Final Report, para 4.12.

<sup>190</sup> “We also consider that the time is right for a general review of the law relating to co-ownership and recommend that this item be added to the Committee’s programme of law reform or the programme of law reform of any new Law Commission established to replace the Committee.”; *ibid*, para 5.37.

## QUASI-LEGISLATIVE DEVOLUTION. POWERS AND PRINCIPLES

*Richard Rawlings, Law Department, London School of Economics.<sup>1</sup>*

“If executive devolution is to prove effective, two fundamental problems will need to be resolved. First, primary legislation for Wales will have to be drawn up more loosely than primary legislation for England, so as to give scope to the Assembly. . . . Second, principles must be devised to regulate the dividing line between primary and secondary legislation.”

Vernon Bogdanor<sup>2</sup>

Designed as a contribution to the Welsh constitutional development, the purpose of this study is threefold. First, it is intended to provide a basic conceptual framework, so far sadly lacking in the general discussion, for evaluation of the design and continuing evolution of the current scheme of executive devolution. Secondly, the aim is to elaborate the scope for and scale of development of legislative practice and procedure inside the parameters of the Government of Wales Act 1998 (GWA). The third and related aim is to construct a set of principles relating to the policy for allocating powers to the Assembly, in keeping with the spirit of the devolution legislation. As the opening quotation suggests, the fact that such principles have not so far been articulated in a public or transparent way is one of the most striking features of the Welsh devolutionary development. Evidently, it has been too sensitive a matter.

The study is divided into four main sections. Part I focuses on certain key features of the model of executive devolution in general and of the Welsh scheme in particular. The chief theme is the legal and administrative complexity involved in the constitutional development and the associated difficulties. Part II presents a novel ideal-type for the purpose of legal and constitutional analysis, what I have called 'quasi-legislative devolution'. Used in tandem with a competing concept, 'strict executive devolution', it serves to illuminate the considerable flexibility of, or strong organic element in, the basic statutory design. The space for and fact of, as well as the limitations on, a continuing evolutionary development under the auspices of the GWA is the main theme of this section. In Part III the link with legislative practice and procedure is elaborated, both in terms of primary or Westminster legislation bearing on Assembly functions and the exercise by the Assembly of its subordinate law making powers. The vexed issue of Assembly input into the central government lawmaking machine is seen at the core of the current constitutional debate in Wales. Part IV presents a set of what I have called 'devolution principles'. As well as encouraging consistency and transparency in the law-making process, the principles are

---

<sup>1</sup> I am grateful to participants at the Lord Morris seminar on 'The Subordinate Law Making Powers of the National Assembly for Wales', held in Cardiff in January 2001, for comments on a draft of the study. The usual disclaimer applies.

<sup>2</sup> V. Bogdanor, *Devolution in the United Kingdom* (Oxford, 1999), pp. 259-260.

designed to underscore important constitutional and administrative concepts associated with the basic idea of devolution of power.

For the avoidance of doubt, the argument in this study is not one in favour of the model of executive devolution.<sup>3</sup> The approach is one of constructive engagement with the devolutionary scheme under which the people of Wales are presently governed, in the certain knowledge that the search for improvements will also point up major shortcomings in that scheme.

## I. EXECUTIVE DEVOLUTION: A MAP OF EMPOWERMENT

Welsh devolution is well known to have introduced into Britain a new and untested set of constitutional arrangements: a form of executive devolution that includes the transfer of various subordinate or secondary law-making powers. It contrasts with legislative devolution as in Scotland, the more powerful and straightforward allocation of primary legislative functions to the territory. The nomenclature provides the clue: an ‘Assembly’ in Wales, a Scottish ‘Parliament’.

In practice, as a method of allocating law-making functions, executive devolution involves from the standpoint of the lawyer four main elements. The first relates to the vertical division of primary law-making powers that is used both in legislative devolution and federal systems. The UK Government, in devolving powers to Scotland, Wales and Northern Ireland, has naturally retained core elements of the functions of the state: not least defence and foreign affairs, general taxation and immigration and nationality laws. In the event, reference is made in Schedule 2 of the GWA to certain ‘fields’ or subject-areas for the transfer of functions. They include economic development and transport; agriculture and fisheries; health, social, and housing policy; local government and education; and planning and the environment.<sup>4</sup> Beyond this range of functions in public law are many parts that Assembly laws cannot and will not reach.

The second main element is the horizontal division between primary and secondary law making powers that is the hallmark of executive devolution. It is the question not of whether but of how much legislative power relating to a function should be transferred. In the event, a key feature of the implementation of the Welsh scheme is the specific enumeration of the powers devolved statute by statute. There is in other words no general secondary legislative competence for the Assembly in fields of transferred functions. Also relevant is the way in which the dividing line may be blurred by for example the use of so-called Henry VIII clauses, statutory provisions that allow primary legislation to be repealed or amended by means of

---

<sup>3</sup> Or, rather, against a scheme of legislative devolution, which elsewhere I advocate; R. Rawlings, ‘The New Model Wales’ (1998) 25 *Journal of Law and Society* 461; id, *Delineating Wales: Legal and Constitutional Aspects of National Devolution* (University of Wales Press, forthcoming).

<sup>4</sup> See general discussion, K. Patchett, ‘The New Welsh Constitution: The Government of Wales Act 1998’, in J. Barry Jones and D. Balsom (eds.), *The Road to the National Assembly for Wales* (University of Wales Press, 2000).

secondary legislation. The GWA so empowered the National Assembly for certain limited purposes.<sup>5</sup>

The issue arises of overlapping jurisdiction, which is so familiar in constitutional systems of divided competence. Joint and concurrent powers with central government, as well as consultation and consent requirements, are as the third element a significant feature of the new devolutionary architecture in Wales. Not surprisingly, so-called 'cross-border' matters involving England and Wales furnish various examples.<sup>6</sup> But easily the most important in terms of the legal and constitutional development is the supervisory power of central government in ensuring the implementation of European Community legal obligations. It is a necessary consequence of the legal and political responsibility of the UK Government in the role of Member State of the European Union.

The following diagram represents this part of the story.

---

<sup>5</sup> See GWA, sections 27-28 (reform of Welsh health authorities and other public bodies).

<sup>6</sup> There are also many examples in the agricultural and industrial fields.

Executive devolution, however, is a moving target. The method implies an ongoing allocation of powers as new statutes come on stream: the fourth element. The Assembly has in this way been a recipient of functions virtually from the moment of its birth. The element of flexibility is further developed in the GWA.<sup>7</sup> The Assembly was first empowered by means of statutory instrument, in the form of a Transfer of Functions Order.<sup>8</sup> As the Government had promised in the devolution White Paper,<sup>9</sup> this operated to transfer nearly all of the statutory functions of central government formerly exercised under the auspices of the Secretary of State for Wales. The power exists to make additional orders, in effect transferring functions exercised by other Ministers in relation to Wales. Put simply, while the GWA makes reference to the transfer of functions in certain fields, it does not so restrict the process that is executive devolution.<sup>10</sup>

### **Legal complexity: political and administrative difficulties**

To develop the theme, the diagram both illustrates the great complexity that is associated with the scheme of executive devolution and is deceptively simple. Almost the first thing one learns when studying the scheme is that the dividing line between primary and secondary legislation for the purposes of the Assembly is effectively a zigzag. For reasons of speed and avoidance of conflict with Whitehall Departments, it made sense – politically and administratively speaking – to base the initial Transfer Order on the delegated powers that over the years the Welsh Office had come to exercise. But as Rachel Lomax, the then Permanent Secretary pointed out:<sup>11</sup>

“The Secretary of State's present powers have accumulated piecemeal over a long period of time, and the distinction between matters that are dealt with in primary and secondary legislation has reflected pragmatic considerations as much as principle.”

In turn, the basic Transfer Order is an extraordinary document. Some 350 Acts of Parliament have had to be listed, containing functions transferred to the Assembly. References to excepted and partially excepted sections abound, as also powers exercised concurrently or jointly with central government. Such is the painful detail of definition and sub-definition that the technical guide to the Order runs to over 500 pages.<sup>12</sup> It was clearly a most laborious task, involving a series of drafts and consultation exercises, and taking almost a year to complete.

---

<sup>7</sup> See especially GWA, sections 21-22.

<sup>8</sup> National Assembly for Wales (Transfer of Functions) Order, No. 672, 1999.

<sup>9</sup> *A Voice for Wales*, Cm. 3718 (1997).

<sup>10</sup> Those wanting a comprehensive list of the functions of the Assembly are referred to Welsh Legislation Online: [www.wales-legislation.org.uk](http://www.wales-legislation.org.uk)

<sup>11</sup> Quoted in V. Bogdanor, *op cit* p 258; and see for general discussion, D. Lambert, ‘The Government of Wales Act – An Act to be Ministered in Wales in Like Form as it is this Realm?’ 30 *Cambrian Law Review* (1999) 60.

<sup>12</sup> Welsh Office Devolution Unit, Technical Guide to the Transfer of Functions Order (1998); and for the so-called popular version, *id*, Making the Difference in Wales. A Guide to the Powers of the National Assembly for Wales (1998).

The political and policy processes in Wales are directly affected in a number of ways. First, the evident patchwork of devolved functions serves to fuel demands for additional powers from Westminster. This has been a constant refrain among Assembly Members.<sup>13</sup> Expressed slightly differently, the evident complexity operates to underscore the unstable character of the devolutionary scheme.

Secondly, there is a basic problem of the Assembly achieving coherent policies when faced with rule making powers of uneven width and depth. The difficulty is apt to surface in so called ‘cross-cutting issues’, where especially by reason of the *ad hoc* historical development a matching division of primary and secondary legislation cannot be taken for granted. The scheme is thus not well suited to that most fashionable of official pursuits: ‘joined up government’.

The design – and in particular the lack of governing principles – is also a recipe for inefficiency and intergovernmental tensions or conflict. It cannot be supposed that the transfer of functions to the Assembly has been a purely technical matter. Here it suffices to observe that some Departments have been more receptive to the current Welsh political metamorphosis than others.<sup>14</sup>

Further, the principle of intelligibility, which is considered so important in constitutional documents, is offended. Who other than a lawyer<sup>15</sup> or official could give any meaningful guidance on the legislative competence of the Assembly? This feature is the more striking, because of the great stress placed in the devolutionary design on transparency and bringing government closer to the people.<sup>16</sup> Intelligibility of functions or powers is a *sine qua non* of the practice of inclusiveness.

We begin to see why the demand for a system of principles will not go away. That is, at least for so long as the scheme of executive devolution endures.

## II. INTRODUCING QUASI-LEGISLATIVE DEVOLUTION

Properly to understand the devolutionary process in Wales, it is necessary to look beyond the standard dichotomy with legislative devolution and to consider possible competing models of executive devolution. To this end, assuming a Welsh style system of specific empowerment, and focusing on the constitutional and legal aspects, let us consider the minimal and maximal scenarios. The concept of quasi-legislative devolution serves here as the counterpoint to a strict or narrow view of what UK Ministers have been pleased to call the ‘devolution settlement’ for Wales.

Competing concepts: strict executive devolution and quasi legislative devolution

---

<sup>13</sup> See further below, in the context of subsequent primary legislation.

<sup>14</sup> The theme is elaborated in R. Rawlings, *Delineating Wales*, *op cit*. And see below, Part III.

<sup>15</sup> See on the exceptional legal dimension to the Welsh devolutionary scheme, R. Rawlings, ‘Living With The Lawyers’ (1999) (3) *Journal of the Institute of Welsh Affairs* 32; and W. Roddick, *Crossing the Road* (Law Society in Wales, 1999).

<sup>16</sup> See for discussion, R. Rawlings, ‘The New Model Wales’, *op. cit*.

Aspect	Strict executive devolution	Quasi legislative devolution
A. Internal architecture		
1. Government structure	Committee or classical local government model	Cabinet model
2. Assembly workings	Corporate form (inclusiveness)	Parliamentary style (oppositional)
B. Secondary legislative powers		
1. Range of transfer of functions	Narrow	Broad
2. Form of delegation	Limited, tight definitions	Framework legislation; Henry VIII clauses
C. Role in primary legislative process	Model of influence	Privileged access
D. Taxing power	None	Tax-varying function

This conceptual framework is helpful in a number of ways. As indicated, it serves to highlight both the room for manoeuvre or spectrum of possible approaches within, and the overarching constraints of, the legislative scheme of the GWA. For example a most important feature is the absence of an Assembly power of taxation. Underwriting the devolutionary process by so providing a measure of fiscal freedom and accountability would obviously require primary legislation. For contrast, reference can be made to the internal re-balancing of roles in terms of the cabinet and committee models of administration that is permissible via a system of broad delegation of functions.<sup>17</sup>

Similarly, a conceptual framework is established with which to test the strength and trajectory of the constitutional development in Wales. For according to a well-known saying, devolution is a process not an event.<sup>18</sup> A good illustration involves the (legal) concept of the Assembly as a corporate body, which cuts across constitutional demands for the separation of powers.<sup>19</sup> Entirely predictably, one issue that has arisen is the nature of the relationship between, on the one hand, the Presiding Officer of the Assembly and his staff, and, on the other, the devolved administration or Welsh Government as represented by the Cabinet. In the event, one of the most striking features of what has been an ongoing constitutional metamorphosis of the Assembly post-devolution is the increased separation or independence of the Office of the Presiding Officer (OPO). In turn, the rise of OPO is correctly seen as part of a more general move towards a parliamentary style or form for the Assembly.<sup>20</sup> The sudden appearance, in the context of the

<sup>17</sup> GWA, sections 52, 63.

<sup>18</sup> R. Davies, *Devolution: A Process not an Event* (Institute of Welsh Affairs, 1999).

<sup>19</sup> GWA, section 1.

<sup>20</sup> See for example J. Osmond, 'A Constitutional Convention by Other Means: The First Year of the National Assembly for Wales', in R. Hazell (ed.), *The State and the Nations* (Imprint Academic, 2000).

coalition or ‘partnership government’ that came into being in October 2000, of the titles ‘First Minister’ and ‘Leader of the Opposition’, provides a different kind of marker here. Discussion of the principles to govern the allocation of powers cannot sensibly take place divorced from this broader constitutional and political context.

Certain key factors that go to the substance and workability of a scheme of executive devolution are underscored. The first one is easy and effective access to the primary lawgiver. In terms of the formal parliamentary process, arrangements may on the one hand amount to little more than the standard indirect techniques for exercising influence, and, on the other, involve the concept of privileged access for the devolved administration. This is not to overlook the broader issue of intergovernmental relations, and that access into the central government (lawmaking) machine which is so necessary for the efficient and effective operation of devolutionary arrangements, and of executive devolution in particular.<sup>21</sup>

The second factor, identified by Bogdanor in the opening quotation, concerns the basic way in which the division of primary and secondary law-making powers is approached. It could (continue to) proceed *ad hoc* in a typical manifestation of the British tradition of constitutional pragmatism. Or, in recognition of the new devolutionary paradigm, it may involve a serious attempt at developing a set of constitutional principles to guide the division - the second main purpose of this study.

The style or form of the delegation of secondary legislative powers is a third and related factor. To explicate, under a strict regime characterised by limited legal autonomy, the devolved administration finds itself curbed by tight restrictions on or definitions of secondary legislative powers; as also perhaps by an increased recourse to primary legislation. In contrast, techniques of legislative drafting may be used which boost the discretionary power of the devolved administration in secondary law making.<sup>22</sup> Framework legislation, whereby myriad rule-making powers are exercised inside the broad parameters of legislative policy, is a potent method. All the more so, if it comes with a liberal sprinkling of Henry VIII clauses. At the extreme end of the spectrum, it becomes necessary to think in terms of quasi-legislative devolution. This would involve a devolved administration in making the kind of policy rules commonly expressed in, but without the proper status of, primary legislation.

The GWA once again provides a flexible framework here, so allowing for considerable movement in terms of drafting practices and techniques inside the formal legal parameters of the so-called devolution settlement. Arrangements akin to the classic Henry VIII clause, whereby the Assembly

---

<sup>21</sup> See for general discussion, R. Rawlings, ‘Concordats and the Constitution’ (2000) 116 *Law Quarterly Review* 257; also R. Hazell, ‘Intergovernmental Relations: Whitehall Rules OK?’ in R. Hazell (ed.), *The State and the Nations* (Imprint Academic, 2000).

<sup>22</sup> See for an early discussion in the context of the Assembly, P. Silk, ‘The Assembly as a Legislature’ in J. Osmond (ed.), *The National Assembly Agenda* (Institute of Welsh Affairs, 1998).

may apply with modifications the provisions of primary legislation, or disapply those provisions and make separate provisions for Wales, could for example be more widely used. Again, it would be possible under the auspices of the GWA to adopt an approach that is standard in other constitutional systems of divided competence, the devolution of functions by reference to subject-area.<sup>23</sup>

One could envisage the allocation of law-making functions to the Assembly developing over time as an area of constitutional convention, effectively the sub-text of this study. Changing political hues in Wales and at Westminster, however, may produce substantially different results. The potential in terms of the delegation of functions for a pendulum effect flows directly from the ongoing allocation of powers that is part of executive devolution. For the purpose of this discussion, some recent comments by the Assembly First Minister could hardly be timelier:<sup>24</sup>

“What we often find difficult is individual parties or individuals in the Assembly taking an *a la carte* approach... If they want an issue debated in the Assembly because they think that they might have a better chance of having a different outcome here than if it is debated in Westminster, they are all in favour of greater powers for the Assembly. If they think that there is a better chance of getting their way in Westminster they do not want the power devolved to the Assembly. You must have a set of principles. . . You must be consistent in your principles and in your attitude to devolution, and not pick and choose just because it suits you on a particular issue.”

“In theory, a future government of another colour... could cheat us of our rights by putting almost nothing down for secondary legislation. There is nothing in the British constitution which states what proportion of a Bill confers powers by secondary legislation and when it is all done in the primary legislative Act. One could leave almost nothing to the discretion of the Assembly. There is nothing that lays down any procedure that guarantees powers to the Assembly. It is not a problem provided there is a Labour Government.”

To anticipate the argument, the set of governing principles proposed in this study is in part designed for the situation of administrations of different political colours, or ‘cohabitation’ as the French like to call it. The people of Wales deserve better than a constitutional structure that is reliant on Labour Party hegemony.

### III. OUTPUTS AND INPUTS

What then of the state of play? It should surprise no one to learn that the qualitative issue of the ongoing legislative treatment of the Assembly, the statutory outputs, and the logically prior matter of privileged access to the central government machine, the legislative inputs, have moved rapidly

---

<sup>23</sup> The approach for example of the Scotland Act 1998, predicated on the reservation of areas of competence to Westminster, bears no repetition here.

<sup>24</sup> *Official Record*, 12 December 2000.

centre-stage in the new Welsh polity. Such considerations being of the essence of the constitutional situation of Wales, it is only natural that different political actors should seek to maximise or minimise the extent of the difficulties. As Rhodri Morgan wryly observed of the period immediately prior to the Queen's Speech in December 2000:<sup>25</sup>

“During the past few weeks I have answered 23 Assembly questions on what the Cabinet has been doing to influence the process and content of primary legislation. Each time, I have referred to the efforts of the Cabinet and officials to get the best deal in relation to primary legislation.”

Three major contributions convey the flavour. The Presiding Officer (and Plaid AM) Lord Elis Thomas has expressed considerable dissatisfaction, to the extent of raising the question, ‘National Assembly, a Year in Power?’ As indicated, the administrative history of the territorial department that was the Welsh Office casts a long shadow:<sup>26</sup>

“The current basis of the Assembly's powers displays no constitutional logic, but was based entirely on the political processes of the gradual acquisition of powers within the Office of the Secretary of State for Wales. Devolving “secondary legislation”, as a category, makes no constitutional sense, because it is itself legislatively various.”

More recently, the ministerial architect of Welsh devolution (and backbench Labour AM) Ron Davies has contended that ‘if devolution for Wales was an accepted part of the mindset of Whitehall, it would show.’ ‘A common approach would inform all Departmental legislation and a common principle underpinning the Government's approach with the evidence. There isn't and that's worrying. . .’. Perhaps hopefully, Mr Davies believes that the centre understands:<sup>27</sup>

“Westminster knows that the Assembly cannot deliver its full potential within the structure currently operating and that if it fails to be more expansive and responsive to the needs of the National Assembly, the calls for full powers over primary legislation will be irresistible.”

Labour's Business Secretary, Andrew Davies, has mounted a robust defence. The argument is typically one of general improvement in the light of early difficulties. This fits with the strong theme in the UK devolutionary development of experimentation and broad scope for institutional learning or adaptation.<sup>28</sup> In the Minister's words:<sup>29</sup>

“Contrary to what some have said. . . we have an excellent track record in influencing primary legislation. . . However, we cannot take that for granted. The Cabinet will continue to

---

<sup>25</sup> *Official Record*, 19 December 2000.

<sup>26</sup> Lord Elis Thomas, ‘National Assembly, A Year in Power?’, lecture delivered to the Institute of Welsh Politics, Aberystwyth, 2000.

<sup>27</sup> R. Davies, ‘In Search of Attitude’ (Memorandum, December 2000).

<sup>28</sup> See for elaboration in the Welsh context, R. Rawlings, ‘The New Model Wales’, *op cit*.

<sup>29</sup> *Official Record*, 19 December 2000.

press for legislation that reflects the needs of Wales and respects the Assembly's role. . . ”

“The choice before us today is simple. We can carry on making a real and positive difference to primary legislation affecting Wales, or we can descend into making self-indulgent points to which no-one, least of all Parliament and the UK Government, will pay attention. . . ”

At the same time, however, such political controversy should not be allowed to obscure the important legal issues or lawyerly concerns that are raised in this context. By which is meant especially the techniques and pre-existing canons of, and the scope post-devolution for creativity in, legislative or parliamentary drafting. Together, that is, with the difficulties the practitioner may have in fully grasping the intricacies of what may now properly be called the emergent Administrative Law of Wales.<sup>30</sup> This in turn is apt to feed back into the constitutional debate. Or, as one might say, the ‘technical’ is ‘political’.

### **Administrative and political dialogue**

The ongoing allocation of powers to the Assembly is essentially the product of an administrative and political dialogue or negotiation with central government departments, extending to the UK Cabinet Office and the new Wales Office. It is in other words a closed and elite form of constitution building, typically conducted far from the public gaze.<sup>31</sup> Different but related, the approach reflects the strong sense of pragmatism in the devolutionary development. Insiders attest to the standard Whitehall mixture of give and take, to a heavy emphasis on personal dealings, and – perhaps more virulently than before – to turf wars. An official involved in producing the first Transfer of Functions Order gives a whiff of the flavour:<sup>32</sup>

“If the. . . process illustrates anything about the way government works it is to do with quite how entrenched Ministers’ and Departments’ views can become in interpreting what would appear to be a fairly straightforward construction. . . and quite how many obstacles can be thrown in the way.”

Not that central government is a monolith, or that much in the exchanges is other than routine. At the same time, the current style of proceeding – very fluid and informal – shows a natural tendency towards the patchwork approach to the allocation of powers: more a matter of immediate responses, less the sense of constitutional vision. Expressed slightly differently, the conditions are ripe here for yet further legal complexity. A related feature is

---

<sup>30</sup> This is not to overlook the many interesting questions that arise concerning judicial review and so-called ‘devolution issues’. See generally on this aspect, Sir John Thomas, ‘The Legal Implications of Welsh Devolution’, in D. Miers (ed.), *Devolution in Wales: Public Law and the National Assembly* (Wales Public Law and Human Rights Association, 1999).

<sup>31</sup> It should be noted that for the purpose of the Freedom of Information Act 2000 information is exempt information if its disclosure ‘would, or would be likely to, prejudice relations between any administration in the United Kingdom and any other such administration’ (section 28).

<sup>32</sup> Quoted in R. Rawlings, *Delineating Wales*, *op cit*.

criticism on the floor of the Assembly of the lack of transparency, with Cabinet Members having to defend the case for confidentiality in the discussions about primary legislation with central government.<sup>33</sup>

### Devolution and evolution

The interplay of the twin elements of continuity and change lies at the heart of the UK devolutionary development. In the case of Wales, the pace of the evolutionary process has not slackened – quite the reverse. There is first a major role for, and emergent sense of, autochthonous constitutional development. Secondly, various elements of the process, some positive, others negative, reinforce the case for a set of organising principles for the devolution of powers. Let us look more closely.

*Primary legislation:* Turning first to the style and substance of the later primary legislation relating to Assembly functions, the UK legislative programme for 1999/2000 – the first full year that the Assembly was up and running – demonstrates several important traits. The volume of legislation dealing with the transfer of powers to the Assembly is increased. Whereas in the previous parliamentary session only 5 statutes had made provision for devolved functions, there were 14 such statutes in this session of Parliament. At the same time, there is an ever more bewildering array of provisions concerning, or references to, the Assembly, in part no doubt a reflection of the predilections of the individual Parliamentary or legislative draftsmen. Sometimes separate parts of an Act relate to Assembly functions, on other occasions the Assembly is given equivalence to a Secretary of State, and on other occasions again parallel powers are set out in particular sections. It is a case of complexity piled on complexity.<sup>34</sup>

The wide variety of general approaches to devolution is a particularly striking feature. At one end of the spectrum may be placed the Transport Act 2000.<sup>35</sup> In most parts of the legislation the rule making powers will be exercised not by the Assembly in relation to Wales but by UK Government Ministers. Various and specific functions relating to roads and bus services in Wales are devolved to the Assembly, but almost nothing in relation to the railways. Whither an integrated transport policy or joined up government? At the other end of the spectrum are several statutes that demonstrate a major and genuine attempt to legislate distinctively for the needs of Wales, including by generous grants of secondary lawmaking powers. The Learning and Skills Act 2000 for example incorporates in separated parts of the statute provisions relating solely to Wales reforms for the post-16 education structure that had been proposed by the Assembly. Then there is the Care

---

<sup>33</sup> See *Official Record* 23 January 2001. The ministerial architect of the devolutionary scheme has added his voice to the calls for more openness: R. Davies, 'In Search of Attitude', *op cit*.

<sup>34</sup> See further, Lord Prys Davies, *The National Assembly: A Year of Laying the Foundations* (Law Society in Wales, 2000). This is not the place to rehearse detailed criticisms of specific provisions.

<sup>35</sup> See on the background, Welsh Affairs Committee, *The Transport Bill and its Impact on Wales*, HC 287 (1999-2000); and for the responses of the UK Government and the National Assembly, HC 497 (1999-2000).

Standards Act 2000, which in the compelling circumstances of a major scandal<sup>36</sup> established the Children's Commissioner for Wales.

The Local Government Act 2000 deserves a special mention. It has raised the delicate issue of the nature of the relationships or spheres of authority between the different tiers of government after devolution. In the event, in such areas as 'best value' policy and the internal restructuring or modernisation of local government, the DETR has retained key powers on an England and Wales basis, or under the traditional rubric of central-local government relations. So also, the legislation occasioned a dispute about the scope of Henry VIII powers for the Assembly, with the DETR insisting on a conservative approach. The affair is the more noteworthy, since for the first time the Assembly Cabinet broke cover in the official discussions, complaining publicly at the turn of events.<sup>37</sup>

The attenuated programme that was the Queen's Speech in December 2000 demonstrates similar features. Five of the 16 Bills are of particular relevance to the Assembly's responsibilities, on subjects as diverse as health and social care, homes, and regulatory reform. The flagship measure here is the Children's Commissioner for Wales Bill, a positive outcome for the Assembly, which has prioritised the matter on an all-party basis, and a genuinely innovative piece of legislation. In terms of the ongoing constitutional development, the Bill stands for what the Assembly First Minister has said should become established practice: each year at least one Assembly sponsored Bill in the Westminster legislative programme.<sup>38</sup> More blurring, that is, of the practical distinction between legislative and executive devolution. At the same time, the Children's Commissioner Bill illustrates some basic limitations. As well as being a more restrictive measure than at least some of its advocates had envisaged,<sup>39</sup> the Bill has had to be fitted into the pre-existing statutory framework, with the constraints on legislative drafting that this implies. The specific or restricted form of Henry VIII clause that is adopted for Assembly purposes is also noteworthy in this respect.<sup>40</sup> Put simply, while this is 'go it alone' legislation, it is not 'do as you please'.

As well as the unceasing complexity, the new Bills amply convey the sense of different authorship. A point that has perhaps been underestimated in the design of the devolutionary scheme is the extent to which the UK legislative programme is driven by individual Departments. That there are for example different approaches to the changing of Assembly functions and laws through the exercise of new Ministerial order-making powers, centred on the requirement or otherwise of the consent of the Assembly, is a notable

---

<sup>36</sup> See *Lost in Care – The Report of the Tribunal of Inquiry into the abuse of children in care in the former county council areas of Gwynedd and Clwyd since 1974* (the Waterhouse Report), HC 201 (1999-2000).

<sup>37</sup> See *Assembly Record*, 4 July 2000.

<sup>38</sup> See *Official Record*, 21 November 2000. This is not to overlook the constraints imposed by a crowded legislative timetable at Westminster, or the difficulties implicit in a situation of political cohabitation. See further below.

<sup>39</sup> Most notably in terms of the focus on devolved functions; see for analysis, House of Commons Research Paper 01/05, *The Children's Commissioner for Wales Bill* (2001).

<sup>40</sup> See Children's Commissioner for Wales Bill, clauses 3-4.

feature.<sup>41</sup> To this effect, the case for organising principles relating to the allocation of devolved powers grows stronger by the day.

The detailed explanatory memoranda that accompany Government Bills are also relevant. On the one hand, they serve to point up the awesome task that the skeletal Wales Office now faces in representing Welsh interests in the ongoing primary legislative process. As regards the Bills particularly affecting Wales, some but not all memoranda refer to input from the territorial department. On the other hand, the memorandum on the Special Educational Needs and Disability Bill shows best practice in this sphere.<sup>42</sup> A section on the territorial coverage of powers is included, which elaborates the position in the various countries including that in relation to the Assembly. That this is not replicated elsewhere demonstrates once again the disjointed approach and the room for improvement in the practice and procedure of legislative drafting in the light of the devolutionary development.

Standing Orders: The elaboration of a tolerably efficient set of subordinate law making processes in the Assembly is an evolutionary development of the first importance, and one that is now underwritten by a codification of the relevant provisions in standing orders.<sup>43</sup> An internal process of streamlining and improved co-ordination has thus created space for meaningful debate in those cases displaying real scope for separate policy development or diversity in law.<sup>44</sup> In contrast, the report of the National Assembly Advisory Group,<sup>45</sup> on which much of the original procedure was based, showed a poor grasp of the realities of secondary legislation. There was insufficient provision for channelling the mass of dull and technical measures or for coping efficiently with the major driving force in the Assembly lawmaking process of Westminster and European requirements.

The fact that elaborate procedures are available for the use of generous grants of subordinate lawmaking powers remains an important strength of the Assembly legislative process.<sup>46</sup> Emblematic of the blurring of the distinction between legislative and executive devolution, these forms of democratic scrutiny incorporate some of the features of the primary legislative process in the UK Parliament.<sup>47</sup> So too, they were much

---

<sup>41</sup> See for example Regulatory Reform Bill clause 1(4); Countryside and Rights of Way Act 2000 section 52(3); and Local Government Act 2000 section 5(4). And see below, Part IV.

<sup>42</sup> See further, *Thirty-Seventh Report from the House of Lords Select Committee on Delegated Powers and Deregulation*, HL 130 (1999-2000); and for discussion, D. Lambert, 'A Voice for Wales: The National Assembly for Wales' (2001) 1 *Welsh Legal History Journal* (forthcoming).

<sup>43</sup> See Standing Orders 22-30, as approved by the Assembly in December 2000; and for general discussion, R. Rawlings, 'Scrutiny and Reform. Assembly Law Making and the Role of the Legislation Committee', in J. Barry Jones and J. Osmond (eds.), *Inclusive Government and Party Management* (Institute of Welsh Affairs, 2001).

<sup>44</sup> Especially through the introduction of the so-called standard accelerated procedure.

<sup>45</sup> National Assembly Advisory Group, *Recommendations* (1998).

<sup>46</sup> In the form of the so-called standard and extended procedures.

<sup>47</sup> See for discussion, Lord Elis Thomas, *op cit*.

trumpeted in the devolution White Paper as an advance on the oversight of secondary legislation typically practised at Westminster.<sup>48</sup>

Once again, the pressures for and processes of change are ongoing: a state of perfection in Assembly legislative practice and procedure there is not! One looks forward to the development of a more innovative legislative programme under the auspices of the new coalition or 'partnership government',<sup>49</sup> and in particular to a more proactive role in terms of scrutiny and oversight for the Assembly's Legislation Committee.<sup>50</sup> For present purposes, the broad constitutional significance of the internal reform of lawmaking procedure should be emphasised. Allowing for better targeting of the Assembly's Rolls Royce machinery for democratic scrutiny, it reinforces the case for a more generous allocation of devolved functions.

Amendments have also been made to standing orders formalising a process of debate and approval of Assembly proposals for primary legislation.<sup>51</sup> The new provisions effectively expand on the statutory duty of the Secretary of State for Wales to consult the Assembly each year about the UK Government's legislative programme.<sup>52</sup> A parallel procedure has thus been created, whereby the Assembly Cabinet brings forward a set of proposals for primary legislation in the following session of the UK parliament: a kind of preliminary Welsh Queen's Speech.

The development brilliantly illustrates the special demands of the scheme of executive devolution, a need to ensure timely input by the Assembly at the different stages of the preparation of Government Bills, and for the Assembly Cabinet to deal proactively in these matters. Notably, a planning framework has also been put in place at official level, whereby the various Groups in the Assembly Administration are now expected to come forward with ideas for Wales-only pieces of primary legislation: an Assembly shopping-list. Of course there is no getting away here from the high dependency on administrative and political goodwill that is involved in the brand of devolution applied to Wales. In paradoxical fashion, such measures – a louder 'voice for Wales' – also serve to highlight this aspect.

*Soft law*: From the legal perspective, a major feature of the UK devolutionary development is the strong use of 'soft law', in the broad sense of rules of conduct which have limited or no legally binding force; and in particular, of inter-institutional agreements in the guise of concordats or protocols.<sup>53</sup> On the one hand, it demonstrates the pressing need to maintain effective liaison

---

<sup>48</sup> *A Voice for Wales*, Cm.3718, paragraph 4.23.

<sup>49</sup> It is a major element of the first Annual Government Business Programme; see *Official Record* 21 November 2000.

<sup>50</sup> See for general discussion, R. Rawlings, 'Scrutiny and Reform', *op cit.*

<sup>51</sup> See SO 31.

<sup>52</sup> GWA, section 31; and see for general discussion, K. Patchett, 'Dealing with Primary Legislation', in J. Osmond (ed.), *The National Assembly Agenda* (Institute of Welsh Affairs, 1998).

<sup>53</sup> See generally, R. Rawlings, 'Concordats of the Constitution' *op cit.* The Assembly Cabinet will agree a concordat, whereas a protocol may involve the Assembly *qua* Assembly.

arrangements between the central and territorial layers of government, not least by reason of the increased complexity and reach of policy problems that is such a feature of contemporary public administration. On the other hand, it reflects the long silences in the devolution legislation concerning the structures and processes of intergovernmental relations, the official preference being for facilitative framework structures and the flexibility of soft law techniques. 'Concordatry' in other words is part of the 'glue' of the reinvented Union State.

In practice, the recourse to and reach of individual concordats will vary tremendously. It is not surprising to learn of the Welsh arrangements being slow to emerge, given both the intricacies of the devolutionary scheme and the benign political conditions that have facilitated the fluid and informal processes of dialogue between administrations. At the same time, concordatry has special resonance in the case of Wales. Simply put, the basic concept of 'no surprises' takes on a whole new meaning in the constitutional situation of horizontal division of lawmaking powers. The relevant instruments deal at considerable length with the procedures for Assembly inputs into the UK Government legislative programme, or in the terminology of this study with the gradual elaboration of arrangements for privileged access over and above the ordinary processes of interest representation.

The Concordat between the Assembly Cabinet and the Wales Office was published in January 2001.<sup>54</sup> Perhaps it is reassuring to know that 'both parties agree that good working relationships between them are vital to the public interest and to the effective governance of Wales'. They 'are committed to working together wherever it is appropriate, and to doing so through the agreed processes set out in this concordat'. But further, and specifically by reason of the model of executive devolution, 'it is essential that the Assembly Cabinet is informed of any proposals for new primary or secondary legislation at the earliest possible date'. Where appropriate, the Wales Office will facilitate the consultation 'and ensure that the Assembly's views are fully considered by the UK Government'. On the one hand, the Concordat builds on the amendments to Assembly standing orders: the First Minister undertakes to communicate to the Secretary of State the terms of any resolution of the Assembly requesting the UK Government to make or amend primary legislation. On the other hand, certain habits die hard. 'Parliamentary Counsel is unwilling to accept instructions from lawyers of the Office of the Counsel General of the Assembly'; which translated into practice means that skeleton Bill teams will have to be seconded to the Wales Office for the purpose of Wales only legislation. There is also much stress on the importance of maintaining confidentiality in the new modalities of intergovernmental relations: a general principle of the system of concordats.<sup>55</sup>

---

<sup>54</sup> The full text of the Concordat is available on the Assembly web site.

<sup>55</sup> Memorandum of Understanding and supplementary agreements between the United Kingdom Government, Scottish Ministers, the Cabinet of the National Assembly for Wales, and the Northern Ireland Executive Committee, Cm. 4806 (2000), paragraph 11.

Although debated and accepted by the full Assembly in February 2000,<sup>56</sup> the Protocol on Assembly Proposals for Primary Legislation had still not been signed off by the Secretary of State at the time of writing. It goes however to the heart of the scheme of executive devolution. On the one side, the Assembly agrees to co-ordinate proposals for primary legislation with the UK Government's internal consideration of its legislative programme, especially in the timing. On the other side, there are commitments by the Secretary of State to consider such proposals fully; to convey them to ministerial colleagues as appropriate; and – most important – to bring the proposals to the attention of the Legislative Programme Committee (LP) of the UK Cabinet. At the same time – continuity and change – the new modalities are made subject to old constitutional constraints. 'The content of the Queen's Speech is necessarily confidential, and can in no circumstances be made known to the Assembly. . . before it is delivered.' 'The above procedures are thus without prejudice to the UK Government's ultimate right to determine the final content of its legislative programme for each Parliamentary session without informing the Assembly'. At the more practical level, 'Both parties recognise that pressure for Parliamentary time, and for space in the UK Government's legislative programme, is intense'. So there can be said to be no guarantees, express or implied, or in lawyer's parlance no legitimate expectation.

A third instrument, a so-called devolution guidance note, is of a different order, being an internal UK Government communication issued by the Cabinet Office. Entitled 'Post Devolution Primary Legislation affecting Wales', it was finalised in February 2001, drafts of the document having done the official rounds for over a year.<sup>57</sup> The purpose of the guidance is 'to facilitate the efficient conduct by the UK Government of its legislative business.' 'Disagreements are an impediment to that and it is in the Government's interests that potential disagreements are identified as early as possible through consultation'. Ensuring that by the time proposals to introduce legislation reach the Legislative Programme Committee 'all devolution-related issues. . . have been addressed and so far as possible resolved' is seen as the essential requirement. Coupled, that is, with the recurring theme of confidentiality in the post-devolutionary system of government. 'Where the possibility of particular legislation has not been publicly announced, information going to the Assembly Cabinet should be passed in confidence.' It will be 'a matter for agreement whether, and to what extent, confidentiality must constrain wider consultation by the Assembly Cabinet and in no circumstances will the Assembly Cabinet circulate or allude to Bill material without the consent of the lead Department'. Such agreement, if reached, 'may depend on the duty of confidentiality extending to other bodies consulted by the Assembly Cabinet'.

In view of the track record of different approaches to legislative provisions concerning the Assembly, special requirements to explain to the Legislative Programme Committee those proposals involving distinctive Welsh provisions, or changes to the existing functions of the Assembly, suggest an

---

<sup>56</sup> See *Official Record*, 2 February 2000.

<sup>57</sup> It is available on the UK Cabinet Office web site, under the reference DGN 9.

additional potential. Exceptions to what is accepted to be the general rule ‘that a new function created by the Bill will pass to the Assembly in cases where it already exercises similar functions within that subject area’ are also made subject to this procedure. In covering some largely technical points about referring to the Assembly in primary legislation, an annex to the document supplies some further nuggets that point the way forward. ‘Commencement provisions in a Bill. . . should normally apply on equal terms to England and Wales, and to Ministers and the Assembly’. ‘A Bill should not normally subject the actions of the Assembly to Ministerial consent or approval (or vice versa).’ ‘New public bodies which fall solely under the Assembly’s control should normally be subject to its general powers to reform public bodies in Wales’, that is including certain limited Henry VIII powers.<sup>58</sup>

In summary, the instruments fulfil a function of procedural co-operation, being principally concerned with processes of communication and consultation. They demonstrate once again considerable administrative and political creativity in the face of the awkward character of the devolutionary scheme. At one and the same time, there is recognition of, but only a touching on, the function of substantive policy co-ordination, which – including the articulation of powers and responsibilities between levels of government – is a familiar feature of intergovernmental agreements in advanced constitutional systems of divided competence.<sup>59</sup> There is room here for a set of organising principles.

*A corporate view:* The formal response by the Assembly to the last Queen’s Speech is an event of some significance in the constitutional development. Passed unanimously, the resolution signals further internal changes, as well as expressing a demand for more generous allocation of powers in primary legislation. For convenience, it is set out in an annex to this study.

The resolution involves a modest attempt to render the Assembly Cabinet more accountable. Sundry consultation and reporting requirements make it clear that a wholly secretive or old-style Whitehall model of political and administrative negotiation is lacking in democratic legitimacy for the task of determining the ambit of devolved competencies. On constitutional as well as political grounds, the pressure for greater transparency in this sphere will not go away.

The innovative use of the Assembly’s subject committees, as a vehicle both for generating inputs into Westminster Bills, and for facilitating outputs in terms of implementation or the exercise by the Assembly of its new powers, is a welcome development. Such a process only became fully manageable once coalition government had secured working majorities on these committees. Let us hope that the Members are properly briefed and adequately resourced, and that the Assembly will be given adequate time to debate the committees’ reports. Looking forward, the use of the committees further strengthens the case for a set of organising principles relating to the

---

<sup>58</sup> See further below. And see above, n 4.

<sup>59</sup> J. Poirier, ‘The Functions of Post-Devolution Concordats in a Comparative Perspective’ (2001) *Public Law* (forthcoming).

policy for conferring powers. Otherwise the new machinery could itself prove the agent of a patchwork approach.

The substantive demand is a form of legislative drafting that will permit the Assembly ‘maximum flexibility’ in policy development and implementation in the major fields of devolved competencies. This can be seen to reflect a general sense of frustration among Members with the patchwork approach to the allocation of powers. It reinforces an earlier resolution that also had broad support: ‘The Assembly continues to support the principle that primary legislation affecting Wales should confer all appropriate functions on the Assembly in a flexible way. . . ’.<sup>60</sup> In fact, a feature of the debate in plenary session is the recognition that the Members themselves may have difficulty in fully comprehending the powers and functions of the Assembly.<sup>61</sup> That is, the problem of intelligibility writ large, or a particular kind of democratic deficit.

The open-ended nature of the formula is also important. In the event, and highlighting once again the scope for organic development provided by the GWA, it proved an easy vehicle for all-party support in the Assembly. That ‘maximum flexibility’ means different things to different actors was made abundantly clear in the political exchanges.<sup>62</sup> Read literally, the formula suggests great chunks of framework legislation and wide ranging Henry VIII type powers, or the chief means previously identified for the Assembly migrating towards, if not to, the state of affairs that I have called quasi-legislative devolution.

A special word is in order here about Henry VIII clauses, there having been much loose talk about them in the Assembly. Such clauses come in all shapes and sizes. While many deal with detail and in particular the making of consequential or transitional arrangements, the more important ones allow a Minister to change the substance of legislative policy, according to more or less prescribed statutory limits.<sup>63</sup>

What then of the various options in the case of the Assembly? At one end of the spectrum, so-called ‘tidying up’ Henry VIII clauses should pose little difficulty, as the GWA itself illustrates.<sup>64</sup> At the other end of the spectrum, the broad-ranging Henry VIII clause has so far remained the more notable by its absence, as in the case of the Local Government Act 2000. Hesitant steps allowing the Assembly to occupy at least some of the intermediate ground are visible in the current crop of Government Bills.<sup>65</sup>

To approach the matter solely in terms of the Assembly’s position is futile. Notwithstanding the fact that delegated powers have increasingly appeared in

---

<sup>60</sup> *Official Record*, 2 February 2000.

<sup>61</sup> And notably stressed outside the Chamber by the Deputy Presiding Officer, John Marek: see *Western Mail*, 10 January 2001.

<sup>62</sup> *Official Record*, 19 December 2000.

<sup>63</sup> See for classic examples, the Deregulation and Contracting Out Act 1994, the Human Rights Act 1998, and the Government’s current Regulatory Reform Bill. And see for discussion in the context of the 1994 Act, D. Miers, *The Deregulation Procedure* (Hansard Society 1999).

<sup>64</sup> See above, n 4.

<sup>65</sup> See above, n 39.

broad and experimental forms in recent years, the historical antipathy of Parliament to Henry VIII clauses should not be lightly dismissed.<sup>66</sup> In the case of the Assembly, a demand for general Henry VIII powers invites the response 'dream on'. It is vulnerable to the argument, not least round the UK Cabinet table, of standing for legislative devolution by the back door. So also, the classic constitutional objection based on the threat to Parliament's position can be said to be heightened under the scheme of executive devolution, despite the Assembly's own claim to democratic legitimacy and more elaborate procedures. The UK Minister exercising Henry VIII powers is not only changing Parliamentary law but is also responsible to Parliament.

Turning the argument round, the alternative technique of granting powers to apply with modifications the provisions of primary legislation may be said to have a more general application in the case of the Assembly. It is less challenging than the widely drawn Henry VIII clause in terms of UK constitutional theory and practice, a case less of rewriting statute law and more of building on Parliament's intention. We leave the point here, to pick it up later on.

*Review of procedure:* Nothing better illustrates the continuing evolutionary development than the Assembly Review of Procedure, first announced by Rhodri Morgan in the very different situation of a minority administration,<sup>67</sup> and now up and running with a view to completion by December 2001. As well as the First Minister, the Review Group includes the Presiding Officer, the other party leaders, and other senior political figures in the Assembly. On the one hand, in the interests of political consensus and speedy resolution, it is agreed that the review will not 'produce recommendations which would require changes to the devolution settlement and/or the Government of Wales Act 1998.' On the other hand, the issues identified for consideration are not confined to the Assembly's internal procedures but extend to its relationships: 'the Assembly, Wales and beyond', and more specifically 'the Assembly, the UK Government and Westminster'.<sup>68</sup> Enough has already been said in this study to show that the question of lawmaking for Wales, and in particular the range of approaches that is possible within the parameters of the GWA, including the Assembly's view of them, is of the essence of the matter.

To push home the point, the current Assembly review gives an opportunity for Members and officials to engage with the strategic issues of legislative drafting and practice raised in this study.<sup>69</sup> That is, with the aim of a clearly articulated view as to how new primary legislation should be constructed for the purposes of the Assembly. Let us hope that the elected representatives are

---

<sup>66</sup> See for general discussion, C. Harlow and R. Rawlings, *Law and Administration* (Butterworths, 2<sup>nd</sup> ed. 1997), chapter 6.

<sup>67</sup> See *Official Record* 12 July 2000. As distinct from the Independent Commission into the Assembly's Powers and Electoral Arrangements, promised for 2002-3.

<sup>68</sup> Details of the review are available on the Assembly web site.

<sup>69</sup> Perhaps in tandem with the Welsh Affairs Committee (of the UK Parliament), which recently announced an inquiry into the way in which Welsh interests, including the interests of the Assembly, are taken into account in the drafting of primary legislation and its passage through Parliament (Press Notice No. 7, 2000-2001). This study has been submitted in evidence both to the Review Group and the Committee.

attracted by the idea of a set of principles. It would be a sure sign both of the seriousness of the review and of the process of constitutional maturation in the new Welsh polity.

#### IV. IN SEARCH OF PRINCIPLES

Complaining of incoherence or lack of principle in the constitutional allocation of functions is the easy part. Assuming the legislative framework of the GWA, how might the ongoing empowerment of the Assembly be put on a more rational basis? One could hardly envisage uniformity in legislative style and substance such are the multifarious situations or policy contexts of contemporary public administration. Short that is of adopting an extreme form of quasi-legislative devolution – by which point the case for legislative devolution would surely have been conceded. Again, it is idle to pretend there is an optimum allocation, distinct that is from an exercise of political judgement or the measure of the enthusiasm for the devolutionary project.

##### After the Welsh Office

Perhaps then one can understand the allure of a single, general principle: the Assembly to have those powers that would be allocated to Wales under the central government model of territorial administration. The principle can clearly be a useful one in dealing with recalcitrant Whitehall Departments, most obviously in terms of attempts to whittle down or rein back the Assembly's powers. Notably, it can be said to represent a continuation of the initial design of the devolutionary policy – the transfer of powers from the Welsh Office to the Assembly. Its pull inside the devolved administration is attested by an Assembly official:<sup>70</sup>

“The test we always try to apply and with varying degrees of success with Whitehall Departments. . . is if there was no devolution which Secretary of State would you expect to get the power. . . . We haven't got much on the statute book so far but what we've got is pretty much what we expected, what we would have had, had there still been a Secretary of State for Wales.”

The principle however is insufficient. Without more, the positive element, that if the Welsh Secretary would have gained the powers the Assembly should have them, can so easily translate into the negative.

But further, the principle will not wash. First, in adopting an essentially static view of the Welsh constitutional development the approach grates with the basic legislative design of the devolution statute. More especially, it is no defence to equate the principle with the model of executive devolution. As this study has been at pains to stress, there is more than one approach available under that general rubric, and in particular within the flexible framework with an in-built capacity for change that is the GWA.

Second, it does not do simply to read across from one constitutional model to the other. There is now the small fact of a national, representative institution

---

<sup>70</sup> Quoted in R. Rawlings, *Delineating Wales*, *op cit*.

to consider. Let us also keep in mind the loss of administrative and political flexibility that the scheme of executive devolution has entailed, in the sense that powers previously allocated under the general rubric of 'Secretary of State' have now to be identified as the powers or otherwise of the Assembly. To seek to apply the same general principle in such changed legal conditions is a recipe for difficulties, and will tend to err on the side of caution.

Third but related, an historical approach of this kind suggests a clear basis for allocation of powers to the Secretary of State for Wales prior to devolution. However, as Rachel Lomax observed, and the original Transfer of Functions Order makes so abundantly clear, this never happened. Welsh Office powers 'grewed like Topsy'. The methodology of the principle is thus flawed from the very beginning. As regards the ongoing allocation of powers, who can say what powers the Secretary of State for Wales would have but for the Assembly? It is time to depart this realm of constitutional fiction.

A very different starting point is suggested by Paul Silk, the new Clerk to the Assembly. In his words, 'A Whitehall which is sympathetic to the administration in Cardiff, and which wishes the Assembly to fly, is likely to frame its primary legislation in a way which gives the maximum of flexibility to the Assembly.'<sup>71</sup> Effectively, this is the position now reached by the Assembly in its resolution on the Queen's Speech. But further, the Clerk thinks this implicit in the promise made to the people of Wales in the devolution White Paper:<sup>72</sup>

"As a general principle, the Government expects Bills that confer new powers and relate to the Assembly's functions, such as education, health and housing, will provide for the powers to be exercised separately and differently in Wales; and to be exercised by the Assembly."

On closer inspection, however, this proves to be a false dawn. Cleverly crafted or wonderfully ambiguous, the pledge is also compatible with an allocation of powers under what I called 'strict executive devolution'. The major question of the width and depth of future Assembly powers is thus glossed over.

Once again it is behind the scenes, including in the facilitative role that the Wales Office now plays on behalf of the Assembly in Whitehall,<sup>73</sup> that a rudimentary discourse of devolution principles has begun to develop. It is interesting to observe for example that consistent with the approach in the original Transfer of Functions Order, Parliamentary and Ministerial controls have generally been disappplied in respect of the Assembly in subsequent UK legislation. To this effect, the recent devolution guidance note is intended to reflect as well as structure UK Government practice. In contrast, a year on from devolution the most that a central government lawyer could say of framework legislation was that the position 'is still developing', while the question of handing the Assembly Henry VIII powers had been 'a major

---

<sup>71</sup> P. Silk, 'The Assembly as a Legislature', *op cit.*

<sup>72</sup> *A Voice for Wales* Cm. 3718 (1997), paragraph 3.39.

<sup>73</sup> See Wales Office, *First Departmental Report*, Cm. 4620 (1999-2000).

source of contention'.<sup>74</sup> Evidently, the model of political and administrative negotiation is not so easily operated.

### **Next step**

Let us then elaborate a set of principles governing the allocation of powers. That is - once it has been decided that a Bill relating to Assembly functions should be prepared – the basis on which the UK Government could reasonably be expected to proceed.<sup>75</sup> It is the logical next step in the Welsh constitutional development, as the Assembly First Minister has apparently now recognised.

### **A Set of Devolution Principles**

New functions given to a Minister for separate exercise in England to be given to the Assembly for separate exercise in Wales within the subject fields set out in Schedule 2 of the GWA.

Functions in respect of Wales to be vested in a Minister, or in a Minister and the Assembly acting jointly, only where it is intended that the particular area of public administration should be undertaken on a common England and Wales, GB or UK basis.

New functions to pass to the Assembly in cases where it already exercises similar functions within that subject field.<sup>76</sup>

Policy functions for separate exercise in Wales not to be vested specifically in the Secretary of State for Wales.<sup>77</sup>

Save with the consent of the Assembly, its existing powers not to be reduced in new primary legislation by giving concurrent functions to a Minister, or imposing consent requirements, or by specifying in the legislation matters that have previously been functions of secondary legislation exercisable by the Assembly.

Provisions giving the Assembly new functions to be drafted to allow the body flexibility to develop its own policies; including, where appropriate, provision for secondary legislative powers different from those given to a Minister for separate exercise in England, or which proceeds by reference to the subject-matter of the Bill.

Permissible to vest in the Assembly Henry VIII powers to amend statutes for defined purposes, as also powers to apply with modifications the provisions of primary legislation, the test being whether the particular powers are justified for the purpose of the effective implementation of the relevant policy. Where alternatively such powers are to be vested in a Minister for separate exercise in England, they will be vested in the Assembly for

---

<sup>74</sup> Quoted in R. Rawlings, *Delineating Wales*, *op cit*.

<sup>75</sup> The further question of the appropriate fields or policy areas of devolved functions lies outside the scope of the study. The subject of fox hunting has typically fuelled debate in the Assembly about this: see for example, *Official Record*, 27 June 2000.

<sup>76</sup> The principle echoes the recent devolution guidance note.

<sup>77</sup> As indicated in the text, there are in fact very few powers vested in a named Secretary of State.

separate exercise in Wales, with if necessary the Assembly being required to place its relevant Orders before Parliament for the purpose of the negative resolution procedure.<sup>78</sup>

Assembly to have the commencement powers in relation to the provisions in Bills granting it powers. Where the Minister is to have commencement powers in respect of England the Assembly will have the same powers in respect of Wales.

These principles are designed to incorporate a series of important constitutional and administrative concepts. The first principle is appropriately described as the bottom line, or in terms of a constitutional and political doctrine of the devolutionary minimum. Giving Wales *qua* Wales its first-ever democratically elected and accountable government, the Assembly should be treated no less favourably than a Minister is in respect of England.

The difference from and the similarity to a general principle based on the powers of the Welsh Office are important features. At one and the same time, the new principle is forward-looking, or targeted on the emergent patterns of allocation of powers, and is well suited – like the historical approach – to defending the Assembly from the withering of powers. It is then vital to the devolved administration, as well as having obvious attractions in the conduct of the political and administrative negotiation with central government. In particular, in the small world of legislative drafting, it is apt to appear the most economical approach, both in terms of administrative and professional resources and the demands on time in the Westminster programme.

But this principle too should not be considered sufficient or all embracing. Not only does it yoke together two different constitutional models. But also, to the extent that the principle operates on a stand alone basis, the spectre is raised of an overly Anglo-centric approach to the development or drafting of new powers, in line with the prevailing views and concerns of the powerful central government departments in London.<sup>79</sup> In contradistinction, that is, to the devolutionary idea of a territorial government best equipped or specifically empowered for local conditions. To invoke an old and notorious saying, 'for Wales see England'.

Secondly, the fact of, and need to allow for, the dynamic character of the devolutionary process is recognised in the design. The principles, as well as being an advance on the current patchwork approach to the allocation of powers, should themselves be sufficiently flexible to facilitate, and not to hinder, a continuing evolutionary development. To this effect, the Assembly is explicitly confirmed as the prime repository for the ongoing allocation of powers in fields of devolved functions. For the reasons explained, this is at one with the legislative scheme of the devolution statute.

---

<sup>78</sup> See in relation to this, the application of Parliamentary control which continues in the circumstances set out in sections 44(2) and (4) of the GWA and sections 1-3 of (Assembly) Standing Order 23.

<sup>79</sup> See for general discussion, M. Laffin, A. Thomas and A. Webb, 'Intergovernmental Relations after Devolution: The National Assembly for Wales' (2000) 71 *Political Quarterly* 223.

Confirmation of the devolutionary logic of policy diversity and legal pluralism, thereby underpinning a constitutional claim to general or flexible forms of legislative drafting, is the third and related aspect. Guidance is specifically given on the availability of a range of techniques previously seen to come within the ambit of the GWA, from framework legislation to subject-area designations, and on up to Henry VIII clauses. As explained, the power to apply with modifications the provisions of primary legislation is especially well suited here.

Effective implementation, a not unfamiliar refrain in the contemporary canons of public administration, is the fourth main concept. Its use is in helping to determine when special powers that may be devolved are allocated to the Assembly. At the risk of stating the obvious, the approach cannot guarantee a straightforward result. Rather the aim here is to structure the inter-change now taking place inside the new structures and processes of intergovernmental relations.

There are conscious echoes here of the principle of subsidiarity, familiar from, and continuing to be elaborated in the context of, the European Union, not least in terms of the so-called post-Nice agenda and the idea of more precisely delimiting competencies as between different tiers of government.<sup>80</sup> Perhaps it is relevant to note that the Assembly First Minister has embraced the broad interpretation of this idea, whereby the competencies of 'regional' or territorial governments inside the EU Member States are included as in the case of the Assembly.<sup>81</sup> A set of organising principles of the kind proposed in this study would also sit comfortably with this vision.

The other element incorporated in the principles is a protective one, which links in terms of the overarching UK devolutionary development to the political science concept of quasi-federalism, or the general sense that power devolved, far from being in the famous phrase 'power retained', is power transferred.<sup>82</sup> In the case of Scotland, the idea finds concrete expression in the so-called Sewel Convention, whereby the UK Government undertakes to proceed on the basis that 'the UK Parliament would not normally legislate with regard to devolved matters except with the agreement of the devolved legislature'.<sup>83</sup> Presently, in the case of Wales, the idea finds limited expression in s. 22(4) of the GWA, effectively a constitutional lock or ratcheted approach to the allocation of powers, whereby a transfer of functions order can only be varied or revoked under the statute with the Assembly's approval.<sup>84</sup> In the spirit of that provision, the protection of the Sewel Convention would be explicitly extended to the Assembly under the principles, so reflecting and reinforcing the importance of its secondary legislative powers. The underlying concept here is one of comity or mutual

---

<sup>80</sup> See for discussion in the Welsh context, J. Gallacher, *After Nice: Devolution on the EU Agenda* (Wales European Centre, 2001).

<sup>81</sup> See *Official Record*, 19 December 2000. It is too early to say whether this interpretation will prevail.

<sup>82</sup> See for general discussion, V. Bogdanor, *op cit.*

<sup>83</sup> House of Commons Debates, 21 July 1998, column 791; Memorandum of Understanding, *op cit.*, paragraph 13.

<sup>84</sup> An approach that now finds echoes in the subsequent primary legislation: see especially Regulatory Reform Bill, clause 1(4).

respect between jurisdictions, one that is familiar in advanced constitutional systems of multi-layered democracy.<sup>85</sup> In the event, since the Assembly came into being, the political focus has been very much on the issue of more generous devolution of powers. However, to repeat, this is not the whole picture.

***Implementation: flexibility and resource***

For the avoidance of doubt, the principles are not intended as a vehicle for legal action. They are designed as a useful addition to, and to fit with, the general development in soft law techniques that has accompanied the UK devolutionary process, and which has itself involved strenuous efforts to limit the role of the courts in disputes between the different administrations.<sup>86</sup> Assuming that the Assembly has the will to ask, it would be a case of seeking the support especially of the UK Cabinet Office, and in particular of the argument being won in the Devolution Policy Committee (DP) of the UK Cabinet. An appropriate means would then be a statement of the principles in a (second) legislative protocol between the Assembly and the Secretary of State for Wales. This would be the first step to a hardening into constitutional convention.

It is further envisaged that the principles would operate on the basis of 'normal' practice, similar in fact to the operation of the Sewel Convention, as also to the relevant provisions of the recent devolution guidance note. Once again, a measure of flexibility would be maintained, underscored in the case of central government by the doctrine of Parliamentary Sovereignty. So also, consistent with practice in the general system of concordats, there would need to be provision for review and elaboration or amendment in the light of practical workings. The principles are not designed to be exhaustive.

Different but related, the principles should not be seen as antithetical to the processes of political and administrative negotiation that lie at the heart of the new modalities of intergovernmental relations, and which have special importance in the sphere of executive devolution. Moving beyond the patchwork approach, characterised by an overwhelming sense of pragmatism, need not entail a rigid framework for the policy for conferring powers on the Assembly. Establishing a firm collaborative basis with sufficient clarity and flexibility to allow, on the one hand, for the effective management of continuing relations, and, on the other, ample scope for responsiveness to change or institutional learning, is of the essence of this kind of principled approach.

Appropriate flanking developments include the reworking of, and in particular much greater consistency in, legislative drafting practices and conventions in light of the scheme of executive devolution. Separate parts and sections of statutes concerning Wales, clear references to the Assembly and explanation of the territorial dimension to the allocation of powers: such

---

<sup>85</sup> Especially in Germany: see for an introduction, P. Blair and P. Cullen, 'Federalism, Legalism and Political Reality: The Record of the Federal Constitutional Court' in C. Jeffery (ed.), *Recasting German Federalism* (Pinter, 1999).

<sup>86</sup> Including by an expansive development in machinery for alternative dispute resolution; see R. Rawlings, 'Concordats of the Constitution' *op cit.*

matters may sound dull and technical especially to the non-lawyer. Yet they help to convey the underlying message of this study, the pressing need for a measure of constitutional vision in developing the novel and untested arrangements that comprise Welsh executive devolution. Principles relating to the policy for, and with regard to the method of, conferring powers on the Assembly, must be intertwined.<sup>87</sup>

Of course principles of this kind can only go so far in promoting the values of rationality and efficiency, and of transparency, in the processes of government. All the more so, it may be said, given the multifarious policy contexts that are involved here, as also the continuing sway of old habits of centralism. However, turning the argument round, the principles would be a valuable resource for the Assembly, especially given the legal and administrative vulnerability of the institution; and, further, serve as both a practical instrument and constitutional benchmark for the conduct of central/territorial relations.

To expand the point, the principles have been chosen as a means of grounding the political and administrative exchange between Cardiff and London, and of facilitating democratic accountability. They are designed to broaden horizons inside government: not so much fragmentation of powers, more a general understanding of the constitutional role and position of the Assembly. To this effect, it should be recognised that the current methods have important costs, including for the centre. Not least, it can be said, in terms of the time and energy involved in determining anew – or squabbling over – specific allocations of powers, and the demonising of certain UK Government Departments that has been an uncomfortable feature of the Welsh devolutionary development in the initial phase. A set of organising principles to help smooth the ongoing allocation of powers is not only in the interests of the Assembly.

## CONCLUSION

In the prophetic words of Sir David Williams: 'Executive devolution is on trial, and there will be inevitable problems of adaptation'.<sup>88</sup> Nowhere, it may be said, is this better illustrated than in the constitutional fundamental that is the ongoing allocation of functions to the Assembly. At one and the same time, the process demonstrates a strong evolutionary development in terms of the practice and procedure, including behind the scenes, and the limitations or difficulties associated with the strong dose of pragmatism or piecemeal approach, as also with the basic scheme of executive devolution.

The concept of quasi-legislative devolution is presented here as a useful tool for analysing the scope for, factors in, and implementation of, a migration in Wales to a more generous form of the so-called devolution settlement. Expressed slightly differently, the concept serves to underscore, in tandem with that of strict executive devolution, the way in which the current Welsh

---

<sup>87</sup> The related question of taking into account the bilingualism of Assembly order making in the drafting of the enabling primary legislation is outside the parameters of this study.

<sup>88</sup> D. Williams, 'The Devolution of Powers from Central Government', in D. Miers (ed.), *Devolution in Wales: Public Law and the National Assembly op cit*, p. 10.

devolutionary scheme can be operated with more or less enthusiasm, including differentially in terms of the fields of, and Departmental responsibilities bearing on, the devolution of powers.

The case for a set of principles to govern the ongoing allocation of functions to the Assembly is the central argument of this study. The potential contribution is multi-faceted, from promoting efficiency and effectiveness in the practice of lawmaking for Wales to establishing a tolerably coherent and user-friendly system of empowerment, and on through helping to secure a proper measure of constitutional intelligibility and democratic legitimacy for the Welsh devolutionary development. To end at the beginning, such principles are a necessary element in the elaboration of the new Welsh Constitution, that is, if the model of executive devolution is to be taken seriously. Whether that model proves sufficient for the people of Wales, time will tell.

### **ANNEX: ASSEMBLY RESOLUTION ON THE QUEEN'S SPEECH, 19 DECEMBER 2000.**

Amended motion:

the National Assembly notes the content of the UK Government's legislative programme for 2000-01 and regrets the absence of measures to deal with the crisis in rural Wales;

calls on the First Minister to publish a detailed account of the procedure through which the Assembly can influence the content of the government's legislative programme;

notes that the following proposed Bills are of particular relevance to the Assembly's responsibilities and calls on the First Minister and the Secretary of State for Wales to ensure that all Bills which impact on the functions and responsibilities of the Assembly are drafted in such a way as to permit the Assembly maximum flexibility in implementing their provisions and developing policy in the areas concerned:

Children's Commissioner for Wales

Health and Social Care

Homes

Regulatory Reform

Special Educational Needs and Disability

remits the above Bills to the relevant Subject Committees (1 and 2: Health and Social Services; 3: Local Government and Housing; 4: Economic Development; 5: Education and Lifelong Learning) for further consideration as to the provisions they should make for Wales and how the Assembly might use its new powers therein;

calls on the relevant Assembly Ministers to make a statement prior to the conclusion of the passage of these Bills through the UK Parliament detailing the extent to which any amendments to the Bills reflect the representations made by the Assembly;

calls on the Executive to consult the Assembly on which Wales only Bill should be requested in next year's UK legislative programme;

requests that each Committee report to the Assembly by 13 February 2001;

notes that the Hunting Bill is of particular relevance to Wales, and refers the Bill to the Agriculture and Rural Development Committee for consideration of its bearing upon Wales, and requests the Minister for Rural Affairs to report on the application of the proposed legislation in Wales; and

reaffirms its previously stated belief that the abolition of defendants' right to opt for jury trial proposed in the re-introduced Criminal Justice (Mode of Trial) Bill amounts to a serious erosion of civil liberties.

## FRUSTRATION OF LEASES – THE HAZARDS OF CONTRACTUALISATION<sup>1</sup>

*Warren Barr, Lecturer, School of Law, University of Liverpool*

The introduction of the doctrine of frustration to leases by the House of Lords in *National Carriers Limited v Panalpina (Northern) Limited*<sup>2</sup> has been well documented<sup>3</sup>, and is symptomatic of an increasing tendency throughout the common law world to emphasise the contractual nature of the lease over the proprietary aspect<sup>4</sup>. However, frustrating a lease remains a possibility rather than a reality for British landlords and tenants, as, at the time of writing, a lease has yet to be terminated by frustration. In the nineteen years since *Panalpina*, the question of frustration has arisen only twice in reported cases<sup>5</sup>, and the discussion was *obiter* in both.

The task facing any member of the judiciary faced with an actionable leasehold frustration is not an enviable one, as the boundaries of frustration have yet to be set; so much so that no judicial consideration has been given to the actual mechanics by which frustration will terminate a lease. It will be shown that there are a number of potential hazards in this area, which may undermine the operation of the doctrine in landlord-tenant law, and that the doctrine may not operate as expected by their Lordships in *Panalpina*. It will be submitted that the solution to many of these dangers, in the absence of statutory intervention, lies in the dual device of viewing the lease as primarily a property relationship and applying a sub-species of frustration which allows for lawful excuse for non-performance of covenants. Contractualisation of the lease is to be resisted.

---

<sup>1</sup> This article is not concerned with issues arising out of privatisation, in which the term “contractualisation” is used in a general sense. The term is employed here to describe the “sea change” in legal thinking concerning the legal principles regulating the term of years, from traditional property to general contractual principles.

<sup>2</sup> [1981] 2 AC 45.

<sup>3</sup> See, for example, Treitel, *Frustration and Force Majeure* (1994); Wilkinson, “Frustration of Leases” (1981) 131 *NLJ* 189.

<sup>4</sup> This process is known as the ‘contractualisation’ of leases. It is trite law that a lease has a duality of legal character, as it is both a contract and grants an estate in land, yet, as will be discussed *infra*, in modern practice the contractual covenants are often viewed by the parties as more significant than the estate interest. This has led to the application of contractual principles to the regulation of the landlord and tenant relationship. For a succinct and balanced discussion of this phenomenon at home and abroad see Bright and Gilbert, *The Nature of Tenancies* (1995) pp 69-120.

<sup>5</sup> *Holbeck Hall Hotel Ltd v Scarborough BC* [1997] 2 EGLR 213, where no ruling was obtained on whether a business tenancy was ended by frustration when coastal erosion caused the demised building to fall into the sea. See also *Prince v Robinson* (1999) 31 HLR 89, in which frustration was mentioned in a case relating to a Rent Act protected tenancy, which was decided on other grounds.

## THE APPLICATION OF FRUSTRATION TO LEASES

In the years before *Panalpina*, frustration was held inapplicable to leases, as the lease granted an estate, and this conveyance of the legal estate was the essence of the bargain agreed between landlord and tenant, so that was not affected by most supervening events. A typical example is *London & Northern Estates Co v Schlesinger*<sup>6</sup>, where an Austrian defendant who claimed that his lease of a flat had been discharged by frustration of purpose in 1914, because he had been prohibited from residing there as an alien enemy, was denied relief as Lush J considered that:

“It is not correct to speak of this tenancy agreement as a contract and nothing more. A term of years was created by it and vested in the appellant, and I can see no reason for saying that because this order disqualified him from personally residing in the flat, it affected the chattel interest which was vested in him by virtue of the agreement. In my opinion, it is vested in him still”<sup>7</sup>.

This reasoning may have been technically compelling, but on first reading it does not accord with the modern reality of many lettings by lease. It is undeniable that in many commercial and residential leases, it is the leasehold covenants entered into by the parties which are considered to be of paramount importance. It is the covenants which regulate the use of the demised property and impose obligations on the parties; the grant of an estate may be viewed as largely incidental to the parties’ purposes.

This viewpoint, whatever the merits, clearly impressed their Lordships in *National Carriers Limited v Panalpina (Northern) Limited*<sup>8</sup>, in which they held, Lord Russell dissenting, that while a lease would “hardly ever” be discharged by frustration, there was no authority “to erect a total barrier inscribed ‘You shall not pass’”<sup>10</sup>. The majority rejected the argument that the conveyance of the estate was the essence of the bargain between landlord and tenant, asserting that such a proposition ignored the commercial realities underlying the transaction:

“However much weight one may give to the fact that a lease creates an estate in land in favour of the lessee, in truth it is by no means always in that estate in land in which the lessee is interested. In many cases he is interested only in the accompanying contractual right to use that which is demised to

---

<sup>6</sup> [1916] 1 KB 20.

<sup>7</sup> *Ibid* at 24; subsequently approved by Earl of Reading CJ in *Whitehall Court Ltd v Ettlinger* [1920] 1 KB 681 at 686, where he too denied relief to a dispossessed tenant of flats as he could “see no reason why the chattel interest which was vested in the tenant by virtue of the two leases was affected merely because he was personally prevented from residing in the flats”. The same reasoning was also in evidence in both the Court of Appeal’s decision in *Matthew v Curling* [1922] 2 AC 180 (CA) *per* Bankes LJ and Younger LJ. The House of Lords decided the appeal on different grounds, but did not doubt the opinion of the lower court.

<sup>8</sup> [1981] 2 AC 45.

<sup>9</sup> *Ibid* at 52H *per* Lord Hailsham.

<sup>10</sup> *Ibid* at 59F *per* Lord Wilberforce.

him by the lease, and the estate in land which he acquires has little or no meaning for him".<sup>11</sup>

The dictum of Laskin J in the Canadian case of *Highway Properties Limited v Kelly, Douglas & Co Limited*<sup>12</sup>, which warned against separating leases from other commercial contracts, was also considered highly persuasive:

"It is no longer sensible to pretend that a commercial lease, such as the one before the court, is simply a conveyance and not also a contract. It is equally untenable to persist in denying resort to the full armoury of remedies ordinarily available to redress repudiation of covenants, merely because the covenants may be associated with an estate in land."

Their Lordships involved themselves in an extensive review of previous authority and considered the arguments against the application of frustration to leases. They were struck by the commercial situations in which frustration had been held to apply, which they felt were analogous to the concept of the lease, namely demise charters of ships<sup>13</sup>, agreements for leases<sup>14</sup> and licences to occupy land<sup>15</sup>. Accordingly, to "place leases of land beyond a firm line of exclusion seems to involve anomalies, to invite fine distinctions, or at least to produce perplexities."<sup>16</sup>

Lord Simon said, in relation to demise charters of ships:

"On the other hand, to deny the application of the doctrine would create an anomalous distinction between the charter of a ship by demise. . . and a demise of land: compare, for example, a short lease of an oil storage tank and a demise charter for the same term of an oil tanker of a peculiar class to serve such a storage tank, and a supervening event then frustrating the demise charter and equally affecting the use of the oil storage tank. Again, a time charter has much in common with a service tenancy of furnished accommodation . . . But most strikingly of all is the fact that the doctrine of frustration undoubtedly applies to a licence to occupy land . . ."<sup>17</sup>.

A further argument put before their Lordships was that a lease, like a contract for the sale of land, vested a legal estate in the tenant on conveyance. It followed, therefore, that as property owner the tenant was in the same position as a freeholder in bearing the risk of any subsequent destruction or event affecting the land<sup>18</sup>. Lord Simon, in rejecting this

<sup>11</sup> *Ibid* at 76C per Lord Roskill.

<sup>12</sup> 17 DLR (3d) 710 at 721, a case dealing with the application of repudiatory breach to leases.

<sup>13</sup> See *Blane Steamships Ltd v Minister of Transport* [1951] 2 KB 965.

<sup>14</sup> See *Denny, Mott & Dickinson Ltd v James Fraser Ltd* [1944] AC 265 (HL).

<sup>15</sup> See *Krell v Henry* [1903] 2 KB 740.

<sup>16</sup> *Panalpina op cit* at 57E per Lord Wilberforce

<sup>17</sup> *Ibid* at 64E/F

<sup>18</sup> See *Paine v Meller* (1801) 6 Ves 349, where after a contract for the sale of land had been agreed it was held not to be capable of discharge, even though the premises were destroyed before the completion of the conveyance as the risk of

submission, refused to view a lease and a contract for the sale as analogous concepts:

“Moreover, the sale of land is a false analogy. A fully executed contract cannot be frustrated; and a sale of land is characteristically such a contract. But a lease is partly executory: rights and obligations remain outstanding on both sides throughout its currency. Even a partly executed contract is susceptible of frustration in so far as it remains executory: there are many such cases in the books.”<sup>19</sup>

Having dispensed with the arguments against the applicability of frustration to leases, their Lordships turned to the question of its operation. Lord Hailsham considered that the operation of frustration, by means of an implied term in the lease to cover supervening events, was not problematic as leases generally contained provisions allowing them to be terminated before the term date:

“. . . Seeing that the instrument as a rule expressly provides for the lease being determined at the option of the lessor upon the happening of certain specified events, I see no logical absurdity in implying a term that it shall be determined absolutely on the happening of other events – namely, those which in an ordinary contract would work frustration.”<sup>20</sup>

The Lordships also opined that the introduction of the doctrine would not open the floodgates to litigation since it would rarely be successful and be rarely used:

“It is the difference immortalised in *H.M.S. Pinafore* between “never” and “hardly ever,” . . . though. . . the doctrine [is] applicable in principle to leases, the cases in which it could properly be applied must be extremely rare.”<sup>21</sup>

It is submitted that this decision is regrettable, for a number of reasons. Their Lordships were so intent in holding that frustration would be applicable to leases, no doubt in what they believed to be the interests of justice, that they failed to give due consideration to whether it *should* apply to leases. They saw the contractualisation of the lease as a universal panacea for the problems created by supervening change in this area. In doing so, they failed to properly consider the method by which frustration could destroy the lease, and indeed if it was possible for it to do so. Indeed, their reasoning is much less compelling than it at first appears.

---

such events had passed to the purchaser as owner of the land. In this case the equitable proprietary interest vested in the purchaser was sufficient to identify him as purchaser.

<sup>19</sup> *Ibid* at 68D.

<sup>20</sup> *Panalpina op cit* at 55E, approving a *dictum* of Aitken LJ (dissenting) in *Matthew v Curling* [1922] 2 AC 180 at 199.

<sup>21</sup> *Ibid* at 52H.

## IS THERE A NEED FOR FRUSTRATION IN LANDLORD-TENANT LAW?

It is clear that there may be exceptional circumstances where frustration or a similar, more adaptable right might make sense. *Matthew v Curling*<sup>22</sup>, for example, is a very exceptional set of facts in which it might be felt that the tenant was treated harshly. The tenant had covenanted, *inter alia*, to insure the demised premises, and to expend the insurance money on rebuilding if the demised premises were destroyed by fire at any time during the currency of the term. The demised premises were requisitioned by military authorities and subsequently destroyed by fire. The tenant was held liable to pay rent and reinstate the premises. The tenant was unable to make use of the existing legislation for compensation due to a technicality and it appears that the insurance company also refused to make a payment on this basis. The tenant was therefore put to considerable expense to rebuild premises which had been destroyed through no fault of his own, and which he had no right to occupy.

It is doubtful, however, that frustration would improve the lot of the tenant in this situation, since the term had a reasonable amount of time left to run. In *Panalpina* itself, the length of the disruption set against the length of the term was important in the finding that the lease in that case had not been frustrated – five years out of a ten year term was not considered sufficient interruption. A right to vary the terms of the agreement or to abate the rent would be more satisfactory, since the tenant may wish to retain his proprietary asset. If the rental obligation is suspended while the reinstatement was to take place, this would relieve the burden on the tenant. This is not possible with frustration. It must also be remembered that this particular set of facts is unlikely to arise again, being so exceptional. Modern compensatory legislation is also generally better drafted and benefits from being drafted to remedy a particular wrong or meet a particular set of needs.

It must also be considered that, especially in the commercial sphere, landlords and tenants are usually better advised than most contractual parties, and may well have allocated the risk of certain supervening events by either express covenants allowing for termination, or by insurance means. The presence of notices to quit might also allow the parties to terminate the transaction and escape, without the need for frustration. Nevertheless, such clauses are not universal, especially in residential leases where the balance of power usually lies firmly with the landlord.

The application of frustration to leases may be limited by an even more fundamental issue than those already outlined. In most cases of frustration, the plea of a tenant or landlord will be that the purpose of the transaction has been frustrated. Although English law was the first to recognise frustration of purpose in the case of *Krell v Henry*, Treitel<sup>23</sup> opines that the courts have been very reluctant to apply it since. Broadly, pleading frustration of purpose will not succeed, unless some common object agreed between the

---

<sup>22</sup> [1922] 2 AC 180.

<sup>23</sup> Treitel *Frustration and Force Majeure passim*.

parties has been radically altered<sup>24</sup>. Even if this is successful, the court will not discharge the contract if some other contractual purpose may be performed, provided that purpose is not wholly trivial. In *London & Northern Estates Company v Schlesinger*, for example, the fact that the tenant could not reside in the premises would not have been a sufficient ground to discharge the contract, as he would still have been able to assign or sub-let his interest to someone who could. It is submitted that their Lordships in *Panalpina* may have confused the position in English law with that under American law. Lord Wilberforce cited a passage from *Corbin, Contracts* with approval:

“Many short-term leases have been made, in which the purpose of the lessee was to conduct a liquor saloon, a purpose known to the lessor and one which gave to the premises a large part of its rental value. Then followed the enactment of a . . . prohibitory law preventing the use of the premises for the expected purpose. . . The prohibition law. . . frustrates the purpose of using the premises for a liquor saloon in the reasonable hope of pecuniary profit. . .”<sup>25</sup>.

It is submitted that under the English law of frustration, unless perhaps the lease contained a user covenant restricting the use of the premises to the particular use prohibited or made it otherwise unachievable, there would be no frustration of purpose in a similar situation, as the premises would be available for some other purpose.

Hence, frustration will, as their Lordships opine, probably operate only in the rarest of circumstances. This makes the introduction of the doctrine all the more objectionable, when one considers the difficulties which may arise in cases where the doctrine operates.

## HAZARDS OF FRUSTRATION

### 1. Frustration discharges a contract automatically

The effect of frustration is to bring about the automatic discharge of the contract in question from the time it was frustrated<sup>26</sup>. The doctrine is not discretionary and may be pleaded by any party to the contract<sup>27</sup>. This may promote rather than suppress injustice, as it has a special venom when applied to the landlord and tenant relationship. Termination may occur where the tenant does not himself wish to raise the plea of frustration and is happy to continue paying the rent notwithstanding the events which have occurred, but the landlord wants the property back. The landlord has, in effect, an additional right akin to forfeiture, without the fetters of relief against the action.

---

<sup>24</sup> See, for example, *Conigrex SARL v Tradex Export SA* [1983] 1 Lloyd’s Rep 250 at 253.

<sup>25</sup> *Corbin* Vol 6 (1951) s1356, cited in *Panalpina op cit* at 59A/B.

<sup>26</sup> An exception to this rule is where the contractual obligation is severable, part may be discharged and part remain in force – See *The Nema* [1982] AC 724 (HL).

<sup>27</sup> See *Hirji Mulji v Cheong Yue SS Co Ltd* [1926] AC 497, PC.

This is not a theoretical problem. In *John Lewis Properties plc v Viscount Chelsea*<sup>28</sup>, the tenants wished to put forward an argument, based on *dicta* in *Bailey v De Crespigny*<sup>29</sup>, that they had a lawful excuse for the non-performance of a building covenant in their lease due to supervening events. The landlord threatened to counter-claim that the entire lease had been frustrated, on the basis that the requirements necessary to prove a lawful excuse would also have been sufficient to prove frustration of the covenant, which would have ended the whole of the lease. It is highly questionable whether such a claim would have met with any success. Nevertheless, the tenants, who risked losing the whole of their property asset, withdrew the argument. The landlord was effectively able to use the consequences of frustration as a bullying tactic against the tenants.

This unconscionable use of frustration may be especially worrying for tenants who hold as business tenants under the provisions of the Landlord and Tenant Act 1954. It may, without appropriate judicial care, allow the landlord to deprive the tenant of his entitlement to a new tenancy agreement as of right, in cases where the tenant would have merely wished an excuse for non-performance of the affected covenant, or to have paid the rent rather than lose his asset. It is true that the tenant in that situation would be able to agree a new tenancy with the landlord. However, the resulting tenancy would be on less favourable terms than a tenancy as of right, because in the latter situation the court can fix the terms if the parties themselves cannot agree on them, which gives a basis for negotiation between the parties.

## **2. Frustration is inflexible, and is less effective than other methods of dealing with supervening events**

Frustration does not allow for the abatement of the rental obligation or the variation of the terms of the lease. Accordingly, where the premises are destroyed or rendered uninhabitable and the obligation is on the landlord to repair, frustration offers no solution to the tenant having to continue to pay the full rent because he will still have the legal estate, nor will it force landlords to renegotiate single-user clauses. It offers one solution and one solution only: the dissolution of the legal relationship between the parties.

In stark contrast, where a statute covers the supervening event the remedies offered are infinitely superior to those at common law. An excellent example is the Landlord and Tenant (War Damage) Act 1939. Where damage has been caused by war, section 1 of the 1939 Act relieves the tenant from any obligation to perform any repairing covenants in the lease. Moreover, there is no problem with the tenant having to pay rent for premises he does not wish to use. Section 4 gives the tenant the power to choose between disclaiming the lease or retaining it. If he chooses the latter option, as for example where the lease is highly profitable and is still of useful duration, he has to reinstate the premises, though he will not be required to pay rent until he has done so.

---

<sup>28</sup> [1994] 67 P & CR 120

<sup>29</sup> (1869) LR 4 QB 180, which suggests that it may be possible to suspend a single covenant in a lease, or have the frustrating event act as a lawful excuse for the non-performance of the covenant. This situation, including the *John Lewis* case, is discussed, *infra*.

Sensible interpretation of legislation can stop it being used to the advantage of a particular party. In *Cussack-Smith v London Corporation*<sup>30</sup>, the ultimate tenants by virtue of Town Planning legislation, tried to secure the use of the demised estate without paying rent. They served a notice on the landlord under the Landlord and Tenant (War Damage) Act 1939 that they intended to retain the lease, although they knew that the plot could not in fact be so developed. Stable J held that the service of the notice was a nullity, as this is not what the legislature could have intended when drafting the Act.

### 3. Frustration may not be able to bring about the termination of the estate

Perhaps the most significant concern is the question of how frustration will dismantle the leasehold tenancy. The position will depend upon the application, or otherwise, of the Law Reform (Frustrated Contracts) Act 1943. It might be thought that there could be no reason for holding the Act inapplicable to the lease. However, in *Pioneer Shipping Limited v B.T.P. Trioxide Limited*<sup>31</sup>, it was held inapplicable to voyage charter parties, which their Lordships in *Panalpina* considered to be analogous to leases, and the language of the Act does not seem appropriate to the landlord and tenant relationship. Both positions are clearly worthy of consideration.

If the Act does not apply, E O Walford summarises the position succinctly:

“ . . . frustration of the lease would produce the following result: -

- (a) The lessee would retain the benefit of the term granted by the lease, for it is now well settled that frustration does not entitle either party to recover any benefit properly acquired by the other party pursuant to the contract prior to the date of the frustrating event. . .
- (b) Although the lessee would retain the benefit of the lease he would not be liable to pay any rent becoming due during the remainder of the term.
- (c) The lessee would also be discharged from liability to perform any other obligations due to be performed after . . . the frustrating event.”<sup>32</sup>

The reason in this situation that the estate would remain vested in the tenant is that a party is not entitled to recover properly accrued benefits unless there has been a total failure of consideration<sup>33</sup>, which there will not have been in the case of a lease, as the tenant will have had the benefit of the estate and suffered the detriment of paying rent.

---

<sup>30</sup> [1956] QB 1308.

<sup>31</sup> [1980] 3 All ER 117

<sup>32</sup> “Impossibility and Property Law” [1941] 57 LQR 339.

<sup>33</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, where there had been a total failure of consideration because the buyers never received delivery of the products ordered in the contract due to the interference of a supervening event after the contract had been agreed but before delivery.

This fortunate tenant would remain the recipient of the term, and would be at liberty to use it as he pleased, free from any contractual covenants he had entered into, until it was terminated by effluxion of time. The tenant's conduct could cause extreme damage to the value of the reversion, and the landlord may have to stand by, powerless, as he watched his reversion fall into ruin, or be gutted by fire. In the majority of cases, it would be cold comfort indeed that he too would be released from any obligations under the lease, especially since he would lose his right to any rental income from the premises<sup>34</sup>.

The tenant may also be disadvantaged if frustration occurs. He might have paid a large premium for the lease, disguised as a once and for all service charge, because the landlord had covenanted to keep it in repair, which he will not now have the benefit of nor will the premium be returned to him.

This is a highly undesirable position, and it is suggested that their Lordships must have expected the Law Reform (Frustrated Contracts) Act 1943 to apply to leases. In essence, section 1(2) of the Act provides that all sums payable before the frustrating event cease to be payable; that sums already paid under the contract are recoverable; and that the court has discretionary powers to allow expenses incurred in the performance of the contract by the payee to be set off against the sums paid or payable.

If the lease is viewed simply as a contract, then the estate would come to an end and the landlord would get the demised premises back, as sums already paid are recoverable. Beyond that, however, the position is uncertain. As H M Wilkinson<sup>35</sup> points out:

“It is easy to say that the tenant must give up possession and can cease to pay rent but. . . what is the position of sub-lessees or of mortgagees? If a premium has been paid is it to be returned in full or will the court apportion it according to the length of time enjoyed by the tenant?. . . What if the tenant has improved the property and could claim a payment for enhancement from the landlord at the end of the term. Does an earlier frustrating event cancel his right to claim?”.

Moreover, Jeffrey Price<sup>36</sup> asks what the position will be where the premises have been let at a rent higher than the market value. It seems that the landlord will be forced to disgorge the rent paid, and will only get the value in return (by way of set-off) which is therefore likely to be less.

It is submitted that there may be a more fundamental problem – namely, that even if the Law Reform (Frustrated Contracts) Act 1943 applies, there is a question whether frustration, as a contractual doctrine, can actually operate to bring about the destruction of the estate.

---

<sup>34</sup> It is submitted that this is only possible where the lease is viewed purely as a contract, since rent is a dual obligation, both contractual by covenant and proprietary as an incorporeal property right, which is an incident of the estate and compensation for the granting of the estate. The discharge of the contractual aspect will therefore not affect the proprietary obligation. See *infra* p 92.

<sup>35</sup> (1981) 131 *NLJ* 189 at 191

<sup>36</sup> “The Doctrine of Frustration and Leases” (1989) 10 *JLH* 90 at 103.

This is the suggestion that in the hybrid relationship of contract and property law which the lease represents, it is the property element which is the ascendant and governing aspect. This is so because the proprietary estate is the essential element which transforms an otherwise commercial contract into a lease; it is the defining element which separates the lease from a contractual licence to occupy and, being an interest limited in time, from ownership of the fee simple absolute. The estate describes the parcels of land demised, and the duration of the holding. The relational contract element, on the other hand, is a creative subsidiary which works within the discipline of the estate and regulates the use to which the parties may put the estate. Its lifetime is strictly co-extensive with that of the estate, and it may not destroy the estate. This is so, even though on the surface it may look to be of more importance than the proprietary aspect of the arrangement.

When a legal estate is vested in the tenant by the completion of the conveyance, what he receives is “a time in the land, or land for a time”<sup>37</sup>. He has been given exclusive possession of the demised parcels of land in a unitary block of land, subject to a right in the landlord to get the land back and to compensation in the form of rent for the loss of his right to possess the parcels, called the reversion. Once the lease has run its course the estate is destroyed and the demised parcels are returned to the landlord. The concept of the estate is elastic enough to encapsulate the right of the landlord to get the parcels back at the fixed term date or at any other. Accordingly, where he has a right of forfeiture reserved to him for breach of covenant, it is inherent to the nature of the estate granted that it may be ended at any time. Similarly, where the tenant is given a “break” clause in a lease, which is exercised in the form of a notice to quit, it is not evidence of a contractual right bringing about the destruction of the estate: the right to get out of the lease at any time is inherent to the nature of the estate granted so that when it is exercised, it destroys the lease as if the term date had been reached. The right has also been granted by the landlord as holder of the reversion, since it is his right to give.

Therefore, it is suggested that the contractual doctrine of frustration when it applies to leases will discharge the contractual side of the relationship, not the estate which it has no power to do. It is not a matter of whether the lease is executed or executory, as their Lordships suggest in *Panalpina* – it is the simple proposition that only a right reserved in the time-fixing formula of the estate can successfully destroy it; the estate can survive the destruction of the contract. This has been recognised to an extent by the Australian judiciary in relation to a right to terminate the lease for repudiatory breach, which they have opined may only exist where there is a right to forfeiture<sup>38</sup>.

In *Panalpina*, their Lordships had suggested that since a right to end the lease prematurely exists within many leases there is no logical absurdity in implying a right to end the lease by frustration. However, this misses the issue that in all other cases the right to terminate is linked to the nature of the estate granted and the right of the landlord to get back that which has been

---

<sup>37</sup> *Walsingham's Case* (1573) 2 Plowden 547 at 555.

<sup>38</sup> See *Progressive Mailing v Tabali* 57 ALR 609, see also see W Barr “Repudiation of Leases – A Fool’s Paradise” at pp 331-334 in P Jackson and D Wilde (eds), *Contemporary Property Law* (1999).

granted. There is no proprietary basis for an implied term. It is a right of contract alone. This is different from the situation where the parties have inserted a *force majeure* clause. Such a clause would alter the *nature* of the estate granted to determine the estate on the specified event agreed between the parties to the lease. There is no contractual implication of a term in these circumstances.

It is submitted that their Lordships were, with respect, in error to hold that frustration could apply to a lease on property terms. The effect of frustration would be to destroy the contract, but the estate would remain vested in the tenant. The position would be the same as that already outlined where, under a purely contractual analysis, the Law Reform (Frustrated Contracts) Act 1943 does not apply, with one notable difference: the tenant would still be liable to pay the rent reserved in the lease.

This is due to the dual nature of the rental obligation. Traditionally, rent payments were viewed as compensation for the loss by the landlord of his right to possess the demised land, and were considered an incident of the estate in land. The penchant for contractualisation of the lease led to the view, expressed by Lord Diplock, that rent is contractual consideration, “a payment which a tenant is bound by his contract to pay to the landlord for the use of his land”<sup>39</sup>.

Nevertheless, as Troman notes<sup>40</sup>, though the latter view has overtaken the traditional view, it had not extinguished it. It is still common practice in the drafting of leases to include both a reservation of rent in the *reddendum*, which will include the words “yielding and paying” and an express covenant from the tenant to pay rent. It is submitted that the right to rent is in itself an incorporeal right of property which is reserved to the landlord. The covenant sets the amount, which is then imprinted on the incorporeal right which is itself attached to the estate. On this basis, when the contract is discharged, the rental obligation remains at the level set by the covenant for the duration of the term so long as the estate remains. The landlord may even be entitled to the remedy of distress, if the tenant refused to pay<sup>41</sup>.

#### 4. Other problems with the reasoning in *Panalpina*

The reasoning of their Lordships is, with respect, difficult to defend on a conceptual basis, especially given the dangers illustrated with an actionable frustration.

It was suggested that the lease was executory since contractual covenants remained to be fulfilled throughout the duration of the term. It is submitted that this ignores the essential basic fact that the right of possession (and property) which the landlord gives to the tenant passes as a unitary block. The contractual covenants are completely separate and do not transform the lease into something it is not, since they are subject to the estate. This does not ignore the commercial realities of the leasehold transaction, indeed it gives effect to the ultimate commercial reality which is that the parties have agreed a lease not a licence, and as such the tenant has become the property

---

<sup>39</sup> *United Scientific Holdings Ltd v Burnley B C* [1978] AC 904 at 935.

<sup>40</sup> S. Troman *Commercial Leases* (1987).

<sup>41</sup> See *Bradsham v Pawley* [1980] 1 WLR 10.

owner with the attendant disadvantages and benefits which that classification brings, which includes the realisation that the majority of supervening events will not alter the fact that they are property owners. Similarly, the risk inherent in property ownership does pass to the tenant, unless it is otherwise divested in the terms of the lease, since he is the owner:

“Under the bargain between lessor and lessee the land for the term has passed from the lessor to the lessee, with all its advantages and disadvantages. . . If a principle of achieving justice be anywhere at the root of the principle of frustration, I ask myself why should justice require that a useless site be returned to the lessor rather than remain the property of the lessee?”<sup>42</sup>

The argument that simply because frustration applies to demise charters and agreements for leases it must apply to leases also lacks force. Demise charters and leases are not analogous concepts. The former is a complex, commercial hire-purchase arrangement, which grants a personal licence to use a ship, enforceable between the parties to the contract only. The lease grants a right of estate ownership, which may be bought and sold subject to any restrictions in the leasehold document imposed by the landlord as holder of the reversion. Land is not the same as a chattel – it is unique and irreplaceable. It is possible with the right materials to create more ships, it is not possible to create land. The courts have in the past realised that a distinction exists, and have held the doctrine applicable to one and not the other. By way of example, the principle of relief against a forfeiture action, applicable to leases, does not apply to a demise charter for a ship since the parties in that case do not enjoy proprietary or possessory rights, just a personal contract of services<sup>43</sup>.

Similarly, there is no disparity in holding frustration applicable to an agreement for a lease, and not a legal lease. While it is trite law that an agreement for a lease confers an equitable estate in the prospective tenant, by virtue of the fact that it is specifically enforceable<sup>44</sup>, this does not mean that an equitable estate and a legal estate are one and the same:

“The entitlements under an agreement for a lease are closely linked to the parties’ entitlement to enforce the agreement by specific performance. Being an equitable remedy it is a discretionary remedy, and may be refused. . . The rule in *Walsh v Lonsdale* is *not* to be taken as destroying the difference between legal and equitable estates. The very basis of relief in the granting of specific performance is founded on the distinction between executory and executed contracts.”<sup>45</sup>

Since no legal estate has actually passed, there has as yet been no separation of the elements of the lease and it is simply a contract for the purposes of the application of contractual doctrine. This is illustrated in *Austerburry v*

---

<sup>42</sup> *Panalpina op cit* per Lord Russell at 71C.

<sup>43</sup> See *The Scaptrade* [1983] 2 AC 694 at 702.

<sup>44</sup> *Walsh v Lonsdale* (1882) 21 Ch D 9.

<sup>45</sup> Robertson “Frustration of Leases: Who Bears The Risk?” (1982) 9 *Syd L Rev* 672.

*Corporation of Oldham*<sup>46</sup>, where it was held that a landlord had no privity of estate to enforce obligations against an equitable assignee. Therefore, the contractual element is ascendant and may discharge the equitable estate. This is not so with the legal lease, where a full proprietary estate has been granted.

It remains to deal with the argument that the law should not draw a distinction between a lease and a licence in relation to the application of frustration. Lord Hailsham<sup>47</sup> opined that it would be anomalous if a lease of a holiday cottage were held not to be frustrated in circumstances where a licence of the same premises would be. The answer is simply that in the one case (lease) the tenant is the owner in law of the property, whereas in the other the occupier has a right to use the property. There is no anomaly. This might seem unnecessarily harsh and doctrinaire, but this article is not advocating that a tenant in such a situation should not have some remedy, just that frustration is not that remedy.

### **ALTERNATIVE METHODS OF DISCHARGE BY SUPERVENING EVENTS**

Property law, as it stands, can deal with supervening destruction of the subject matter of the lease. This is because, quite simply, on a property based analysis, destruction of the estate by some vast convulsion of nature or by burial under the sea does not require any doctrine of frustration through impossibility to bring the tenant's obligations to an end. The destruction of the freehold reversion necessarily entails the end of the estate, which is a lesser interest granted out of it. In the words of Lord Russell<sup>48</sup>:

“. . . of the total disappearance of the site. . . [as] a piece of terra firma. . . I would not need the intervention of the court to say that the term of years could not outlast the disappearance of its subject matter: the site would no longer have a freeholder lessor, and the obligation to pay rent, which issues out of the land, could not survive its substitution by the waves of the North Sea”.

This is only so, of course, where the *parcels demised* cease to exist, not the buildings or other structures on those parcels. Thus, destruction of office premises on the demised land will not suffice by means of an earthquake or otherwise, since the parcels themselves will still exist. The *obiter dicta* in *Holbeck Hall Hotel Limited v Scarborough BC* add little of substance to this important point. What of other supervening events?

### **A COMMON LAW SOLUTION – PARTIAL FRUSTRATION?**

It is suggested that many of the problems of supervening events may be dealt with satisfactorily by a principle developed in *John Lewis Properties Plc v Viscount Chelsea*<sup>49</sup>, called “frustratory mitigation”<sup>50</sup>, which it allows for the *de facto* suspension of contractual obligations, except rent.

---

<sup>46</sup> (1885) 29 Ch D 750.

<sup>47</sup> *Panalpina op cit* at 54G.

<sup>48</sup> *Ibid* at 71E.

<sup>49</sup> [1994] 67 P & CR 120.

The doctrine of frustratory mitigation arises from the judgment of Mummery J in *John Lewis Properties plc v Viscount Chelsea*<sup>51</sup>. John Lewis took three 999-year building leases from the landlords. The demised premises included the famous Mackmurdo building, and the leases contained covenants by John Lewis to demolish and redevelop the site in two phases, according to plans approved by the landlords. Before the second phase was completed, the Mackmurdo building was listed as a Grade II listed building. An application by John Lewis for listed building consent to build was withdrawn following an indication from the Council that it would not be granted. Viscount Chelsea, the person entitled to the reversion at the time of the action, sought to forfeit the lease for the failure of the tenants to carry out the building scheme.

In considering the landlord's claim for breach of covenant, Mummery J held that "there may exist lawful excuses for non-performance of building covenants short of full frustration"<sup>52</sup>, on the basis of *dicta* of Lord Russell in *Cricklewood*, where he said<sup>53</sup>:

"It may well be that circumstances may arise during the currency of the term which render it difficult, or even impossible, for one party to carry out some of its obligations as landlord or tenant, circumstances which might afford a claim to damages for their breach, but the lease would remain. The estate in land would still be vested in the tenant".

After noting that in *Cricklewood*, the claim was for arrears of rent, and that no lawful excuse thus existed, he held that John Lewis had a lawful excuse in the instant case for failure to perform the building covenant. The effect of this lawful excuse was to suspend the covenant, not to discharge it:

There is no logical reason to believe that what may be applied to a building covenant may not be applied to any other covenant in a lease, except that to pay rent which is more than a mere covenant. Moreover, the existence of the doctrine is assured. In the nineteenth century case of *Bailey v De Crespigny*<sup>54</sup>, a restrictive covenant entered into by the landlord not to permit building on a paddock adjoining the demised land, was discharged when the paddock was compulsorily acquired by a railway company. It is suggested that the current doctrine is really a development of that principle, which has evolved to the point that a covenant may *de facto* be held in abeyance, until such time as either the lease ends by effluxion of time or otherwise, or the covenant once again becomes capable of performance.

Frustratory mitigation avoids many of the practical and conceptual difficulties which would plague an actionable frustration. It permits the suspension of the contractual obligations without the need to discharge the estate, which the contractual entity cannot do. Moreover, it recognises that rent may not be discharged, as it is an incident of the estate.

---

<sup>50</sup> See Morgan "Suspending Leasehold Covenants: A Doctrine of "Frustratory Mitigation" " [1995] *Conv* 74.

<sup>51</sup> [1993] 67 P & CR 120.

<sup>52</sup> *Ibid* at 132.

<sup>53</sup> [1945] AC 221 at 234.

<sup>54</sup> (1869) LR 4 QB 180.

The standard required for the operation of the doctrine is also lower than the high threshold required for a successful action of frustration of purpose. It operates in circumstances less than frustration, and therefore the length of the prohibition or impossibility seems not to be of concern. In *John Lewis*, the lease had well over nine hundred years left to run.

The simple fact that it may be possible to suspend a number of covenants gives it an advantage over frustration, which must bring the whole contract to an end automatically. It is also suggested that the operation of the doctrine is not automatic at the behest of one party, by the very nature of the fact that it must be proved as a lawful excuse. Since it does not involve the discharge of the lease, the problems of apportioning payments and the demised premises does not arise.

Jill Morgan<sup>55</sup> suggests that the suspension of the lease in its entirety, including that of the obligation to pay rent, would make good sense. It is suggested that this would be impossible, given the nature of the rental obligation as only the contractual right to rent would be discharged. This accordingly might appear to deprive the remedy of some of its utility, since it would not help the plight of the tenant awaiting the reinstatement of premises or indeed the unfortunate tenant in the *Curling* case. It is submitted that a general right to abate rent would harm the landlord's position, since in most cases all he wants from his tenant and the tenancy is a guaranteed rental income stream, especially since he has given ownership of the property to the tenant in one unitary block not in a continuously flowing right dependent on the payment of the rental obligation. Moreover, it is submitted that specific legislation gives sufficient rights to the parties when it is deemed necessary to subvert the general rights of property. The tenant must accept the bad aspects as well as the good in owning property.

A more significant failing, however, is that where the landlord or tenant actually do wish to end the lease, it gives them no method of doing so. Unless there is an express term in the lease, or a break clause, the parties will be forced to keep the lease on foot even if they do not want to. This is most likely to effect residential tenants, due to their weak bargaining position.

Nevertheless, it is suggested that the principle of frustratory mitigation can be viewed as an evolution of the doctrine of frustration in the area of landlord and tenant law under property principles. Giving due consideration to the peculiar practices and complexities of legal relationships and drafting differing rules for them does not necessarily lead to the law being compartmentalised. It may in fact lead to a rule which is one evolutionary step beyond the original.

### STATUTE

It might also be possible to supplement the gaps in frustratory mitigation by statutory enactment. The Law Commission have deliberated on the issue of the effect of supervening events and have come up with a proposal for termination, which is based upon intention, in the sense that the "purpose for which the tenancy was granted can no longer be fulfilled in accordance with

---

<sup>55</sup> *Op cit* at n 51.

the intentions of the parties.”<sup>56</sup> It has the advantage that it works within the existing property law structure, by utilising surrender as the means of terminating an estate for supervening difficulties. Matters have come no further in the thirty-two years since the proposal was tabled, so it is perhaps a pious hope to think that such statutory enactment is possible.

## CONCLUSION

The doctrine of frustration is ill-suited to use in landlord and tenant law. It is limited by practice and by principle, and the remedies it provides are clumsy and as capable of creating injustice as they are of achieving justice. More attractive alternatives exist along a property law route, by suspension of particular covenants through frustratory mitigation, or by the possible enactment of a statutory right for the tenant to surrender the lease in cases in certain supervening circumstances. Landlords and tenants, particularly in commercial lettings, would be well advised to circumvent frustration by the use of express clauses relating to common supervening events, if they do not already do so.

On a more general level, it is difficult to avoid the conclusion that the introduction of principles of contract law to the landlord and tenant relationship was ill-considered. It illustrates the need, on the part of reformers (judicial or otherwise), to think through the implications of the introduction of contractual doctrines in the landlord-tenant relationship, rather than simply seeing property law as outdated and in need of replacement.

In a sense, the stable door is being closed after the horse has bolted. Frustration is a reality, in spite of the attendant problems associated with it, and the reasoning of their Lordships has been used as justification to introduce other contractual principles, such as repudiatory breach.<sup>57</sup> However, if a subsequent court is willing to revisit the reasoning in *Panalpina*, and recognise that the contractual doctrine of frustration can only discharge the contractual element of a lease, the hazards of contractualisation might yet be avoided in relation to frustration of leases.

---

<sup>56</sup> Law Commission Working Paper No16 *Working Paper Proposals Relating To Termination of Tenancies* Vol 2 (1968) Proposal 12.00.

<sup>57</sup> For a review of the attendant difficulties caused by this doctrine, see the article by the author in “Repudiation of Leases – A Fool’s Paradise” at pp 331-334 in P Jackson and D Wilde (eds), *Contemporary Property Law* (1999).

## TRANSFER OF UNDERTAKINGS LAW: BACK TO CONFUSION

*Paul Buggy, Head of Legal Services, Northern Ireland Housing  
Executive*

The transfer of undertakings legislation can potentially apply, in some circumstances, in the context of a contract for services:<sup>1</sup> there is no doubt about the correctness of that proposition. But in what circumstances is the legislation likely to actually apply to such a contract? That question has been clearly answered by the European Court of Justice in its judgment in *Suzen*.<sup>2</sup> It has also been clearly answered by the English Court of Appeal in its decision in *ECM (Vehicle Delivery) Service v Cox*.<sup>3</sup> The problem is that the two answers are incompatible.

However, the differences between the two decisions should not be exaggerated. Both decisions are consistent with the proposition that the legislation can apply if any one or more of the following conditions is satisfied:

- If there is a transfer, to the transferee, of significant tangible assets.
- If there is a transfer of significant intangible assets (such as “know-how”).
- If the transferee takes over a major part of the transferor’s workforce.<sup>4</sup>

But what if none of those conditions exists? Can the legislation apply even if there is no transfer of assets or of staff? Or, to put the question another way, can the legislation apply merely because the transferee carries out the same activities, for the same customer, as those which the transferor had carried out? *Suzen* is clear authority, at European level, against that proposition. However, in *Cox*, the Court of Appeal held that it is open to an employment tribunal to hold that the legislation does apply, even in the absence of a transfer of assets or of staff.

### The basic principles

It will be necessary to look at the *Cox* judgment in greater detail, and to consider the legislation from a policy point of view. However, before doing so, it is important to refer to the basic principles of this area of law.

The legislation consists of the EEC Acquired Rights Directive 1977 and the implementing regulations, the Transfer of Undertakings (Protection of Employment) Regulations 1981<sup>5</sup> (“TUPE”); the Regulations apply throughout the United Kingdom. In practice, in deciding whether the

<sup>1</sup> *Rask and Christensen v ISS Kantineservice A/S* [1993] IRLR 133, ECJ.

<sup>2</sup> *Suzen v Zehnacker Gebäudereinigung GmbH Krankenhausservice* [1997] IRLR 255, ECJ.

<sup>3</sup> [1999] IRLR 559, CA.

<sup>4</sup> See *Suzen* at p 259, para 24.

<sup>5</sup> SI 1981/1794.

Regulations apply in a particular situation, the task of British courts and tribunals is limited to determining whether the situation falls within the scope of the Directive; the requirements of the Directive must of course be ascertained in the light of the case-law of the European Court.<sup>6</sup>

Article 1(1) of the Directive defines the scope of the legislation, by providing that it cannot apply unless there is:

“ . . . a transfer of an undertaking, business or part of a business . . . ”.

Accordingly, the legislation cannot apply unless there is a transfer of an economic entity. In its case-law, the European Court of Justice consistently uses the term “economic entity” as a common denominator for describing an “undertaking”, a “business”, or a “part of a business” within the meaning of the Directive<sup>7</sup>. As Burton J pointed out in *Whitewater Leisure Management Limited v Barnes*,<sup>8</sup> the transfer of an entity involves two separate requirements:

- There must be an entity. (This is a subject-matter requirement).<sup>9</sup>
- That entity must be the subject of a transfer. (This requirement relates to process).

The subject-matter (or “entity”) requirement must be satisfied both in relation to the transferor and in relation to the transferee: As a result of the transfer, the alleged transferor must have ceased to be in charge of running an entity,<sup>10</sup> and the alleged transferee must have begun to be in charge of running an entity. The point of the process (or “transfer”) requirement is that the entity which ceases to be under the control of the transferor, and the entity which comes under the control of the transferee, must be one and the same.<sup>11</sup>

Therefore, the concept of a transfer of an entity involves three separate but inter-linked requirements:

- A transferor’s entity requirement.
- A transferee’s entity requirement.
- The transfer requirement.

If the European and British case-law is analysed in terms of those three requirements, many of its apparent contradictions disappear.

<sup>6</sup> See *Betts v Brintel Helicopters Ltd and KLM ERA Helicopters (UK) Ltd* [1997] IRLR 361, CA, at p 366, para 50.

<sup>7</sup> See the Opinion of Advocate General Van Gerven in *Schmidt v Spar – und Leihkasse der fruheren Amter Bordesholm, Kiel und Cronshagen* [1994] IRLR 302, ECJ, at p 306, para 13.

<sup>8</sup> [2000] IRLR 456, EAT, at p 457, para 6.

<sup>9</sup> See *Allen v Amalgamated Construction Co. Ltd* [2000] IRLR 119, ECJ, at p 134, para 24.

<sup>10</sup> The employees lost in *Betts* primarily because the Court of Appeal concluded that the entity requirement was not satisfied in relation to the transferor. See *Betts*, at p 366, para 45.

<sup>11</sup> See *Spijkers v Gebroeders Benedik Abbatoir BV* [1986] ECR 1119, ECJ, at paras 10 and 11 of the judgment.

### What is an “entity”?

The term “entity” was first defined by the European Court in 1997, in its judgment in *Suzen*; that definition has been endorsed and re-affirmed by the Court in subsequent cases.<sup>12</sup> According to the *Suzen* judgment:

“The term entity ... refers to an organised grouping of persons and assets facilitating the exercise of an economic activity which pursues a specific objective”.<sup>13</sup>

Later in the same judgment,<sup>14</sup> the Court warned:

“An entity cannot be reduced to the activity entrusted to it. Its identity also emerges from other factors, such as its workforce, its management staff, the way in which its work is organised, its operating methods or indeed, where appropriate, the operational resources available to it”.

Subsequent European case-law indicates that the *Suzen* definition is valid in all types of contracting-out situations.<sup>15</sup>

### What is the “transfer” requirement?

In *Spijkers v Gebroeders Benedik Abbatoir CV*,<sup>16</sup> there was no doubt that, as a result of the alleged transfer, the alleged transferor had ceased to be in charge of an entity, and that, by the same process, all the necessary constituent elements for an entity had come into the hands of the alleged transferee. Accordingly, *Spijkers* is a case which is concerned *only* with the concept of a transfer (as distinct from the concept of an entity). The European Court’s 1986 judgment in that case continues to be the leading authority on the question of what conditions have to be satisfied in order to comply with the process (or “transfer”) requirement.

According to the *Spijkers* judgment, in deciding whether a transferor’s entity has been the subject of a “transfer”, the key question is whether the entity: “was disposed of as a going concern, as would be indicated, *inter alia*, by the fact that its operation was actually continued or resumed by the [alleged transferee], with the same or similar activities”.<sup>17</sup> And the Court points out elsewhere in the judgment that: “. . . the decisive criterion for establishing whether there is a transfer for the purposes of the directive is whether the [entity] in question retains its identity”.<sup>18</sup>

Therefore, *Spijkers* shows that the *transfer* requirement can be satisfied in relation to a contract if, both before and after the making of that contract, much the same activities are carried out for the same customer.

---

<sup>12</sup> See *Francisco Hernández Vidal SA v Gomez Perez* [1999] IRLR 132, ECJ; *Sanchez Hidalgo v Asociacion de Servicios Aser and Sociedad Cooperativa Minerva* [1999] IRLR 136, ECJ; and *Allen*.

<sup>13</sup> *Suzen*, at p 259, para 13.

<sup>14</sup> At para 15 of the judgment.

<sup>15</sup> See the cases cited at n 12 above.

<sup>16</sup> See n 11 above.

<sup>17</sup> Para 12 of the judgment.

<sup>18</sup> Para 11 of the judgment.

### The *Cox* decision

In *Cox*, the relevant workers had been employed by the transferor for the purposes of carrying out a vehicle delivery contract with the transferor's customer, VAG. The transferor lost that contract, which was then awarded to ECM (the alleged transferee). There was no transfer of material assets, and no significant transfer of intangible assets. ECM took on none of the transferor's staff. Nevertheless, the industrial tribunal held that the Transfer of Undertakings Regulations applied in the circumstances. According to the industrial tribunal's decision, the relevant economic entity was: ". . . the VAG contract itself and the activities which surrounded that VAG contract."<sup>19</sup>

The Court of Appeal's reasons for upholding the employment tribunal decision emerge from the judgment of Mummery LJ. He justified the upholding of the tribunal's decision mainly on the basis of three propositions:<sup>20</sup>

- The *Spijkers* line of authority<sup>21</sup> (with its emphasis upon an examination of the similarities between activities before and after the transfer) continued to be good law.
- *Spijkers* showed that the "necessary factual appraisal" was a matter for the adjudicating authority at first instance (in this situation, the employment tribunal).
- The *Suzen* judgment had to be read within the context of the particular factual circumstances of the *Suzen* case.

However, none of those propositions provides convincing support for the Court of Appeal's decision. First, as has been emphasised above, the *Spijkers* principle is concerned only with the "transfer" requirement; it provides no support for the proposition that activities can equate to an entity. Secondly, although the question of whether the legislation applies, in a particular scenario, is a question of fact, the court or tribunal at first instance must find those facts within the constraints of the legal principles established by European case-law. Thirdly, post-*Suzen* European case-law clearly shows that the *Suzen* definition of an entity is applicable in all sorts of contracting-out situations.

### The policy issue

In the United Kingdom, the *Suzen* judgment has been the subject of much criticism from a policy perspective. *Cox* is, at least in part, a response to that criticism. The main argument of the critics is that the *Suzen* ruling defeats the purpose of the legislation, by allowing employers to evade the

---

<sup>19</sup> *Cox* (n 3 above) at p 560, para 13.

<sup>20</sup> See *Cox* at pp 561 and 562 (para 23 of Mummery LJ's judgment).

<sup>21</sup> That line of authority includes the case of *Schmidt* [1994] IRLR 302, ECJ. In *Schmidt*, the Court proceeded on the basis of an *assumption* that the relevant transfer's subject-matter was an entity, but did not decide the point; see *Ledernes Hovendorganisation (acting for Rygaard) v Dansk Arbejdsgiverforening (acting for Stro Molle Akustik A/S)* [1996] IRLR 51, ECJ, at p 56, para 20.

applicability of the legislation (by the simple expedient of declining to take on any of the transferor's staff).<sup>22</sup>

However, this argument is misconceived. Contrary to the view of the critics, the legislation does not exist in order to safeguard employee's rights in all circumstances. Its employee-protection aim is much more narrowly focused; as the title of the legislation itself shows, the Directive is aimed at safeguarding employee's rights if, and only if, there is a transfer of an entity.<sup>23</sup> Furthermore, there is nothing illogical in deciding that, in some situations, the Directive will apply if transferor's employees are taken on, and will not apply if they are not taken on; in such situations, the employees themselves may be the sole or main element of the entity. As the European Court pointed out in *Francisco Hernandez Vidal*: ". . . an organised grouping of wage earners who are specifically and permanently assigned to a common task may, in the absence of other factors of production, amount to an economic entity".<sup>24</sup>

### CONCLUSION

We have been in this situation before. During the mid-1990s, there was considerable confusion as to the precise circumstances in which TUPE was likely to actually apply, in the context of contracts for services. During that period, the confusion was caused by the maddeningly vague manner in which the European Court of Justice sometimes chooses to express itself. But, in *Suzen*, the Court clarified its position. Now, there is confusion once again, on the same issue as before. This time, however, the source of the problem is closer to home.

---

<sup>22</sup> See para 29 of the judgment of Lindsay P in *RCO Support Services and Aintree Hospital Trust v Unison* [2000] IRLR 264, EAT, at p 629. For a particularly trenchant commentary, see "Highlights" in the June 1997 edition of the Industrial Relations Law Reports.

<sup>23</sup> According to its title, the legislation is a directive "on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of businesses".

<sup>24</sup> *Francisco Hernández Vidal*, at p 134, para 27.

## BOOK REVIEWS

*VIEW POINT: A POINT OF VIEW ON RIGHTS OF VIEW. By John Greed [University of the West of England 2000, x and (with index) 182pp, £8.00]*

The publication of this book coincides with proposals in England for new legislation to deal with nuisance hedges. This is in recognition of the distress which is caused to thousands of people by overgrown hedges and the legislation aims to relieve the unnecessary suffering caused by nuisance hedges.

John Greed's book sets out how the common law has dealt with these issues up to the moment. Although dealing specifically with rights of view, it provides a thorough discussion and analysis of the general law on easements. His commentary on the case law starting in 1610, includes the House of Lords decision in 1997 in *Canary Wharf* and recent cases in late 1999. The case law covers facts as diverse as the right to have clothes blowing on a clothes line and the right to have timber dried by the flow of air. The case law would be of particular relevance not only for blocked views but also in relation to many problems arising in a neighbour dispute case.

Of particular benefit to a busy practitioner is the chapter setting out Greed's conclusion and summings-up. This effectively summarises the main legal issues and contains useful cross-references to the case law already discussed.

This book, although setting out why a right to view should exist, also provides the other more easily recognised tools by which a right of view may be enforced, such as nuisance, under the right to light and by express grants or restrictive covenants. How planning authorities deal with issues of amenity, including views, is also considered and the planning laws can also provide proactive assistance in avoiding a view being blocked.

It is a thought-provoking discourse which should be considered by anyone with the problem of a right of view being blocked and the associated difficulties.

I note that Mr Greed's personal problem with an overgrown tree was solved in a gale but this book should certainly help others who have not been so lucky.

Even if legislation is enacted (there is no guarantee as it is dependent in England on there being space in the parliamentary timetable and in Northern Ireland the matter will fall within the jurisdiction of the new legislative Assembly) it can only possibly address a very limited number of views which are blocked. It will be unable to protect, (to borrow Greed's examples), a view to the wicket at Lord's cricket ground and the view of the spire of Salisbury Cathedral will not be protected by any current proposal.

For such protection, it will be necessary to consider the various possibilities set out in this book and the case law will prove a useful complimentary line of attack.

**KAREN BLAIR**

*Associate Solicitor, Cleaver Fulton Rankin Solicitors, Belfast*

*PARTNERSHIP LAW. By Michael Twomey [Butterworths: Dublin, 2000, xcii and (with index) 933 pages.]*

Partnership law is the Cinderella of commercial law. The reason is that its principles are so simple and well-established. They had been settled in the late nineteenth century and codified in the 1890 Partnership Act, which applied to England, Wales, Scotland and Ireland, and which was echoed in jurisdictions throughout what was to become the Commonwealth. The lack of legal literature on partnership law reflects the success of Sir Frederick Pollock, the author of the 1890 Act, in codifying it with a simplicity and clarity which modern legislative draftsman would benefit from imitating. So Partnership law became a victim of its own success, surviving the twentieth century as a placid backwater. But it is wrong to underestimate the importance of the partnership as a business entity in Ireland as in the United Kingdom. Almost as many partnerships are trading as limited companies. Nor are the businesses small: 852,000 of the 2.77 million persons employed by partnerships in the United Kingdom are in firms with at least ten employees.<sup>1</sup>

The simplicity, and prevalence, of partnership law does not mean that its principles are universally understood. The accountancy profession tenaciously refuses to understand the nature of partnership capital. Moreover partnership law has developed since 1890 in different ways in England, Scotland and Ireland, and also in the common law jurisdictions with similar statutes, notably Canada, Australia and New Zealand.

Michael Twomey's guide to Irish partnership law fills the need for a single comprehensive guide to the law as it has developed in Ireland. To put it another way, he has researched the pre-1890 Irish law as thoroughly as the post-1890 Irish law, so as to give a distinctively Irish slant to the 1890 Act. He is right to treat Irish partnership law as different from that of England and Wales, and to point out that those differences that arose between 1890 and 1922 are differences which should be followed in Northern Ireland.

But the focus of this book is not a local one. Twomey's time as a Harvard visiting researcher has given him an opportunity to view from a distance the development of partnership law in all the Commonwealth jurisdictions, and his overview is invaluable.

---

<sup>1</sup> Small and Medium Enterprise Statistics for the UK 1998 (August 1999).

It is rivalled by his historical research. He reminds us that the first limited partnership in the common law world was created by the Irish Parliament, when it enacted the splendidly-named Anonymous Partnerships Act 1781. Similarly he mentions the reason why the Companies Acts imposed an apparently pointless bar on partnerships of more than 20 members. It is because in those days a creditor of the firm had to join each partner in any action against the firm, an operation which was completely impractical if the partners were numerous.

To test this useful and comprehensive book on the law as it is today, I tried out Twomey on the two problems that I regard as the most difficult in partnership law.

First I sought Twomey's stance on the question of repudiation, as raised by Lord Millett in the English House of Lords in *Hurst v Bryk* [2000] 2 WLR 740. The problem is this. Can a partnership be repudiated, so that a partner who suffers a fundamental breach in the partnership agreement can walk out of the partnership and treat himself as freed from it? In principle, why not? This is no more than simple contract law. But where does that leave section 35(d) of the 1890 Act, which gives to the disgruntled partner a right to apply to the court for an order for dissolution, if another "so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him"? Does this subsection not implicitly exclude his right to treat the partnership as repudiated without any court order? Moreover, how does the doctrine of repudiation work where one member is being wrongfully ejected from the firm by another or a wrongful clique, but other members know nothing about it? Do the latter find their partnership dissolved although they are not involved (either as victims or protagonists) in the repudiatory acts? Lord Millett answers that a partnership is more than a contract, it is a relationship, which is not susceptible to the common law remedy of repudiation. Opinions almost as weighty as Lord Millett differ from him.<sup>2</sup> It is a classic battle between the equity lawyers and the common lawyers. I prefer to stand by Lord Millett. Twomey inclines to the common law position.

Twomey also address the difficult question whether a partner is liable for his own simple negligence towards another member of the firm. Can he be financially penalised, or is it of the nature of a partnership that the members accept the possibility of mistakes being made by the other members? To put it another way, is the duty between partners a duty of good faith and nothing more? Some of us say yes.<sup>3</sup> There are authorities each way, and Twomey directs us (in particular) to the Irish authorities.

This is a book to be welcomed. It would be churlish to point out any slight weaknesses. For instance, Twomey expresses no view on the vexed question of whether the rules of natural justice apply where a partnership agreement empowers a majority to expel a partner without cause, a provision which is

---

<sup>2</sup> See the "Joint Consultation Paper of the Law Commission" and the "Scottish Law Commission on Partnership Law", (2000).

<sup>3</sup> The unreported judgement of Carnwath J at first instance in *Hurst v Bryk* (HC 11/4/95) is instructive on this.

common in modern partnership agreements. But in general his coverage and achievement is magnificent, and his book is one which no law library in a common law jurisdiction should be without.

**MARK BLACKETT-ORD**

*5 Stone Buildings, Lincoln's Inn*  
*[Author of Partnership (Butterworths) (1997,)]*