# NORTHERN IRELAND

# LEGAL QUARTERLY

Murder: The Mental Element
(*The Honourable Mr Justice Keane*)

The Common Agricultural Policy: From Quantity to Quality (*Joseph A McMahon*)

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

ISSN 0029-3105

# MURDER: THE MENTAL ELEMENT*

***The Honourable Mr Justice Keane, Chief Justice of Ireland***

> "In contrast [to the civil law system], in a system such as our own which has never experienced a radical break with the past, where there has been 'no wholesale wiping out of the legal wisdom of centuries, no division of the law into a pre- and post- revolutionary era,' the criminal law appears as a continuum that spans the ages and accordingly, as a phenomenon that ought to be approached historically as well as analytically, with an eye to its evolutionary processes as well as its current arrangements." (McCauley and McCutcheon, *Criminal Liability, A Grammar, vii*)

The authors of a recent Irish work on Criminal Liability thus draw attention to the importance of recognising the historical perspective when analysing difficult topics in the criminal law. This certainly applies with particular force to the topic which I have chosen to discuss this evening: the mental element in murder.

Reading judgements from various common law jurisdictions on this area of the law would make one long at times for the simplicity of the biblical injunction, "Thou shalt not kill." But, apart from any other considerations, that attractively simplistic approach breaks down when one turns to the facts of some of the cases with which judges and juries have had to wrestle in many countries over the centuries.

Take for example the American case of *Commonwealth* v *Malone*,[1] dating from 1946. That was a "Russian roulette" case: the defendant when playing the game shot his friend dead. There were five chambers in his revolver, one of which was loaded, and the gun fired on the third pull of the trigger. There was thus a sixty per cent probability that the third pull would be lethal. That probability – or "risk" as it might also be called – was sufficient in the view of the court to justify a conviction of murder. But, as one commentator observed, if the gun had discharged on the first pull, the risk could be said to be only twenty per cent. Should that have meant that a manslaughter conviction only was warranted? In terms of moral culpability, what was the difference?

Then there is the House of Lords decision in *Hyam* v *DPP*.[2] That was the case of the woman who set fire to the house where her rival for the affections of her lover was living with her three children: as a result two of the children died. She said that she only wanted to frighten the other woman and drive her away from the locality, but she knew that is highly probable that serious injury, at the least, would be the result of her action.

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* The Annual Address for 2001 to the judiciary of Northern Ireland, 13th September 2001.

1 354 Pa 180.

2 [1975] A.C. 55.

Coming closer to home, there is the decision of Lowry LCJ, sitting as a trial judge without a jury, in *Regina* v *McFeely*.[3] The accused was one of a gang responsible for planting a bomb in a public house near Limavady which caused the death of an RUC constable and for a robbery at the premises. He was the driver of the getaway car and the evidence was that the premises had been evacuated as a result of a warning having been given by the gang. The constable was killed when he arrived in response to a call from the manager after the robbers had left. Could the accused be found guilty of murder, as distinct from manslaughter, in those circumstances? Applying the law as laid down in *Hyam*, the learned chief justice was not satisfied beyond a reasonable doubt that the accused knew that the probable result of his actions would be – at the least – serious personal injury. In the result, he found the accused not guilty of murder, but guilty of manslaughter.

The historical background against which the common law pursued its sometimes agonisingly tortuous path towards an acceptable definition of the essential ingredients of the crime of murder is dominated by two factors. The first is the abhorrence common to all civilised societies of the deliberate and premeditated killing of another human being. The second is the presence in all the common law jurisdictions until the second half of the last century of capital punishment. As early as the sixteenth century, English law recognised the distinction between the felonies of murder and manslaughter: it was only in the case of the former that the person accused of killing someone could not plead "benefit of clergy". (It will be recalled that an accused who was able to read a particular verse of the psalms – charmingly described as the "neck verse" – escaped the gallows.) And murder was defined in a phrase that came to haunt the criminal law as killing with "malice aforethought". (Sir James Stephens memorably said of it that it was a phrase which "is never used except to mislead or to be explained away".)

At one stage, the law went so far as to say that in the case of every killing, "the law presumeth the [killing] to have been founded in malice, unless the contrary appeareth".[4] That view was finally laid to rest in the famous speech of Viscount Sankey in *Woolmington* v *DPP*,[5] celebrating the "golden thread" of the onus of proof on the prosecution running through the web of the English criminal law. But another aspect of "malice" was a hardier growth which for a long time defied attempts by both judges and legislators to uproot it: what came to be called the doctrine of "constructive malice".

This concept was not confined to the law of homicide: it was part of a developing tendency in the criminal law from the early nineteenth century onwards to attach criminal liability to acts committed with a "guilty mind" even where it could not be proved that the accused "intended" to commit the specific act which the law had criminalised. It would take us too far afield to consider how this tendency was reflected in the case law dealing with *mens rea*. In the case of homicide, it took the form of the principle that a person was deemed to have killed another with malice aforethought where the killing was committed by him with the intention of committing a felony or – in effect – resisting arrest by a police officer. Thus a person who committed

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[3] [1977] NI 149.
[4] Foster, *Crown Law*, p 255.
[5] [1935] A.C. 462.

the felony of causing grievous bodily harm but did not intend to kill his victim could be convicted of murder when his victim died.

In England, constructive malice appeared to have been banished from the law with the enactment of section 1 of the Homicide Act, 1957 which provided that a person was not guilty of murder unless the killing were:

> "done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of an other offence."

However, while that provision seemed to have – as the marginal note indicated – done away with constructive malice in England, it left the door open to what was now called "implied malice aforethought" as providing the necessary mental ingredient in the crime of murder. The consequences became clear with the decision of the Court of Criminal Appeal in *Regina* v *Vickers*[6] where Lord Goddard LCJ defined murder as killing committed "with the intention either to kill or to do some grievous bodily harm." Since the expression "grievous bodily harm" had itself a somewhat storied history, the House of Lords in their highly controversial decision in *DPP* v *Smith*[7] took the opportunity to substitute for it the phrase "really serious harm" and when the Irish legislature addressed the question of the necessary mental ingredient in murder, they adopted the same approach. Section 4 of the Criminal Justice Act, 1964 (attached to which is the marginal note "malice") provides that:

> "(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not."

English and Irish law alike had thus reached the stage where a person could be found guilty of murder although he had not intended to kill his victim: he could not be heard to say in his defence that "I admit I intended by striking X to cause him serious injury but I never meant to kill him." Whether that departure from what some would see as the fundamental principle of the criminal law that, in general terms at least, a person should not be convicted of a crime which he did not intend to commit, was desirable is a question to which I shall return. At this stage, however, I must complete my citation from section 4 of the 1961 Act, *viz*:

> "(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted."

That brings me back to *DPP* v *Smith*. That was the case in which a man driving a car with stolen property in the back was stopped by a policeman and drove off with the policeman clinging to the side. He drove it deliberately in an erratic manner with the result that the policeman fell from the car and was killed. The man was convicted of capital murder and the House of Lords unanimously approved the direction of the trial judge to the jury that they should convict if they were satisfied that a reasonable man in

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[6] [1957] 2 Q.B. 664.
[7] [1961] A.C. 290.

the accused's position would have contemplated that driving the car in that manner would probably result in grievous bodily harm being caused to the policeman.

The decision provoked a storm of criticism throughout the common law world, since it seemed to lay down that a jury was entitled to convict a person of murder even in a case where it had not been proved that he actually intended to kill or cause grievous bodily harm. In England, the Criminal Justice Act, 1967 made it clear that juries were not bound to infer that a person intended or foresaw a particular result simply because it was the natural and probable consequence of his action: they were to decide whether he so intended or foresaw the result by reference to all the evidence. As we have seen, section 4 of the Irish Act, although in different terms, also made it clear that the presumption as to intending the natural and probable consequences of one's acts could be rebutted in any case. Both legislatures thus rejected the objective test for determining whether the necessary intention existed which had been approved in *Smith*.

But what precisely is meant by an intention to kill or cause serious injury continued to cause difficulties, as was illustrated by *Hyam*, the case of the jealous woman who burnt down her rival's house. Even if her intention simply was to frighten her rival, she had committed an action with the jury were entitled to conclude she must have foreseen would be likely seriously to injure, if not to kill, the occupants of the house. If they concluded that she did indeed foresee that as the probable result of her action, were they entitled to convict, since her motive – as distinct from her intention – was not material? A majority of the Law Lords held that they were: Lord Diplock dissented, but for different reasons to which I shall return. The speeches of the majority gave rise to the difficulty that they suggested different degrees of probability as being required: one spoke of "highly probable" and another of "a serious risk".

In a further sequence of cases, the superior courts in England continued to grapple with these thorny problems. I shall content myself with briefly recalling their salient features, before summarising what appears to be the present position in that jurisdiction.

*Regina* v *Moloney*[8] was the case of the soldier who shot and killed his stepfather (with whom he was indisputably on affectionate terms) during the course of a drunken argument as to which of them was quicker on the draw. There Lord Bridge, this time with the unanimous agreement of his brethren, said that foresight of the probable consequences was not the equivalent of, or alternative to, the specific intention required for murder. He regarded the issue as really an evidential one rather than a question of substantive law. Juries should be told that if they were sure that the death or serious injury was the natural consequence of the act in question and that the accused foresaw that consequence as the natural consequence of his act, they were entitled to infer that he intended to kill or cause serious injury. In that case the accused had claimed that he had not intended to aim the gun at his stepfather's head. Lord Bridge said that the jury should have been told that the inference that he intended to kill or cause serious injury should not be

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[8] [1985] A.C. 905.

drawn unless they were satisfied that he had foreseen the consequence. He added that the probability of the consequence being foreseen would have to be "little short of overwhelming" if it was to be sufficient to establish the necessary intent.

That seemed to be not entirely on all fours with what was said in *Hyam* and the uncertain state of the law was further demonstrated by *Regina* v *Hancock*,[9] which arose out of the bitter miners' strike in the early eighties. A taxi driver, who was carrying a miner to work, was killed when two lumps of concrete were dropped from a bridge on to his taxi by two miners who were to strike. They said that they had not intended to drop the lumps on the taxi and had simply intended to block the carriageway and frighten the miner.

A jury convicted the two men of murder, having been directed in accordance with the guidelines in *Moloney*. The conviction was set aside by the Court of Appeal, Criminal Division, and that decision was upheld by the House of Lords. Lord Scarman, while he warmly endorsed the retreat from *Smith* which had been completed in *Moloney*, was unhappy with the guidelines because they omitted any reference to the probability of the consequence following from the act and simply referred to its being the "natural" consequence of the act. He also echoed the strong disapproval voiced by both Lord Hailsham and Lord Bridge of the elevation of what they regarded as a simple evidential maxim or even a matter of common sense – that people should normally be presumed to intend the natural and probable consequences of their acts – to the status of a legal presumption: the factual context, he said, should always be taken into account. He did not dissent, however, from Lord Bridge's conclusion that the probability should be "little short of overwhelming" if the necessary intention was to be found.

In *Regina* v *Nedrick*[10] – another case of a house being set on fire and a child being killed as a result – the Court of Appeal on the basis of the previous House of Lords' decisions formulated a model charge for juries in these terms:

> "Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be directed that they are not entitled to infer the necessary intention unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case."

That formulation was widely welcomed by academic commentators with one qualification: it was pointed out that it was not correct to speak of the jury "inferring" the necessary intention from foresight, since in at least some cases foresight could itself be regarded as a species of intention. That view was approved of by the House of Lords in the most recent decision on the topic, *Regina* v *Woollin*,[11] Lord Steyn indicating that the word "find" should be substituted for "infer".

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[9] [1986] A.C. 455.
[10] [1986] 3 All E.R. 1.
[11] [1999] A.C. 82.

It will be noted that, although in many if not all of these cases the conduct of the accused could, at the least, be regarded as reckless, that was not regarded as sufficient to bring the cases within the category of murder: cases where recklessness alone had been proved were within the manslaughter category. (See the remarks of Lord Bridge in *Moloney* and Lord Steyn in *Woollin*.) It is true that section 4 of the Criminal Justice (Northern Ireland) Act, 1966 provides that, where it is necessary to determine the knowledge or state of mind of a person at the time of the commission of an offence, the court or jury may infer that the person:

> "(a) had knowledge of his conduct and of the natural and probable consequences of that conduct; and
>
> (b) either intended those consequences, or, if he did not intend them, was reckless as to whether or not they would ensue from that conduct."

While murder is, of course, an offence requiring proof of a specific intent, this section seems to be of general application and Lowry LCJ sitting as a trial judge in *McFeely* considered that he should direct himself in accordance with its provisions. His judgement, however, makes no further reference to the "reckless" provisions.

The possibility of recklessness providing the necessary *mens rea* in murder was adverted to in the decision of the Irish Court of Criminal Appeal in *The People* v *Douglas*.[12] That was a case of shooting with intent to murder, but the observations of McWilliam J are to some extent relevant to murder itself. Having referred to *Smith* and *Hyam*, he went on:

> ". . . evidence of the fact that a reasonable man would have foreseen that the natural and probable consequences of the acts of an accused was to cause death and evidence of the fact that the accused was reckless as to whether his acts would cause death or not is evidence from which an inference of intent to cause death may or should be drawn, but the court must consider whether either, or both of these facts do establish beyond a reasonable doubt an actual intention to cause death."

Before considering how the law has evolved in other common law jurisdictions, I should mention that there is some authority for the view that in deciding whether an accused can be said to have had the intention to kill or cause serious injury, a court should consider whether he can be said to have willed the result: he must in other words have done more than merely contemplate the result. That was what Asquith LJ in *Cunliffe* v *Goodman*[13] said was what was meant by "intention" and his definition was approved by Lord Hailsham in *Hyam*. A similar view was expressed in the Irish Supreme Court by Walsh J in *The People* v *Murray*.[14]

In the United States, the Model Penal Code provides that criminal homicide constitutes murder where *inter alia* "it is committed recklessly under

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[12] [1985] I.L.R.M. 25.
[13] [1950] 2 K.B. 237.
[14] [1977] I. R. 360.

circumstances manifesting extreme indifference to the value of human life."[15] In Australia, recklessness is also capable at common law of supplying the necessary *mens rea*. The Indian Penal Code, which has traditionally commanded much respect since it was originally drafted by Sir James Stephen, does not seem to envisage recklessness as being sufficient:[16] indeed, it is of interest to note that the Indian Supreme Court have also referred to intention as "shaping . . . one's conduct so as to bring about a certain event."[17] Finally, I should mention the distinctively Scottish contribution to the topic: under their law, a murder conviction may be established by "evidence of such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences."[18]

When the Irish Law Reform Commission came to consider the topic recently, they also referred in their Consultation Paper, "Homicide: the Mental Element in Murder"[19] to the position in some of the European civil jurisdictions, such as Italy and Germany, and pointed out that under their law – and under South African law – persons could be convicted of murder where, having recognised the possibility that death may result, they nevertheless pursue a particular course of action. The Commission themselves have provisionally recommended that, in addition to clarifying the Irish law as to intention, the legislature should incorporate in the law the American concept of reckless indifference to the value of human life.

There has also been much discussion as to whether the law should continue to allow an intention to cause serious injury to provide the necessary *mens rea* for murder. In his dissenting speech in *Hyam*, Lord Diplock demonstrated with a wealth of erudition how this form of constructive malice came to be part of English law and argued that it should now be discarded in favour of an intent to cause injury likely to cause death. However, as the Irish Consultation Paper suggests, a person who deliberately causes serious injury to another must be taken to be aware that he is putting the person's life at risk, given the inherent frailty of the human body.

Their proposal, however, that in addition to clarifying the law as to intention, our law should also allow for the American concept of reckless indifference to the value of human life is obviously more debatable. As long as our law retains the distinction between murder – the conscious and deliberate taking of another person's life – and manslaughter, there can hardly be room for a form of *mens rea* in murder cases which embraces conduct which, however morally culpable, falls decisively short of that form of homicide.

That, of course, inevitably raises the question as to whether the distinction should in fact be retained. Some would say that the time has come to recognise that unlawful killings may range all the way across the spectrum from the cold blooded act of terrorism which kills tens or even hundreds of men, women and children, and the impetuous assault which results in a tragedy never intended by the assailant. Why should not the law provide for

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[15] American Law Institute, *Model Penal Code and Commentaries (Official Draft and Revised Comments)* (1980), Part 1, s2.02.
[16] See Sections 299 and 300 on the Indian *Penal Code*.
[17] *Jai Prakash* v *State (Delhi Administration)* [1991] 2 S.C.C. 32, 42.
[18] *Cawthorne* v *H.M. Advocate* [1968] J.C. 32, 193.
[19] Consultation Paper No. 17, March 2001.

one crime of homicide and allow the courts then to impose the appropriate sentence taking into account all the circumstances which led to the death?

There are a number of reasons advanced by the Commission as to why the existing distinction between murder and manslaughter should be retained. Of these, the most powerful in my view is the extent to which the distinction is deeply rooted in our society and, I would think, throughout the common law world. Abolishing it would, in an age where violence is so unhappily on the increase, be understandably seen by many people as a further retreat from the principle that all human life is sacred. But if it is to be retained, as I think it should be, then the time is long overdue for abolishing the mandatory life sentence in cases of murder and recognising, as I think is abundantly demonstrated by the cases which I have been discussing this evening, that the gradations of culpability in the crime of murder are almost as infinite as the variations in the human psyche itself.

# THE COMMON AGRICULTURAL POLICY: FROM QUANTITY TO QUALITY?

***Joseph A McMahon, Professor of International Trade Law, Queen's University Belfast****

## I. INTRODUCTION

Opening a High Level Round Table on Food Quality in March this year, David Byrne, the Commissioner for Health and Consumer Protection, noted that the goal of food security has been realised. He continued:[1]

> ". . . general affluence and surplus in our food supply has resulted in a gradual change in public policy focus away from efficiency and productivity towards quality and diversity in agri-food production. Indeed modern food production methods themselves have raised matters of public concern beyond human health and safety in relation to environmental and ethical aspects of agri-food production. . . "

He went on to suggest the need for a new food production/consumption model, which would be focussed on food safety and food quality. This debate has arisen out of a concern for the future of European agriculture in the wake of the BSE crisis and more recently, the outbreak of foot and mouth in the United Kingdom.

Other factors will influence this debate, not the least of which are the possible renegotiation of the Uruguay Round Agreement on Agriculture and the probable enlargement of the European Union (EU) to include the countries of Central and Eastern Europe. As for when further reform will occur many dates can be suggested. The mid-term review of the Agenda 2000 reforms will occur in 2002, the peace clause of the Agreement on Agriculture expires in 2003, the next Inter-Governmental Conference will be held in 2004, enlargement may become a reality by 2005, and the Berlin Summit set the end-date for the current reforms as 2006.

Irrespective of which date is chosen, the policy will be subject to further reform and, consequently the Common Agricultural Policy (CAP) may pursue different objectives. In all previous reforms, the objectives of the policy as enshrined in Article 33 of the Treaty of Rome have never been changed. Two questions arise:

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* Inaugural Lecture delivered 8th November 2001, Queen's University Belfast. I would like to express my thanks to David Capper for his decision to restore the practice of publishing Inaugural lectures in the Quarterly. Thanks must also go to Dr John Davis of the Department of Agriculture and Food Economics at Queen's University Belfast and to Professor Alan Matthews of the Department of Economics at Trinity College Dublin for their comments on the Inaugural Lecture.

[1] See http://www.europa.eu.int/comm/dgs/health_consumer/library/speeches/speech88_en.html.

- why have past reforms not led to a re-writing of the objectives of the policy?
- if the objectives are to be re-written, what objectives will be pursued by the EU and the Member States in the area of agriculture and rural policy?

This lecture will address these two questions, however, before doing so, it is necessary to examine the objectives set for the CAP, especially as interpreted by the European Court of Justice.

## II. The Objectives of the CAP

The objectives set for the CAP in Article 33 EC (ex Article 39) are:

> 1. (a) to increase agricultural productivity by promoting technical progress and by ensuring the rational development of agricultural production and the optimum utilisation of the factors of production, in particular labour;
>
> (b) thus to ensure a fair standard of living for the agricultural community, in particular by increasing the individual earnings of persons engaged in agriculture;
>
> (c) to stabilise markets;
>
> (d) to assure availability of supplies;
>
> (e) to ensure supplies reach consumers at reasonable prices.
>
> 2. In working out the common agricultural policy and the special methods of its application, account shall be taken of:
>
> (a) the particular nature of agricultural activity, which results from the social structure of agriculture and from structural and natural disparities between the various agricultural regions;
>
> (b) the need to effect the appropriate adjustments by degrees;
>
> (c) the fact that in the Member States agriculture constitutes a sector closely linked with the economy as a whole.

The objectives are a reflection of the three factors that have always been used to justify governmental intervention in the agricultural sector:[2]

- the politico-economic factor, i.e. to contribute to overall economic growth of the Member States, both individually and collectively,
- the socio-political factor, i.e. a concern with the welfare of the rural population,
- the socio-economic factor, i.e. a concern with adequate food supplies for consumers.

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[2] See A. El-Agraa, *The Economics of the Common Market* (4th edition) (Harvester Wheatsheaf, London, 1994) pp 211-12, and J. Marsh and P. Swanney, *Agriculture and the European Community* (Allen & Unwin, London, 1980) pp 12-16.

Looking more closely at the objectives, the first objective to be pursued in Article 33(1), an increase in agricultural productivity, is to be pursued by promoting technical progress and a rational development and optimum use of agricultural production factors. This implies a type of regional structural policy, an implication which is given added weight by Article 33(2)(a) which requires the particular nature of agricultural activity to be taken into account in the working out of the policy. Using the word "thus" in paragraph (b) it appears that both objectives are connected. Therefore, it could be argued that the regional structural policy must lead to an achievement of a fair standard of living for the agricultural community. However, some doubt can be cast on this interpretation because of the second part of paragraph (b), which sets as an objective, an increase in the individual earnings of persons engaged in agriculture. This may mean that the most important aspect of the objectives is to increase the earnings of agricultural producers so that they have a fair standard of living, thus making paragraph (b) a type of income guarantee. As such, it would have to be achieved over the longer term. In contrast, paragraph (c) is more interested in the short-term effects of fluctuations in prices, demand and supply. The policy must therefore include mechanisms designed to smooth out these fluctuations, thereby connecting paragraph (c) with paragraph (d), although no reference is made to techniques which would ensure such availability of supplies or to the scope of Community activity in this area. Finally, paragraph (e) confirms that the scope of the policy is not to be limited to producers and processors but is to extend to consumers. Prices for them are to be "reasonable" as opposed to the standard of living of farmers, which is to be "fair".

Turning from the literal approach to Article 33(1) to the jurisprudence of the European Court of Justice on the separate objectives of the CAP, the range of possible approaches to the future development of the policy may be identified. For example in the *Danske Landboforeninger* case, the Court pointed out that:[3]

> . . . the very wording of Article 39(1) shows that the increase in the individual earnings of persons engaged in agriculture is envisaged by being primarily the result of the structural measures described in sub-paragraph (a).

The Court has also declared that Article 33(1)(b) does not constitute an income guarantee for farmers.[4]

With respect to the remaining objectives of Article 33(1), the Court has held that a range of measures may be used to stabilise markets.[5] Measures to effect such stability which impact adversely on individuals, do not give that individual the right to complain.[6] In relation to the safeguarding of supplies there are no fixed mechanisms to achieve this. Finally, with respect to paragraph (e), the Court made it clear in the case of *Germany* v *Commission* that reasonable prices did not mean the lowest possible prices but had to be

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[3] Case 297/82 [1983] ECR 3299, p 3317. See also cases 36 and 71/80 *Irish Creamery Milk Suppliers Association* [1981] ECR 735.

[4] See for example, case 2/75 *Mackprang* [1975] ECR 607 and case 281/84 *Bedburg* [1987] ECR 49.

[5] Case 250/84 *Eridania* [1986] ECR 117 and case 46/86 *Romkes* [1987] ECR 2687.

[6] Cases 63-69/72 *Wehrhahn* [1973] ECR 1229.

considered in the light of the CAP.[7] In a later case, the Court would rule that Article 33 would only be breached if a measure led to consumer prices that were obviously unreasonable.[8]

No hierarchy of objectives is indicated in Article 33(1) but it is obvious that the CAP has a series of objectives that are both conflicting and not capable of reconciliation. As early as 1968, the Court recognised that the Community institutions would have to balance the competing demands of Article 33(1).[9] The classic formulation of this balancing act occurred in the case of *Balkan*, where the Court stated:[10]

> "In pursuing these objectives the Community institutions must secure the permanent harmonisation made necessary by any conflict between these aims taken individually and, where necessary, allow one of them temporary priority in order to satisfy the demands of the economic factors or conditions in view of which their decisions are made."

The formulation has been repeated by the Court on several occasions with the Court limiting itself to an examination of whether the measure in question contains a manifest error, constitutes a misuse of power or whether the discretion enjoyed by the Community institutions has been exceeded.[11]

With respect to the *Balkan* formula, it must be pointed out that it is in conflict with the Court's approach to the interpretation of Article 2 of Regulation 26/62, where an agreement hoping for exemption from the competition provisions must satisfy all the objectives of the CAP. This is demonstrated by the decision in *FRUBO*.[12] Secondly, the statement suggests that at some stage the Court may overrule a measure of the institutions if the situation of "temporary priority" is continued for a substantial period, thus jeopardising the achievement of the other objectives of the policy. The possibility that the Court could adopt such an approach was highlighted in its decision in *Behla-Mühle*.[13] The Court in this case declared a regulation on the compulsory purchase of skimmed milk powder, which was designed to reduce stocks of this product that had increased significantly, to be null and void. In doing so, the Court used the objectives in Article 33(1), the rule on non-discrimination contained in Article 34(3), and the general principle of proportionality to rule that the obligations imposed by the regulation were discriminatory and not necessary to attain the objectives of the CAP. One further interesting feature of the case, arising from the current reforms of the

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7 Case 34/62 [1963] ECR 131.

8 Case 5/73 *Balkan* [1973] ECR 1091.

9 Case 5/67 *Beus* [1968] ECR 83, where the Court stated that: "As those objectives are for the protection of agricultural producers as well as of consumers, they cannot all be realised simultaneously and in full."

10 *Supra* n 8, p 1112.

11 See for example, case 29/77 *Roquette Frères* [1977] ECR 1835, case 203/86 *Spain* v *Council* [1988] ECR 4563, and case C-311/90 *Hierl* [1992] ECR I-206. See also the repetition of the *Balkan* formula by the Court of First Instance case T-489/93 *Unifruit Hellas* [1994] ECR II-1201.

12 Case 71/74 [1975] ECR 563. See also case C-399/93 *Oude Luttikhuis* [1995] ECR I-4515.

13 Cases 114, 116 and 119-20/76 [1977] ECR 1211.

CAP, was the suggestion by Advocate General Capotorti that a strict interpretation of Article 33(1) might:[14]

> . . . justify the conclusion that the whole of the market policy so far followed by the Community is illegal in view of the fact that . . . its essential basis is the fixing of prices to suit agricultural products in order to assure farmers an adequate income, whereas the policy favouring the modernisation and structural improvements and, in consequence, the rational development of agricultural production has been late in gathering momentum and is now evolving slowly and with considerable difficulty.

Whilst the Community institutions enjoy considerable discretion in the implementation of a policy to achieve the objectives of Article 33(1), both individually and collectively, it is important to conclude that the discretion is not unlimited. Considerable latitude has been given to the institutions by the *Balkan* formula but as *Behla Mühle* indicated there are limits to that latitude. The limits were hinted at in *Crispoltoni II* where after repeating the *Balkan* formula the Court continued: "That harmonisation must preclude the isolation of any one of those objectives in such a way as to render impossible the realisation of other objectives."[15]

It must be acknowledged that Article 33 is not the only relevant provision when it comes to establishing the objectives of the CAP. According to Article 3(e), a common policy in the sphere of agriculture is one of the mechanisms available to the Community institutions for achieving the general objectives of the Treaty.[16] The Court has made it clear, for instance, that the objectives set by Article 33 cover all aspects of agricultural production from public health and consumer protection to animal welfare issues.[17] Moreover, the interpretation advanced by the Court allows the scope of the CAP to expand to embrace new policy goals identified within the Treaty, such as environmental regulation in Article 174 or development co-operation in Article 177.[18] The only restrictions imposed by the Court are that the measures adopted must concern agricultural products as defined by

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[14] *Ibid* p 1229. See also case C-353/92 *Greece* v *Council* [1994] ECR I-3411, involving a challenge to Regulation 1765/92 (OJ 1992 L 181/12) where the Court accepted that stabilising markets can take precedence over a fair income for farmers in certain circumstances.

[15] Joined cases C-133/93, C-300/93 and C-362/93 [1994] ECR I-4863, p 4903. See also joined cases 197-200, 243, 245 and 247/80 *Ludwigshafner Walzmühle* [1981] ECR 3211 for a similar statement.

[16] See for example, case 48/74 *Charmasson* [1974] ECR 1383, cases 80 and 81/77 *Ramel* [1978] ECR 927, and case 68/86 *UK* v *Council (Hormones)* [1988] ECR 855.

[17] On public health and consumer protection see for example, case 11/88 *Commission* v *Council (Pesticides)* [1989] ECR 379, case C-146/91 *KYDEP* [1994] ECR I-4199, and case C-180/96 *United Kingdom* v *Commission* [1998] ECR I-2265; on animal welfare see case 131/86 *UK* v *Council (Battery Hens)* [1988] ECR 905 and case C-27/95 *Woodspring* [1997] ECR I-1847.

[18] See case C-280/93 *Germany* v *Council* [1994] ECR I-4973, where the Court rejected the German argument that the regulation establishing the common organisation of the market in bananas was part of a development policy for the CAP and so could not be based on Article 37 (ex Article 43).

Annex II of the Treaty and that the measure is intended to achieve one or more of the objectives of Article 33.[19]

## III. Past Reforms of the CAP

In December 1960, the Council made their first substantive decision on the CAP, thus paving the way for the introduction of that policy. The significance of that decision rests with its establishment of the three basic principles of the CAP; common prices, common financing, and Community preference.[20] In the years that followed, common organisations were gradually introduced so that by the end of the transitional period common organisations existed for the bulk of the products listed in Annex II. A single Guidance and Guarantee Fund (known by its French acronym, FEOGA) was introduced in 1962 and split into two separate sections in 1964; a Guarantee section to finance the prices and markets policy and a Guidance section to finance structural operations. Only in the early 1970s did the Community institutions seriously address the need to reform the structure of European agriculture through a reappraisal of the structural policy. The original principles were designed to meet the situation where Europe was still a net importer of agricultural products. The support of farm incomes through internal price arrangements and the partial or total exclusion of imports of certain products because of increased protection at the frontiers of the Community ensured that the policy met the problems it was initially designed to deal with. However, once this situation had been reached, the instruments of the policy were not changed. Therefore surpluses appeared in a number of areas, with a consequent negative impact on prices, and trade relations with third countries deteriorated with increases in the level of Community subsidised exports and continuing restrictions on imports.

Reform of the policy was inevitable. Such reform, according to the Commission in 1980, would have to reconcile four main objectives:[21]

> (1) to maintain the positive aspects achieved, i.e. consumer security of supply, income of farmers, free trade and the contribution of farming to external trade;
>
> (2) to set up mechanisms whereby the budgetary consequences of production surpluses may be held in check. This could be achieved by adjustment of market organisations to introduce the principle of co-responsibility or producer participation;
>
> (3) to ensure better regional distribution of the benefits derived by farmers from the CAP; this would entail a radical readjustment of structural policy aimed at the reduction of regional disparities; and,

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[19] See for example, case 68/86 *United Kingdom* v *Council* [1988] ECR 855 and case 11/88 *Commission* v *Council* [1989] ECR 379. On the interpretation of Annex II, see Cases 2 & 3/62 *Commission* v *Belgium and Luxembourg* [1962] ECR 425, case 185/73 *König* [1974] ECR 607, case 77/83 *CILFIT* [1984] ECR 1257, and case 123/83 *BNIC* v *Clair* [1985] ECR 391

[20] Bull. CE 1/61, p 83.

[21] COM (80) 800 *Reflections on the Common Agricultural Policy*.

> (4) to organise the financing of the CAP on sound foundations which will not cause disputes in future between Member States.

Gradual reforms were introduced throughout the 1980s and, to a limited extent, they met the objectives set by the Commission in the above statement. For example, on the introduction of mechanisms to check the budgetary consequences of surplus production, it is possible to point to the introduction of milk quotas in 1984.[22] Further confirmation of the emergence of a fourth principle, producer responsibility, would emerge in 1986 and 1987 as limits were imposed on market support for cereals and milk products. In 1988 further stabilisation measures were introduced in all market organisations and also in 1988, the European Council agreed to place an overall ceiling on agricultural expenditure, linking it to trends in the Community's GDP. Reform of structural policy later in 1988 constituted an attempt to ensure a better regional distribution of the benefits derived from the CAP.

These reforms represented the beginning of a process of continuing reform of the CAP. Further reforms emerged in 1992 with the so-called "MacSharry reforms". In essence, these reforms were two-fold. Firstly, there was a three-year reduction in the level of prices in the arable crops and beef sectors. The purpose of such a reduction was to bring the level of Community prices closer to those on the world market, so improving the competitiveness of Community production. The negative impact of such price reduction on the income of farmers was mitigated by the introduction of compensatory payments. Various *premia* were payable to all farmers on the basis of eligible acreage and a set-aside premium was also payable on land that had been withdrawn from production. Likewise in the beef sector compensatory payments were introduced and were made payable based on a maximum stocking rate per hectare. The second set of reforms built on the compensatory payments by introducing a range of accompanying measures, such as the granting of aid to farmers to encourage the protection of the environment, the landscape and natural resources. These latter reforms would be built on as a consequence of the reference in the Maastricht Treaty to rural areas in the context of the economic and social cohesion of the Community. They would also allow the Community to build on the 1988 reforms of the structural funds that had encouraged integrated rural development.

As for an assessment of these reforms, it must be pointed out that they were limited to those areas where the budgetary and international trade problems had become most acute; other areas such as sugar were excluded, as such problems had not arisen. So the 1992 reforms were not a wholesale reform of the CAP, rather a response to both internal and external problems. This raised some doubt as to what was likely to happen in other sectors of the policy, where the problems were not so prominent, in the years that would follow. As was usual the Commission's reform proposals were more dramatic than the end result; the original proposals had called for a 40% reduction in cereal prices but the final figure was 29%. Having said this,

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[22] See G. Avery, "The Common Agricultural Policy: A Turning Point" (1984) 21 CMLRev 481.

agreement on such a large cut did represent a significant shift in the attitudes of the Member States and a symbol of the future direction of the CAP. As for the nature of the symbol, it was clear, especially concerning the conditions attached to the set-aside provisions, that the burden of financing agricultural expenditure was being shifted from the consumer to the taxpayer. One commentator concluded:[23]

> "They have failed to address the fundamentally objectionable features of the CAP and they have introduced a new and unwelcome policy instrument into the CAP's operations. They have not addressed the distortions the CAP creates, they leave decision making capacity in the hands of institutions that have demonstrated their incapacity to make good decisions, and they even appear unlikely to have solved the budgetary problems that first put reform on the EC agenda."

Coupled with these reforms, agreement was reached in 1994 in the Uruguay Round of multilateral trade negotiations, including for the first time an Agreement on Agriculture that would establish legally binding commitments in the areas of market access, domestic support and export subsidies. Parties to the Agreement would be expected to increase market access, through tariff reductions and the adoption of the process of tariffication for existing non-tariff barriers. The level of support offered by domestic agricultural policies would be calculated and reductions would have to be made in certain areas. Aspects of such policies were categorised in terms of boxes, with the MacSharry reforms being placed in the Blue Box – the result of the Blair House Accord. Finally, budgetary restraints and quantitative limitations would be placed on export subsidies. This Agreement also provided for the introduction of a further Agreement on Sanitary and Phytosanitary Measures and for stronger and more operationally effective GATT rules. The Uruguay Round Agreement and the new GATT rules would be policed by the newly created World Trade Organisation (WTO) which would enforce the rules through the newly effective dispute settlement process. The Agreement on Agriculture, the overall activities of the WTO and its Dispute Settlement Body, would accentuate the impact of the 1992 reforms, and emphasised the need for further reform of the policy.

In its assessment of the MacSharry reforms the 1997 Agenda 2000 document noted both a considerable improvement of market balances and continuing improvements in average agricultural incomes. But the reforms had had mixed effects on the environment and had led to increased budgetary expenditure in the sectors affected by the reforms. The reforms were characterised as insufficient to meet the new demands confronting the CAP in the years to come, of which the Commission identified three distinct, but inter-related, problems. The first problem was the adaptation of the existing policy to maintain the Community's position in world trade. An element of that adaptation would involve the re-negotiation of existing international commitments and the negotiation of new commitments and this was recognised as the second problem. The final problem was the adoption of the new policy (accompanied by consequential reforms) by the applicant countries of Central and Eastern Europe on their accession to the

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[23] M. Atkin, *Snouts in the Trough* (Woodhead Publishing, 1993), p 146.

Community. Any one of these problems represents a significant challenge to the Community.

The initial Commission thinking on the nature of the reforms needed in the CAP was outlined in the Agenda 2000 document itself. It involved a "deepening and extending" of past reforms through a further package that would convert the primary support mechanism of the CAP from price support to direct payments accompanied by a more aggressive rural policy. The latter was needed not only to implement a more coherent policy to tackle the social and economic problems of rural areas but also to reinforce and enhance the existing environmental aspects of those areas and the CAP. This particular aspect of rural policy was seen as increasingly demanded by the citizens of the Union, who at the same time, in their capacity as consumers, were also demanding greater food safety and products which were both "environmentally-friendly" and "culturally-significant". In addition to these objectives, the new CAP would also demand the promotion of greater economic and social cohesion between the Member States.

In March 1998 more detailed proposals for the reform of the CAP were published by the Commission, which were intended to translate the above reforms into legal texts.[24] These proposals envisaged:

- the role of intervention would be to act as a safety net for farmers rather than as a guarantee of price stability.
- to ensure a fair standard of living for the farmers affected by these changes, the direct payments introduced in 1992 would be increased.
- a new division of functions between the Community and the Member States. For example, in the area of direct payments to producers, a limited amount of compensation would be provided in the form of national envelopes by the Community, with the Member States being responsible for the allocation of this money, subject to agreed criteria, to its agricultural producers. As examples of the agreed criteria, a degressive ceiling was proposed on the amount of direct aid that a farm could receive and Member States would be able to adjust the direct aids awarded on criteria they defined relating to the number of workers employed on a farm.
- a similar decentralised approach was also to be taken in the area of rural development, where there would be two groups of measures, constituting a kind of second pillar to the CAP. First, those relating to less favoured areas and the measures in the 1992 reform package such as early retirement, and agri-environment measures, would be co-financed by the Community through the FEOGA Guarantee section for all regions of the Community. The second group of measures, relating to modernisation and diversification would be financed as part of the Community's efforts to promote greater economic and social cohesion in the Community in the newly defined Objective 1 and Objective 2 areas.

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[24] COM (98) 158. This publication can also be found on the Directorate-General for Agriculture's website.

In the aftermath of the publication of the Commission proposals considerable discussion occurred between the Member States on the scope of the reform of the CAP. In preparation for the European Council in Berlin in March 1999, the Council eventually reached a political agreement on a compromise package of reforms.[25] As for the elements of the reform package, the intervention price for arable crops was to be cut by 20% in two steps starting in 2000/2001, and to compensate farmers for the loss of income, direct payments were to be increased. As for other measures, compulsory set aside was to be retained with the basic rate to be set at 10% for the two marketing years beginning in 2000 but was to be reduced to 0% as from 2002; the system of voluntary set aside was to be maintained and improved. In the beef sector, the price reduction was also set at 20% to be achieved by three equal steps; when the final step was taken a basic price for private storage of beef would be established as would a "safety-net" intervention system. Once again, as compensation for the price reductions payments under various *premia* would be increased subject to various regional ceilings. As a measure to promote flexibility, various national envelopes were established allowing Member States to compensate producers for regional variations in production practices and conditions.

The political agreement on reforms to the arable crops and beef sector followed the proposals advocated by the Commission with important changes, notably the price reduction in the arable crop sector was to be 20% over two years rather than the one year proposed and price reduction in the beef sector was to be 20% rather than the 30% advocated. This pattern would be repeated in the reforms agreed in the milk sector. As for measures applicable to all common organisations of the market, there was broad agreement within the Council on the proposals advanced by the Commission, although significantly the proposal to impose ceilings on direct payments was not endorsed. In relation to rural development policy, the Council endorsed the Commission's proposals for a more coherent and sustainable rural development policy, which would create a stronger agricultural and forestry sector and would be more competitive and respectful of the environment and the rural heritage.

Overall, although less ambitious than the original proposals of the Commission, the political agreement on reforms represented an attempt by the Council to continue with the reform process initiated by the MacSharry reforms. However, the agreement still had to be endorsed by the European Council, as it was only one part of the Agenda 2000 package of reforms. In welcoming the political agreement of the Council, the European Council commented that:[26]

> The content of this reform will ensure that agriculture is multifunctional, sustainable, competitive and spread throughout Europe, including regions with specific problems, that it is capable of maintaining the countryside, conserving

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[25] See European Commission Directorate-General for Agriculture Newsletter 11 (Special Edition) *Agriculture Council: Political Agreement on CAP Reform* (Brussels, 1999).

[26] *Presidency Conclusions Berlin European Council*, Part I A. Heading 1 (Agriculture) 2 (available on Europa website).

> nature and making a key contribution to the vitality of rural life, and that it responds to consumer concerns and demands as regards food quality and safety, environmental protection and the safeguarding of animal welfare.

Despite this welcome, various changes were made to the political agreement on reform.[27]

For example, the agreed changes to the dairy regime, save those on quotas, were not to enter into force until the marketing year 2005/2006 and the intervention price for cereals, instead of being reduced by 20%, was to be reduced by 15% with the base rate of compulsory set aside to be fixed at 10% for all of the period 2000-2006. Beyond these changes the Council and the Commission were requested to pursue additional savings, except in the areas of rural development and veterinary measures, to ensure that average annual agricultural expenditure over the period 2000-2006 would not exceed 40.5 billion Euros. It was considered by the European Council that the reform of the CAP over this period, along the lines agreed by the Council, as amended by the European Council, would lead to a reduction in expenditure, thus contributing to the overall objective of achieving a more equitable financial framework. One aspect of the latter objective was agreement on another major aspect of the Agenda 2000 reform package – structural operations – where there would be three programmes, thus matching the number of Objective Areas.[28] Additional funding for rural development would also be available under the agricultural aspect of the financial perspective, which indicates that financing for rural development and accompanying measures shall not exceed an average of 4340 million Euro over the period 2000-2006.

The overall agreement on the Agenda 2000 package reached at the Berlin European Council undoubtedly represented an important milestone for the CAP and for the Community. As for the nature of that milestone, several points may be made. Reform of the policy up to this time had concentrated on the three (or four) core principles established for the policy in 1960. Although the MacSharry reforms added a more effective second pillar to the CAP, they did not fundamentally alter the fact that the CAP was a price support and production control policy. With the changes to the role of intervention, an increasing emphasis on direct payments and greater support for rural policy, the Agenda 2000 reforms signalled a further realignment of the twin pillars of the CAP towards a situation of greater equilibrium. Although the objectives set for the policy in Article 33 can accommodate this realignment, just as all past extensions of the scope of the CAP have been accommodated, the Agenda 2000 reforms also signalled greater scope for national discretion in rural development regulation and in the implementation of the national envelopes. Although falling short of a partial re-nationalisation of the policy, the fact that the next Inter-Governmental

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[27] See European Commission Directorate-General for Agriculture Newsletter 10 *Berlin European Council: Agenda 2000, Conclusions of the Presidency* (Brussels, 1999).

[28] *Supra* n 26, Heading 2 (Structural Operations). As for the three schemes, these included the INTERREG scheme on cross-border and inter-regional co-operation and the LEADER scheme on rural development.

Conference (IGC), to be convened in 2004, will discuss regional rights and responsibilities may signal further moves in this direction.[29]

## IV. New Objectives?

The Commission has listed five particular objectives as motivating its proposals for reform of the CAP:[30]

- to increase competitiveness;
- to assure food safety and food quality;
- to maintain a fair standard of living for the agricultural community and stabilise farm incomes;
- to better integrate environmental goals into the CAP; and
- to develop alternative job and income opportunities for farmers and their families.

For the Commission, such objectives would confirm the nature of the European model of agriculture as being multifunctional. How would such objectives be achieved?

In November 1995, the Directorate-General for Agriculture invited a group of experts to analyse the inconsistencies and problems inherent in the existing CAP and in this light to define a series of principles that would form the basis of a new integrated rural policy. The resulting report, known as the Buckwell report, proposed that the existing CAP should be transformed into a Common Agricultural and Rural Policy for Europe (CARPE) whose objective would be "to ensure an economically efficient and environmentally sustainable agriculture and to stimulate the integrated development of the Union's rural areas."[31] The three elements of the new policy, economic efficiency, the environment and rural development, would, unlike the CAP, be equally balanced. The report made it clear that the new policy, although revolutionary, would also be evolutionary, so allowing the policy to respond to new challenges as they emerge.

As for the first element of the new policy, economic efficiency, the goal would be to reduce the level of price support to world market levels, with the role of the Community being to provide a safety net in the forms of intervention. There is no doubt that the MacSharry and the Agenda 2000 reforms have reduced the level of price support within the Community and the Agenda 2000 reforms, when fully implemented, will begin the process of returning intervention to its proper role as a safety net. However, a number of problems remain. With respect to the probable enlargement of the Community, in relation to direct support there are no proposals for the abolition of this form of support or for their conversion into truly decoupled payments. This raises the prospect of the acceding countries receiving

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[29] See Declaration 23 attached to the Treaty of Nice. Paragraph 5 of this declaration on the future of the Union states that the debate to be launched in 2001 will, *inter alia*, address the question of how to establish and monitor a more precise delimitation of powers between the European Union and the Member States, reflecting the principle of subsidiarity.

[30] COM (99) 22 Directions towards Sustainable Agriculture, p 30.

[31] See europa.eu.int/en/comm/dg06/new/buck_en/index.htm, chapter 6.1

"compensation" for losses that they have not suffered, and assumes they have the same rights and duties with respect to agriculture as the existing Member States. Secondly by agreeing to lesser price reduction than originally proposed and by delaying in some cases actual price reductions, the Agenda 2000 reforms add to the cost of enlargement. A more radical reduction in prices and the end to the use of existing direct support measures would have the advantage of opening the Community market to greater imports as the isolation of that market is ended. This would allow the Community to participate effectively in the next round of international trade negotiations on agriculture, as the support that it provides would be decoupled. There are two particular areas to be examined here, market access and domestic support

In relation to market access, the Agreement on Agriculture provided for the usual reduction in tariffs and the conversion of existing non-tariff barriers into tariffs, the process of tariffication. Although the agreement on tariffication was significant, the impact of that process has not been. One reason for this is the choice of base period, 1986-88, when the difference between world and domestic prices was particularly high. Another reason is that several WTO members have engaged in the process of "dirty tariffication" – the setting of tariff equivalents in excess of the price differential for that period.[32] Consequently, many tariffs contain what is referred to as "a good deal of water" allowing for their subsequent reduction without adversely affecting domestic prices. When combined with the Special Safeguard Provision in Article 5 of the Agreement on Agriculture, the net result is that there has not been a significant increase in market access for a number of WTO members. The Community has been one of the guilty parties here. Indeed, the Agenda 2000 reforms did not lower import tariffs, thus increasing the amount of "water" in its tariff.[33]

In recognition of the likely marginal impact of the market access commitments, the Agreement on Agriculture provides for a range of minimum access tariff quotas (5% of 1986-88 consumption levels by 2000, if 1986-88 imports fell short of this amount). Such quotas have again proved problematic, not least because they lack transparency. It is no surprise, therefore, that major reform of such quotas is high on the agenda of the current discussions. Even the Community has proposed that a set of rules and disciplines should be defined to increase the transparency, the reliability and the security of the management of Tariff Rate Quotas, so that concessions granted should be fully realised.[34] Beyond this, it has proposed the retention of Article 5, the special safeguard clause, and measures:[35]

> " (a) to guarantee effective protection against usurpation of names for agricultural products and foodstuffs;

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[32] See Ingco, "Tariffication in the Uruguay Round: How much Liberalisation?" (1996) 19(4) *The World Economy* 425.

[33] See Swinbank, "CAP Reform and the WTO: Compatibility and Developments" (1999) 26(3) *European Review of Agricultural Economics* 389, pp 396-99.

[34] See WTO document G/AG/NG/W/90 – EC Comprehensive Negotiating Proposal, paragraphs 2-4.

[35] *Ibid*, paragraphs 18-19. See also G/AG/NG/W/18 – Food Quality: Improvement in Market Access Opportunities.

(b) to protect the right to use geographical indications or designations of origin; and

(c) to guarantee consumer protection and fair competition through regulation of labelling."

To enable the Community to achieve these non-trade concerns may require additional concessions in the area of market access. At least the Community has provided itself with room for manoeuvre in this area.

The existing Community position on domestic support in the negotiations for a new Agreement on Agriculture does not envisage the abolition of the Blue Box, indeed such payments are seen as an important tool in further agricultural reform and so the concept of the Blue Box would be retained.[36] Most WTO members do not envisage the retention of this exceptional measure, and envisage changes in the nature of the Aggregate Measurement of Support (AMS). For example, it has been suggested that the new Agreement should introduce product-specific limits on support rather than having the AMS calculated for the entire agricultural sector. Such a change, effectively repealing the Blair House Accord, would generate significant problems for the Community.

More immediately, additional problems in the Blue Box may also be generated as a result of the Agenda 2000 reforms. Under Article 13 of the Agreement on Agriculture, during the implementation period, which ends in 2003, limited protection is provided to Blue Box measures that conform fully to the provisions of Article 6(5) and where no determination of injury or threat thereof is shown. According to Article 6(5)(a) direct payments under production-limiting programmes will be exempt from the domestic support reduction commitment if:

(i) such payments are based on fixed areas and yields; or

(ii) such payments are made on 85 per cent or less of the base level of production; or

(iii) livestock payments are made on a fixed number of head.

In the Agenda 2000 document and the March 18 proposals, the Commission went to great lengths to create a "virtual cow" as the basis for compensating farmers for the reduction in the level of support prices for milk. Such a payment could have come within Article 6(5)(a)(iii). However, the premium eventually agreed was based on the farmer's milk quota, and, as a result, is unlikely to come within the scope of Article 6(5). At least, the European Council set the base rate of compulsory set aside at 10% for the period 2000-2006, rather than at 0 as recommended by the Commission, thus ensuring that the policy could appear to be production-limiting.

Rather than promote competitiveness, it seems clear that the Community is intent on maintaining the Blue Box as an integral element of the CAP. Such a policy will be dependent on the continuation of Article 13 of the Agreement on Agriculture. As for the future of this provision, some countries envisage a new Peace Clause that ensures that they would not be challenged so long as they comply with their commitments on export

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**36** See in particular, G/AG/NG/W/17 – EC Proposal on Domestic Support.

subsidies and domestic support under the Agreement. For others, the new Agreement would contain no new Peace Clause, as this would frustrate their overall objective of bringing agriculture under general WTO disciplines. Some countries have proposed variants.[37] The conclusion is that, given few WTO members actually use the Blue Box,[38] the Community may have to pay heavily for its retention and the protection provided by Article 13, even if it is prolonged, is very limited. An approach that would promote the objectives identified by the Commission as motivating the Agenda 2000 reforms and which would not be as problematic internationally merits consideration. Such an approach would eschew continued reliance on the Blue Box in favour of policy objectives that could be pursued legitimately under the Green Box of the Agreement on Agriculture.

One of the legitimate public policy objectives to qualify as a Green Box policy, the protection of the environment, formed the second aspect of the proposed CARPE. Environmental and Cultural Landscape Payments would be made for positive action taken by farmers. This was defined as the provision of services that impose an additional cost on farmers. The payments would be regionally based and there would be two levels of payments. The first level would be directed to farming systems providing high nature value whilst the second level would concern specific environmental management practices, such as intensive action to preserve or create significant environmental effects. The distinction between the two levels rested in the fact that level one was directed at farming whereas level two was directed at the environment, although there would be some cross-fertilisation between the two levels.

With respect to the Green Box, the Community's negotiating position recognises the need to retain the Green Box, which is viewed as including measures that meet important societal goals such as the protection of the environment and the sustained vitality of rural areas.[39] However, the position advocates a re-assessment of the criteria used for Green Box measures so as to ensure that such measures are well-targeted, transparent and cause minimal trade distortion. One problem that has not yet surfaced in relation to the Green Box is the criterion that support provided by such policies should have a minimal impact on production. Again, it emerges from Article 13 of the Agreement on Agriculture which affords protection, during the implementation period, to Green Box measures that conform fully to the provisions of Annex 2. The protection is limited, as Annex 2 requires Green Box measures must have a minimal impact on production. This raises two questions:[40]

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[37] For example, Canada would like to see "green box" domestic supports freed from the possibility of countervailing action under the Subsidies Agreement. (G/AG/NG/W/92) India proposes something like the Peace Clause should be retained but only for developing countries, so that some subsidies are free from the possibility of countervailing duty. (G/AG/NG/W/102)

[38] See the Memorandum of the Australian Government in House of Commons, CAP Reform: Agenda 2000. Volume II. Second Report from the Agriculture Committee 1997-98 Session HC 311-11 (HMSO, London, 1998).

[39] *Supra* n 34, paragraphs 13-16

[40] See Blandford, "Are Disciplines Required on Domestic Support" (2001) 2(1) *The Estey Centre Journal of International Law and Trade Policy* 35, p 48.

(a) if payments are made whose primary aim or effect is to increase producer incomes, will these payments have a minimal impact on production?

(b) if payments are made to achieve other aims, e.g. environmental objectives, is it logical to require these to have a minimal impact on production?

Any payments made will increase the funds available to the producer for use in his/her business, so it will have an impact on production. It will also have an impact on the other less obvious outputs of agriculture – this is the multifunctionality argument. With respect to the generation of employment, it would be more rational to allocate resources to rural development as a means of generating rural employment. As for the protection of the rural landscape, the payment will necessarily have an impact on production – for example supporting particular production methods – and of necessity on trade. Clearer criteria, as the Community itself has recognised, are needed for all Green Box payments. The problem here for the Community is that existing policy measures under the second pillar of the CAP may not fully conform to Annex 2. For example, there are no clear environmental criteria used in the payment of various premiums, neither are they limited to those farmers in the less-advantaged areas of the Community. The Environmental and Cultural Landscape Payments recommended by the Buckwell Report are much more in accordance with the existing criteria of Annex 2 of the Agreement on Agriculture.

These payments, according to the Buckwell Report, would form part of the third aspect of the proposed new CARPE, Rural Development Incentives. Rural development would remain wider than agricultural development and the approach would involve a continuation of the existing policy of promoting sustainable rural development. So the existing measures of assistance directed towards agricultural development would continue. Given the major changes involved in the transition from the CAP to the CARPE, the report recommended the transformation of the compensation payments introduced in the 1992 reform package into what is termed Transitional Adjustment Assistance. The three principles of such assistance are that it will be decoupled from production, be non-distorting of competition, and that recipients should respect environmental conditions. It is worth noting that the proposed objectives of the Commission are met to a greater extent by the proposed CARPE than by the Agenda 2000 reforms. Market stabilisation measures would increase the competitiveness of European agriculture. Equally, the Environmental and Cultural Landscape Payments and the Rural Development Incentives would maintain a fair standard of living for the agricultural community and stabilise farm incomes, whilst better integrating environmental goals into the CAP and developing alternative job and income opportunities for farmers and their families.

The Commission's policy, supported by the Council and the European Council, is much more problematic. It involves continued reliance on an instrument whose future is uncertain, the Blue Box, and whose continued existence may require significant sacrifices to be made by the Community. Moreover, the Agenda 2000 reforms have actually increased the possibility of a WTO challenge to existing measures. Article 13 of the Agreement on Agriculture provides only limited immunity from such challenges. Existing

policy with respect to the environmental aspects of the CAP is also not immune from challenge in the WTO. The approach of the Community to the negotiations for a new Agreement on Agriculture has been to stress the balance between trade and non-trade concerns. In order to promote future liberalisation and expansion of international agricultural trade, which will contribute to economic growth in all countries, the Community claims that:[41]

> ". . . it is vital to muster strong public support, which can only be achieved if other concerns are met, in particular the multifunctional role of agriculture, which covers the protection of the environment and the sustained vitality of rural communities, food safety and other consumer concerns including animal welfare."

The objective for the Community is WTO recognition of the multifunctional role of agriculture. The problem for the Community is that the objectives of the CAP do not afford recognition of that multifunctionality.

## V. CONCLUSION

One element of whether or not it is appropriate to re-write the objectives of the CAP may be determined this year as the Commission assesses the impact of the Agenda 2000 reforms. Speaking at a conference in Dublin, Franz Fischler, the Commissioner for Agriculture, suggested that the future of the CAP rested with consumers.[42] He continued by noting that the mid-term review of Agenda 2000 may be viewed as the "ideal opportunity for all the stakeholders to contribute to the future orientation of a genuinely European agricultural policy." At present, what is envisaged is a further strengthening of the second pillar of the CAP, the rural development policy. However, this may not be enough, after all the pursuit of the objectives of the CAP has led to mounting concerns about human health and safety, and the environmental and ethical aspects of agricultural production.

If the argument being advanced is that the objectives of the CAP have been realised, especially in the area of food security, then should the new food production/consumption model have new objectives? Equally, if the Community is seeking WTO recognition of the multifunctional role of agriculture then should the objectives of the CAP not recognise that multifunctionality?

The key to this concept is the contribution that farming makes to a series of societal goals or non-trade concerns. Two points must be emphasised here. First, to be acceptable it must be shown that the net contribution made by agriculture is greater or more valued by society than the net contribution of equivalent sectors. Only when this can be shown will assistance to agriculture be seen as worthy of continued government assistance as opposed to other sectors that do not receive assistance, yet contribute to societal goals. It is here that evidence is particularly difficult to determine. For example, is there a difference between general product safety and food safety? Is there something culturally significant about food and farming which merit especial

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[41] *Supra* n 34, para 1.

[42] Speech "Agriculture and Agri-Food: A clean green future" available on Rapid (DN: Speech/01/254), Dublin 31 May 2001.

attention? The argument of the Community is that there is a difference with respect to food and that there is a European model of agriculture. The second point is that price support is not the appropriate mechanism to promote the multifunctionality of agriculture. There will have to be a re-balancing of the existing pillars of the CAP in favour of the second pillar. So, the protection of the environment would be a part of the broader Community environmental policy. The focus of the existing environmental aspect of the CAP needs to reflect concern with the environment rather than being used as a means to supplement farmer's income. Payments must become truly decoupled. The "sustained vitality of rural communities" would be a part of the Community policy to promote economic and social cohesion. Farmers would be seen as part of the rural community but it must be acknowledged that the policy of price support is a blunt instrument to support that community. A more regionalised approach to rural development is needed.

The European model of agriculture, and the means to realise it, must be included within the Treaty. The existing objectives do not reflect what is being characterised as "the European model of agriculture." Moreover, it is unlikely that they can provide a sufficient basis for a new production/consumption model. To emphasise the nature of the changes to the existing objectives, the new objectives should place the consumer first through an emphasis on food safety and food quality. The means to achieve this objective include existing mechanisms promoting such areas as organic production, geographical indicators and animal welfare issues. Other existing areas would be re-focussed, for example, greater use of instruments to support environmentally sound production methods. Such instruments would be environmentally based rather than producer based. Moving to the producer, payments would be made, sufficient to ensure a fair standard of living, on the basis of the contributions made to the societal goals recognised in the European model of agriculture, for example, the cultural landscape. In addition, the farmer would be seen as part of the rural community and mechanisms would be devised to promote the economic and social cohesion of such communities.

The Buckwell report concluded:[43]

> "From its origins, when the CAP was most definitely part of the big European political and cultural compromise – assistance for agriculture to adjust, in return for an open market for industrial products – it has descended into [a] purely commodity approach. In this process it lost its sense of purpose. A bold new start towards a more integrated rural policy could reassert a constructive role for this important aspect of the European Union."

Considerable political capital has been invested in the CAP throughout the history of the Community. However, a time has been reached when the objectives of the policy are no longer appropriate to the model of agriculture that consumers are demanding. Coupled with the concerns of consumers, the international environment in which the policy operates is fundamentally

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[43] *Supra* n 31, Chapter 8.5.

different from that of the 1950s. A new set of objectives must be drawn up, especially if the Community wishes to defend successfully in international negotiations what it has labelled the "European model of agriculture." A debate on the future objectives of the policy should be launched as a result of the mid-term review of the Agenda 2000 reforms and the 2004 IGC offers an ideal opportunity to realise a new set of objectives for the policy. These objectives would be more regionally and environmentally oriented than the existing objectives and would place the consumer at the heart of an integrated agricultural and rural policy. A common policy at European level would continue to exist but, respecting the principle of subsidiarity, would increase regional rights and responsibilities, as direct assistance to farmers would be tailored to the needs of each region. Such new objectives would represent a bold new start for the CAP and re-establish its constructive role within the European Union.

# WILLING LANDLORDS, UNRESPONSIVE BUSINESS TENANTS

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When the Law Reform Advisory Committee for Northern Ireland embarked upon its First Programme for Law Reform in 1990, one of the topics included in the programme was the law of business tenancies as enacted in the Business Tenancies Act (Northern Ireland) 1964. The 1964 Act was broadly equivalent to its English counterpart, the Landlord and Tenant Act 1954, Part II, but unlike the 1954 Act, it had not been significantly amended in light of difficulties which had arisen in the operation of the legislation. The Committee published a Discussion Paper in 1992[1] and, after a consultation period, this was followed by a Report on Business Tenancies (the "LRAC Report") in 1994.[2] The Report contained a draft Order which has been substantially adopted as the text of the Business Tenancies (Northern Ireland) Order 1996.[3] In the 1994 Report, the Committee explained its approach to reform of the law of business tenancies:

> "We confirm our view that the main substance of the [1964] Act should be retained but with a number of amendments. These amendments are not aimed at changing the fundamental principles of the legislation but will, we hope, have the effect of streamlining its operation. Our objective has been to maintain a fair balance between the parties to a tenancy in a context of legal certainty and simplicity. . . . We are also of the view that any interference with the initial contract between a landlord and tenant should be kept to a minimum."[4]

The Order created gains and corresponding losses for both landlords and tenants. In the interests of tenants, the Committee firmly rejected the possibility of contracting out of the protection of the Order, even though this is an established feature of the English system.[5] The Order does, however, allow for agreements to surrender sanctioned by the Lands Tribunal,[6] and it extends the term of short lettings that may be granted without the tenant obtaining security of tenure.[7] The Tribunal now has the power to vary the rent during interim continuation and to backdate the revised rent under the new tenancy.[8] Further, landlords have been given a right in certain

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1 *Discussion Paper No 3: A Review of the Law relating to Business Tenancies in Northern Ireland* (HMSO, 1992).
2 *Business Tenancies*, LRAC No 2, (HMSO, 1994).
3 SI 1996/725 (NI 5), repealing and replacing the Business Tenancies Act (NI) 1964. Hereafter, "the 1996 Order".
4 *Op cit*, n 2 above, paras 1.7 and 2.1.
5 *Ibid*, para 3.5.9.
6 Art 25, 1996 Order.
7 Art 4(1)(a), 1996 Order.
8 Arts 11(3) and 18(3), 1996 Order.

circumstances to make a tenancy application.[9] The position of tenants, on the other hand, has been strengthened in line with the Committee's proposals in a number of ways. Several procedural changes benefit tenants, as explained below. The ground of opposition to renewal most commonly relied on, paragraph (f), has been significantly strengthened to prevent landlords recovering possession on slight or unfounded pretexts.[10] The provision for compensation for disturbance has also been enhanced. Compensation levels have been increased and compensation is now more widely available.[11] Other changes made by the Order, notably the Tribunal's power to alter time limits, have the potential to benefit either party.[12] The purpose of this paper is to consider some of the procedural changes made by the Order and to assess whether they do in practice achieve the Committee's objective of creating and maintaining momentum and certainty in the renewal process.

The streamlining of the procedures for commercial lease renewal under the Order incorporated a number of features designed to ensure that the renewal process retains momentum and that neither party loses substantive rights on a "mere technicality"[13] or is prejudiced as a result of any inertia on the part of the other. The removal of some of the more onerous aspects of the 1964 Act, such as the obligation on the part of a tenant upon receipt of a landlord's notice to determine, to serve not one but two notices to safeguard his position,[14] has simplified the process and should therefore be welcomed. The changes in the 1996 Order were, however, predicated on the assumption that both parties would embrace the new streamlined approach and co-operate with each other in the renewal process.[15] Unfortunately, this assumption is not always borne out in practice and many of the changes designed to enhance and expedite the renewal process can, in fact, frustrate and prolong it. This is particularly the case where there is a willing landlord and an unresponsive tenant. In the converse case where the tenant seeks renewal but the landlord does not respond, the Order enables the tenant to force the pace, by making a tenancy application.

When the renewal procedure is triggered by a landlord willing to grant a new tenancy, the Order provides for an "upfront" approach in that the landlord's notice to determine must state the general terms of his proposals for the new tenancy, including rent, duration and the property to be comprised in the new tenancy.[16] This ensures that the tenant has information which is relevant to the decisions to be taken in response to the landlord's notice. A further procedural change is that the tenant is no longer required to serve a counter-notice following receipt of the landlord's notice to determine. The thinking

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[9] Art 10(1)(a), 1996 Order.
[10] Arts 12(1)(f) and 13, 1996 Order.
[11] Art 23, 1996 Order.
[12] Art 10(5), 1996 Order.
[13] *Op cit*, n 2 above, para 4.4.7.
[14] S 4(6)(a) (tenant's counter-notice) and s 8 (tenant's application for a new tenancy) of the 1964 Act.
[15] *Op cit*, n 2 above, para 4.4.5.
[16] Art 6(6)(a), 1996 Order. Under s 4 of the 1964 Act, the landlord merely indicated whether or not he was willing to renew: see Dawson, *Business Tenancies in Northern Ireland* (1994), pp 82-94.

behind this reform, as explained in the LRAC Report, was that, following receipt of a notice to determine served by an unwilling landlord, the parties might as well proceed directly to a tenancy application, whilst on receipt of a notice to determine served by a willing landlord, the parties will enter into negotiations as to the terms of the new tenancy.[17] If a tenant was aware of the landlord's proposals for a new tenancy from the outset, this would presumably encourage such negotiation which in turn would lead to the grant of a new tenancy without the need for a tenancy application[18] or, if unsuccessful, would lead to the matter being brought before the Lands Tribunal by virtue of a tenancy application.

A further change contemplated by the Committee but rejected, would have enabled the parties to make a tenancy application up to 12 months from the expiry of the "date of termination" specified in a landlord's article 6 notice to determine, or the "date of commencement" detailed in a tenant's article 7 request for a new tenancy. Whilst this would have facilitated a longer process of negotiation, the Committee ultimately decided that it would be an unacceptable breach of the fundamental philosophy of the 1964 Act which was to ensure that an application to the Tribunal was made, if possible, before the end of the contractual term.[19] The Order therefore requires any tenancy application to be made before the date of termination/commencement.[20] This provision in itself can prolong the renewal process. The landlord's notice to determine or tenant's request for a new tenancy can specify a date of determination/commencement as far as one year in advance.[21] Under the 1996 Order, this specified date is the deadline for making a tenancy application, whereas under the 1964 Act, a tenancy application had to be made not less than 2 nor more than 4 months after the service of the landlord's notice to determine or the landlord's response to a tenant's request for a new tenancy. The practical effect of the changes introduced by the Order is that up to a year could elapse between the service of a notice by a willing landlord and the making of tenancy application by the tenant, causing additional delay and uncertainty for the landlord.

In connection with tenancy applications, the Lands Tribunal has been given two important new powers. The first of these is a power to vary, by extension or reduction, the time limits within which the tenancy application must be made.[22] This was principally in order to ensure that, if negotiations break down after the date for termination/commencement specified in an article 6 notice or article 7 request, the parties' rights are not lost in the process.[23] Formerly, if time limits were not complied with, a party lost the right to apply to the Lands Tribunal, but by adopting this new paternalistic approach, the Order gives the Tribunal discretion to "bend the rules" if it considers it appropriate to do so. This power has already been exercised by the Lands Tribunal in the case of *J L Harvey* v *Schofield & Anderson*

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17 *Op cit*, n 2 above, para 4.4.5.
18 See art 10, 1996 Order.
19 *Op cit*, n 2 above, para 4.4.6.
20 Art 10(2) and (3) 1996 Order.
21 Arts 6(2) and 7(2) 1996 Order.
22 Art 10(5) 1996 Order.
23 *Op cit*, n 2 above, para 4.4.7.

*Limited*.[24] In this case, the parties had been negotiating a new tenancy and time had simply "run out". When the tenant applied for an extension of the time limit for making a tenancy application, the Lands Tribunal granted an extension in light of the "complete loss of property rights if the application were refused". Significantly, the Tribunal went on to emphasise that its discretion was not confined to situations in which "somebody was a day or so out of time". With respect to the principles behind its decision-making, it declared that "it is perhaps appropriate to begin with something close to a clean sheet and for principles to evolve from decisions case by case".

The second power conferred on the Tribunal under the 1996 Order is a power to vary the rent payable during interim continuation of tenancies which are the subject of a pending tenancy application.[25] This innovation brings to an end the financial interest which tenants formerly had in protracted delays in the process and is likely to lead to a reduction in pre-emptive strikes, whereby a tenant rushed to serve a request for a new tenancy specifying a date of commencement as far in advance as possible.[26]

A further procedural change made by the Order, and the source of the problem discussed in this paper, is that either party may now make a "tenancy application", which means, however, either an application by the landlord for an order that the tenant is not entitled to a new tenancy, or an application by the tenant for an order for the grant of a new tenancy.[27] A difficulty arises under the Order when a tenant receives a notice to determine (or a response to a request for a new tenancy, pursuant to article 7(6)(a) of the Order) from a landlord willing to renew, and makes no response at all. The landlord, having already indicated his willingness to renew, is precluded from making a tenancy application in order to bring matters to a head, because as we have just seen, an application can only be made by a landlord for an order that the tenant is *not entitled* to a new tenancy. Further, the combined effect of articles 10(1) and 12(1) is to allow the landlord to make a tenancy application only on the grounds of opposition to renewal stated in the landlord's notice to determine or, as the case may be, in the landlord's response to the tenant's request for a new tenancy. A willing landlord by definition will have no grounds for making a tenancy application and, if faced with an unresponsive tenant, is left in limbo without any mechanism to resolve the matter.

It seems unlikely that a landlord's willingness to renew was anticipated as a fresh source of stalemate under the 1996 Order. On the contrary, enabling either party to apply to the Tribunal was intended to maintain momentum. Although some sections of the LRAC Report suggest that landlords might make a tenancy application either for the refusal *or grant* of a new tenancy,[28] the draft Order appended to the Report is in substantially the same terms as the Order as enacted and it is fairly clear that these provisions were intended to provide a complete answer to the problems encountered under the earlier

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[24] BT/27/1998.
[25] Art 11(3) and (4), 1996 Order.
[26] See Dawson, *op cit*, n 16 above, p 98.
[27] Art 10(1), 1996 Order.
[28] *Op cit*, n 2 above, para 4.4.10, second bullet point; paras 4.4.5 and 4.4.6 are more ambiguous.

law. One proposal made by the Committee and incorporated in the draft Order, which was abandoned at a later stage in the legislative process, sheds some light on the matter. The Committee proposed that a landlord who had initially opposed renewal might subsequently concede a willingness to renew in order to enable him to apply to the Lands Tribunal for an order for the *grant* of a new tenancy.[29] This is the only example of the landlord being seen as requiring a power to apply for an order for the grant, rather than refusal, of a tenancy. Apart from this exceptional proposal, which was not finally enacted, the Order seems to be based upon an assumption that landlords do not need power to apply to the Tribunal except in the circumstances set out in article 10(1). In consequence, the legislation does not provide a clear solution for the situation where a tenant does not respond to a willing landlord's proposals by beginning negotiations with all due expedition, yet in practice, willing landlords are often met with a lack of response from the tenant. Whether this unresponsiveness is due to apathy or a deliberate desire to block or prolong the renewal process, the result is the same – uncertainty for all parties.

A landlord's notice to determine specifies a date of determination and a tenant's request for a new tenancy specifies a proposed date of commencement of a new tenancy. The consequence is that, in the problem scenario, the old tenancy will terminate on the date of termination or immediately prior to the proposed date of commencement, as the case may be, in accordance with article 5 of the Order. There is ample authority to support this proposition, for example, *Meah* v *Sector Properties Limited*.[30] The discretionary power given to the Lands Tribunal by virtue of article 10(5)(a) appears, however, to give it the ability to resurrect determined tenancies[31] and it would seem that if a landlord has received no response to his statement of willingness by the date of termination/commencement specified in the relevant article 6 notice or article 7 request, and notwithstanding that no tenancy application has been made by such date, he can no longer take it for granted that the existing tenancy is at an end or that he is free to utilise or dispose of the premises. Unfortunately, there is no clear guidance either in the legislation itself or in the case law to date as to when an application to extend the article 10 time limits would be granted or refused. At the very least, the impact of the Human Rights Act 1998 and the landlord's right to the enjoyment of his property would seem to be relevant considerations in the exercise of the discretion.[32]

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[29] *Ibid*, para 4.4.9 and art 10(6) of the draft Order contained in Appendix A of the Report.

[30] [1974] 1 All ER 1027. See Dawson, *op cit*, n 16 above, p 93. For a recent example, see *London Baggage Co (Charing Cross) Ltd* v *Railtrack plc*, unreported, 17 April 2000.

[31] As noted earlier, art 11 of the 1996 Order will not apply where the tenancy has been terminated by a landlord's notice or tenant's request and no tenancy application has been made.

[32] More specifically, art 1 of Protocol 1 to the European Convention on Human Rights provides that "[e]very 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. . . ." At what point does the Tribunal's discretion to extend time limits become an unreasonable interference with the landlord's right of property?

The situation is further complicated if the tenant remains in occupation after the tenancy ends. This overholding cannot be attributed to a continuation tenancy under article 5 of the Order as the statutory continuation mechanism is expressly ousted by the service of a valid landlord's notice (or tenant's request). The tenant's status must, therefore, be analysed in light of general principles of land law. If the tenant remains in occupation and either does not pay rent or offers rent that is refused by the landlord, one can assume that his occupation is by virtue of a tenancy at will or, once possession is demanded, at sufferance to which the Order does not apply.[33] The landlord could seek to recover possession of the premises by ejectment proceedings (including a claim for mesne profits), but this is clearly an unsatisfactory conclusion to a process which was initiated months earlier by the landlord indicating a willingness to renew the tenancy and specifying actual proposals for renewal. In this instance, the tenant's lack of response and the landlord's inability to progress the matter by bringing it before the Lands Tribunal results in much wasted time and energy which could have been more profitably employed by the landlord actively negotiating a new tenancy with the existing tenant or looking for a new tenant.

The majority of commercial landlords are unlikely to permit occupation of their premises without the receipt of rent in return – even if acceptance of rent may not be the most advisable route to follow in every case. The ongoing payment of rent by the tenant and its acceptance by the landlord in the scenario outlined above can, however, lead to a very uncertain situation. If one accepts that the old tenancy has been determined by the notice to determine or request for a new tenancy, the question arises which type of tenancy arises by virtue of continued occupation and payment of rent. Under general principles of land law, a periodic tenancy can arise by implication in such circumstances.[34] The type of periodic tenancy depends on how the rent accepted by the landlord is calculated rather than how it is paid. Most commercial rents are assessed on an annual basis. If this is the case in the problem scenario, and the existing rent continues to be paid, a yearly periodic tenancy could be said to have arisen. Such periodic tenancies continue indefinitely until terminated and are protected by the provisions of the 1996 Order, so in this situation the landlord is faced with having to initiate the whole renewal process all over again. It could, however, be argued that an implied periodic tenancy should not be inferred from payment of rent, where the landlord accepted it as a payment against liability for mesne profits in respect of the tenant's overholding as a mere tenant at will.[35] Nevertheless, where the landlord has already indicated a willingness to renew, and continues to accept the same rent after the determination of the old tenancy, the inference of a periodic tenancy is compelling.[36]

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[33] Art 2(2), 1996 Order.

[34] See Dawson, *op cit*, n 16 above, pp 13-4.

[35] *Longrigg Burrough & Trounson* v *Smith* (1979) 251 EG 847, *Javad* v *Aqil* [1991] 1 All ER 243, and *London Baggage*, *op cit*, n 30 above. See also *Stirling* v *Leadenhall Residential 2 Ltd* [2001] 3 All ER 645.

[36] In the English case, *London Baggage*, *op cit*, n 30 above, the court ruled that a periodic tenancy did not arise on the facts when a business tenant continued in possession after the date of termination. The landlord had served a notice to determine and the tenant had not responded. The main reason for the decision was

The concept of a new periodic tenancy arising from receipt of rent from a tenant who holds over also begs the question, what are the terms of such a tenancy? In the case of the *Earl of Meath* v *Megan*, [37] Gibbon LJ stated:

> " where any tenant holds under a lease or agreement in writing, for a term which comes to an end, and he continues in possession without making any fresh agreement, there is a presumption that all the terms of the agreement continue to apply, except so far as they are rendered inapplicable by the changes of the tenancy."

Such authority would seem to prevent a landlord claiming that the terms of a new periodic tenancy should be as proposed in his notice to determine on the basis that the tenant has impliedly accepted these by remaining in possession. In simple terms, this means that a landlord willing to renew on fresh terms can be faced with a new periodic tenancy at the old rent, due to the tenant's lack of response. This is patently unfair, particularly in a buoyant market. The new power given to the Lands Tribunal by virtue of article 11(3) to vary the rent in a *continuing* tenancy was specifically designed to protect a landlord's interests in the event of a continuing tenancy, particularly if a tenant was deliberately prolonging the process. It is therefore ironic that, in this problem scenario, where a tenant's unresponsiveness has caused the ultimate delay and prevented the continuation of the old tenancy, this mechanism is unavailable. Article 11(3) specifically provides that the power can be invoked "where the term of a tenancy is extended in consequence of the operation of paragraph (1)". Article 11(1) in turn only comes into play when an existing tenancy is continued by virtue of a tenancy application having been made.

Matters become more complicated where the landlord demands a different rent as specified in his initial notice to determine and the tenant remains in possession paying this revised rent. In these circumstances, it is not clear whether a periodic tenancy on the same terms as the old lease has arisen, albeit at a varied rent, or whether the payment of the revised rent is also evidence of the tenant's acceptance of any other different terms specified in the landlord's notice. In such a situation, an inventive landlord could also argue that something more than a periodic tenancy has arisen. Section 4 of the Landlord and Tenant Law Amendment Act (Ireland) 1860 ("Deasy's Act") provides that:

> "every lease or contract with respect to lands whereby the relation of landlord and tenant is intended to be created for any freehold estate or interest, or for any definite period of time not being from year to year or any lesser period, shall be by deed

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that the landlord had indicated in its notice its opposition to renewal. What is argued here is that the converse may also be true; where the landlord indicates a willingness to renew, the tenant does not respond, the tenancy comes to an end, and the tenant continues in possession paying the old rent, which the landlord accepts, it is difficult for the landlord to argue that a periodic tenancy has not arisen by implication.

[37] [1897] 2 IR 477; 31 ILTR 93.

> executed, or note in writing signed by the landlord or his agent thereunto lawfully authorised in writing."

The setting out of proposals for a new tenancy in writing by the landlord in the notice to determine (or response to the tenant's request for a new tenancy) could not easily be seen as a grant of a new tenancy as such proposals are made during the continuance of the old tenancy. It is, however, possible to argue that such proposals constitute an offer. Case law supports the view that such an offer can be impliedly accepted by conduct, and that if, following receipt of the offer, the tenant remains in possession, it becomes arguable that a contract has been concluded.[38] In a Scottish case, *M'Farlane* v *Mitchell*,[39] a landlord wrote to the tenant of a shop, not giving notice to quit but proposing new terms for continued occupation. The tenant stated that the terms were unacceptable. The landlord wrote to him again, insisting that the earlier letter contained the terms on which the tenant could continue in occupation in the coming year. The tenant made no response but remained in possession. The Court of Session held that the tenant was bound to pay the higher rent which the landlord had proposed. Lord Moncrieff asked: "What is the proper inference? I think that the reasonable inference is that he agreed to the landlord's terms, and that he is now bound by them."[40] There is no rule of law, however, that a tenant who continues in possession following an offer of a new tenancy is deemed to have accepted it; this conclusion depends on the facts of each case.[41] Such an inference could only arise in the case under consideration if the tenant continues in occupation after the old tenancy has been brought to an end as a result of the landlord's notice.

If it can be established that an agreement for a lease has been concluded, then since equity regards as done what ought to be done, the agreement for a lease is as good as a lease itself, under the rule in *Walsh* v *Lonsdale*.[42] The landlord might seek to enforce such an agreement by decree of specific performance, which for this purpose would have to comply with the formalities required for contracts set out in the Statute of Frauds (Ireland) Act 1695, that is, the agreement must be evidenced by a note or memorandum in writing, signed by the party to be charged or his authorised agent.[43] In our scenario, such formalities are not met because there is no signature by the tenant who is the party "to be charged" (that is, the defendant in the action to enforce the contract for a lease). Nevertheless, an agreement for a lease is still specifically enforceable in equity if there are sufficient acts of part performance of the contract for a lease to take the case outside the Statute of Frauds. These acts must be performed by the plaintiff in the potential action, that is, the landlord in the case under consideration. In our scenario, following the failure of the tenant to challenge the landlord's

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38 *Chitty on Contracts* (27th ed, 1994), vol 1, para 2.018, and *Roberts* v *Harwood* (1828) 3 C & P 432.
39 (1900) 2 F 901.
40 *Ibid*, p 904.
41 *Glossop* v *Ashley* [1921] 2 KB 451.
42 (1882) 21 Ch D 9. And see Sheridan, "*Walsh* v *Lonsdale* in Ireland" (1952) 9 *NILQ* 190, and Wylie, *Irish Land Law* (3rd ed, 1997), para 3.038.
43 See Wylie, *Irish Conveyancing Law* (1978), chp 9.

proposals and his continuance in possession paying a *revised* rent,[44] the landlord's receipt of that rent can be relied on as a sufficient act of part performance, clearing the way for a decree of specific performance of the agreement for a lease. Such an argument is supported by both Irish[45] and English[46] authority. In *Conner* v *Fitzgerald*, for example, lands in Co. Cork were let for 21 years until 1872. When the lease expired, the parties entered into a verbal agreement for a new lease for 31 years. The tenant paid the increased rent for a while but subsequently claimed to be a periodic tenant from year to year. The catalyst for the tenant's actions – and a relevant factor in a number of other cases decided in the Irish courts in the 1880s, involving this issue – was the enactment of the Land Law (Ireland) Act 1881, which conferred new rights on yearly tenants. The tenant in *Conner* hoped to take advantage of his alleged status as yearly tenant to secure a reduced rent under the 1881 Act. Following earlier English and Irish authority, Chatterton V-C granted the landlord a decree of specific performance of the agreement for a 31-year lease, stating that:

> "The payment of an increased rent *per se* is not sufficient proof of part performance, but if there is evidence to show that it was paid by the tenant and accepted by the landlord on foot of the new tenancy, there is, in my opinion, sufficient part performance."[47]

Rejecting counsel's argument that payment of rent is a sufficient act of part performance *by the tenant only*, he considered that "there was a corresponding part performance by the landlord in accepting the rent, and permitting the tenant to continue in possession."[48]

In the English case of *Miller & Aldworth Ltd* v *Sharp*, the tenants of "The Jolly Millers", an inn at Dartford, Kent, verbally agreed with the landlords for a new lease for 21 years at an increased rent. No lease was executed. Three years later, the landlords, realising that the rent agreed was considerably lower than that justified by current market conditions, refused to honour the arrangement. The case was eventually compromised, after the court ruled that there were sufficient acts of part performance by the

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[44] Where the tenant stays on paying the old rent, this does not constitute an act of part performance: *Sweeney* v *Denis* (1883) 17 ILTR 76.

[45] *Archbold* v *Lord Howth* (1866) IR 1 CL 608, *Howe* v *Hall* (1870) IR 4 Eq 242, *Conner* v *Fitzgerald* (1883) 11 LR Ir 106, *Beauclerk* v *Hanna* (1888) 23 LR Ir 144, *Haire-Foster* v *McIntee* (1888) 23 LR Ir 529. See also *McFarlane* v *Dunne* (1890) 24 ILTR 17. This line of authority flourished even though, in the context of *purchases* of land, a rule had developed in the nineteenth century to the effect that payment of money alone is not a sufficient act of part performance: *Clinan* v *Cooke* (1802) 1 Sch & Lef 22. In the leading contemporary English case on the subject, *Steadman* v *Steadman* [1976] AC 536, the House of Lords did not accept this as a general rule and Lords Reid, Simon and Salmon specifically stated that there was no such rule. According to Lord Reid, such a rule "would seem...to defeat the whole purpose of the doctrine" (*ibid*, p 541). See generally, Wylie, *op cit*, n 43 above, para 9.059.

[46] *Nunn* v *Fabian* (1865) LR 1 Ch 35, *Miller & Aldworth Ltd* v *Sharp* [1899] 1 Ch 622. See also Spry, *Equitable Remedies* (3rd ed, 1984), pp 263, 268 and 275, and Jones and Goodhart, *Specific Performance* (1986), p 103.

[47] *Op cit*, n 45 above, p 113.

[48] *Ibid*, p 116.

plaintiffs (in this case, the tenants) to take the case out of the scope of the Statute of Frauds. Interestingly, in this case, the only documentary evidence available was an initial proposal from the landlords for a new lease, and a series of receipts for the increased rent. Byrne J stated:

> "In the present case what was done could not refer to the old tenancy, but is in my judgment an unequivocal act referable to some new contract, and that could only be a contract of tenancy. Evidence must, therefore, be admitted to show what the contract was."[49]

Thus, the case law establishes that payment and receipt of a revised rent, on foot of a new tenancy, can constitute sufficient acts of part performance to enable either the tenant or the landlord to obtain a decree of specific performance of an agreement for a lease. It is, of course, essential that the plaintiff can prove that an agreement for a new lease was concluded. If the landlord has submitted proposals for the new tenancy and the tenant, not having disputed these, has paid the new rent when demanded, it is at least arguable that an agreement for a lease has been concluded and that it should be specifically enforced.

To summarise, the changes enshrined in the 1996 Order have inadvertently left willing landlords vulnerable to the threat of unresponsive tenants. First, a willing landlord has no ability to initiate a tenancy application and if the formal time limits for the tenant to initiate such an application expire, there is no certainty that the old tenancy has in fact come to an end, because of the Tribunal's new power to extend the time-limits by virtue of article 10(5). Secondly, if a tenant remains in occupation at the determination of a tenancy and a landlord continues to accept rent, a new periodic tenancy could be said to arise. As the tenancy is new rather than "continuing", the Tribunal has no power to increase the rent payable thereunder pursuant to article 11(3). In order to vary the rent or effect other changes, a landlord will be forced to initiate the renewal procedure laid down by the Order all over again. As mooted above, if, following receipt of the landlord's notice to determine or his response to the tenant's request for a new tenancy, the tenant stays on in occupation paying a revised rent as demanded, the landlord might seek a decree of specific performance, arguing that his proposals for a new tenancy were the basis of an agreement for a lease. The outcome of such an action is by no means certain given the discretionary nature of the remedy of specific performance, although case law does tend to support the landlord in this regard, assuming that he can establish actual agreement. The net result of the changes in the not uncommon circumstances under consideration is increased uncertainty in the renewal process which is disappointing and somewhat surprising given Judge Gibson's pronouncement in *Joyland Amusements (NI) Limited* v *AS & D Enterprises Limited*[50] that "in the field of commercial law certainty is, in the Tribunal's view, of fundamental importance".

The uncertainty also begs the questions, how should it be resolved and, pending resolution, how can willing landlords and their professional advisors mitigate the impact of unresponsive tenants? A simple means of resolving

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[49] *Op cit*, n 46 above, p 626.
[50] BT/102/1989.

the particular problem would be to amend article 10(1)(a) to permit willing landlords to initiate a tenancy application seeking an order for the *grant* of a new tenancy. In the absence of such an amendment, it is advisable for a willing landlord to encourage communication and negotiation with the tenant with a view to settling the terms of a new tenancy prior to the date of termination/commencement specified in the initial trigger notice. It has come to the writers' notice that some landlords in this jurisdiction are seeking to avoid the problems outlined above by serving a notice to determine stating that they will oppose a new tenancy, even if they are willing to grant one. This tends to have the effect of encouraging a response from the tenant. It would, however, be unfortunate if such action were to become common practice, as it is totally at odds with the spirit of the legislation. It could also have adverse implications for a landlord who relied on one of the compensatory grounds of opposition, should the tenant decide to vacate the premises and receive the statutory compensation, rather than pursue a new lease. Another option, if a landlord fears that a tenant is not going to respond as envisaged by the Order, might be for the landlord to make an application under article 10(5) for the Tribunal to *reduce* the time limit for the making of a tenancy application. This could focus an unresponsive tenant's mind on the renewal process and possibly encourage an early response. Landlords and their professional advisers should also be aware of the implications of continuing to accept rent from a tenant in possession once the date of termination/commencement has passed. In such circumstances, an action for ejectment may be a preferable option even if a landlord would happily grant a new tenancy to the existing tenant.

The business tenancies code has often been described as a "balancing act" between the interests of landlords and tenants. In failing to anticipate the implications for the landlord of an apathetic or mischievous tenant, the 1996 Order appears to have inadvertently tipped the scales in favour of such a tenant. An urgent need exists for equilibrium to be restored by an appropriate statutory amendment or by case law decisively addressing the problem of the unresponsive tenant.

# MATRIMONIAL PROPERTY AND IRISH LAW: A CASE FOR COMMUNITY?

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## INTRODUCTION

Family property is a primary area of contention in property law.[1] If spouses only have rights in relation to property to which they can show legal or beneficial title, they may be left unprotected in the event of marital breakdown, despite what may be a lengthy and considerable contribution to family life. If spouses have automatic rights to one another's property, injustice may result where no contribution (financial or familial) has been made. Should the law provide for property redistribution, as opposed to maintenance?[2] If a property interest is to be granted, how, and by whom, is such an interest to be quantified?

In dealing with these issues, both Ireland[3] and Northern Ireland have adopted a statutory separation of assets approach, under which property rights are not automatically altered by marriage,[4] and no automatic interest is conferred on one spouse in the property of the other. However, the principle of separation has been considerably eroded in recent years in both jurisdictions by the enactment of legislation conferring a judicial power of equitable redistribution of matrimonial property in the context of marriage breakdown. It is by no means certain that this represents the most appropriate or just approach to the issue of matrimonial property rights. Indeed, the Law Reform Advisory Committee for Northern Ireland has recently gone so far as to advocate the equitable co-ownership of certain matrimonial property, including in many cases the family home.[5] This approach clearly derives from the principle of community property, particularly prevalent in civil law

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* I would like to thank A.P Simester, Conor Hanly and Siún O'Keeffe for their comments on drafts of this manuscript. I would also like to thank Vera Orschel and Sandrine Lefèvre for their comments on the German and French sections of this paper.

1 In this article, discussion is limited to the family within marriage, and the principal rights addressed are the property rights of spouses, with some reference to maintenance. Irish law currently does not confer property rights on cohabitees (except where contributions create an equitable interest under a trusts analysis). Extensive legislative provisions apply to married couples, and the issue of extending these to unmarried partners involves policy questions outside the scope of this paper, which is primarily focused on the *nature* of the legislative marital regime.

2 Presuming that some level of financial support is deemed appropriate.

3 For convenience, the term "Irish" will be used to describe the law applicable in Ireland, while Northern Ireland law will be specifically identified as such.

4 An exception is the Irish Succession Act 1965 (discussed below).

5 See the section on Northern Ireland in this paper. The Law Reform Advisory Committee (LRAC) also advocated that defined property rights be extended to qualifying co-habiting persons, but this aspect of the Committee's recommendations is outside the scope of this paper.

jurisdictions, where spouses are treated as having an interest in defined marital property due to their marital status. This interest may be vested in spouses during the marriage, or may arise only in the event of its termination on death or divorce. Advocates of community property contend that this approach is more representative of the usual marital partnership and that it promotes equality between the spouses. A key issue in Irish family law must therefore be whether a community property approach would be preferable to the current regime, or whether, indeed, a modified joint ownership approach, such as that recommended in Northern Ireland, should be adopted.

In this paper, the background to different property regimes is outlined, and the theoretical justifications for each are briefly examined. The operation of community property regimes is then analysed and compared with regimes of separation of assets and equitable redistribution. The practical operation of the current Irish approach is scrutinised, and the gradual shift towards community thinking in Irish legislative policy is analysed. Finally, it is contended that Ireland should adopt a formal and complete community-based approach, and that in this respect a system of deferred community is to be preferred.

## Property Regimes: The Field Of Choice

Three principal approaches may be taken to the distribution of property between spouses: community of property, separation of assets and equitable redistribution.[6] While equitable redistribution is a relatively modern phenomenon, the community and separation systems result from different historical approaches to the same difficulty, namely, how to protect the financial interests of dependent spouses, usually wives, at times and in systems where economic and political power tended to be reserved to men only.

In England, one of the principal aims of the feminist movement in the nineteenth century was to reform the marital property laws, to redress a situation where a woman's property passed to her husband on marriage.[7] Ultimately, the solution adopted in England and Ireland was to give both spouses ownership and control of their own assets.[8] The introduction of a separation of assets regime was therefore aimed at promoting justice for women, by protecting their property rights, independence and security. An individualist approach is taken, and neither spouse may claim property belonging to the other.[9]

The general feature of community regimes, on the other hand, is that some or all of the spouses' property is treated as a common fund, owned equally by

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[6] Equitable redistribution might also be viewed as a modified form of separation of assets. It is treated here as a distinct system, as it differs from a pure separation approach in both philosophical basis and effect.

[7] This was subject to limited legal protections. See Holcombe, *Wives and Property* (1983) for a detailed analysis of this area.

[8] Married Women's Property Act 1882.

[9] In common law jurisdictions, beneficial as well as legal ownership must be considered.

each.[10] Most often the fund comprises property acquired in the course of the marriage by either spouse. Marital status is crucial, as marriage automatically leads to entitlements. However, excluding cases of universal community,[11] the property rights obtained generally depend on issues such as the duration of the relationship.[12]

The community regime was initially intended to provide a measure of security for the wife (as the dependent and legally disabled spouse),[13] while also providing a mechanism for both parties to contribute to family expenses, and for the management of the family funds.[14] One argument in favour of a community system is that it increases the rights of the less well-off spouse, usually the wife,[15] by guaranteeing her at least some share of the family's wealth on the termination of the marriage.[16] It is also perceived as a just reward for the work she has performed for the family during the marriage. In some jurisdictions, such as Sweden, a community regime was also

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[10] Interestingly, Bartke notes that "the concept of coequal, present ownership by the wife has been adopted grudgingly, and that originally the wife's interest was a mere expectancy". See Bartke, "Community Property Law Reform in the United States and Canada - A Comparison and Critique" (1976) 50 *Tulane Law Re*v 213 at 219. For a discussion of the historical background of community principles, see generally Rheinstein and Glendon, "Interspousal Relations", in *International Encyclopaedia of Comparative Law*, volume 4, p 47; Graue, "German law," in Kiralfy (ed), *Comparative Law of Matrimonial Property* (1972).

[11] Such regimes arise where all assets of either spouse are comprised in the community fund, irrespective of how or when those assets were acquired.

[12] *E.g.*, under a system of acquests (where the community fund consists only of property acquired after the marriage), the longer the marriage lasts, the greater the pool of "marital" assets for division.

[13] Foyer, "The reform of family law in France", p 79, in Chloros (ed), *The Reform of Family Law in Europe* (1978) (hereafter "Chloros (ed)"); Paulsen, "Community Property and the Early American Women's Rights Movement: the Texas Connection" (1996) 32 *Idaho Law Re*v 641 at 654; Graue, *supra* n 10, p 118.

[14] Note, however, Chloros' contention that joint property systems were devised not to assert the unity of the family, but to keep the wife under her husband's tutelage; hence the preference of English law for separation of assets, as promoting the emancipation of women. See Chloros, "Principle, Reason and Policy in the Development of European Law" (1968) 17 *ICLQ* 849 at 858.

[15] This seems evident given women's participation rates in the workforce. Ruane & Sutherland note that overall participation by women has increased from 25.7% of the labour force in 1971, to approximately 37% by 1997 (Ruane & Sutherland, *Women in the Labour Force* (1999), p 30). Of this, married women's participation rates increased from 14% to over 52% of the total female workforce over the same period. Not all of this participation represents full-time employment. In 1997, 111,000 workers out of 148,000 engaged in part-time employment were women, and 65% of women in regular part-time employment were married (p 37). Single women and married women without children have higher labour force participation than married women (as defined). Only 50% of 25-29 year old married women with children participated in the labour market, while over 90% of married women without children and 87.6% of single women in the same age group did so (p 30). Since women's average earnings are also lower than men's (see note 22, below), it seems reasonable to conclude that the husband is the main wage earner in most families, and that wives will often lack the financial resources to acquire property on an equivalent basis.

[16] Usually this would occur on death rather than divorce.

implemented for reasons of social aspiration.[17] Community regimes were seen as promoting equality between the spouses, and hence between men and women in general, by ensuring some semblance of equal rights and equal respect for the contributions of each spouse to the marriage.

The original aim of both regimes to protect dependent spouses has since been extended, and the current objective is to protect the interests of both parties. The difference is that the separation regime, in its pure form, aims to protect the rights and interests each spouse acquires in his or her own name, while the community regime aims to protect both spouses by offering both a share in property acquired by either during the marriage. This could work to a wife's detriment,[18] but will more usually work to her benefit.

Pure separation of assets systems are now rare, as most are modified by a judicial discretion to redistribute property in the interests of justice on the breakdown of the marriage. Ironically, the separation regime, although introduced to protect women, was ultimately perceived as working against many of them, due to sociological factors: women's traditional work in the home means that many of them do not have the opportunity to acquire wealth, and are therefore in fact penalised by a system which decrees that they have no right to share in their husbands' property.[19] The rationale of the redistributive power is to ensure that the interests of dependent family members (usually wives and children) are met, and a fair division of assets is made, while retaining flexibility to deal with varying family circumstances. No share exists unless and until awarded by the court, and spouses have merely a right to be considered for a discretionary share of property.[20] Marital status alone will not guarantee a share, or a particular share: division tends to be based on contribution (financial or domestic), though increasing emphasis is placed on the idea of partnership. By contrast, in a regime of pure community, each spouse has a vested share in the marital property (however defined) from the moment of marriage. In a regime of pure separation, neither spouse has rights over the property of the other. The three approaches may therefore be viewed as points on a continuum, moving from total individualism, through individualism modified by discretionary sharing, to community or partnership.

## Philosophical And Theoretical Justifications For Property Regimes

### *i. Separation of assets*

The choice of a matrimonial property system (where separation of assets is also viewed as such) will primarily depend on the theoretical or philosophical view taken of marriage. Separation of assets may ultimately be justified by the contention that the rights of individuals should not be adulterated save by their express consent. In particular, the mere fact of

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[17] See Bradley, "Marriage, Family, Property and Inheritance in Swedish Law" (1990) 39 *ICLQ* 370 at 371-374.

[18] *E.g.*, where the wife is the principal earner in the marriage.

[19] A more detailed discussion of this difficulty is contained in the following section.

[20] A third possibility, deferred community, gives no vested share during the marriage, but confers one automatically on termination.

marriage should not affect the rights of property owners, or the right to continue acquiring property for the use and benefit of the individual. In this conception, the spouses may be viewed as having agreed to share their lives in emotional or spiritual terms, or indeed in regard to daily living, but they should not be placed in an inferior position to non-married persons in terms of the acquisition of wealth. Essentially, the viewpoint is one of individualism and presumed free will: if a spouse fails to cater for personal financial security, or chooses to concentrate on other priorities, such as children, he or she cannot expect to be compensated or subsidised by the other spouse. If need is an issue, this is something to be dealt with in other ways, for example, with the assistance of the state.

In this context, individualism is lauded both for philosophical reasons and for its perceived social benefits. Philosophically, the rights and free will of the person are viewed as paramount, and as essential for personal self-development. Individuals are therefore to be preferred to artificial social groupings, which may or may not last. Although marital sharing is desirable, the sharing in question is one of experiences, rather than wealth, and is argued to be at its best when both parties are equal and independent.[21] Socially, it is argued that individualism particularly promotes financial independence and responsibility, which is ultimately preferable to a prolonged financial dependency for either spouse or former spouse. Individualism also promotes equality of the sexes, as women are encouraged to seek financial independence, for example, by means of a career.

Although the promotion and protection of individualism may be accepted as a valid social and philosophical goal, it is clear that there is a price to be paid. While the pure individualist doctrine assumes that both parties to a marriage are equally able to accumulate wealth, social reality clearly demonstrates that this is not so. In practice, except in childless marriages where childcare is not an issue, one of the parties will almost invariably have to subsume his or her career to family needs. This is not always a matter of choice, though sometimes it may be; it may well be that alternative means of childcare are unavailable. For social and financial reasons (for example, because women statistically tend to earn less than men,[22] or because of socialised gender roles), it will usually be the woman whose career is thus subsumed, and who is therefore impeded in her acquisition of wealth. Even should she later return to the market, she is unlikely to do as well as she otherwise might have done, as she will be hampered by age, lack of seniority, unfamiliarity with new techniques and the obsolescence of old ones.

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[21] See, *e.g.*, Powell, "Community Property – A Critique of its Regulation of Intra-familial Relations" (1936) 11 *Washington LR* 12.

[22] Ruane and Sutherland note that the average weekly industrial earnings of females in Ireland in 1997 were only 64.37% of men's. The average hourly earnings for women comprised 72.93% of the average for men when all industries examined were considered, and in fact the ratio was considerably lower in some sectors (*supra* n 15, p 58). Within the corporate sector, female managing directors earned only 75% of the salary of male equivalents, and females in other management ranks earned around 86% of the salary for male equivalents (*ibid* p 69).

To treat the woman's subsequent financial vulnerability solely as the result of her individual choice is to ignore the fact that such a choice will usually be a matter of implicit or explicit agreement between the spouses. In other words, the spouses have *both* agreed on a division of labour, and it is the choice of *each* that one should earn *for the family* while the other works in the home. It is surely unlikely that a home-making spouse would agree to forego the chance of personal gain unless she believed that she would share in the financial gains made by her partner, and thus have an equal chance of financial security; it is also surely unreasonable that the earning spouse would expect the homemaker to do so. If this is the proper 'default' understanding of the marital bargain,[23] it is unjust for one spouse only to be faced with bearing the cost of the decision. A pure separation approach to property effectively allocates the negative consequences of the spouses' bargain to one spouse only, and ignores the other spouse's complicity in the arrangement.

Despite arguments that a separation of assets regime ultimately compels women to take responsibility for acquiring wealth on their own behalf, there is no clear evidence that this is the case in the Irish context. Although separation of property has been the dominant approach in Ireland and the UK since the passing of the Married Women's Property Act 1882, it is only in recent decades that women have remained in employment after marriage, in significant numbers.[24] This would suggest that, in itself, a separation of assets regime is unlikely to encourage labour market participation by married women. As against this, married women's lower employment rates may not always have resulted from individual choice. Until Ireland joined the European Economic Community, and was compelled to introduce gender equality legislation, many women, particularly those employed in the public sector or in banking, were compelled to leave their employment on marriage.[25] The constitutional emphasis on women's work in the home[26] may also have contributed to this trend. Married women might therefore find themselves effectively debarred from earning on their own behalf, even if they wished to do so. It is therefore impossible to say with certainty whether the rise in employment participation by married women is linked to a separation regime or to changing attitudes to gender equality and the financial needs of the family as a whole.

### *ii. Sharing of assets – equitable redistribution and community of property*

Two reasons advanced for property redistribution (of any kind) are status and contribution. Under a status argument, spouses are automatically entitled to share in each other's wealth simply because they are spouses; the fact that they have chosen to marry, rather than simply cohabit, is viewed as implying that they intend to tie their lives together in every sense. Under a contributory approach, a spouse is entitled to share in the other spouse's property because she contributed to its acquisition, by directly helping to purchase it, or by indirectly enabling the other spouse to acquire it, for

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[23] Clearly, this understanding may be varied by agreement.
[24] See note 15, above.
[25] The so-called "marriage bar".
[26] Art 41.2.2 of the Irish Constitution.

example, by relieving him of other charges. The contributory approach has long been adopted by the courts of Equity, in the form of the purchase money resulting trust,[27] as it is assumed that a person would not contribute to the acquisition of an asset without receiving a share in it.

Both the status and contribution arguments may be subject to criticism: why should the mere fact of marriage entitle one spouse to a share of the other's (perhaps hard-earned) wealth, in particular where the marriage is of short duration? If contribution is the key requirement, how is that contribution to be quantified? Is it limited to financial contribution (which many women may not be able to make), or can domestic labour, childcare and psychological and emotional support be taken into account? A particular criticism of a contributory approach has long been that the emphasis on direct financial assistance ignores the value of work in the home and childcare, which the earning party would otherwise have to pay for or undertake personally. Although contributions for trusts purposes have been expanded in many jurisdictions to include the payment of household bills, domestic labour and childcare are still not generally accepted as contributions giving rise to beneficial entitlements.[28] However, legislation frequently now includes work in the home as a contribution for the purposes of equitable redistribution.[29] In this context, contributions include contributions to the overall well-being of the family, not merely to the acquisition of property.

Paradoxically, just as a separation of assets approach is said to rest on equality, so also is a community of property regime.[30] In the separation approach, equality is said to arise because each of the spouses has an equal opportunity to acquire and retain wealth for personal benefit, although (as previously discussed), this vaunted equality of opportunity may be more apparent than real. Community of property, on the other hand, is said to rest on the concept of equality because the contribution of each spouse to the marriage is valued equally. The husband and wife are akin to business partners, engaged on a joint enterprise. Each contributes equally to the success of the marriage, in his or her different way. The purpose of the partnership is to create a successful marriage, and this can only be achieved where each contributes fully, either financially or otherwise. As each contribution is equally essential, neither contribution can or should be valued more than the other. Each spouse has an equal stake in the marital venture, and each is therefore entitled to an equal share in the marital profits. To say otherwise unjustly devalues the contribution of one spouse and reinforces an assumption that only contributions in money or money's worth (as rigidly determined by the courts) are significant.

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[27] The resulting trust is not limited to marriage, and indeed may be less available to spouses in some situations (*e.g.*, where the presumption of advancement is held to apply).

[28] See note 113 for greater detail.

[29] See the sections on New Zealand and Ireland in this paper.

[30] Under current Irish legislation, equality is not a consideration when the court is exercising its powers of equitable redistribution. See also the comments of McGuinness J in the recent case, *MK* v *JP* (*otherwise SK*) (Supreme Court, unreported, 6 November 2001), discussed below.

Equality, status and contribution may now be subsumed into the broader heading of partnership and sharing. It has been argued that the true explanation and justification for the sharing of marital property is the presence of "common expectations" or "sharing principles".[31] In other words, neither marriage nor contribution alone will entitle a spouse to a share in property, but a share may be granted where the parties intended to own things in common, and to act as if the marriage were a partnership.[32] Here the criticism of the individualist approach is not based on, or solely on, the practical consequences of a separation approach. Instead, it is contended that individualism is an inappropriate guiding precept in relation to marriage or family property issues. There is a fundamental division between those advocating individualism, and those arguing in favour of communality or sharing. To the latter, it is simply not true to say that a marriage consists of individuals only, and that the same rules should therefore apply as would apply to complete strangers. As Gardner expresses it,

> ". . . the values which society expects to characterise the dealings between parties to an emotional partnership are not those of individual autonomy and discrete responsibility, but those of trust and collaboration".[33]

The approach here is not one of calculating relative profits or losses, which might require compensation or reallocation, but of recognising that the parties to a marriage will usually think in terms of joint rather than individual needs and gains. Although there may be situations where there was no such intention, it would seem reasonable to argue that it is a more appropriate "default understanding" of marriage than pure individualism, and that communality should generally be assumed in the absence of evidence to the contrary.[34]

To the "sharing" argument may be added one of human dignity. Unlike those who argue that separate property ownership fosters equality and responsibility, and hence (presumably) dignity, communitarians argue that it is the failure to reward both contributors to the marriage that undermines dignity. Women's dignity, in particular, is undermined by the legal view that non-earning parties, usually wives, contribute less to the marriage. As Vaughn notes,

> "The law in the common law states fails to recognize the wife as a helpmate and partner engaged with the husband in the

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[31] See, *e.g.*, Prager, "Sharing principles and the future of marital property law" (1977) 25 *UCLA Law Re*v 1. However, see also Glendon's comments in Glendon, *The New Family and the New Property* (1981), chapter 2.

[32] Common expectations should not be restricted to situations where the parties have specifically addressed the issue of property ownership: as Gardner and others have noted, this may rarely happen. Thus, Gardner argues that the better view is to look for the broader concept of "trust and collaboration." See Gardner, "Rethinking Family Property" (1993) 109 *LQR* 263.

[33] *Ibid* at 286.

[34] *E.g.*, by the existence of a pre-nuptial agreement stipulating otherwise.

> common enterprise of creating a family as well as a fortune, and refuses her the place of dignity to which she is entitled."[35]

If communality or sharing is accepted as the usual basis for marriage, it follows that the law should incorporate sharing principles by adopting some form of property sharing rather than a separation-based approach. Clearly, what is then required is a policy decision as much as one of principle, in terms of how this understanding should be implemented. Should the sharing be pre-determined and automatic, or should it vary with individual circumstances?

This question is linked with the final concern in this area, namely, justice. Like equality, this is paradoxically a concern of both sharing and separation approaches. In the separation of assets model, justice requires that a person's (often hard-earned) property remains exclusively his.[36] In a community or redistribution approach, justice requires that the contribution of the other spouse towards the acquisition should be recognised, and that the couple share the property acquired. A community regime assumes that justice should almost always result in an equal sharing; under equitable redistribution, justice and sharing may be informed by other considerations, such as need, earning potential and responsibilities. Consequently, equality is not always justice.

As between equitable redistribution and community of property, each system has advantages and disadvantages. Equitable redistribution offers a flexibility that a community approach cannot match, and the factors taken into account are generally fair and pertinent. For example, it seems reasonable to argue that a spouse of many years' standing should obtain a higher share than one newly married. The longer the parties have lived together, the more likely and appropriate it may appear for them to intend to share things and own them jointly. It also seems fair that a person who has contributed, in whatever manner, to the acquisition of wealth should participate in its benefits. Sharing and contribution principles may overlap here: if both spouses contributed to an asset, it seems likely that they intended to share it. If a broad approach is taken, emotional support and psychological commitment might also be taken into account in assessing contribution to the overall relationship,[37] though it is not clear what conduct

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[35] Vaughn, "The Policy of Community Property and Inter-spousal Transactions" 19 *Baylor LR* 20, cited in Reppy and Samuel (eds.), *Community Property in the United States* (2nd ed, 1982), p 4.

[36] One of the arguments most frequently advanced against automatic sharing is that it may lead to injustice, as the owner of property may be deprived of it after a short marriage by someone who has not contributed to the acquisition of the property (see generally Oldham, "Is the Concept of Marital Property Outdated?" (1983/84) 22 *JFL* 263). In fact, the share of property reallocated in either system discussed above will generally depend on factors such as the duration of the marriage; this may be an explicit factor for the deciding court to consider (as in the Irish legislation, discussed below), or may automatically serve to limit the property available for distribution, as in the French or German systems (discussed below).

[37] *E.g*, in *Black* v *Black* [1991] DFC 95 (Lexis citation), the New South Wales Court of Appeal noted that the "activities of a homemaker involve not only physical activities about the house but also the provision of support, love and affection. . . necessary to maintain a happy family unit".

should suffice in this regard. Other factors, such as the existence of children, or the fact that one person forewent opportunities for the overall good of the family (for example, by missing job opportunities), also merit consideration.[38]

By contrast, a community regime presumes from the beginning that the couple intended to share everything equally, in the absence of evidence to the contrary.[39] Both spouses are therefore aware from the start of their property entitlements, and that their individual efforts will advance the interests of both.[40] The community regime is therefore not only *based* on sharing, but also promotes it, as it strengthens the emotional and economic marital partnership.

## Classification Of Community Property Regimes

In order to provide a greater understanding of how community regimes operate, two contrasting models (those currently in use in France and Germany) will now be examined briefly.[41] These will then be contrasted with the system of separation of assets, which, ameliorated by equitable redistribution, is currently in force in Ireland. The applicable law in New Zealand, which incorporates elements of both systems, will also be briefly discussed, as will the recent proposals of the Law Reform Advisory Committee in Northern Ireland.

## Community Property In French Law

When two people marry in France, they necessarily opt for a particular financial arrangement,[42] either voluntarily or involuntarily. They may consciously select a particular marital regime, or devise one to suit their particular needs;[43] if no choice is made,[44] the law provides that the "legal

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[38] Indeed, it has been suggested that unless such factors as these are present, no real redistribution of assets should take place (see Oldham, *supra* n 36, at 287). This is justified variously on the basis of non-contribution, lack of true commitment, and equality (a refusal to "patronise" women, or a fear that injustice will be done to men); *ibid* at 284-286. Again, however, these factors can be combined with a sharing analysis: children (apart from requiring maintenance in themselves) may well demonstrate partnership and commitment to a relationship, as may a distribution of labour in the perceived best interests of the family. (This is certainly not to say that no such partnership can exist without children).

[39] Such as the couple contracting out of the statutory regime.

[40] Expectation, in this context, may also justify sharing.

[41] The French and German systems remain two of the most influential community property regimes, with equivalents being adopted in many other jurisdictions, and offer an interesting insight into some of the different ways in which community property may operate.

[42] Unmarried couples, including same-sex partners, have recently been permitted to organise their community life and define their property rights and responsibilities through a "civil pact of solidarity" (PACS) under the law of 15 November 1999.

[43] Since 1965, the Civil Code offers the separation of goods or participation in acquests (effectively a form of deferred community) as alternatives to the legal regime. The spouses may also devise their own marital regime, but cannot depart from the basic requirements (or "primary regime") contained in Title V, Chapter I of the Civil Code.

regime" will apply, and the spouses are deemed to have selected the system laid down in Article 1400 *et seq.* of the Civil Code.

The legal regime has been radically altered on a number of occasions, in response to social and historical changes.[45] The current system was introduced in 1965[46] and is confined to acquests only. The community is subject to the debts and liabilities of the marriage. The assets include all goods gainfully acquired by the spouses either separately or together, in the course of their marriage.[47] They also include the fruits or income derived from the goods they own separately.[48] Each spouse has the right to manage the jointly-held property.[49] However, the spouse making a decision will be responsible to the other spouse for any errors.[50] Where either spouse has a separate profession, he or she has the sole power of management in that regard.[51]

There are three funds into which all property must fall, namely, the husband's fund (his separate property), the wife's fund (her separate property), and the community fund (joint property). Each spouse is entitled to half the property acquired during the marriage, regardless of financial contribution. To determine which property belongs to which fund, it is necessary to have regard to particular principles. For example, classification of property according to its origin[52] or its nature[53] may result in its allocation to a particular fund. The liabilities of the community consist of the debts incurred by each spouse, in the course of the marriage. The creditor may satisfy these debts from the jointly-held property, unless the spouse who owes the debt committed fraud, and the creditor was not acting in good faith. However, even if a debt is binding on the community, compensation may be

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[44] Until recently, it appears that few couples exercised the right to opt out of the default system. However, Bell *et al* note that 60% of French spouses now choose to be subject to a separation of assets regime: Bell, Boyron and Whittaker, *Principles of French Law* (1998), p 225.

[45] Factors influencing change include the trend towards contracting out of the previous legal regime (of movables and acquests) and the perceived injustice of that regime. A third cause of change has undoubtedly been the rise of gender equality concerns. See *International Encyclopedia of Comparative Law*, paras 4-108 to 4-110. For an account of the pre-1965 regime(s), see Amos, *Amos & Walton's Introduction to French Law* (1967), chapter 12.

[46] Under the law of 13 July 1965.

[47] Art 1401 C Civ.

[48] *Ibid.*

[49] Art 1421 C Civ. Originally, the husband had sole powers of management, but this was changed by the law of 23 December 1985.

[50] Art 1421 C Civ.

[51] *Ibid.*

[52] Art 1401 C Civ provides that the community consists of acquisitions made by the spouses together or separately during the marriage, as a result of their personal skill, as well as savings made from the fruits and revenues of their own property. Under art 1405 C Civ, property acquired before marriage belongs to the spouses' individual funds, as does any property acquired by gift or inheritance during the marriage, unless otherwise specified. Joint gifts to spouses are presumed to belong to the community.

[53] *E.g.*, personal items (such as clothing or compensation actions for injuries) are separate property belonging to the individual, as are things essential to a separate profession (art 1404 C Civ). See also arts 1405-1408 C Civ.

payable in some cases.[54] The separate property of a spouse is not available to creditors of the other spouse, unless the debt is for household expenses or the children's education.[55]

The aim of the legal regime is to give each spouse independence with respect to his or her earnings and separate property, but to provide a form of joint management of common property where important transactions are concerned. Each spouse has complete control over his or her separate property.[56] However, if the regime is liquidated, each spouse may be held responsible to the community if he or she failed to collect the fruits of his or her separate property, or consumed them fraudulently, during the previous five years.[57] In addition, while the spouses have joint and several powers of administration over the community, certain important acts can only be done jointly.[58] Consent is required for gifts, the sale or mortgage of immovables or commercial enterprises, and for the alienation of any asset subject to the requirements of registration.[59] A second consent is required before the contracting spouse can collect the purchase price. Finally, the matrimonial home and contents receive special protection under French law.[60]

The community fund is protected by various devices.[61] If either spouse defaults seriously in his or her duties, so as to jeopardise the family's interest, the family court judge may order urgent protective measures, and forbid the defaulting spouse to dispose of his or her own or community property without the consent of the other spouse.[62] Where a divorce suit is pending, a judge may order any steps necessary to protect the rights of a spouse and the common property.[63] Ultimately, a spouse may sue to put an end to the community, if this is necessitated by the misconduct of the other spouse.[64]

The community property regime will automatically terminate on death, judicial separation or divorce.[65] The couple's acquests will then be itemised and divided equally between them (or, in the case of death, between the

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54 *E.g.*, where a community has paid the personal debt of a spouse, compensation is payable by that spouse to the community. See arts 1409-1418 C Civ for the debts of the community.

55 Art 1414(1) C Civ. This might be relevant where neither the spouse who incurred the debt nor the community has sufficient to discharge the debt.

56 Art 1428 C Civ.

57 Art 1403 C Civ.

58 For example, both spouses are required for a gratuitous disposition of community property; see Art 1422 C Civ.

59 Arts 1424 and 1425 C Civ.

60 Art 215 C Civ states that neither spouse can dispose of the rights which secure the family home or furniture without the consent of the other. The transaction may be authorised by the Court if consent is unreasonably withheld only where the act is being done in the interests of the family. Where one spouse has not consented to the disposition of the family home, he or she may apply to the Court to avoid the transaction within one year of becoming aware of it.

61 Originally, the aim of these devices was to protect the wife's interest, given the potential for abuse by the husband: see Foyer, in Chloros (ed), *supra* n 13, p 86.

62 Art 220(1) C Civ.

63 Art 257 C Civ.

64 Art 1443 C Civ.

65 Among other grounds; see Art 1441 C Civ.

surviving spouse and the estate of the deceased spouse). Maintenance may also be payable in the context of divorce or separation.[66] In the case of death, the surviving spouse may also be entitled to a share of the deceased's separate property.[67]

## Deferred Community In German Law

Like the French, the Germans opted to create a default statutory regime, which would apply unless the parties specifically opted for an alternative.[68] However, the statutory regime originally adopted was not one of community, but one of separation of assets, wherein the husband was given powers of administration over his wife's property. The wife retained legal title to the property she brought to the marriage, both real and personal, but lost the rights of administration, possession and profits to her husband. Alternative systems were also available, and the parties retained the power to alter the regime after marriage.[69] However, such changes would not be effective against third parties unless they were registered in the matrimonial property register operated by the county court.

As in France, social conditions changed greatly after the introduction of the original system. After World War II a "community of increase"[70] was adopted as the default regime. This is often described as a hybrid system, as it presents characteristics of both the separate property system and the community system. The aim is to divide the increase in value of the property equally between the spouses, at the end of the marriage. The spouses retain their separate property so long as the marriage continues, but if they divorce, the spouse with the larger increase must give half the difference in value to the other.[71] This is essentially a system of deferred community. If the marriage ends on death, an extra quarter of the deceased's estate is generally added to the surviving spouse's statutory portion, irrespective of any increase in the value of either spouse's property during the marriage.[72]

The German system does not provide for the sharing of all marital property, but merely for the sharing of the increase in value of marital property. All that is given is a money claim, rather than the right to any particular asset. During the marriage, there is no marital fund (as there is in the French system), but only the separate funds of either spouse.[73] No distinction is

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66 Arts 282 and 293 C Civ.

67 Art 767 C Civ.

68 Alternatives to the statutory regime include the separation of assets and a community of property (effectively universal community, subject to exceptions and reservations).

69 This was not possible in France prior to the 1965 reforms.

70 Zugewinngemeinschaft. For a detailed account of the general background and the current system, see Thiele, "The German Marital Property System: Conflict of Laws in a Dual-nationality Marriage" (1982) 12 *California Western Intl LJ* 78, or Graue, *supra* n 10.

71 S 1378(1) BGB. However, even though property ownership is separate, and the property is administered independently, the spouses are limited in the exercise of their powers in some respects: see sections 1364-1366 and 1369 BGB.

72 S 1371 BGB.

73 Thiele considers that the term "deferred community" is a misnomer, when applied to German law, "because no genuine community is created. Rather, the new

made with regard to how the increase was arrived at.[74] The division is confined to increases in value: there is no concept of sharing a loss suffered by the other spouse, as there is in French law.

In terms of valuing the initial estate of each spouse, the spouses may agree an inventory of initial belongings, which is then presumed to be correct.[75] If no inventory is agreed, there is a presumption that there was no initial estate, with the result that each spouse will be assessed on the full value of their current property, i.e. everything the spouse now owns is treated as an "increase". Consequently, the difference in total value of the two estates is divided between the spouses. Since few couples will trouble to prepare an inventory, what was intended to be a division of the difference in increase in value often ends up as a division of the difference in total value of the spouses' estates. However, a saving provision provides that if there is a "grave inequity," the court is given a certain measure of discretion in assessment and division.[76] Finally, even though neither spouse has an interest in the specific assets of the other, each needs the other's consent for certain transactions.

Overall, the German marital regime provides for each spouse in the event of death or divorce, while leaving a high degree of independence to each during the course of the marriage. It achieves this aim in quite a different manner to the French community system, as in Germany no community or claim exists until the property is being divided. The division of the increase is designed to leave the two parties benefiting equally from the marriage, however they contributed during the course of the relationship. This may lead to some unfairness, but by and large, the premise is the same as in the French system: it is presumed that the parties are true partners, and entitled to equal distribution, save in cases of extreme inequity.

## Community Property In New Zealand

The law on division of matrimonial assets in New Zealand represents an interesting compromise between the certainty and sharing aspects of the community property approach, and the flexibility and concern for needs and justice of equitable redistribution. Under the Matrimonial Property Act 1976, the contributions of both spouses to the marriage partnership are

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regime is one of separate property during marriage, with compensation or balancing of the individually-won gains upon termination of the marriage" (*supra* n 70, at 84). Similarly, Graue comments that the spouse's share of the other's gain constitutes a "compensatory debt," and that there is no community as such, since there is no split in title. See Graue, *supra* n 10, at 126.

74 The only exception relates to gifts and inheritances during the marriage: these are added to the "initial value" of the relevant spouse's property, *i.e.* she is treated as if the property was acquired before marriage, and thus will not have to divide the value of the increase it represents.

75 Unless the parties listed their assets in an inventory prior to the marriage, all assets are presumed to have been acquired after the marriage (s 1377 BGB). This approach is not free from criticism, see *e.g.* Neumayer, "General Introduction: Report on Comparative Law", in Chloros (ed), *supra* n 13, p 14.

76 S 1381 BGB. S 1381(2) provides that gross inequity can exist particularly if the spouse who made a smaller increase over a considerable period negligently failed to carry out the economic obligations which are inherent in marital relations.

recognised as equal, and the concern of the Act is to provide for a just distribution of assets when the marriage ends by separation or divorce. Property is divided into matrimonial and separate assets, with only the former being subject to the Act. As in Germany, there is no community during marriage, and property division is deferred until termination of the relationship. It is also possible to avoid the application of the legislation by formal agreement, subject to review by the courts.[77] Matrimonial property is defined as all property acquired by either spouse after the marriage, together with assets acquired after marriage for the couple's common use and benefit out of property they owned before marrying, and any pension or other entitlements arising after marriage.[78] Separate property is defined as property acquired by either spouse while they were not living together, unless the court considers it just in the circumstances that such property should be treated as matrimonial property.[79] Hence, matrimonial property is generally limited to assets acquired before the parties ceased to live together, or at the latest, by the time of the proceedings. The former date determines the right to a share, and the latter determines the valuation.

In principle, the matrimonial property is divided equally between the husband and wife, and the Act proceeds on the premise that the efforts of one spouse in the domestic sphere are intended to free the other spouse to concentrate on working outside the family home, to the benefit of the family as a whole. Hence, each spouse is taken as contributing in a different but equally important manner to the marriage partnership.[80] The 1976 Act subdivides matrimonial property into two categories. The first category, consisting of the matrimonial home and chattels, is shared equally between the spouses[81] unless the marriage is of short duration[82] or there are "extraordinary circumstances" making such equal sharing "repugnant to justice".[83] In this situation, the assets are shared in accordance with the contribution of each spouse to the marriage partnership.[84] The second category comprises all other matrimonial property; here, there is a presumption of equal sharing, unless the contribution of one spouse to the marriage partnership has been clearly greater than that of the other, in which case the property is shared in accordance with the contribution of each to the marriage partnership.[85] "Contribution" is broadly defined, and specifically

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77 Under s 21 of the 1976 Act, the court may declare that an agreement is wholly or partly ineffective, either because of non-compliance with the statutory formalities, or because it would be unjust to give effect to the terms of the agreement. In considering the potential injustice of the agreement, the court must have regard to its provisions, the time that has elapsed since it was entered into, whether it was unfair or unreasonable at the time it was entered into, or whether it has become unfair or unreasonable because of a change in circumstances.

78 S 8.

79 S 9(4).

80 See the comments of Richardson J in *Reid* v *Reid* [1979] 1 NZLR 572, 611, and also the comments of the Minister in the second reading of the Matrimonial Property Bill (408 *New Zealand Parliamentary Debates*, 4565).

81 S 11.

82 This is defined as a marriage of less than three years duration (s 13).

83 S 14.

84 S 14.

85 S 15.

includes both financial and domestic contributions, the forgoing of a higher standard of living which would otherwise be available[86] and the giving of assistance or support to the other spouse, whether or not of a material kind.[87] Assistance or support specifically includes help that enables the other spouse to acquire qualifications[88] or that aids him in his occupation or business.[89] Monetary contributions are not presumed to be more valuable than non-monetary ones.[90]

Hence, although the 1976 Act primarily enforces a community property approach, a place remains for the exercise of judicial discretion, where equal distribution would be manifestly unjust.[91] However, rather than a full supplementary power of equitable redistribution, where the court might redistribute the property as it thought just, the redistribution must be based on "contribution" to the relationship. This clearly derives from the communitarian emphasis on sharing and partnership, where the emphasis on equality is based on a belief that equal contributions are made by both spouses. Nevertheless, it shares important features with equitable redistribution powers, as prevailing in other jurisdictions, particularly in the listing of a wide range of factors that can be taken into account in determining the "contribution" of each spouse.[92]

The Act operates on a "clean break" principle. On the breakdown of the relationship, the matrimonial property is divided between the former spouses, who are thereafter free from property claims by each other. A similar principle applies with regard to spousal maintenance proceedings under the Family Proceedings Act 1980. Generally speaking, spousal maintenance after the end of the marriage will be short-term only, and will be strictly needs-based. Maintenance will usually terminate on divorce, but this is not always the case, as it may continue where it is necessary to meet the reasonable needs of the other party, which cannot be met by the party herself. Inability to meet reasonable needs may arise from factors including custodial arrangements, the division of functions within the marriage or the need to undertake re-education or re-training to facilitate independence.[93] Maintenance may also be continued if it is necessary to meet reasonable needs, and it would be unreasonable not to award maintenance, considering the ages of the spouses and the duration of the marriage.[94] The impact that this restrictive approach to maintenance may have on the equality ideal will be discussed in the final sections of this paper.

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86 S 18(1)(g).
87 S 18(1)(h).
88 S 18(1)(h)(i).
89 S 18(1)(h)(ii).
90 S 18(2).
91 It is clear that this will arise only in very exceptional circumstances.
92 S 18 of the 1976 Act.
93 S 64(1) of the 1980 Act.
94 S 64(3) of the 1980 Act.

## Proposals For Co-Ownership Of Matrimonial Property In Northern Ireland

In Northern Ireland, as in Ireland, it is generally presumed that the person who paid for property is the owner of it, and that the individual's property rights are not altered by marriage. However, under trusts law, a spouse (or other person) can acquire an interest in property by contributing to its acquisition.[95] "Contributions" are strictly defined, and so-called "indirect" contributions (for example, the payment of household bills) will generally not suffice.[96] This stringent approach is ameliorated by statutory provisions, one of the most important of which is the Matrimonial Causes (Northern Ireland) Order 1978. This confers on courts the power to transfer property between spouses in divorce, nullity and judicial separation proceedings, after considering a number of statutory factors. Other important rights include the statutory right of occupation in the matrimonial home, under the Family Homes and Domestic Violence (Northern Ireland) Order 1998. As yet, however, no automatic ownership rights are conferred on spouses in Northern Ireland, although this may be about to change following the recent recommendations of the Law Reform Advisory Committee for Northern Ireland (LRAC).[97]

The LRAC's recommendations are focused primarily on the family home,[98] housekeeping money and household goods. Regarding household assets, the LRAC recommends that property acquired by either spouse, or both, or transferred by one to the other, for the joint use of the couple, should generally be jointly owned. This would be subject to exclusion by the parties, which would be established by the acquiring or transferring party making it known to the other party, at the time of the transfer or acquisition, that ownership was not being transferred.[99] How this should be evidenced is not discussed in the report, and seems likely to be the subject of dispute.

Although the discussion in chapters 3 and 5 of the Report is focused on "household goods and housekeeping money", the scope of the actual recommendation made[100] is such that almost any asset acquired for joint use or jointly purchased may come within the ambit of the rule.[101] For example, a family car, though not usually understood as a "household good", may be covered by the rule.[102] The main difficulty with the provision concerns the

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95 *McFarlane* v *McFarlane* [1972] NI 59; *C* v *C* [1976] IR 254.

96 Unless there is an express agreement to the contrary; see *McFarlane* v *McFarlane* [1972] NI 59, and the general summary of the law contained in the Law Reform Advisory Committee Report below.

97 *Matrimonial Property*, Law Reform Advisory Committee for Northern Ireland Report No 10 (LRAC No 8, 2000) (hereafter "the Report"), which followed on *Matrimonial Property*, Law Reform Advisory Committee for Northern Ireland Discussion Paper No 5 (1999).

98 The term "joint residence" is used throughout the Report, as the Report also makes recommendations concerning certain co-habiting couples.

99 See para 5.12 of the Report.

100 Recommendation 4 in Chapter 6 of the Report.

101 Excluding land, business assets, the joint residence, life assurance policies or contracts of deferred annuity.

102 This is a deliberate departure from Scottish law; see paras 5.10 and 5.11 of the Report.

potential difficulties caused by equitable interests for third parties, particularly purchasers and creditors. It is not clear how extensive a doctrine of notice will be applied: for example, is a purchaser of property from a married person[103] automatically put on notice that the vendor's spouse may be entitled to a joint equitable interest in that property? Indeed, what level of joint use is required to render an asset co-owned, and what level of enquiry by purchasers is required?

Greater difficulties may arise in the context of the family home. Emphasising that the female partner is historically and socially more likely to be disadvantaged with regard to property ownership, the LRAC recommends that a presumption of an equitable joint tenancy should apply to the couple's joint home. This presumption could be rebutted by an express agreement to the contrary by the parties, evidenced in writing. The presumption would not apply retrospectively, but would arise in every subsequent transaction involving the acquisition of a principal joint residence by a married couple, or by either spouse, or where a joint residence was put by either spouse into the name of the other. Retrospective application is rejected as being likely to interfere with prior agreements between spouses, and as being a disproportionate interference with property rights.[104] Instead, where a situation is not covered by the proposed legislation, it is recommended that the court should be directed to consider a number of factors in determining the parties' respective beneficial interests in the property.[105]

Although the LRAC gives reasoned arguments in support of its proposals, the result is unfortunate. As between spouses, a two-tier system is proposed, whereby older wives, in established homes, are unlikely to benefit from the new system. Given that these wives are likely to be those most involved in "traditional" marriages, it seems strange that they are least likely to benefit from the proposals, while younger wives, who are more likely to be earning, and to acquire their homes jointly with their spouses, are covered by the proposed new rules.

Admittedly, older wives would come within the LRAC's alternative system, and might be awarded a beneficial interest in the home under the criteria contained in paragraph 5.34 of the Report. These generally relate to contributions "in money and money's worth", but the nature of these contributions is not specified. In particular, does a contribution "in money's worth"[106] include work in the home and childcare, and if so, how is the value of these contributions to be quantified? Previous experience in other jurisdictions (for example, New Zealand) does not suggest that much value is placed by the judiciary on contributions of this type.[107] Similarly, what exactly are the "reasonable expectations of the parties in all the circumstances of the case"[108], and how are they to be assessed and

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[103] Or a co-habiting one, within the meaning of the Report.
[104] See para 5.25 of the Report.
[105] See paras 5.32 to 5.34 of the Report.
[106] Para 5.34(a) of the Report.
[107] See Peart, "Towards a Concept of Family Property in New Zealand" (1996) 10 *Int'l J. of Law, Policy and the Family* 105 at 112.
[108] Para 5.34(f) of the Report.

quantified? Is this a purely objective criterion, or is there a subjective element?

Although some of the stated criteria may be helpful in expanding the restrictive approach of equity, many of the factors listed in the Report seem likely to lead to further difficulties, despite the LRAC's views to the contrary.[109] While considerations of beneficial entitlement may be overlooked in the marriage breakdown context, as the court may then utilise its power to adjust property rights,[110] it is likely that much less protection will be afforded to "traditional" wives in the context of bankruptcy or the repossession of property. Difficulties may also arise for creditors, with regard to the taking or realisation of a secured interest in the family home.[111] Many of these difficulties could be avoided by a deferred community approach, which would generally not affect third party rights, would eliminate the need to determine whether an asset was acquired for joint use, and would generally avoid the complications of potential equitable interests. As against this, a spouse in a deferred community regime would have no property entitlements until the termination of the marriage, and might therefore be deprived of the psychological advantage of financial power during the marriage. A deferred community regime would therefore fail to give a spouse priority over third parties, including creditors, as the LRAC's proposals might do.

## Separation Of Assets, Equitable Redistribution And Irish Law

In Ireland, as in Northern Ireland, the basic separation of assets approach is modified by trusts law. In this regard the Irish courts have permitted a greater degree of latitude in the interpretation of what amounts to a contribution, than the judiciary in Northern Ireland.[112] However, many of the applicable rules can still seem rigid and illogical.[113]

Finding a pre-existing proprietary interest is no longer necessary between spouses as the strict principles of separation have been ameliorated by the

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[109] Para 5.35 of the Report.

[110] The Report does not state that the new joint ownership system would replace the equitable redistribution system currently in place, and therefore it is assumed here that the proposed new provisions would be in addition to the existing provisions.

[111] For a more complete discussion of this issue, see Fox, "Co-ownership of Matrimonial Property: Radical Proposals for Reform" (2001) 52 *NILQ* 20 at 43.

[112] *E.g.*, an indirect financial contribution to a family fund, which enables the owning spouse to pay the mortgage, is a sufficient contribution, unless the contrary has been agreed. *McC.* v *McC.* [1986] 6 ILRM 1.

[113] *E.g.*, contributions to "improvements" generally do not count as contributions to the acquisition of property, but as a gift to the landowner: *NAD* v *TD* [1985] 5 ILRM 153. Work contributions in the husband's business may have a monetary value, but work in the home does not, as it is something the wife might be expected to do in any event (see Mee, "Trusts of the Family Home: the Irish Experience" (1993) *Con*v 359 at 366). Even where a wife has contributed by work, it may be insufficient to obtain a share, even if this was intended by both parties: see *CR* v *DR* (High Court, unreported, April 1984) and Shatter's comments thereon (Shatter, *Shatter's Family* Law (4th ed, 1997) (hereafter "Shatter"), p 803).

principles of equitable redistribution through a range of recent enactments.[114] Under the new legislation, ownership is acknowledged, yet may be deemed unjust or unsatisfactory, considering the circumstances of the case.[115] Indeed, it seems that strict separation principles are now so adulterated that in many respects the parties' respective assets form one almost homogeneous mass, ready for appropriate division.[116] Although the legislature has provided some degree of guidance as to how this division should occur,[117] there remains a high degree of uncertainty: no spouse can be sure of his or her rights until the court has spoken, and even then, it is clear that no form of closure can be relied on.[118] Finally, although the principles of equitable redistribution may be said to be based on some of the same ideas as community of property (most notably, the view that there is an economic partnership between the spouses), this partnership is usually only given effect when the marriage ends, with the result that there is no equality between the spouses until that time, and perhaps not even then.[119]

Currently, where spouses disagree, separate or divorce, the court may make ancillary orders, including property adjustment orders and lump sum payment orders, under the Judicial Separation and Family Law Reform Act 1989, the Family Law Act 1995 or the Family Law (Divorce) Act 1996.[120] The relevant provisions contained in the 1989 Act were repealed and replaced by the 1995 Act, which applies in the context of any judicial separation proceedings instituted after the commencement of that Act.[121] The court's powers are very extensive; orders might include the sale of property and division of the proceeds (not necessarily in proportion to ownership of the property), or ordering one spouse to transfer his or her interest in

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[114] The Judicial Separation and Family Law Reform Act 1989, the Family Law Act 1995 and the Family Law (Divorce) Act 1996.

[115] As opposed to a trusts analysis, where it is concluded that property is not owned as per the legal title.

[116] See the comments of Lord Denning in the English case, *Hanlon* v *The Law Society* [1980] 1 All ER 763 at 770. In Ireland, the parties' pre-existing property rights are merely one factor among many for consideration, albeit one that many courts emphasise.

[117] See below.

[118] See, *e.g.*, *J.D.* v *D.D.* [1998] FLJ 17. In the High Court, McGuinness J commented that by enacting the 1996 Act, the legislature "has made it clear that a "clean break" situation is not to be sought and that, if anything, financial finality is virtually to be prevented. . . " S 22 of the 1996 Act and s 18 of the 1995 Act explicitly confer on the court almost unlimited powers to vary, suspend or terminate earlier orders, excluding only a few situations where limited blocking orders may be made (*e.g.* in relation to settlements).

[119] Obviously, a similar criticism may be made of a deferred community system, although there, spouses are at least aware of their future entitlements.

[120] This article concentrates on the property adjustment and lump sum provisions contained in the legislation, but other orders affecting property may also be made. These include financial compensation orders, by which the court may make provision for the future financial security of a spouse, and compensate her for financial loss, by means of insurance policies. Maintenance orders, pension adjustment orders, and miscellaneous ancillary relief orders are also available.

[121] The property provisions of the 1989 Act are now effectively irrelevant in practice, as they apply only in very limited circumstances (s 3(2)(c) of the 1995 Act).

property entirely to the other.[122] However, in applying the legislation, the courts have tended to have regard to the extent of the parties' pre-existing rights: for example, a court might not be willing to transfer the entire interest in the family home to one spouse, but might transfer the outstanding share to a spouse who is already entitled to a partial interest. The quantification of the parties' relevant shares in the property therefore remains relevant, as this can affect the court's view of justice in any particular case.[123]

## The Irish Legislation In Practice

A key question in Irish law is whether the courts are in fact taking advantage of the formidable array of powers currently at their disposal, and to what extent they are inclined to emphasise the legal ownership of the assets in question, rather than other matters such as the degree of sharing, moral support and contributions to home life which a non-owning spouse may have made during the marriage.

It is difficult to analyse judicial practice in this area, as there are comparatively few reported judgments. Many cases settle before hearing,[124] orders are often consensual,[125] judgments are mostly unwritten and contain little theoretical analysis, and the level of discussion of the relevant principles is generally not high. Even where a written judgment is available, it frequently fails to list or value all the assets available. It is therefore extremely difficult to establish exactly how property is distributed. Finally, given the comparatively recent nature of the 1995 and 1996 Acts, time must be allowed for a settled line of authority to emerge, although it would seem reasonable to expect a similar interpretation to the equivalent provisions in the 1989 Act.[126]

In making ancillary orders, including property distribution and lump sum orders, courts are required to consider particular criteria. The key requirement in the 1995 Act is that the provision made must be "adequate and reasonable",[127] while the 1996 Act states that "proper provision" should be made for the spouses and the children of the marriage.[128] Neither phrase is defined, but both Acts list factors to which the court must pay particular

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[122] S 9(1)(a) of the 1995 Act and s 14(1)(a) of the 1996 Act. Coggans and Jackson comment that "[i]n practice orders under s 14 are most frequently made by way of a simple transfer of the property, usually the family home and contents, from one spouse to the other in consideration of a lump sum payment by the other spouse to the value of their [*i.e.*, the transferor's] interest in the property, or a portion thereof depending on the transferee's ability to pay." See Coggans and Jackson, *Family Law (Divorce) Act, 1996* (1998), p 37.

[123] Compare, *e.g.*, *EM* v *WM* [1994] 3 FLJ 93 with *O'L(A)* v *O'L(B)* [1996] 2 FLJ 63, both discussed below.

[124] Walls and Bergin, *The Law of Divorce in Ireland* (1997), p 101.

[125] Clissmann, "Ancillary Relief Update" (Family Law in Ireland Conference, Dublin, 26 March 1998), p 24.

[126] Different principles might well be thought to apply to a property division in the context of judicial separation, than in that of divorce. However, this is not the position adopted in Ireland.

[127] S 16(1) of the 1995 Act.

[128] S 20(1) of the 1996 Act.

regard in reaching its decision.[129] Relevant factors include the present or likely future "income, earning capacity, property and other financial resources"[130] and the "financial needs"[131] of each spouse. No order may be made unless it is in the interests of justice.[132]

Although potential earning capacity will be considered by the courts,[133] it is clear that less stringent standards may well be applied where a home-making spouse is concerned.[134] Equally, however, the court may be influenced by the need of a spouse to retain assets for a particular reason. Where wives are concerned, the asset tends to be the family home, and the need related to childcare;[135] for husbands, the need may well be business related.[136] The assets of both spouses will be viewed in their entirety, and the courts are not restricted to the assets acquired during the marriage; indeed, such matters as potential legacies or income from trust funds, at unspecified future dates, may also be taken into account.[137]

A key problem in Irish law is that the primary aim of the legislation is unclear. Although the criteria listed for judicial consideration are all legitimate, as Power notes with reference to the 1996 Act,

> "What is missing is the bigger picture. What outcome are the criteria designed to achieve between the couple? To ask this is to speculate on the aim that underlies the making of orders and

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[129] Ss 16(2)(a) to 16(2)(1) of the 1995 Act and s20(2)(a) to 20(2)(1), and s 20(3) of the 1996 Act. These criteria apply where the applicant is a spouse. Other criteria apply where the applicant is a dependent family member.

[130] S 16(2)(a) of the 1995 Act, and s 20(2)(a) of the 1996 Act.

[131] S 16(2)(b) of the 1995 Act and s 20(2)(b) of the 1996 Act.

[132] S 16(5) of the 1995 Act and s 20(5) of the 1996 Act.

[133] S 20(2)(e) of the 1996 Act (s 16(2)(e) of the 1995 Act), provides that "any physical or mental disability" of either spouse is a matter to be considered by the court. In *S.B.* v *R.B.* [1996] IFLR 220, the wife's medical condition, which made it difficult to earn any substantive income, was taken into account by the court in reaching its decision.

[134] In *B.F.* v *V.F.* [1994] 1 FLJ 15, it was held that it was "reasonable and proper" for the wife not to seek work outside the home "at present", as she was providing a home for the three children of the marriage, "a full-time occupation in itself."

[135] Ward, for example, regarding a sample of District Court maintenance applications, noted that 86% of wives had dependent children living with them at the time of the application. See Ward, *Financial Consequences of Marital Breakdown* (1990), p 27: hereinafter referred to as "Ward (1990)". S 20(2)(j) of the 1996 Act (s 16(2)(j), 1995) requires the court to have particular regard to "the accommodation needs of each spouse," and s 15 (s 10, 1995) also requires that "proper and secure" accommodation should be provided, where practicable, for a spouse who is wholly or mainly dependent on the other, and for any dependent children. However, the wife may simply be given occupational, rather than ownership rights (*e.g.* until the children leave the home), or indeed, the home may be sold, and the proceeds divided to allow for new accommodation to be acquired; *AO'L* v *BO'L* [1996] 2 FLJ 63.

[136] In *J.D.* v *D.D.* [1998] FLJ 17, it was held that the husband's need to retain a sufficient working capital for his business as an auctioneer meant that £160,000 should be left in the business.

[137] *E.g.*, in *J.D.* v *D.D.*, *ibid*, McGuinness J held that the court could take account of the husband's likely allocation of money from a family trust fund, and the high degree of unlikelihood of a similar allocation being made to the wife.

> there is little legislative guidance on this, except that, whatever the aim is, it must be proper in the circumstances".[138]

Overall, the greatest emphasis appears to be placed on the needs of the parties at the time of the application, as opposed to the making of a fair overall distribution based on the respective contributions to the marriage.[139] However, it is probable that this depends on the circumstances of the parties: the greater the degree of wealth, the likelier a redistribution of assets, both because more is available, and because the parties may have higher expectations and standards of living.[140] There appears to be quite a high degree of judicial realism here; the courts have noted that in most property divisions in the event of marriage breakdown, there is very little to go around, and that it is likely that all parties will end up less well-off than before.[141] It should not be forgotten that the main emphasis in many cases will be on obtaining sufficient maintenance, rather than on a division of assets, although the high degree of non-compliance with maintenance orders[142] may well incline the courts toward making a lump sum provision, where possible.

The court must also have regard to the spouses' ages, the duration of the marriage, and the length of time that they lived with one another.[143] These factors may be significant in two respects: the duration of the partnership may lead to a presumption that a higher degree of sharing is appropriate, and the older the spouses are, the less their earning capacity may be.[144] A woman who has spent her life as a homemaker may be an unsuitable candidate for the job market, due to market competition and lack of training, and it may also be unfair to expect her, at a late stage of her life, to reverse all the

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138 Power, "Maintenance: No Clean Break with the Past" [1998] 1 *IJFL* 15 at 16.

139 S 20(2)(b) of the 1996 Act also requires the courts to have regard to actual and potential "financial needs, obligations and responsibilities" of each spouse, including needs arising in the case of remarriage (s 16(2)(b) of the 1995 Act).

140 S 20(2)(c) of the 1996 Act also specifically requires the court to consider the standard of living previously enjoyed by the family or spouses (s 16(2)(c) of the 1995 Act).

141 See, *e.g., R.H.* v *N.H.* [1986] ILRM 352 and *B.F.* v *V.F.* [1994] 1 FLJ 15.

142 See Ward (1990), *supra* n 135, p 35. Ward found that, of a large sample of District Court maintenance orders paid through the District Court Clerk, 28% were never paid at all, 49% were more than six months in arrears, 10% were in arrears for less than six months, and only 13% were fully paid up. Overall, 77% of all maintenance orders were in arrears for over six months. However, as noted by Walls and Bergin (*supra* n 124, p 114), these figures do not take account of situations where maintenance is agreed informally by the parties, or in a separation deed, or where the order is made by the Circuit Court or High Court. See also the comments of Fahey and Lyons on Ward's analysis: Fahey and Lyons, *Marital Breakdown and Family Law in Ireland: a Sociological Study* (1995), p 85.

143 S 20(2)(d) of the 1996 Act (s 16(2)(d) of the 1995 Act).

144 S 20(2)(g) of the 1996 Act requires the court to consider the "effect on the earning capacity of the spouses of the marital responsibilities assumed by each," especially where these duties have resulted in one spouse having "foregone the opportunity of remunerative activity" (s 16(2)(g) of the 1995 Act). In *D* v *D* (Supreme Court, unreported, July 1991), the wife's share was increased because she had sold her own business at her husband's request, on marrying him 28 years before.

expectations and decisions on which her life has, until then, been based. However, an elderly spouse may also have a low life expectancy, with the result that a moderate capital provision may be sufficient for her needs.[145] Finally, where a marriage is of short duration, a court would probably be reluctant to grant a share of the other spouse's property, especially where it was acquired prior to the marriage.

Section 20(2)(f) of the 1996 Act[146] requires the court to have regard to:

> "the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including the contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family."

The contributions to be evaluated do not only relate to the past, but may be potential or future (for example, continued childcare responsibilities). This statutory emphasis on the homemaker's contributions contrasts starkly with the judicial position adopted in the law of trusts, where work in the home clearly does not constitute a contribution to the home's acquisition.[147] Presumably, the legislature was justifiably apprehensive as to the consequences if no express stipulation of this kind were included, although individual judges have expressed a sense of the value of the homemaker's contributions.[148] Indeed, a similar provision had been included in the 1989 Act,[149] clearly demonstrating a gradual shift in emphasis from purely financial considerations to evaluating the role of both parties in a broader light.

Although the courts have the power to take such factors into account, to what extent are they willing to do so? It is clear that merely empowering judges to take note of homemaking contributions will not necessarily result in weight being given to them, particularly where the bulk of the family property is owned by the other partner. In New Zealand, difficulties arose in applying a similar provision of the Matrimonial Property Act 1963, which specified that the court could have regard to contributions in "money payments, services, prudent management or otherwise howsoever". Despite the clear aim of acknowledging the contributions of home-making spouses, the provision was

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145 See, *e.g.*, *Page* v *Page* [1981] 2 FLR 198.

146 S 16(2)(f) of the 1995 Act.

147 See, *e.g.*, *R.K.* v *M.K.* (High Court, unreported, 24 December 1978). One of the principal difficulties here is that of measuring the monetary value of work in the home. With regard to the 1996 Act, Shatter (*supra* n 110, p 829, n 587) comments that "the courts have not in practice specifically spelt out an applicable methodology for determining the exact monetary value of such contribution but have merely regarded it as one of the statutory factors together with others to be taken into account. . . "

148 See, *e.g.*, Lord Denning MR's comments in *Wachtel* v *Wachtel* [1973] 1 All ER 829, or the comments of Barr J in the High Court decision in *L* v *L* [1989] ILRM 528. The recent House of Lords decision in *White* v *White* [2001] 1 AC 596 recently affirmed the equal significance of financial and domestic contributions. See the speech of Lord Nicholls at 605, and also the comments of Lord Cooke, regarding previous judicial attitudes to non-financial contributions (at 613).

149 S 20(2)(f) of the 1989 Act and s 16(2)(f) of the 1995 Act.

restrictively interpreted, and domestic contributions were conservatively valued.[150] Similar difficulties have arisen in England and Wales,[151] although these may now have been resolved by the recent House of Lords decision in *White* v *White*.[152] Affirming the value of both domestic and financial contributions, Lord Nicholls commented:

> ". . . [W]hatever the division of labour chosen by the husband and wife, or forced upon them by circumstances, fairness requires that this should not prejudice or advantage either party when considering. . . the parties' contributions. . . If, in their different spheres, each contributed equally to the family, then in principle it matters not which of them earned the money and built up the assets. There should be no bias in favour of the money-earner and against the home-maker and carer".[153]

In Ireland, the weight given to non-financial contributions varies with the court.[154]

The conduct of the spouses may also be taken into account, if the court is of the opinion that it would in the circumstances be unjust to disregard it.[155] "Conduct" would presumably include adultery and cruelty,[156] so that this stipulation sits strangely with the "no fault" concept of divorce enshrined in the legislation and the Constitution. The significance of conduct such as adultery may vary with the facts and with the court. However, it seems reasonable that where divorce means that both parties are financially worse off, the party at fault should to some extent bear the cost of the loss induced by his or her conduct.[157] Finally, the "rights of any person other than the spouses, including a person to whom either spouse is remarried" may also be

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[150] See, *e.g.*, Peart, *supra* n 107. This difficulty led to the specific granting of equal weight to domestic contributions in the Matrimonial Property Act 1976.

[151] Walls and Bergin, *supra* n 124, p 103.

[152] [2001] 1 AC 596.

[153] *Ibid*, at 605. Although the court emphasised that there was no presumption of equal division, it noted that there was now "greater awareness of the value of non-financial contributions to the family" (*ibid*), and addressed the need to reconcile fairness and the needs or "reasonable requirements" of the parties, and to avoid discrimination.

[154] *E.g.*, *J D* v *D D* [1998] FLJ 17 (discussed below).

[155] S 20(2)(i) of the 1996 Act and s 16(2)(i) of the 1995 Act.

[156] In *EP* v *CP* (High Court, unreported, 27 November 1998), p 2, McGuinness J noted that the husband "showed no sign of regret for the breakdown of his marriage", which resulted from his adultery and desertion, and showed "very little sign of a real sense of responsibility for the upbringing and financial backing of his children".

[157] In *M Y* v *A Y* [1997] 3 FLJ 86, Budd J cited with apparent approval a dictum of Costello J in *ED* v *FD* (High Court, unreported, 23 October 1980) that a husband who deserted his family should be the one to suffer a fall in income, if this was necessary to protect the financial position of the wife and children. Similarly, in *B (S)* v *B (R)* [1997] 3 FLJ 66 at 69, McGuinness J felt that the husband's adultery was a relevant factor in the apportionment of assets, although in her decisions in *A F* v *E F* (Circuit Court, unreported, May 1995) and *E M* v *W M* [1994] 3 FLJ 93, she held that, on the facts, it was not. However, in the last mentioned decision, the husband's financial conduct and long history of non-payment of maintenance was taken into account (*ibid* at 96).

considered by the court,[158] as may the terms of any separation agreement the couple have entered into, where that agreement is still in force.[159]

As noted previously, it is difficult to establish precise trends or principles in asset division, given the dearth of reported cases in this area. However, a brief analysis of some of the leading cases clearly demonstrates that judicial views of "proper" provision, in terms of both maintenance and equitable redistribution of capital assets, are highly inconsistent.[160] In *JD* v *DD*, McGuinness J held that the financial circumstances were such as to permit a lump sum provision as well as periodic maintenance. Given the length of the marriage, the lack of any career prospects for the applicant, the fact that the respondent was able to accumulate considerable wealth during the marriage due to the low level of matrimonial expenditure, the applicant's work in the home, and the fact that her role as homemaker was approved by the respondent, McGuinness J felt that a "reasonably equal" distribution was appropriate. She therefore ordered payment of a lump sum by way of maintenance of £200,000[161] to be paid to the applicant.[162] A similar preference for equality was evident in *EP* v *CP*.[163] Here, most of the family savings were agreed to have arisen out of work done by the husband, but this was because the household was apparently run on the wife's salary. Again, a reasonably even distribution was made by the court, with McGuinness J noting that "it was a joint enterprise and must be taken as such."[164]

However, equality is not the sole guiding principle of the courts: other concerns include fairness, particularly to parties making financial contributions. In *O'L(A)* v *O'L(B)*,[165] a judicial separation case, McGuinness J was strongly influenced by the fact that "virtually all of the financial contributions" to the family home came from the husband,[166] although the wife had made some indirect contributions from her savings, and had given up her career to care for the child and the home generally. McGuinness J commented that, from a point of view of justice, "[A] proposal simply to

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158 S 20(2)(l) of the 1996 Act. No equivalent provision was contained in the 1989 Act, although (strangely) one is contained in s 16(2)(l) of the 1995 Act.

159 S 20(3) of the 1996 Act. Clissmann fears that this sub-section "may mean that Courts will be more reluctant to act as generously in divorce cases where there is already a Separation Deed. . . " (Clissman, *supra* n 125, p 18). There is no equivalent provision in the 1995 Act, as where a couple have already concluded a separation agreement, they cannot avail of the statutory remedies otherwise available on separation.

160 The court will occasionally go beyond its strict statutory function by offering suggestions to the parties, in the interests of saving them from further costs. See the comments of Murphy J in *C(L)* v *C(A)* [1994] 1 FLJ 19.

161 All figures are in IEP unless otherwise stated.

162 [1998] FLJ 17 at 29. The respondent also undertook to discharge the outstanding cost of the applicant's residence, representing her share of the family home and contents. The family home was to remain in the respondent's name. Approximately £160,000 involved in the respondent's business was to be left there, to ensure its survival. The respondent's other assets were valued at approximately £460,000, while the applicant's amounted to about £46,000.

163 High Court, unreported, 27 November 1998, p 111.

164 *Ibid*, p 5.

165 [1996] 2 FLJ 63.

166 *Ibid* at 66.

transfer this entire asset to the wife gives no recognition to [the husband's] contributions and I do not feel that it would be equitable to take this course."[167] Although the wife in this case was awarded maintenance and a lump sum (less than half the expected proceeds of the sale of existing property) to buy a new home, it is interesting to note the reluctance of McGuinness J to transfer the house to the wife, because of the husband's financial contributions. This may reflect a trusts-based approach, as much as a concern with fairness or the wife's apparently poor powers of management.[168] A similar concern for fairness is evident in *L(J)* v *L(J)*[169] where McGuinness J placed considerable emphasis on the wife's "ungenerous" attitude in declining to contribute at all to the mortgage out of her savings, unless the house was put in her sole name.[170]

The issue of financial contribution was also evident in *M(E)* v *M(W)*.[171] Here, the family home, which was the sole asset of any value, was in the husband's sole name. However, at the time of trial, it was established that 65% of the beneficial ownership lay with the wife, who had single-handedly supported the family for many years. McGuinness J felt it appropriate to take account of the financial conduct of the husband, specifically, "his non-contribution to the mortgage and his failure over many years to assist in the maintenance of his wife and children".[172] Under the 1989 Act, improvements made by both parties could also be considered,[173] and here the husband's contributions were of little lasting value, or were made with money he had not repaid, while the wife's were "considerable".[174] McGuinness J therefore held that it was equitable to transfer the outstanding 35% of the home to the wife, making her sole owner, subject to various charges.

In other cases, the proportions of distribution are unclear. In *SB* v *RB*,[175] the distribution of the proceeds of sale of the house favoured the wife and child, but the total disposable assets are unspecified in the judgment. Occasionally, a serious disproportion exists. In *BF* v *VF*,[176] a separation case, the wife ended up with a net income of £23,000 (including maintenance) to support herself and the three children of the marriage, leaving the husband with about £33,000 net for his sole use.[177]

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167 *Ibid*, at 67.
168 *Ibid*, at 66.
169 [1996] 1 FLJ 36.
170 *Ibid* at 38.
171 [1994] 3 FLJ 93.
172 *Ibid* at 96.
173 These could not be considered in assessing the existing beneficial entitlements of the parties.
174 [1994] 3 FLJ 93 at 96.
175 [1996] IFLR 220.
176 [1994] 1 FLJ 15.
177 The wife was also entitled to a lump sum order for £14,000 to compensate her for having to discharge bank debts, which arose out of her inability to make ends meet. Lynch J held that this, together with the assignment of the husband's lump sum on death or retirement, and the provision of an encumbrance-free two-bed apartment, was sufficient under the legislation.

In some situations, it is clear that the court is more concerned with meeting bare needs, rather than with equality or fairness. In *Y(M)* v *Y(A)*,[178] Budd J noted that it was difficult to assess the husband's financial situation with any degree of accuracy, but that it was apparent that he earned "infinitely more than was disclosed", and that he was "well capable of providing the relatively small sums which his wife and child require to live on in a frugal and thrifty manner", while still having "substantial sums with which to indulge his own extravagant lifestyle."[179] The wife had a very low income, and all her requirements were reasonable. Budd J noted that:

> "[S]he does not socialise and clearly the sum of money which she and her son have to live on is inadequate. Meanwhile her husband enjoys an extravagant lifestyle living with his employee in London. . . He usually drives a large car and stays in expensive hotels and enjoys flying, shooting and scuba-diving as hobbies".[180]

It was estimated that the husband was earning about £5,000 per week, in part thanks to the wife's assistance in building up the business, and Budd J found that there was an intention on both sides that she would be entitled to a share in the assets and profits of the business. He ordered payments to the wife to provide her with £800 per month disposable income in total. She was also to be paid £26,000 in respect of arrears of maintenance, a lump sum of £85,000 to buy a house, and about £4,000 in respect of other sums due. This total lump sum payment of about £89,000 was to be in satisfaction of the wife's interest in the husband's business and business assets.

The case is of interest as it is one of the few available High Court judgments in this area. Given the husband's apparently high income, it is perhaps surprising that the court was satisfied to leave the wife and child with sufficient funds for only a "frugal and thrifty" lifestyle.[181] The maintenance awarded was particularly low, amounting to little over a twentieth of the husband's gross monthly income. Even the lump sums awarded were relatively low, considering that they were due for arrears of maintenance and in respect of the wife's share in what was apparently a very profitable business, and did not greatly reduce the husband's assets.

Although this may be an extreme case, it is noticeable that it is by no means an isolated one, although disparity of distribution may occasionally be concealed, rather than illuminated, by the available figures. In *McA* v *McA*,[182] a recent High Court decision in this area, the wife was awarded £1.2 million in respect of her share of the family business, together with the family home, an apartment in Tenerife, a shop and another house. She also received a pension adjustment order giving her a 75% share of the husband's main pension (worth £750,000), business assets worth £48,000, periodic maintenance of £4,500 (not index-linked) and a lump sum of £300,000. The husband retained the second family home and an apartment, a less valuable pension, and the remaining 85% of the business (as well as the remaining

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[178] [1997] 3 FLJ 86.
[179] *Ibid*, at 89.
[180] *Ibid*.
[181] *Ibid*.
[182] High Court, unreported, 23 May 2000.

15% interest he was ordered to buy from his wife). He also had other businesses, which were not discussed in the judgment.

However, the apparent generosity of the award to the wife is reduced, when it is revealed that she had no assets other than her share in the business, while the husband had assets of £2 million, as well as the rest of a business valued at £8 million and an annual income of £120,000. The wife actually received comparatively little of the husband's property, as the court noted that the £1.2 million was money to which the applicant was entitled as of right (due to her contributions to the business), irrespective of her rights under the 1996 Act. The judgment does not set out the particular factors relied on by the court, and does not elucidate any general principles; the sole comment regarding the 1996 Act was that the factors contained in section 20 did not require repetition by the court. However, it appears from McCracken J's observations that he was particularly influenced by the fact that the business was largely built up by the husband, and that the wife, once she received her share of the value of the business, would not really need that much more. In addition, McCracken J was concerned that placing too heavy an onus on the husband might potentially damage the business, to no one's advantage.

In *CN* v *RN*,[183] the wife had not worked outside of the home while the parties cohabited, but the family home, worth £110,000 at the time of trial, was owned jointly by both spouses. At the time of trial, the wife had sole occupation of the home, and was in receipt of Deserted Wives Benefit of about £64 per week. She was employed as a school traffic warden at a gross wage of about £2,200 per annum, although this was unlikely to continue for long due to her age and poor health. The husband was employed in a company valued at £1,000,000, of which he was a 25% owner. He was in receipt of a gross annual salary of £30,000, plus expenses and other benefits. His net monthly income was about £2,300, plus expenses. He had had several property dealings, and extensively maintained his current partner, even though she had her own means. As McGuinness J felt that the husband could not afford much more in the way of maintenance, she ordered the sale of the family home. The bulk of the sale proceeds was to be spent on a new house for the wife, in which the husband would be a joint tenant (as he had paid most of the mortgage on the original family home), and the remaining £30,000 was to be invested for the wife; this was described as a lump sum maintenance order. Gross annual maintenance of about £7,000 was also ordered.

Given the extreme disparity of income and apparent earning capacity of the parties, the division of property in this case is surprising. The wife essentially ended up with a right of residence in a £70,000 house, which would only become fully hers if her husband predeceased her. The maintenance awarded was extremely low, even allowing for the £30,000 lump sum award, given the length of the marriage and the wife's age, poor health and almost non-existent income. The husband, on the other hand, had a high salary, and could presumably have easily afforded a higher rate of maintenance, if he had spent less extravagantly on himself and on his new partner. This might also have been considered more appropriate as the case related to separation proceedings, rather than divorce.

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[183] [1996] IFLR 1.

It is likely that judgments will become more transparent in the wake of the recent Supreme Court decision in *MK* v *JP (Otherwise SK)*,[184] overturning a substantial High Court award to a former wife due to the lack of clear grounds for the decision. Remitting the matter to the High Court, McGuinness J stated that in deciding what was proper provision for the former wife, the court had to consider her financial needs, her role in caring for the couple's six children, the couple's separation deed and the fact that the man's entire wealth had been accumulated after the couple had separated. The Supreme Court was unable to decide if the High Court had exercised its jurisdiction correctly in making the order since no indication was given in the High Court judgment as to what regard the judge had to various factors in the Act, and emphasised that a judge "should give reasons for the way in which his or her discretion has been exercised in the light of the statutory guidelines."[185]

Interestingly, McGuinness J stated that she doubted whether a policy of equal division of assets between spouses had ever been part of the common law in Ireland or England (as held by the High Court) and noted that the concept of a single capital payment to a wife to meet her "reasonable requirements" for the rest of her life had never been part of Irish law. However, she was not clear as to what guiding principles might apply in the legislative context, other than to emphasise the need to take account of the factors listed in the legislation, and to cite with apparent approval the recent dictum of Thorpe LJ in *Cowan* v *Cowan*[186] that fairness rather than equality was the rule. Irish law therefore still lacks a detailed and authoritative exposition of what amounts to "proper" provision akin to the House of Lords decision in *White* v *White*.[187]

Overall, it is clear that views of "proper" provision may vary greatly, and it is difficult to predict what award will be made in any given circumstances. Much appears to depend on the constitution of the court, as well as on the financial needs and contributions of the parties. The question must therefore be asked, does Irish law, as currently applied, offer a just and equitable solution to the difficulties of property division in marriage breakdown? It is submitted that it does not.

## An Irish Community Of Property?

Irish legislation does not give either spouse the right to a defined share of the family property. However, it does implement a principle that an individual's property is not entirely his or her own, in a family situation, and that it may be redistributed despite the owner's wishes or intentions. The substantive effect of these provisions is to treat the separate assets of the parties as a fund, from which limited amounts may be doled out to either party.[188] This

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184 Supreme Court, unreported, 6 November 2001.
185 *Ibid*, *per* McGuinness J.
186 [2001] 3 WLR 684 at 703.
187 [2001] 1 AC 596.
188 Or indeed to third parties, such as children or dependents - see, *e.g.*, s 14(1) of the 1996 Act.

principle has in fact been in place since the enactment of the Succession Act 1965, which guarantees certain rights to a surviving spouse.[189]

The Family Home Protection Act 1976 also constitutes an early step in this direction. The aim of the Act is to ensure that a spouse does not suddenly discover that the family home has been sold or mortgaged without his or her knowledge. The Act does not give the non-owning spouse an interest in the family home, but provides that any sale, transfer or mortgage of the home without that spouse's prior written consent is void.[190] Where consent is unreasonably withheld, the court may dispense with this requirement.[191] The court can also make such order as it thinks proper to protect a family home where it appears that a spouse is engaging in conduct that may lead to the loss of an interest in the home, or render it unsuitable for habitation.[192] However, the court can only intervene if it is satisfied that the spouse has the intention of depriving the applicant spouse or a dependent child of her residence in the home.[193] Finally, the Act restricts the disposal of household chattels, as defined, in certain circumstances.[194]

The trend towards increasing the property rights of spouses is conscious, not accidental.[195] As early as 1972, the Commission for the Status of Women recommended that the adoption of a community regime be considered, and the Second Commission for the Status of Women recommended that a community regime of some sort should in fact be adopted.[196] Both Commissions were particularly concerned that a pure separation of assets approach could result in grave injustice to wives, particularly with regard to the family home. This concern was addressed by the Matrimonial Homes

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189 Where a spouse dies testate, the surviving spouse is entitled to half or one third of the value of the estate (depending on whether there are also surviving children): Succession Act 1965, s 111. Under s 56 of the Act, the surviving spouse also has a right to have the family home appropriated to him or her, in full or partial satisfaction of any share to which he or she is entitled. Where a person dies intestate, the surviving spouse is entitled to all or half of the estate, again depending on whether there are also surviving children: s 67 of the 1965 Act.

190 S 3.

191 S 4.

192 S 5.

193 *S* v *S* [1983] 3 ILRM 387.

194 S 9.

195 A similar trend is noted by Dewar with regard to English law, with the "familialisation" of trusts and real property law and a "nascent statutory regime" regarding the family home. See Dewar, "Land, Law and the Family Home" (hereafter "Dewar (1998)"), in Bright and Dewar, *Land Law: Themes and Perspectives*, p 328. See also Peart's contention that family property law may be divided into three stages of development, a "support" stage, a "contribution" stage and a "relationship" stage (*supra* n 107). This last suggests that the relationship should itself give rise to real property rights, and is in place in New Zealand since the adoption of the Matrimonial Property Act 1976. It is suggested that Irish law is now also moving towards this stage of development.

196 Commission on the Status of Women, Report to the Minister for Finance (1972) p 177. The Commission's first report preferred a deferred community approach (though without any real analysis of the regimes discussed), but the Second Commission, which actually recommended a community regime be adopted, did not discuss what type of community this should be. See Second Commission on the Status of Women, Report to Government (1993), p 39.

Bill 1993, which represents the clearest example of the move towards community. The Bill imposed equitable co-ownership of the matrimonial home by spouses, where a dwelling had been occupied by a married couple at any time since a specified date,[197] and either or both of the spouses had an interest in the dwelling, other than in equal shares. Under clause 4 of the Bill, the equitable interest in the property would, in these circumstances, vest in both spouses as joint tenants, subject to exclusion by the court. Under clause 7, a spouse could also make a written declaration that clause 4 should not apply to the matrimonial home, after obtaining independent legal advice. Finally, clause 14 provided that the household chattels owned by either or both of the spouses would belong to both as joint owners. This provision could also be excluded by an agreement to the contrary.

On referral to the Supreme Court by the President,[198] the Bill was held to be unconstitutional. Although the court accepted that the objective of the legislation was to promote the stability of marriage and the institution of the family, by encouraging joint ownership of the family home, the manner in which this objective was to be achieved conflicted with the inalienable right of decision-making reserved to the family itself under Article 41.1.1 of the Constitution. The Bill applied the principle of joint ownership to every matrimonial home, even though the couple living there might well have decided that the home should not be jointly owned. It therefore had the potential to interfere with positive decisions of the family. Even though the parties could still contract out of the legislation, it would be necessary for the couple to re-address the issue, which might arouse discontent and disturb the equilibrium of the family. The non-owning spouse might refuse to make a written declaration that the legislation would not apply, which could lead to litigation.[199]

However, it appears implicit in the Supreme Court's decision that not all attempts to establish such a regime would fail. The Court's emphasis was clearly on the impermissibility of legislative interference with *past* family decisions regarding ownership, and the automatic deprivation of proprietary interests that would ensue. It is not stated that legislation relating to the future acquisition of property by married couples would also be prohibited, particularly if the parties retained the option of contracting out of the statutory regime.[200] There would thus appear to be nothing to prevent the imposition of a default system of community property, in relation to couples entering marriages in the future or, probably, in relation to the acquisition of new assets by couples already married.[201] However, the result of this might

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197 25 June 1993.

198 Under art 26 of the Irish Constitution, the President may refer a bill to the Supreme Court to rule on its constitutionality. If found to be unconstitutional, the Bill cannot be signed into law.

199 *Re Matrimonial Homes Bill 1993* [1994] 1 ILRM 241.

200 See Coughlan, "Land Law", in: *Annual Review of Irish Law* (1994), p 320.

201 This is less certain, as it might be held that a couple's implicit or explicit decision regarding the acquisition of property at the commencement of the marriage, could not be overridden by the legislature at a later date, even if the couple could opt to avoid the application of the legislation (note the Supreme Court's reluctance to cause family disputes). The difficulty of ascertaining the ownership of household

well be the creation of a two-tier system of property ownership, whereby parties to earlier marriages would be less protected than those entering later marriages. This difficulty is likely to be particularly significant given that it is typically wives in "traditional" marriages who are most vulnerable financially. The decision also casts doubt on the constitutionality of the property adjustment orders which may be made by the courts under the 1989 and 1995 Acts, since these might well interfere with agreements regarding property ownership previously made by spouses.[202]

## Arguments For And Against Community

To date, the focus in Ireland has been on ameliorating existing rules, rather than on revising the nature of the system itself – on remedying individual instances of injustice, rather than on providing a prescription for the just ownership of marital property. Should, therefore, the State intervene to impose a community regime in the context of matrimonial property?

Against the concept of community, it can be argued that the interference with family property rights and agreements is too great, and that it is not for the State to intervene to this extent. However, this argument can no longer withstand objective scrutiny, since the State already intervenes, in a far greater and less certain manner, in its equitable redistribution mechanisms.[203] The statutory powers briefly analysed above clearly go far beyond the scheme outlined in the Matrimonial Homes Bill 1993. The only distinction appears to be that the Bill was certain in its scope and application: as noted above, the principal difficulty associated with the current law is its potential for arbitrariness and uncertainty.

Indeed, when the policy behind the current legislation is examined, it is clear that legislative policy has long moved towards community principles. The Succession Act 1965 already curtails the spouses' freedom of testamentary disposition, the Family Home (Protection) Act 1976 effectively restricts the right of sale of the family home (though without varying the ownership), and the 1989, 1995 and 1996 Acts permit redistribution of all property owned or likely to benefit either spouse. It is submitted that putting this intervention on a precise and formalised legal footing would not conflict with statutory policy; indeed, it might well be regarded as the culmination of such interventionism. It would also eliminate the inconsistency of rights being automatically granted on death, being awarded on a discretionary basis in the event of marriage breakdown, and not awarded at all while the relationship

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chattels would also arise, as these would be likely to be acquired over a long period.

[202] The 1996 Act is more secure, as the constitutional amendment which was necessary to permit the introduction of divorce legislation specifies that a dissolution of marriage may only be granted where "such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law" (Art 41.3.2.iii of the Constitution).

[203] Indeed, in the English context, Dewar goes so far as to argue that "ownership now plays a default role", and is only relevant where there is no statutory means to resolve property disputes. See Dewar (1998), *supra* n 195, p 330.

subsists.[204] It would also help to eliminate the inordinate delays and consequent legal costs currently bedevilling Irish law.[205]

One of the strongest arguments in favour of a discretionary system is the flexibility it offers to deal with individual cases, and thus to maximise individual justice. This flexibility may indeed play an important role in cases where there is insufficient wealth to provide for all parties, and in particular to provide for the future of the children of the marriage. It may also be necessary to achieve long-term justice and equality between the parties.[206] However, the price for this individual flexibility may be high, in terms of lack of foreseeability and certainty, and possibly with regard to difficulties in reaching a settlement between the parties.[207] There is also, as Dewar points out, growing doubt as to our ability to know what is "best" in any particular case, partly because it is impossible to predict the future with certainty, and partly because it is by no means certain that the law is able to devise the most beneficial solution to a given set of facts.[208]

It is submitted here that the lack of principle and predictability are by no means outweighed by the flexibility of the current system.[209] The evidence to date suggests that although some decisions implement a reasonably equal distribution of assets, in other situations courts are reluctant to utilise their statutory powers fully. Whatever a community of property lacks in the way of responsiveness, it at least offers a certain and principled solution to the ownership of marital property.[210] Dependent spouses would be guaranteed a particular portion of the family assets, and would be less subject to the perils of litigation. The scope for arbitrariness would be removed, and the impact of what may sometimes appear to be conservative judicial attitudes would be reduced.

It is not suggested that parties should be unable to contract out of such an arrangement; on the contrary, they should always be able to do so, after obtaining independent legal advice.[211] Moreover, the question of property ownership would at least have been raised and (presumably) discussed.[212]

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[204] The courts' powers under the 1995 Act are an exception to this general rule.

[205] Fahey and Lyons found that the median duration of family law cases was between 12 and 19 months, with some cases lasting more than 3 years (*supra* n 140, p 94). Note also the regrets of McGuinness J in *EP* v *CP*, where she commented that "The end result of this unfortunate history is that the considerable pot of capital which was available at the beginning of this case to both parties and for the future of their children is now dissipated either in borrowings or in legal costs. . . . It is a tragedy that all of this money should have disappeared." (High Court, unreported, 27 November 1998, p 4).

[206] See Wilson, "Ancillary Relief Reform" [1999] *Fam Law* 159 at 160.

[207] See Rheinstein, "Division of Marital Property" (1976) 12 *Williamette LJ* 413 at 432.

[208] Dewar, "Reducing discretion in family law" (1997) 11 *AJFL* 309 at 320.

[209] For an opposing viewpoint, see Wilson, *supra* n 206.

[210] Interestingly, Dewar notes that there is no hard evidence that increased certainty would lead to reduced overall costs (to the State or the parties); this is an issue meriting further empirical research. See Dewar, *supra* n 208.

[211] For potential policy and practical difficulties here, see Wilson, *supra* n 206, at 162.

[212] Strangely, the Law Commission for England and Wales, in its *First Report on Family Property: A New Approach* (1973) (Law Com No 52), cited this as an

Since some intending spouses might be reluctant to insist on obtaining a share of the family property, it is suggested that where a regime of separation is selected, the equitable redistribution power should be retained.[213] This would safeguard the family as a whole, in accordance with what is clearly legislative policy.

Of course, marriages where there was little property to be distributed would not be greatly affected, but these are in practical terms not much affected by the current legislative provisions either.[214] Certainly, it is doubtful if a community regime would offer any advantages to the least well-off members of society.[215] For this reason, the Law Commission for England and Wales considered that no purpose would be served by adopting a full community regime, and that joint ownership of the family home would serve just as well, as this was usually the only asset of any value.[216] Shatter, on the other hand, noting the rise in joint ownership of the family home and the high level of statutory protection now afforded to spouses, contends that measures such as the failed Matrimonial Homes Bill (and presumably, a community of property) are consequently no longer necessary to safeguard spouses.[217] However, he admits that circumstances may still arise where the non-owning spouse (generally the wife) will be vulnerable.[218] It is submitted here that the fact that a proportion of the population would not necessarily obtain any advantage from a new property regime, does not justify ignoring the significant proportion that might do so.

More perturbing is the possibility that a community regime might work against vulnerable spouses, by limiting the fund for distribution on the termination of the relationship. Under current law, all assets owned by either party, or indeed, assets likely to be acquired by them, may be divided by the court. In the forms of community regime most likely to be adopted, a spouse only obtains an interest in the assets or gain acquired after the marriage. This could potentially preclude the division of a large portion of wealth. However, this risk might be reduced by the inclusion of a provision similar to that in German law, whereby an inventory might be agreed by the parties on entering the marriage, listing the assets already owned by each; where there was no such inventory, it would be presumed that all property was acquired subsequent to the marriage. This would offer protection to spouses

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argument against imposing fixed property rights, as it might cause dissension and discourage people from marrying. However, it is respectfully submitted that a couple with fundamentally opposing views on property ownership would perhaps be better not to marry at all, or at least should not enter marriage blindly, as is too often the case.

213 This would be akin to the solution proposed by the LRAC for Northern Ireland (discussed earlier).

214 See Fahey and Lyons, *supra* n 142, p 121. Similarly, Ward comments that while maintenance may have some relevance for middle and higher income couples, it has little or none for people at the lowest economic level; see Ward, *Divorce in Ireland: Who Should Bear the Cost?* (1993), p 9: hereinafter Ward (1993).

215 Interestingly, Prager considers that this argument ignores the many other sources of wealth that are increasingly available to modern families (*supra* n 31, at 7, footnote 21).

216 *Supra* n 212, para 61(d).

217 See Shatter, *supra* n 113, p 834.

218 *Ibid* p 835.

who entered marriage with a large amount of property, if those spouses wished to avail of the proviso. Where spouses did not prepare an inventory, the property to be divided would be the same as under the current law.

Further, it is not unreasonable to exclude assets acquired prior to the marriage from the community of property, as the impact of this would be felt mostly in marriages of relatively short duration. Where a marriage has endured a number of years, it is likely that a large proportion of property would be acquired after the marriage; similarly, it is probable that a gain would be made. It also seems more just to restrict the division to wealth gained by the joint efforts of the couple, rather than property independently acquired and owned by either. If the division is based on the concept of the family as a partnership, where both spouses contribute to the relationship, it is not unjust to limit the rights acquired by each to the assets or gain jointly made.

The most worrying issue relates to children, as an equal division of assets might preclude the retention of the family home by the primary carer, thus depriving the children of their home. The great advantage of the present discretionary system is that the court has flexibility to cater for the housing needs of the family, which would not be the case in a standard community regime. There is no easy solution to this difficulty. However, it might be worthwhile exploring the possibility of giving courts the power to defer the sale of the family home in the interests of the children[219] – though this obviously raises other difficulties, both theoretical and practical.[220]

Another key difference would relate to the finality of the arrangement: current legislative policy appears to be heavily set against a "clean break", and therefore, the adoption of a community regime might be regarded as inappropriate. This issue is problematic: as Ward notes, the "clean break" policy applied in the United States has resulted in the impoverishment of many women.[221] It appears that this difficulty is caused primarily by restrictive maintenance awards,[222] and it is not clear whether Ward is speaking of community or equitable distribution states. Similar difficulties have arisen in New Zealand, owing to the clean break policy which applies there to both maintenance and asset division.[223] It is submitted here that a division of family assets under a community regime might go far to alleviate the lot of many former wives, and that where a family has few assets, the "clean break" issue is in fact irrelevant, as far as property distribution is concerned, as there is little or nothing to be divided. Even if there is a "clean break" with regard to property redistribution, there is no reason why maintenance should not be ongoing, particularly where there are children.[224] If a marriage is legally terminated, former spouses should not be subjected to

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219 This approach is occasionally utilised by the courts under existing law.

220 Alternatively, a custodial spouse might be permitted to buy out the other spouse's interest in the home, though this would not always be possible, for financial reasons.

221 See Ward (1993), *supra* n 214, p 26.

222 *Ibid.*

223 See *Z* v *Z (No. 2)* [1997] 2 NZLR 258 at 275 ff.

224 See the analysis of rationales for maintenance payments in Power, *supra* n 138, at 17.

continued readjustment of their property interests, however reasonable maintenance payments may be in many situations.

Assuming the case for a community property regime to be accepted, which form of community should be adopted? It is argued here that the most appropriate system is that of deferred community, which permits maximum freedom with regard to property management during the marriage. A further advantage of a deferred community on the German model is that there is no concept of loss-sharing; effectively what is offered is a regime with many of the advantages of separation of property, but with a certain and predefined division, which treats both spouses equally. Against this must be weighed the advantage to a dependent spouse of feeling that he or she is not deprived of financial power, which is given by a community on the French model (where both spouses have equal management powers), or by the LRAC's proposals in Northern Ireland. O'Connor, for example, argues in favour of a regime offering a present, rather than a deferred interest in family property.[225] However, it is submitted that the French approach is too restrictive, and too likely to cause administrative difficulties, as well as difficulties for third parties such as creditors.[226] This may also be a problem in relation to the Northern Ireland proposals,[227] and the LRAC's recommendations, as discussed earlier, also seem likely to lead to undesirable inequality between older and younger wives.

A specific difficulty raised in the Irish context in the divorce referenda, and subsequently by the Second Commission for the Status of Women, relates to family farms.[228] It is argued by some that a farm that has been in the family of a particular spouse for generations, should be treated differently to other family assets. Two points may be made in this regard. First, the current legislation makes no distinction between family farms and other property; nor would it be right that it should, where a spouse has contributed many years of work to improving the farm and the fortunes of the family. Second, in a deferred community, what is divided is the increase in value of the assets of the parties, i.e. the "gain" made by each in the course of the marriage. Unlike a community fund on the French model, a financial payment is required, rather than the division of specific assets. If the farm were owned by one of the spouses prior to the marriage, therefore, only half of the increase in value would be payable.

## CONCLUSION

It is submitted that the current Irish approach to matrimonial property shares many of the ideals and aims of community property theory. In particular, the sharing of assets between the spouses in both approaches mirrors an economic and social sharing. However, Irish law falls far short of the

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225 O'Connor argues, *inter alia*, that ". . . rights to property ought not to be postponed until the occurrence of such pathological events as death and marital breakdown." See O'Connor, *Key Issues in Irish Family Law* (1988), p 214.

226 See, *e.g.*, MacDonald's comments on the drawbacks of the French community property regime: MacDonald, "The French Law of Marriage and Matrimonial Regimes" (1952) 1 *ICLQ* 313.

227 See Fox, *supra* n 111.

228 *Supra* n 196.

certainty and equality to be desired in this most important area. While this certainty is especially needful in the event of the breakdown of the relationship, it is also highly desirable during the marriage.

The present law offers neither certainty nor finality. It also fails to secure equality for the homemaking spouse, as domestic contributions are consistently undervalued. Although the equitable redistribution approach offers flexibility, it is submitted that the price of this alleged responsiveness, in terms of anxiety, strain and litigation, is too high. A community regime is limited as regards flexibility, but it offers a measure of security, certainty and transparency which, it is contended, is likely to increase both justice and emotional well-being during and after marriage. Consequently, it is argued that the legal position should be altered, and that a regime of deferred community should be constituted the regime of default. Such a change would also promote true equality within marriage.

Whether the community regime should apply to all, or simply to future marriages, would be a matter for debate. In the light of the Supreme Court decision regarding the Matrimonial Homes Bill 1993, it might be thought that the regime should apply to future marriages only. However, given the effect that the current legislative provisions may have on existing property arrangements, it is contended that this argument is illogical. Limiting the application of a community property regime to future marriages only would result in a two-tier system, whereby older spouses in "traditional" marriages, who tend to be the most vulnerable financially, would be afforded least protection. Although there would clearly be considerable difficulties in imposing a new property regime on married couples,[229] such a change has already effectively been imposed by the 1989, 1995 and 1996 Acts. Perhaps the solution would be to give all couples an equal right to opt out of the community regime, irrespective of the date of marriage. In this situation, the current equitable redistribution principles would continue to apply, with all the uncertainty and risk that they entail. Although such a course might, as the Supreme Court suggested[230] (and as the LRAC has suggested in the Northern Ireland context) increase marital discord in the short term, in the long term, it is argued that this disadvantage would be outweighed by the benefits of clear and predetermined spousal rights.

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[229] Even so, a referendum might still be necessary to ensure constitutional compliance. Of particular interest here is the recent Supreme Court decision in *Re Art 26 and the Planning and Development Bill 1999* [2000] IESC 20, where the court upheld the compulsory acquisition of privately owned residential development land for social housing. The court was influenced primarily by the social need for low-cost housing, by the fact that only up to 20% of land could be acquired, and by the fact that compensation was payable to the landowner (albeit at less than market rates). The key question is whether a measure is necessary for the common good, and is a proportionate means of achieving that good; however, less judicial emphasis might be placed on "private" social good (within families or workplaces) than on "public" measures. The judicial approach to interference with private property rights has generally been highly conservative; see, e.g., *L* v *L* [1992] 2 IR 77 (where the court refused to grant the wife a constitutional right to a share in the family home) and *Re Art 26 and the Employment Equality Bill 1996* [1997] 2 IR 321 (where the court refused to allow the financial burden of accommodating disabled workers to be placed on employers).

[230] *Re Matrimonial Homes Bill 1993* [1994] ILRM 241.

# THE POLICY OF PROMOTION: THE CLASH OF RIGHTS IN SEX EDUCATION LAW

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## INTRODUCTION

This paper briefly analyses the nature and impact of section 28 of the Local Government Act of 1988 (hereafter "Section 28") in England, Wales and Scotland; before looking at how sex education is governed in Northern Ireland. The central tenet of this paper is that in Northern Ireland there has been a failure to resolve the questions surrounding the practical need to discuss homosexuality in sex education. This issue may prove a complex and thorny one for the burgeoning human rights regime here since this area involves a number of competing rights, including:

- the rights of students to education and information;
- those of the gay community to equality under the law; and,
- those of parents and schools to have the curriculum taught in a manner harmonious with their religious and moral beliefs.

Another potential legal difficulty is the malleability and indeterminacy of the word "promote", which has been used to give Section 28 impact beyond its official scope, and may similarly obfuscate the level of quantifiable action required to comply with the equality provisions in section 75 of the Northern Ireland Act 1998. As a case study, the recent guidelines from the Scottish Parliament will be examined as an example of the work of a devolved government bound by equality provisions.

### Section 28: Its Implementation And Scope

It is widely admitted that the introduction of Section 28, which amended the Local Government Act of 1986, was a response on the part of the Conservative government of the time to the actions and attitudes of some Labour controlled local authorities. It was also a piece of legislation very much in keeping with the wider global trends in conservatism at that time. A notable parallel can be drawn between Section 28 and the Helms Amendment to the legislation governing the American National Endowment for the Arts (hereafter the "NEA"). The wording of the Helms Amendment and the wording of Section 28 are remarkably similar. The Helms Amendment to the NEA provided that, none of the funds authorized to be appropriated pursuant to that Act may be used to promote, disseminate, or produce obscene materials, including, but not limited to, depictions of sadomasochism, homo-eroticism, the exploitation of children or any individual engaged in sex acts. Section 28 reads as follows:

> "(1) A local authority shall not intentionally promote homosexuality or publish material with the intention of promoting homosexuality; promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.

> (2) Nothing in subsection (1) shall be taken to prohibit the doing of anything for the purpose of treating or preventing the spread of disease."

As Stychin notes the Helms Amendment was largely a knee-jerk response to the emergent gay and lesbian arts culture, and especially the work of gay artists notably, Robert Mapplethorpe and Andres Serrano, which was considered unacceptable and pornographic.[1] This 'knee-jerk' reaction was not a uniquely American phenomenon and Section 28 is evidence of the desire of some sections of the British government of the time to limit the emergent gay cultural scene by choking off its funding and support from the more liberal local authorities. It is perhaps this fact, coupled with the ambiguity of Section 28's approach to schools, which has allowed both supporters and detractors alike to claim at various times that Section 28 does not concern schools. Indeed, a spokesperson for the Department of Education went so far as to assert to the media during the discussion surrounding the government's recent attempts to repeal Section 28 that:

> "Section 28 does not apply, and never has applied, to the activities of individual schools in England. It applies only to the activities of local authorities. But it is clear that it has caused much confusion and many teachers believe that it does apply to schools." [2]

Nevertheless, every debate concerning Section 28 or its equivalents has centred around schooling, and the figure of the child, innocent, vulnerable and in need of protection has become totemic for all sides in this perplexing debate. Furthermore, the homosexual has taken on a totemic role in this debate. For the proponents of Section 28 the homosexual is not only the permissive ally and seducer of the left wing but also the dangerous infectious recruiting pervert who preys upon children. There is a conflation of the homosexual with the paedophile. At its most extreme, and violent, this attitude may be illustrated by the comments of one Leader of the South Staffordshire County Council:

> "Those bunch of queers that legalise filth in homosexuality have a lot to answer for. I hope they are proud of what they have done . . . It is disgusting and diabolical. As a cure I would put 90 per cent of queers in the ruddy gas chamber. I would shoot them all. Are we to keep letting these queers trade their filth up and down the country? We must find a way of stopping these gays going round."[3]

Compare this to the comments of Baroness Knight of Collingtree, one of the original supporters of Section 28, during the second reading of the government's proposed bill to repeal that clause:

> "I referred earlier to the noble Lord, Lord Haringey. Haringey council made a video called "How to become a lesbian in 35

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[1] Stychin, *Law's Desire: Sexuality and the Limits of Justice*, (1995), p 14.

[2] Available online at: http://news.bbc.co.uk/hi/english/education/newsid_689000/689288.stm.

[3] Kaufmann and Lincoln, *High Risk Lives, Lesbians and Gay Politics after the Clause* , (1991), p 4.

> minutes". It was intended to be shown in a school for mentally handicapped girls, some of whom were extremely young. In the course of my years as a local councillor I took a great interest in the mentally handicapped children in my area; I served on the board of schools and had a great deal to do with them. From my experience of those children, it is difficult enough for them to understand normal sexual relations without having homosexuality foisted upon them. I find it horrifying that anyone would support that. All of that was stopped dead by Clause 28. Clause 28 was introduced for that purpose and that purpose alone." [4]

Although Baroness Knight was undoubtedly well intentioned, her comments are disturbing because not only are they factually inaccurate as Lord Harris of Haringey pointed out in a later debate[5] but they retrench the notion of the homosexual as predator, and homosexuality as something abnormal and infectious. Homosexual relations are not the natural expression of adult homoerotic desire and bonds of love but rather something abnormal to be "foisted" upon children. The Baroness does go on to clarify that she has no wish to marginalize or be unfair to those who "choose" a homosexual way of life. However, the notion of choice, of choosing a homosexual lifestyle, is itself a contentious and divisive issue, not least because the notion that homosexuality is chosen buttresses the idea that it can be "foisted" upon the innocent and unwary.

In sharp contrast to this image is the image of the homosexual as a member of a persecuted minority. Those in favour of repeal often argue from the perspective of protecting children from homophobic bullying and giving them proper advice about the difficult issue of sexual orientation, or from the perspective of removing the inherently discriminating legislation from the statute books. In either scenario, the homosexual is characterised as victim, as outsider. Either role ultimately pushes the reality of gay life to the margins and replaces it with an image acceptable to the majority heterosexual community thus dis-empowering the gay subject. Gays and lesbians are forced to be either passive victims in need of legal protection and the patronage of the concerned liberal majority or vilified as criminals. Either position robs them of status and control over their own lives because it describes and identifies them solely in relation to how the heterosexual world chooses to view them.

Schooling and in particular sex education has thus become the arena for an intense political and moral struggle.

## The Impact of Section 28

One of the major sources of contention during the recent repeal debate was the efficacy and scope of Section 28. There are essentially two approaches to the impact of Section 28. The first is to assert that, since no litigation has ever arisen Section 28 has not impacted upon the actions of schools or other bodies. The other is to assert that it has been an effective barrier to schools

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[4] *Hansard*, 6th December, 1999, col 1103.
[5] *Hansard*, 7th February, 2000, col 474.

and authorities disseminating material discussing homosexuality. Some view this as a positive development. Lord Moran for example quoted the following letter he had received from a schools inspector:

> "Section 28 greatly strengthens the hand of officers. If they have a proposal before them from a Council committee which clearly promotes homosexuality then if reason and common sense fail the officer can appeal to Section 28. Councillors know that officers cannot be made to act against the legal advice they have received."[6]

Others view this restriction as pernicious and damaging:

> "Perhaps I may record a few of the facts of life, if I can use those words. The first facts are legal facts. Section 28 is probably one of the worst drafted clauses on our statute book. Reference has been made to how badly the Section is drafted and the fact that the word "promote" is subject to a wide range of interpretations, and how that has led to some of the difficulties in discussing this issue. The other part of Section 28 refers to "pretended family relationships". Those, too, are not the words of calm parliamentary draftsmen. Those are the words used by those in the saloon bars in the Home Counties. It has nothing to do with precision in legislation. It is the kind of terminology used by two middle-aged gentlemen in florid ties who with one breath claim that they have never met a homosexual since they left boarding school and in the other claim that the BBC is absolutely crawling with them."[7]

Certainly, the academic literature cites a number of instances where local authorities have withdrawn or refused funding for projects on the basis of potential Section 28 liability. Edwards notes a number of instances notably the example of a head teacher cancelling a performance in a secondary school of the play "Trapped in Time" because the drama contains a scene in which a male character "comes out" as gay because it was feared such a scene was in contravention of Section 28.[8] Indeed, in the House of Lords debate one peer noted that:

> "I even heard of someone leaving a maintained comprehensive school six years ago who had taught Shakespeare at A-level and had been told that it was impossible to discuss any question of a homosexual relationship in regard to Shakespeare's work. How the Sonnets can be discussed without that question being considered is beyond me. That teacher was told that Section 28 prohibited such discussion."[9]

Clearly, the key impact of Section 28 is not merely the practical import that its framers intended but also its symbolic significance, which has extended its shadow far beyond the arena of the local authority. As one peer (Earl Russell) astutely noted:

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6 *Hansard*, 7th February 2000, col 413.
7 Lord Whitty, *Hansard*, 7th February 2000, col 477.
8 Edwards, *Sex and Gender in the Legal Process*, (1996), p 75.
9 Earl Russell, *Hansard*, 7th February 2000, col 422.

> "If one believes, as I do, that most people do not have a choice about their sexual orientation, one must believe that, whatever is their sexual orientation, they should make as good a job of living that way as they possibly can. If one is to do that, one must be entitled to the respect of being an equal citizen - equal before the law and equal in moral esteem. If one is to be denied that, one finds that life is very difficult indeed. Precisely what annoys most homosexuals about the section is that they see it as being a badge of inequality."[10]

It is this fostering of a sense of division and difference between the homosexual and heterosexual members of the community which may prove the undoing of Section 28.

## Section 28 And Its Impact Upon The Official Guidance On Homosexuality

Regardless of the actual legal impact of Section 28, there has been an evident sea change in Government policy during its lifetime. This is clearly indicated by official guidance circulars. Circular 11/87 made no attempt to proscribe coverage of homosexuality in sex education, but did advise schools that such coverage may cause offence. Furthermore, it stated that:

> "There is no place in any school for teaching which advocates homosexual behaviour, which presents it as a norm, or which encourages homosexual experimentation by pupils."[11]

The 1994 Circular (5/94) contains no specific reference to homosexuality beyond reasserting the legal position as regards Section 28. The only possible sign of governmental relent may be found in paragraph 8, which stresses the need for teachers to acknowledge that whilst sex education should be taught in the context of heterosexual marriage and reproduction, many children come from very different backgrounds and therefore efforts should be made to avoid 'causing hurt and offence. . . and to allow such children to feel a sense of worth.' This is undoubtedly a sop to the much more fearsome Cerberus of common-law partners and single parent families than any attempt to assuage the alienation of the gay community. Despite this sanguine repetition of, and reliance upon, Section 28 there are some inherent problems with its approach.

## Section 28: The Areas Of Legal Contention

There are two major legal difficulties with the interpretation and implementation of Section 28. The first is the ambiguity of the word "promote" and the second is that Section 28 is on a collision course with the blossoming human rights culture prevalent in Europe today. There is strong legal precedent to indicate that the test for "promoting" something is a stringent one with a high threshold. As Thomas and Costigan[12] have noted

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[10] *Hansard*, 7th February 2000, col 421.
[11] DES 1987, para 22.
[12] Thomas and Costigan, Promoting Homosexuality, Section 28 of the Local Government Act 1988, (1990), p 11.

the *Gillick*[13] case seems to be authority for suggesting that to make something easier is not necessarily to promote or encourage it. This difficulty of interpretation was recognised during the House of Lords debate on clause 28 (as it then was). Lord Falkland remarked:

> "It is just not possible (and I dare say we shall argue the point) to understand what is meant by the word 'promote' . . ."[14]

The Minister replied to that comment with an explanation that might have proven key had any litigation tested the meaning using the rule in *Pepper* v *Hart*.[15]

> "But we think that "promote" has a clear meaning. If one promotes something, one is deliberately doing something to give what is promoted a more favourable treatment, a more favourable status or wider acceptance, than other things or that thing hitherto."[16]

This explanation did little to clarify the meaning of "promote" and potentially opened up local authorities to a broad liability for *any* new project or funding for a homosexual cultural group or for any educative purposes with any content concerning homosexuality whatsoever. Thus the fundamental subjectivity of the concept of promotion remains.

Lord Lester highlighted the second difficulty concerning the drafting of Section 28 during the repeal debate.[17] He drew the House's attention to the European Court of Human Rights decision in the case of *Sagueiro da Silva* v *Portugal*.[18] In that case the Court ruled that the refusal to grant custody of a child to the father during divorce proceedings simply on the basis of his being in a homosexual relationship was contrary to his rights under Article 14, read with Article 8, of the ECHR and amounted to unjustifiable discrimination. Thus, homosexual relations based on love and affection and long-term commitment have been recognised as capable of constituting real family relationships. Section 28, with its assertion that homosexual relationships are not and must not be treated as such by local authorities, flies in the face of the Convention. Furthermore, Section 28 must also be viewed as an interference with free speech and an unjustifiable act of discrimination against homosexuals. Lord Lester warns that although it is legitimate to protect children from immoral or harmful influences, Section 28 may not have been drafted conservatively enough to stay within these bounds of legitimate action.

Despite these warnings, the repeal of Section 28 was rejected by the Lords and the government declined to push the Bill any further within that legislative session. The issues therefore remain unresolved although the legal position is clear since Section 28 is still firmly in place in England and Wales. This may be illustrated by the governments' recent sex education guidelines. On the topic of the nature of relationships, the guidance is that:

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13 *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112.
14 *Hansard*, 1st February, 1988, col 867.
15 *Pepper* v *Hart* [1993] A.C. 593
16 Lord Caithness, *Hansard*, 1st February, 1988, col 890.
17 *Hansard*, 7th February, 2000, col 465.
18 REF00001264 12/12/99

> "Within the context of talking about relationships, children should be taught about the nature of marriage and its importance for family life and the bringing up of children. The Government recognizes that there are strong and mutually supportive relationships outside of marriage. Therefore, children should learn the significance of marriage and stable relationships as key building blocks of community and society. Teaching in this area needs to be sensitive so as not to stigmatise children on the basis of their home circumstances."[19]

Thus, the Government has attempted to temper the stringencies of Section 28 with recognition of relationships outside of marriage although this may also be read as referring to single heterosexual parents as well as gay parents. The question, however, cannot remain in stasis long because of the issue of European rights involved. It is at this point that we shall turn to Northern Ireland, a jurisdiction with a *tabula rasa* in relation to legislation like Section 28, but with equally a well-known connection between its schools and the various churches of Northern Ireland, which has nurtured a laissez faire attitude toward sex education. How can this jurisdiction cope with the demands of its new devolved rights culture?

## Sex Education in Northern Ireland: the impact of Section 75

Historically, Northern Ireland's education system has been inseparable from its religious life. As Lundy has noted:

> ". . . the most distinctive factor about Northern Ireland's school system is that it is *de facto* although not necessarily *de iure* religiously segregated."[20]

This division is entrenched by the administrative system for schools in Northern Ireland. On the one hand are voluntary schools which are almost overwhelmingly Catholic in their ethos, and thus, predominantly fall under the control of the Council for Catholic Maintained Schools, and on the other are controlled schools which were Protestant church schools which transferred their assets and obligations to the Government for funding in exchange for guaranteed places on schools' governing boards. This arrangement means that with a few rare exceptions, the relevant church holds a majority of the places on the board of governors of any school in Northern Ireland. Furthermore, because of a wide degree of satisfaction with Northern Ireland's academic achievements among their constituents, politicians are reluctant to interfere with the current schools system.

However, the influence of the churches and the general conservative tenor of Northern Irish society has meant that in the area of sex education there has been little or no guidance in recent years. DENI Circular 1987/45 provides that sex education should be taught in all schools but " in a sensitive manner which is in harmony with the ethos of the school or college and in

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[19] Department for Education, *Sex and Relationship Education Guidance*, Document Reference Number DfEE 0116/2000, s 1.21.

[20] Lundy, *Education Law, Policy and Practice in Northern Ireland*, (2000), p 6.

conformity with the moral and religious principles held by parents and school management authorities."[21]

Many of the main Christian denominations are of the view that homosexuality is sinful and abhorrent. Indeed, in the Papal encyclical *Veritatas Splendor*, His Holiness asserted that acts of sexual perversion are acts that are intrinsically evil and this means that whatever the circumstances they are not capable of being ordered to God or to the good of the person involved.[22] This notion of disorder was precisely the protest His Holiness made against a Gay Pride Parade in Rome in 2000 on which occasion he gave a short speech reasserting that the Catholic view on homosexuality is that it is intrinsically evil.[23]

The Catholic Church is not alone in this attitude as many Protestant denominations also hold that the Bible enjoins us to view homosexuality as a grave and terrible sin. Prior to devolution, article 8 of the Education Reform (NI) Order 1989 was to be balanced against the guidance from DENI that "schools and colleges cannot ignore consideration of sexual practices which run counter to the moral standards of society in Northern Ireland". However as Lundy has noted:

> "The influence of the churches on the schools system and the moral tenor of society in Northern Ireland is such that it is unlikely that a school or even an individual teacher would provide sex education that was anything other than suitably moral. It is almost inconceivable that schools would promote homosexuality or even sex outside marriage."[24]

How then will this situation be effected by the limitations placed on local authorities (including the Education and Library Boards which manage schools) under section 75 of the Northern Ireland Act 1998 (hereafter "Section 75")?

> **"75.** - (1) A public authority shall in carrying out its functions relating to Northern Ireland have due regard to the need to promote equality of opportunity –
>
> between persons of different religious belief, political opinion, racial group, age, marital status or sexual orientation;
>
> between men and women generally;
>
> between persons with a disability and persons without; and
>
> between persons with dependants and persons without."

Again we must note the use of the word "promote" which has still not been satisfactorily defined and is further confused by the addition of "having due regard". We have already seen from the debate on Section 28 that "promote" is a contentious and ambiguous word. Furthermore, the rights enshrined in the ECHR are also part of the foundation of the new Northern Ireland

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[21] Education Reform (NI) Order 1989 art 8(2).
[22] His Holiness Pope John Paul the Second, *Veritatis Splendor*, 1993.
[23] An account of His Holiness' Speech can be found at: http://news.bbc.co.uk/hi/english/world/europe/newsid_825000/825852.stm.
[24] Lundy, *Education Law, Policy and Practice in Northern Ireland*, (2000), p 143.

government, which is constrained in its legislative competence to adhere to its principles.[25] There is an almost immediate conflict of rights apparent then in this issue arising from the competing rights entailed in the ECHR.

The first and in this issue central right is that enshrined in Article 2 of the First Protocol of the ECHR, the right to education. It is essential that this be read in conjunction with the United Nations Convention on the Rights of the Child (hereafter the "CRC"), also because the right to education raises two important issues. Article 2 asserts that no one should be denied the right to education and that the state should respect the right of parents to ensure education and teaching in conformity with their own religious and philosophical convictions. This must be read in conjunction with the provisions of the CRC. The United Kingdom's obligations under the CRC have been described as enshrining the four Ps: participation by children in decisions about their lives, protection of children from abuse and neglect, the prevention of harm to children, and provision to meet their basic needs. While the desires of parents and children are usually harmonious, what would happen if a gay child wished to receive appropriate information and instruction on homosexual relationships within the broader context of general sex education, but the parents felt that that type of education or indeed any type of sex education was inappropriate? As it currently stands, the situation in Northern Ireland is unclear because in practice it is rarely tested. One piece of case law, which is perhaps pertinent, is the case of *Kjeldsen, Busk, Masden and Pedersen*.[26] In that case parents with strong Christian beliefs objected to compulsory sex education lessons in Danish state schools and challenged the policy before the Court. In affirming that Article 2 of Protocol No. 1 enjoined the state to respect parents' religious and philosophical convictions in their children's education, the Court explained that the state is obligated to ensure the communication of information and knowledge in an objective and pluralistic manner. States are not allowed to seek to indoctrinate. However, the sex education lessons, which the legislation had intended to be imparted to pupils, did not amount to indoctrination or advocacy of a specific kind of sexual behaviour. This raises some interesting issues as to whether this can be applied negatively? Can failure to deal with homosexuality amount to heterosexual indoctrination? Or does existing practice, though respectful of parents, contravene this prohibition? Is this case really a charter for parent's rights since it is unlikely that an educational programme could be considered indoctrination?

There is certainly a substantial body of parental opinion in Northern Ireland that is against the inclusion of homosexual issues within the sex education curriculum. A Health Promotion Agency survey has indicated that 2% of parents feel any sex education is inappropriate to the degree that they would withdraw their children from sex education lessons and 21% feel any sex education which includes any homosexual content is inappropriate and should not be taught in schools.[27] Despite this, there is no statutory right for parents to withdraw their children from sex education although in practical

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[25] Northern Ireland Act 1998 s 42(2).

[26] REF00000094 07/12/76

[27] The Health Promotion Agency for Northern Ireland, *Sex education in Northern Ireland, Views from Parents and Schools*, (1996), pp 35 and 25.

terms most schools still require consent. However, it would be better if a clear legislative statement were made as to the rights of parents and children in this area. In England and Wales, the provision of sex education is mandatory for all schools but parents have a right to withdraw their children. This however may be in contravention of the CRC because the child is not consulted. There are a number of suggested solutions but none has satisfactorily balanced the need for safe sex education for the modern world dealing with the crisis of Aids, and the need to respect both parents and children. In Northern Ireland this may be exacerbated by the presence of devolved legislative bodies. The Westminster Government could formulate policy and then face any challenges that may arise from the Human Rights Act or the ECHR, because it is a sovereign body and not constrained in its legislative powers. The Northern Ireland Assembly is prohibited from making such legislation in the first place because its devolved nature makes creating legislation in breach of the ECHR *ultra vires*. It might also be difficult to formulate a policy that could not be construed as discriminating against a particular religious grouping. Any discussion of the difficult issues of abortion, contraception or homosexuality, could be viewed as discriminating against Catholics whose religion forbids such practices, while a failure to touch upon such topics could discriminate against some of the Protestant denominations or indeed humanists and agnostics who labour under no such prohibition.

The second issue is the right of homosexuals to equality before the law. This is not only suggested by the "promotion of equality" provisions of Section 75, but is also contained within the ECHR in that under Article 14 the rights and freedoms set forth in the Convention shall be secured without discrimination on any ground. Certainly, the right to education and the right to freedom of expression, and freedom of thought, conscience and religion are impinged upon if the gay community is not permitted to have sex education on an equal footing with their heterosexual counterparts. Although the right to freedom of expression is limited and expressly includes provision for the protection of public morals, the other rights are not. There is, of course, the question of margin of appreciation in the implementation of the ECHR provisions and indeed the need to clarify what the term "promote equality" in Section 75 actually means. For the most part, these practical decisions and policy formulations will rest in the hands of the Northern Ireland Human Rights Commission (hereafter the "NIHRC"). However, the recent NIHRC report on "Enhancing The Rights Of Lesbian, Gay And Bisexual People In Northern Ireland," is decidedly muted upon this issue, merely noting that although there is no formal legal requirement to provide sex education in Northern Ireland, failure to do so may be a breach of the requirement under the Education Reform (Northern Ireland) Order 1989 that schools' curricula prepare pupils for the "responsibilities and experiences of adult life".[28]

However Northern Ireland, is not the only devolved government wrestling with these issues. Scotland has recently repealed its equivalent of Section 28 and is setting about formulating its own sex education policy within a human rights framework.

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[28] Art 4.

## The Scottish Model: A Case Study In The Policy Of A Devolved Government

The Scottish Parliament has opted for an informal arrangement embedded within a strong rights framework. The guidelines assert quite clearly that the specific content of the sex education curriculum will not be laid out by government policy and that the responsibility for sex education delivery rests with education authorities and school managers. However they have also been equally clear that the Executive Education Department has, after consultation, drawn up guidelines to ensure that sex education has a secure place within the curriculum. Section 56 of the Standards in Scotland's Schools Act 2000 is explicit in asserting that because the Minister issues guidelines a schools actions may be open to challenge if it is found that they do not follow them and are acting unreasonably in doing so.

The thrust of this advice to school authorities is that sex education is best planned and delivered within a wider health education programme and as part of a programme of religious and moral education.

The recently published Scottish Guidance on Sex Education makes some attempt to deal with a number of the problematic issues already discussed. The first is an explicit acknowledgement of the rights and responsibilities implied by law in this context:

> "The right of the child to education.
>
> The right of the young person to have their views increasingly taken into account as they mature.
>
> The right of pupils to have their views taken onto account when the school is preparing its development plan.
>
> The right of parents to have their religious or philosophical convictions taken into account, within specified limits.
>
> The responsibility of parents to provide their child with efficient education.
>
> The responsibility of the local authority to secure provision of education that takes into account the development of the personality, talents and full potential of the child (this means a statutory duty to consider each child individually).
>
> The responsibility of schools to consult with parents on programmes for sex education."

This clear statement, supported by a structure of legislation in the form of the Standards in Scotland's Schools Act 2000, solves many difficulties highlighted in the Northern Ireland model.

With regard to the parents' right to withdraw their child, they have that right but are advised to discuss the matter with the head teacher. Sex education in this scheme is treated as a matter of general personal development and has many of its elements holistically scattered throughout the curriculum to provide a grounded moral social and emotionally secure learning context. The parent's actions are not permitted to prevent the child from receiving an efficient education. Furthermore, the Children (Scotland) Act 1995 requires authorities to educate the child with regard to the parent's religious and philosophical beliefs although the child's welfare is paramount. The 1995

Act also requires authorities to give regard to children's views in line with their age and maturity. This provision also requires a subtle change in the role of the parents once a child reaches the age of sixteen: the parents then cease to give directions to children but instead offer them guidance. This provision may prove invaluable when dealing with a conflict of rights between the needs of the child and the wishes of the parent.

The repeal of Section 28 does not appear to have caused Scotland to fall into moral decline. Rather the emphasis is on a partnership between parents and schools to educate children in how to have responsible self affirming and supportive relationships in a stable and committed (preferably marital) context while fostering tolerance and understanding of those whose backgrounds and desires differ. There is also provision for those of different religious beliefs to foster this kind of understanding in a manner that is appropriate to their belief structures. Denominational schools are expressly permitted to draw up their own guidelines. A vital element in the ethos building is that:

> "Pupils should be encouraged to appreciate the value of stable life, parental responsibility and family relationships in bringing up children and offering them security, stability and happiness. Pupils should also be encouraged to appreciate the value of commitment in relationships and partnerships including the value placed on marriage by religious groups and others in Scottish society. At the same time teachers, must respect and avoid causing hurt or offence to those who come from backgrounds that do not reflect this value. All pupils should be encouraged to understand the importance of self-restraint, dignity, respect for themselves and the views of others."[29]

This broad policy statement is a good beginning towards equality in sex education since the emphasis is placed on the quality and emotional commitment of the relationships involved. Although marriage is to be discussed and valued, so also are other relationships. This seems to be an excellent compromise to the clash of interests between religious groupings and the gay community. It is of course yet to be seen what the denominational schools will do within this framework. However, the protections concerning the need to meet the needs of the individual child, and to respect the wishes of the parents, may well do much to prevent any serious rights abuses occurring, either to those who wish to receive education different from the spiritual ethos of their institution, or to those who wish to provide educational establishments who act in harmony with their spiritual beliefs. However, the question is still unresolved as to the potentiality that fostering an atmosphere where certain types of sexual desire and action which are legal and permissible in the state are vilified might not in itself in some extreme cases constitute an abuse of rights, especially if such teaching directly led to a hate crime. How responsible a teacher or preacher would be for the actions of those who acted upon their anti-gay rhetoric, is a question admitting of no clear answer.

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[29] Scottish Executive Department of Education Circular 2/2001

## CONCLUSIONS

Sex education concerns some of the most fundamental principles and values of our society. It also involves the needs of one of our most precious and vulnerable groups, our children. Because of this we have a most pressing and urgent need to clarify our policies, particularly on clashes of rights, so that the best interests of our children may be served. Thus far both the NIHRC and the Assembly have failed to provide guidance on this crucial matter. The rights asserted by Section 75 do not of themselves solve any of the contentious issues surrounding this topic. A flexible framework of guidance as in the Scottish model may be the answer although any solution must deal with the clash of rights within the social context of Northern Ireland. To conclude, the words of the Quaker Representative Bronwen Currie to the Scottish Equal Opportunities Committee during the Section 28 repeal debate, may be quoted:

> "Education is about preparing children and young people to live in a plural society.
>
> Our education policy needs to prepare them for that society by developing clear policies on sexual education and the conflict of rights."[30]

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[30] Scottish Parliament Equal Opportunities Official Report, Meeting 6, 2000, available online at http://www.scottish.parliament.uk/official_report/cttee/equal-00/eo00-0602.htm.

# THE ENFORCEMENT OF JUDGMENTS FOR POSSESSION OF LAND

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Where a court or tribunal orders an occupier of real property to deliver possession of the land to another, usually the owner, one is tempted to assume that all legal issues between the parties have been resolved. All that remains to be done, one would think, is for physical possession of the land to be given to the person now entitled to it. This article considers to what extent this is true and whether the established procedure for the enforcement of orders for the delivery of possession can, or must, make the person entitled to possession jump through any further legal hoops.

The typical cases under consideration here are those where a mortgagee of land has been granted possession of the land to enable it to sell the land and apply the proceeds towards an unpaid secured loan; or, where a lessor has obtained an order requiring the lessee to vacate the land and allow the lessor to resume exclusive possession. The article is not concerned with orders charging land under article 46 of the Judgments (Enforcement) (Northern Ireland) Order 1981, a process which has created a minefield of problems relating to the obtaining of possession to facilitate sale of the property.[1] The latter is a means of enforcing a *money* judgment, not an order for the possession of land. The order charging land is granted to secure the money judgment, with the process of obtaining possession coming later and designed to enable the land to be sold to realise money for the discharge of the judgment debt.

Before analysing the position with regard to judgments or orders for the possession of land it is worth outlining what is involved in the enforcement of a money judgment.

## Money Judgments

As any hard bitten business creditor can tell you the obtaining of a judgment for debt or damages in no way equates to payment of the sum adjudged due. The debtor may be unable to pay because of insolvency, or may be experiencing cash flow problems and unable to pay at the moment, or the debtor may be either disorganised or bloody minded and simply unwilling to settle the debt.

For debtors of the latter sort the creditor may have to go through the frequently wearisome process of enforcement through the Enforcement of Judgments Office (hereafter the "Office"), in accordance with the procedure laid down by the Judgments (Enforcement) (Northern Ireland) Order 1981

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***** The author would like to thank Dr Heather Conway and Master J Christopher Napier who read and commented upon an earlier version of this article. They are responsible for effecting significant improvements to this article but the author remains responsible for any errors.

[1] On this see Conway, *Co-Ownership of Land – Partition Actions and Remedies* (Dublin, 2000) pp 188-195, 235-239.

(hereafter the "1981 Order").[2] The description just given of this process is not meant to convey the impression that staff working in the Office are obstructive of creditors trying to recover debts or that the system is some kind of conspiracy against creditors. It is simply a fact that any system for the enforcement of judgments which tries to be even handed between creditors and debtors, and which is intended to differentiate the "can't pay" from the "won't pay", is unlikely to be swift in the recovery of judgment debts.

That system depends very heavily upon rigorous examination of the debtor as to its means to pay the debt.[3] For those debtors that the examination reveals are unable to pay a certificate of enforceability can be issued under article 19 of the 1981 Order, effectively preventing that judgment from being enforced until such times as the certificate is lifted under article 13(g)(iii). A prudent creditor may be able to avoid this frustrating conclusion by attempting to ascertain whether it is the likely result of enforcement by careful enquiries about the debtor before enforcement is commenced, or even before the claim is initiated. These enquiries, which only save the costs of enforcement and do not result in payment of the debt, may involve inspection of the register of judgments maintained by the Office[4] to see if other unenforced judgments have been registered against the debtor, or may take the form of inquiries to credit reference agencies. For those debtors who can pay, whether now or with time, the examination should reveal which of a variety of enforcement orders[5] would be most suited to enforcement of the debt. The process does not come cheap. In the Schedule to the Judgment Enforcement Fees Order (Northern Ireland) 1996,[6] as amended by an amending order of 1998,[7] a sliding scale of fees for enforcement is laid down depending on the amount of money due under the judgment.[8]

For non-business creditors, particularly consumers, the fact that a court judgment does not necessarily involve payment is frequently the cause of surprise and disgust. Many struggle to comprehend how they can be no better off, and sometimes even worse off, after a court has determined that they are entitled to payment. For many such creditors the enforcement fees just alluded to are daunting, especially when they are only recoverable if the judgment is enforceable. The sliding scale presents problems too because a very much larger proportion of smaller judgments (more likely to be the sort of judgments consumers would obtain) has to be paid in enforcement fees.[9]

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[2] SI 1981/226 (NI 6).
[3] Under the provisions of articles 26-27 of the 1981 Order.
[4] Under article 116(1) of the 1981 Order.
[5] Most of these can be found in Part V of the 1981 Order.
[6] SR 1996 No. 101.
[7] SR 1998 No. 411.
[8] E.g. For a debt not exceeding £300 the fee is 30p in £, subject to a minimum fee of £30. For debts in the £1,000-3,000 range the fee is £210 plus £8.50 per £100 or part £100 in excess of £1,000. For debts exceeding £10,000 the fee is £645 plus £1.80 per £100 or part £100 in excess of £10,000.
[9] The problems these fees presented for consumer creditors were highlighted in the *Response of the General Consumer Council for Northern Ireland to the Interim Report of the Civil Justice Reform Group* (General Consumer Council, Belfast, 1999) at pp 14-16.

It should also be said that enforcement fees generally are a very much larger proportion of judgment debts than was originally envisaged by the Anderson Report which proposed the setting up of the current enforcement system in Northern Ireland.[10]

## Judgments for the Possession of Land

As the introduction to this article suggested one would probably assume that a court or tribunal decision that possession of land should be given to the owner would leave very little more to decide before physical possession of the land was given. There is a need to apply for enforcement, the relevant fees being £20 for the application to enforce a non-money judgment and £515 for an order for delivery of possession of land.[11] Again these fees are certainly not cheap and there is no sliding scale depending on the value of the land or anything else. But there is no need to examine the occupier as to what means it has for payment of the judgment, and there is no prospect of a certificate of unenforceability being granted because of inability to pay. Any considerations, such as hardship to the occupier, which might lead to possession being refused or stayed, seem logically to be matters for the court or tribunal called upon to decide whether possession should be delivered. Enforcement would not seem to be a process calling for any or any further consideration of these matters.

When the Anderson Working Party considered this matter it did not seem to envisage the Office having any real discretion to withhold or delay possession:–

> "Whilst the making of an order for possession by the Office, in some cases where the Court has already made such an order, may appear to be *unnecessary duplication*, we consider that for this form of enforcement, as in the others, the notification to the judgment debtor of *what is going to happen may*, in some cases at least, have the effect of speeding enforcement, and in some cases enforcement may be effected without any further steps having to be taken." (emphasis added).[12]

Although clause 24(1) of the draft Enforcement of Judgments Bill contained in the Report stated, like article 53(1) of the 1981 Order does, that the Office "may" order delivery of possession, the use of this permissive word should be read in the light of the Report's recommendations. Section 53(1) of the Judgments (Enforcement) Act (Northern Ireland) 1969, the enactment giving effect to the enforcement system recommended by the Anderson Report, also contained the permissive word "may".

Despite this legislative history Murray LJ, in *Allied Irish Banks plc* v *McAllister*,[13] concluded that the Office did have a discretion to grant a stay of

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[10] See the Report of the Joint Working Party on the Enforcement of Judgments, Orders and Decrees of the Courts in Northern Ireland (Belfast, 1965) (the "Anderson Report") para 53.

[11] Judgment Enforcement Fees Order (NI) 1996, art 4 and Schedule, as amended by by Judgment Enforcement Fees (Amendment) Order (NI) 1998, art 2.

[12] Anderson Report, para 108.

[13] [1993] NI 286.

enforcement in mortgagee repossession cases.[14] His Lordship based this on an analysis of the provisions of the 1981 Order generally, together with the Judgment Enforcement Rules (Northern Ireland) 1981 (hereafter the "1981 Rules").[15] In support of a literal meaning of "may" in article 53(1) article 13(f) of the 1981 Order states that, subject to any other statutory provision, the Office may stay enforcement of any judgment either absolutely or subject to such terms and conditions as it considers proper. Rule 103(1)(a) of the 1981 Rules allows the Master (Enforcement of Judgments) to grant a stay of enforcement when he is satisfied that there are special circumstances which render it inexpedient to enforce the judgment. Rule 103(6)[16] states that no stay of enforcement shall be made in respect of a judgment given under Rules of the Supreme Court (Northern Ireland) 1980 Order 113 or a warrant issued under section 1(2) of the Summary Jurisdiction (Miscellaneous Provisions) Act (Northern Ireland) 1946.[17] This supports the conclusion reached by Murray LJ, as the prohibition of a stay of enforcement in some possession cases suggests that it exists in all others.[18]

The wide and apparently untrammelled nature of the discretion conferred on the Office clearly troubled the learned judge. In mortgagee possession cases involving dwelling houses the court has an ostensibly wide discretion under section 36 of the Administration of Justice Act 1970 and section 8 of the Administration of Justice Act 1973 to give the mortgagor a reasonable time to pay and to withhold possession or grant a stay to enable him or her to do so.[19] His Lordship could not see much sense in giving the court this discretion and then giving the Office another discretion to look at the question of possession again after the court had decided that the mortgagor was to be given no further time to pay.[20] As a way of controlling this latter discretion Murray LJ suggested that it be exercised with regard to section 36 of the 1970 Act and section 8 of the 1973 Act. His Lordship explained this by reference to the words "subject to any other statutory provision" in article 13(f) of the 1981 Order.[21] With respect, this is not a convincing solution to the problem. If there is no sensible basis for the Office having an additional

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[14] His Lordship was careful to say that his judgment did not apply to any other proceedings; see [1993] NI 286 at 301. This does not take away from the light which the judgment sheds on whether the Office has *any* discretion under article 53.

[15] SR 1981 No 147.

[16] Inserted by rule 3(2) of the Judgment Enforcement (Amendment No 2) Rules (Northern Ireland) 1983.

[17] These provisions deal with squatters.

[18] See [1993] NI 286 at 300.

[19] This discretion seems to be exercised less generously to the mortgagor in Northern Ireland than it is in England and Wales. Contrast *Cheltenham & Gloucester Building Society* v *Norgan* [1996] 1 WLR 343 with *National & Provincial Building Society* v *Lynd & Anor* [1996] NI 47.

[20] See [1993] NI 286 at 300. His Lordship suggested that very little thought could have been given to this question when the 1981 Order was being prepared.

[21] *Ibid* at 301. Murray LJ held that the six years allowed by the Master (Enforcement of Judgments) for discharge of arrears was too long. The mortgagor had offered to assign to the mortgagee his sheep farming subsidy of £3,000 per annum, which would have discharged the debt in about six years.

discretion to the court's there is little more sense in cutting that discretion down, especially if it is to be cut down by reference to the court's discretion.

The problem gets worse when mortgages over properties not including a dwelling house are considered.[22] Here there is no statutory discretion to stay mortgagee possession proceedings at all, only a very limited power for the court to adjourn or stay execution of an order for possession for a short time to see if the mortgagor can pay off the whole of the mortgage debt.[23] So there would be no obvious way of reducing the discretion which a literal reading of the legislative provisions appears to confer. It cannot seriously be suggested that Parliament intended to make up for the absence of any discretion for the court to stay proceedings by granting the Office an apparently unrestricted discretion through the backdoor route of article 53(1) of the 1981 Order. None of this caused Murray LJ to reconsider whether he was arguing from a false premise but it clearly troubled him even more than did the situation applicable to dwelling houses. His Lordship observed:–

> ". . . such a discretion really strikes at the whole basis of the mortgage transaction which is that if the borrower does not pay the lender in accordance with the relevant contract, the lender is entitled to take the security and sell it to pay himself. A further thought which occurs to me is this: if the protection for the lender under a secured loan is in effect taken away by a too liberal use of the discretion to delay enforcement, the banks and other lending institutions in this country may become quite unwilling to lend their money in situations where up to now they have been willing to do so, and if this occurs such a development could produce highly undesirable results and indeed hardship for prospective home buyers or persons seeking business loans."[24]

While this passage may have included some unthinking acceptance of typical banks' doomsday propaganda, it does reinforce the feeling of discomfort about the discretion which the literal reading of the legislation appears to confer. Murray LJ's solution, exercising the discretion analogously to dwelling house cases, is no more convincing than the proposed solution for dwelling house cases.[25]

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[22] *Allied Irish Banks plc* v *McAllister* was this kind of case. Murray LJ was only considering the position of dwelling house properties because the Master (Enforcement of Judgments) had erroneously assumed it was such a case.

[23] *Birmingham Citizens Permanent Building Society* v *Caunt* [1962] Ch 883.

[24] [1993] NI 286 at 300-301.

[25] Murray LJ suggested that a stay of enforcement could be granted where (a) the mortgagor demonstrates an ability to pay off the mortgage debt within a reasonable time, and (b) where he or she undertakes to carry out such revised terms for repayment of the debt as the court (*sic* Master) fixes. The discretion could also be exercised in cases of particular hardship, e.g. where illness or unemployment had undermined the mortgagor's financial position but there was still a real possibility that given extra time the mortgage payments could be managed. The six years allowed by the Master was not regarded as reasonable for a debt of over £11,000. A stay of two months was given, in part because the mortgagor had been allowed to stay in the property for several years after the original possession order. See [1993] NI 286 at 301.

This judgment demonstrates all the limitations of a literal approach to statutory interpretation. The reliance upon the words "subject to any other statutory provision" in article 13(f) should have led the learned judge away from the conclusion he arrived at. If these words can be used to reduce in scope an Enforcement of Judgments Office discretion because something similar exists at the pre-judgment stage, it would seem to follow that there is no way of reducing the Office's discretion where none is conferred on the court. In *Allied Irish Banks plc* v *McAllister* there was a comprehensive failure to appreciate the qualitative difference between enforcing a money judgment and a judgment for the possession of land. In the former questions about hardship or the debtor's ability to pay have scarcely any relevance at the pre-judgment stage. All the court is concerned with is whether the defendant is obliged to pay the money. In cases involving the possession of land questions of hardship and anything else going to the heart of whether possession should be given to the applicant are inextricably linked to the court's decision. They have very little to do with enforcement, as the passage quoted above from the Anderson Report demonstrates. Another difference of importance is that money judgments can be enforced in a variety of different ways so it is understandable why all questions regarding payment of the debt are not necessarily resolved at trial. By contrast only one method is provided by the 1981 Order for the enforcement of judgments for the possession of land.

The unsatisfactory implications of *Allied Irish Banks plc* v *McAllister* were partly, but by no means completely, resolved by the subsequent decision of Girvan J in *Halifax plc* v *Seawright and Seawright*.[26] This case was an appeal brought against the Master (Enforcement of Judgments)'s decision to adjourn mortgagee possession proceedings in a dwelling house case. The Master had thus purported to exercise the discretion which Murray LJ implicitly recognised in *Allied Irish Banks plc* v *McAllister*.

In coming to a very different conclusion to Murray LJ in the earlier case, Girvan J attempted to distinguish the two cases. While recognising that Murray LJ's reasoning implicitly recognised the existence of an Enforcement of Judgments Office discretion in dwelling house cases, his Lordship contended that *Allied Irish Banks plc* v *McAllister* was actually a non-dwelling house case.[27] While this is technically correct it is a most unsatisfactory basis for distinguishing the two cases because the reasoning supporting an enforcement discretion in non-dwelling house cases is, if anything, weaker than for dwelling house cases. In relation to the latter Girvan J's judgment effectively removed the foundations altogether.

His Lordship offered two reasons for his belief that the Master (Enforcement of Judgments) has no discretion to stay or adjourn enforcement in mortgagee possession cases involving dwelling houses. First, his Lordship pointed out that the basis for limiting that discretion by reference to section 36 of the 1970 Act and section 8 of the 1973 Act was false. The discretion conferred by section 36 (which is amended by section 8), so far as it applies to the High Court in Northern Ireland, is conferred on a judge of the High Court.[28] The

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[26] [2000] NIJB 71.
[27] *Ibid* at 76.
[28] By section 36(6).

Master (Chancery) can exercise the discretion because section 16(3) of the Judicature (Northern Ireland) Act 1978 vests in the High Court generally the jurisdiction vested in a judge of the High Court under any statutory provision. The Master (Enforcement of Judgments) is not a High Court Master, even though article 15 of the 1981 Order gives orders of the Enforcement of Judgments Office the like effect as orders of the High Court.[29] Thus the Master (Enforcement of Judgments) cannot exercise the discretion conferred by section 36, either for the first time or after the court has already done so. It would seem to follow from this that there is no power to stay or adjourn enforcement under article 53 by reference to section 36.

The second reason offered by Girvan J for rejecting the discretion for dwelling house cases reflects much of the reasoning presented in this article. This was that the Master (Enforcement of Judgments) would be acting as a further appellate court from decisions of the High Court. Of course, there might be a relevant change of circumstances between the grant of the court order and the enforcement application but the proper way to deal with that would be to make further application to the High Court for a stay of the possession order.[30]

Before leaving the decision in the *Seawright* case one further matter, which was raised by that case, should be discussed. At the end of his judgment Girvan J observed that a court order for the possession of land is capable of being enforced by committal for contempt, provided it is endorsed with a penal notice and specifies a date by which delivery of possession should be effected.[31] Indeed the learned judge had made two previous rulings to this effect in proceedings under Rules of the Supreme Court (Northern Ireland) 1980, Order 113 against persons trespassing in public rented accommodation.[32] Assuming the existence of this procedure it is another sign that the discretion recognised in *Allied Irish Banks plc* v *McAllister* is dubious, both in mortgagee possession cases and others seeking the possession of land.

The availability of contempt as an enforcement mechanism for land possession cases is not completely satisfactory. Rules of the Supreme Court (Northern Ireland) 1980 Order 45, rule 3 clearly confirms the availability of this process in article 53 cases[33] but it is still something of a relic of the days before the current enforcement system came into effect. It is not without significance that the two cases referred to above in which Girvan J recognised the availability of committal as a means of enforcement of orders for the delivery of possession of land were squatter cases under Order 113. In those cases rule 103(6) of the 1981 Rules specifically provides that the

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29 [2000] NIJB 71 at 75-76.
30 *Ibid* at 76-77.
31 *Ibid* at 77.
32 *Northern Ireland Housing Executive* v *Magee* [1995] NI 97; *Northern Ireland Housing Executive* v *Devine* [2000] 4 BNIL 65.
33 The wording of rule 3 is – "Without prejudice to Article 53 of the Order of 1981. . . . a judgment or order for the giving of possession of land may be enforced in a case in which rule 4 applies by an order of committal under Order 52." Rule 4 provides that the act which the court order requires to be done (in this context the delivery of possession of land) must be one which the court has required to be done by a specified date.

Office may grant no stay of enforcement. Committal for contempt has been preserved for money judgments so it might be thought strange if the ultimate enforcement power did not exist for the most common type of non-money judgments. But for money judgments there is clear recognition of the committal power for the deliberately obstructive debtor in article 107 of the 1981 Order. Rules of Court have also been made to set out the procedure to be followed in these cases.[34] The same should be done for land possession cases and the provision made should be by way of enforcing orders made under article 53. The article 53 procedure should not be by-passed and if it is not working effectively it should be amended so that it can perform the function intended of it.

There are two further reasons to doubt the appropriateness of proceeding by way of contempt. First, committal does not produce possession of the lands. The defendant may prefer to go to prison and still refuse to quit possession. The applicant has no power of forcible entry, this means of enforcement being conferred only on enforcement officers under article 53. Secondly, it may be doubted whether committal would be permitted under the Human Rights Act 1998 and article 5(1)(b) of the European Convention on Human Rights. The latter provision sanctions the detention of a person to secure compliance with a court order but the need for proportionality between means and ends must cast considerable doubt on the validity of committal when another less drastic and arguably more effective means of enforcement is available.[35]

## Evaluation and Conclusion

This article has been principally concerned with mortgagee possession cases but there is no reason to suppose that the same principles discussed here would not also apply to other cases where an order for the delivery of possession of land under article 53 of the 1981 Order is sought. Thus where the landlord of a dwelling house seeks to recover exclusive possession of the property from the tenant a court order must be obtained under articles 55-56 of the Rent (Northern Ireland) Order 1978. This procedure applies to private and public sector rented accommodation.[36] It provides the appropriate time for the court to consider any application for relief from forfeiture[37] or any adjournment or stay of proceedings. For business tenancies the Business Tenancies (Northern Ireland) Order 1996 only provides relief for some tenants against the landlord's refusal to grant a new lease. An existing lease can be forfeited without a court order but the tenant would have the right to apply to the court for relief against forfeiture.[38] Again this would seem to be all the protection against recovery of possession which the tenant should get.

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[34] Rules of the Supreme Court (Northern Ireland) 1980, Order 111; County Court Rules (Northern Ireland) Order 40 Part III.

[35] See *McVeigh* v *United Kingdom* (1981) 25 DR 15 at p 42.

[36] Art. 55 applies to cases where the lease is subject to a right of re-entry or forfeiture and any person is lawfully residing in the premises or any part of them. Art 56 applies where the tenancy has come to an end but the occupier continues to reside in the premises or any part of them.

[37] Conveyancing Act 1881 section 14(2). This would seem to apply only to art 55 proceedings.

[38] *Ibid.*

In relation to mortgagee possession cases involving dwelling houses it is interesting to note the decision of the English Court of Appeal in *Ropaigealach* v *Barclay's Bank plc*.[39] This case establishes that a mortgagee seeking possession of land including a dwelling house may take possession of the property without first seeking a court order. The argument that section 36 of the 1970 Act impliedly required an application to the court was rejected. Effectively the Court of Appeal held that if the mortgagee applies for a possession order the court must consider the exercise of its statutory discretion but if the mortgagee makes no such application the mortgagor is deprived of that protection. Admittedly the circumstances of that case were somewhat special. The mortgagee did not attempt to sell the land with vacant possession and was only able to obtain physical possession because the occupiers of the property had left. To the extent that this case deprives mortgagors of dwelling houses of protection against the loss of their occupation rights it might be open to challenge under articles 6 and 8 of the European Convention on Human Rights.[40] However it does not mean that the Enforcement of Judgments Office should attempt to make up for any perceived deficiency in the pre-judgment law by exercising a discretion under article 53 of the 1981 Order, when the true construction of that Order indicates that no such discretion exists.

When a court or tribunal orders a defendant to give possession of land to another person this should finally settle the questions of whether and when possession is to be given. The only exception to that should be that a court or tribunal which has the power to stay proceedings or the enforcement of its order, should be allowed to take a fresh look at the matter should circumstances change after the grant of the order. On no account should the Enforcement of Judgments Office be examining questions like this. Judgments or orders giving possession of land are quite different from money judgments. No examination of the defendant as to ability to pay is required and the Office has no choice of enforcement methods. There is nothing to justify delay in making an order under article 53 of the 1981 Order.

The two cases discussed at length in this article, *Allied Irish Banks plc v McAllister* and *Halifax plc* v *Seawright and Seawright*, have left the law in an unsatisfactory condition. Since these are two first instance decisions of the High Court the formal position is that the Office can grant a stay or adjournment in mortgagee possession cases where the land does not include a dwelling house but cannot do so where it does include a dwelling house. In possession cases not brought by mortgagees, e.g. landlords, there is no indication whether the Office has any discretion in the matter. In principle it should not because the reasoning in the *Seawright* case, by far the more satisfactory of the two rulings, strongly suggests that stays and adjournments are history by the time proceedings get beyond the court.

What should the Enforcement of Judgments Office do in the face of this conflict of authority? It surely cannot wait for the Court of Appeal to resolve the conflict and apply *McAllister* in non-dwelling house mortgagee cases and *Seawright* in the dwelling house cases in the meantime. It ought to make the

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[39] [2000] 1 QB 263.

[40] As implemented in domestic law by the Human Rights Act 1998.

article 53 order in all cases, including non-mortgagee cases, with all deliberate speed, and leave any occupier aggrieved with the decision to institute an appeal which might end in the Court of Appeal. In correspondence with the author the Master (Enforcement of Judgments) has confirmed that since *Seawright* he regards his article 53 powers as limited to granting a stay only to enable the occupier of property to apply to the court which granted the possession order for a stay on such terms as to the court may seem fit.

In the face of these difficulties one cannot blame litigants anxious to obtain possession of property from instituting contempt proceedings but the relationship between the latter and the enforcement of judgments' legislation is not satisfactory. There should be amendment of this legislation, the 1981 Order and the Rules, to provide that the Office should proceed to deliver possession of the land to the person entitled to it under the judgment. Article 53 should be amended to make clear that the Office *must* make an order for delivery of possession where a judgment (not subject to any current stay of enforcement) grants this to the applicant. The procedure in Rule 35(2) whereby any person in occupation of the land may seek a hearing before the Master to object to the delivery of possession should be abolished because this is simply a request for the exercise of a discretion which does not exist. The procedure under Rule 35(1), under which notice of the intention to make the article 53 order is given to the occupiers, should be retained because they should be given the opportunity to make whatever alternative arrangements they can and possibly apply to the court for a stay of enforcement of the judgment. The committal power under Rules of the Supreme Court (Northern Ireland) 1980 Order 45 should be abolished, save for a residual power to commit anyone who wilfully attempts to frustrate the implementation of an order under the proposed new article 53 procedure. Apart from that the remaining provisions relating to the enforcement of judgments for possession of land should be retained.

# COMPENSATION FOR DISTURBANCE UNDER THE BUSINESS TENANCIES (NI) ORDER 1996 – SOME QUERIES

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The purpose of this short article is to highlight an apparent change in the law relating to compensation for disturbance of business tenants under the Business Tenancies (NI) Order 1996 ("the Order"), a change which was probably not intended and which could cost landlords substantial sums of money because it creates a major shift in the policy governing eligibility for compensation. At the end of the article, a second, more general, query relating to the same provision is also briefly explored.

## Compensation for disturbance of defaulting tenants?

The business tenancies code has traditionally drawn a distinction between good and bad tenants.[1] Business tenants who are in breach of their obligations have always remained vulnerable to forfeiture or ejectment, and these powers are expressly preserved by the Order, following the example of its predecessor, the Business Tenancies Act (NI) 1964 ("the 1964 Act").[2] They are also likely to encounter landlord opposition to the renewal of the tenancy on the basis of the first three statutory grounds of opposition, paragraphs (a) – (c) of article 12(1) of the Order. These three grounds refer to tenant default of one type or another. Furthermore, landlords who have successfully opposed renewal on any of the default grounds, have not incurred liability for compensation for disturbance, at least not under previous legislation. On the other hand, tenants who fulfil their tenancy obligations can expect to have a renewal of the tenancy, or suitable alternative accommodation,[3] or compensation for disturbance if the landlord successfully opposes renewal on the basis of his need to recover possession of the premises in order to further his own legitimate domestic or economic interests.[4]

In order to maintain this distinction, the statutory provision for compensation for disturbance under the 1964 Act contained a key phrase which expressly restricted the availability of compensation to those cases where the Lands Tribunal was precluded from making an order for the grant of a new tenancy:-

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* I am grateful to Rosemary Carson, partner, Carson McDowell, for helpful comments on an earlier draft of this article. The views expressed here are my own.

1 See *Government Policy on Leasehold Property in England and Wales* (1953, Cmd 8713), para 43. This policy statement was followed by the enactment of the Landlord and Tenant Act 1954, Part II. In Northern Ireland, the Business Tenancies Act (NI) 1964 essentially adopted the same policy.

2 Article 8(1) of the Order; section 6(1) of the 1964 Act.

3 Article 12(1)(d) of the Order.

4 Article 23 and article 12(1)(e) – (h) of the Order.

> "by reason of any of the grounds specified in paragraphs (e), (f) and (g) of subsection (1) of section 10, *and not of any grounds specified in any other paragraph* of that section."[5]

The equivalent English provision, section 37(1) of the Landlord and Tenant Act 1954 ("the 1954 Act"), is couched in similar terms. Section 37 was amended in 1969 so that the right to compensation for disturbance could arise at two possible stages in the process. The first, identical to that referred to in section 19(1) of the 1964 Act, is where the landlord's opposition succeeds at hearing on any of the grounds specified in paragraphs (e) – (g), *and on no other grounds*. The second situation, added in 1969, is where the landlord's notice states his opposition on any of the grounds specified to in paragraphs (e) – (g), *and no other ground is specified* in his notice or counter-notice, and the tenant either makes no application for a new tenancy or later withdraws his application. Although section 37 was extended in 1969 so that it now can apply at two different stages in the process, the key phrase – *and not on any ground specified in any other paragraph* – was expressly retained and governs each scenario.

When reform of the 1964 Act was first considered in the early 1990s, the Law Reform Advisory Committee for Northern Ireland (LRAC) at an early stage proposed an amendment which would bring the law in Northern Ireland into line with the change made to section 37(1) in England in 1969. The terms on which the change should be made were stated unambiguously in a LRAC Discussion Paper published in 1992.

> "If this were adopted, the right to compensation would continue to be based on the landlord's opposition to renewal on grounds specified in section 10(1)(*e*), (*f*) and (*g*), but it would arise not only where the Tribunal refuses a new tenancy on those grounds, but also where the tenant does not apply for a new tenancy or where he withdraws his application and agrees to quit the premises on the strength of the landlord's opposition on any of the three relevant grounds. There will be many cases where a tenant can make a realistic assessment of the strength of the landlord's case. Where, having done that, he is not inclined to apply to the tribunal for a new tenancy, he should not be compelled to do so merely in order to be able to assert a claim to compensation."[6]

Two years later, in the LRAC *Report on Business Tenancies*,[7] the following recommendation was made.

> "We therefore recommend that where the landlord's notice to determine or notice of opposition to a new tenancy relies upon the grounds in section 10(1)(*e*), (*f*) or (*g*) *and no other grounds*, and the tenant either does not apply for a new

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[5] Section 19(1) of the 1964 Act. Italics added.
[6] LRAC, Discussion Paper No 3, *A Review of the Law relating to Business Tenancies in NI*, (1992, HMSO), para 8.2.2.
[7] LRAC No 2, 1994 (HMSO).

> tenancy or applies and then withdraws his application, the tenant will have a right to compensation for disturbance."[8]

This recommendation has been implemented in article 23(1) of the Order, remedying a serious deficiency of the 1964 Act. As one English judge has recently stated:

> "The disturbance is suffered equally when . . . the tenant withdraws his application for a new tenancy and a tenant in these circumstances is just as much entitled to his compensation."[9]

When one considers the LRAC recommendation quoted above, and in particular the italicised words, there can be no doubt that the Committee did not intend to extend the right to compensation for disturbance to defaulting tenants whose conduct is a basis for landlord opposition on any of the grounds contained in paragraphs (a) – (c), or indeed to tenants who are offered suitable alternative accommodation under paragraph (d) of article 12(1) of the Order.

The difficulty is that the Order does not contain the words "and on no other grounds" or any equivalent formula. The failure to use a formula, tried and tested in the 1954 and 1964 Acts, to maintain a distinction between defaulting tenants and those who comply with the terms of their tenancy, first occurred in the Draft Order appended to the LRAC Report of 1994, and is repeated in the Order itself. This raises the question whether a defaulting tenant is now entitled to compensation for disturbance. Given the legislative history of the compensation provision and the omission of words deliberately used in the 1954 and 1964 Acts in order to prevent this result, it now appears that defaulting tenants can now claim compensation in the following circumstances:

(1) The landlord opposes renewal on the grounds specified, for example, in paragraphs (b) and (g) of article 12(1) of the Order. Paragraph (b) (persistent delay in paying rent) is a non-compensatory ground of opposition, whilst paragraph (g) (landlord requires the premises for his own business or as his residence) gives rise to a potential entitlement to compensation for disturbance. Both grounds are established at the hearing and the Lands Tribunal either grants the landlord's tenancy application or refuses the tenant's tenancy application. In the event of refusal, under the 1964 Act, and currently in England and Wales, the tenant would not be entitled to compensation for disturbance on these facts. Under the Order, however, it appears that the defaulting tenant is entitled to compensation for disturbance, because the landlord relied on, and established, a compensatory ground of opposition, and despite the fact that the landlord also relied on, and established, a non-compensatory ground of opposition.

(2) As in (1), the landlord relies on the grounds contained in paragraphs (b) and (*g*) of article 12(1), and the tenant fails to make a tenancy

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[8] *Ibid*, para 8.2.2. Italics added.

[9] *Bacchiocchi* v *Academic Agency Ltd* [1998] 2 All ER 241, 251, *per* Ward LJ. This case concerned contracting out of compensation for disturbance, which is no longer possible in Northern Ireland under article 24(d) of the Order.

application or later withdraws his tenancy application. In England and Wales, compensation for disturbance is not payable in these circumstances. Under the 1954 Act, it is necessary to defeat landlord opposition based on tenant default in order to be eligible for compensation for disturbance. If the tenant does not make, or later withdraws, an application for renewal, he inevitably remains ineligible for compensation. For this reason, a landlord may adopt the tactic of relying on one of the non-compensatory/default grounds in paragraphs (a) – (c) as well as one of the compensatory grounds in paragraphs (e) – (g), in order to put additional pressure on the tenant.[10] In Northern Ireland, however, it appears that, on the facts outlined, the tenant is entitled to compensation for disturbance because the landlord relied in his notice on a compensatory ground, and despite the fact that he also relied on a non-compensatory ground.

The Lands Tribunal for Northern Ireland has interpreted article 23 of the Order in this way. In *Age Concern* v *The Honourable The Irish Society*,[11] the landlord's notice to determine relied on paragraphs (c) and (f) of article 12(1). The parties entered into an agreement that the tenant would quit the premises and the landlord would pay the statutory compensation for disturbance. They could not agree on the allocation of costs. The tenant had made a tenancy application. The Tribunal held that the tenant's application had been unnecessary, as the right to compensation is secured as soon as the landlord relies on a compensatory ground of opposition, even though that is coupled with a non-compensatory ground of opposition. As the application was unnecessary, the Tribunal made no order as to costs.

For defaulting tenants to be eligible for compensation for disturbance is contrary to long-established policy. It is also clearly inconsistent with the intention of the Law Reform Advisory Committee as expressed in the 1994 Report, and for that reason, a court might be inclined to adopt a "purposive" construction and interpret article 23(1) as if the missing words were implied. The problem with such an approach would seem to be that these words were actually present in the 1964 Act and are actually present in the 1954 Act. Their absence from the face of article 23(1) is, accordingly, difficult to overlook by a process of benign interpretation.

The question, therefore, arises whether article 23(1) should be amended to make it clear that compensation for disturbance is payable only when the landlord establishes at hearing any of the compensatory grounds *and no other grounds*, or where he relies in his notice on any of those grounds *and no other grounds*, and the tenant does not make, or later withdraws, a tenancy application. As we have seen, the LRAC Report of 1994 leaves no room for doubt as to the Committee's intentions, which have not been realised in the 1996 Order. On the other hand, an *ex post facto* justification might be found for not amending the Order. An argument could be advanced for maintaining the current wording in order to prevent landlords deliberately defeating compensation claims by adding unfounded non-compensatory grounds to well-founded compensatory grounds of opposition. This point of view is tenable at least where, on the strength of the landlord's notice, a

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[10] See Haley, *The Statutory Regulation of Business Tenancies* (2000), para 5.32.
[11] BT/95/2000, 9 December 2001.

tenant either does not make, or later withdraws, a tenancy application – in practice, this may prove to be the common case. Where, however, a case proceeds to a Tribunal hearing and a new tenancy is refused because the landlord has established both compensatory *and* non-compensatory grounds of opposition, the defaulting tenant's eligibility for compensation under the 1996 Order marks a significant change in policy, not heralded by the LRAC Report.

In light of the wording of article 23 and of the Tribunal's decision in the *Age Concern* case, the parties and their advisors must reflect this development in their estate management strategy. If the landlord believes that he can establish a ground of opposition based upon tenant default and also one of the compensatory grounds, he could decide to resist renewal solely on the non-compensatory ground in order to be confident of not incurring liability for compensation for disturbance. But could he at the same time be confident of successfully preventing renewal, given that the default grounds of opposition are at the discretion of the Lands Tribunal?[12] Even where a ground of opposition based on tenant default is made out, the Tribunal has a discretion to grant a new tenancy. Thus, a landlord who relies solely on one of these grounds runs the risk of a new tenancy being granted, especially if the tenant has redeemed his position by the date of the hearing. The landlord will then have missed the chance to recover possession on other grounds such as those contained in paragraphs (f) or (g). Weighing his options in advance, a landlord may decide that recovery of possession is more important than avoiding liability for compensation for disturbance, and so choose to rely on both compensatory and non-compensatory grounds to ensure success in attaining his primary objective. Meanwhile, a tenant who makes a tenancy application believing that eligibility for compensation for disturbance depends upon defeating landlord opposition on non-compensatory grounds, does so at the risk of incurring unnecessary and irrecoverable costs.

## A more general issue of compensation for disturbance – what must be proved?

As stated earlier, article 23(1) of the Order brings Northern Ireland law into line with English law in that a tenant need not pursue a tenancy application to the bitter end in order to establish an entitlement to compensation for disturbance. However, a rogue phrase has crept into article 23(1), which is not present in the equivalent English legislation. Article 23(1) is as follows:

> "Where a landlord—
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> has served—
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> a notice to determine a tenancy to which this Order applies, or
>
> in response to the tenant's request for a new tenancy, a notice under Article 7(6)(b) stating that he will oppose a tenancy application by the tenant,
>
> and the notice states that a tenancy application by the tenant would or will be opposed, on any of the grounds specified in

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[12] See Dawson, *Business Tenancies in Northern Ireland* (1994), 125–30.

> sub-paragraphs (e), (f), (g), (h) and (i) of paragraph (1) of Article 12; and
>
> either—
>
> *in consequence of the landlord's notice* the tenant does not make a tenancy application or, if he has made such an application, withdraws it, or
>
> on hearing a tenancy application by the landlord or a tenancy application by the tenant, the Lands Tribunal, on any of the grounds mentioned in sub-paragraph (a), grants the former application or dismisses the latter; and
>
> the circumstances are such that paragraph (7) does not apply,
>
> then, subject to the provisions of this Order, the tenant shall be entitled on quitting the holding to recover from the landlord by way of compensation a sum determined in accordance with the following provisions of this Article."[13]

The italicised words do not appear in the English legislation, which only requires proof of a chronological series of actual steps, including failure to apply or subsequent withdrawal. The question, therefore, arises whether the words, "in consequence of the landlord's notice", require additional proof from the tenant in order to establish eligibility for compensation, or whether it will be presumed that the tenant failed to make, or later withdrew, a tenancy application in consequence of the landlord's notice. If this is to be presumed, the words become otiose, unless, of course, the presumption is rebuttable. Article 23(1) would make sense without the highlighted words, and would also be consistent with the equivalent English provision and with the text of the LRAC Report of 1994. The question, therefore, lingers, are they intended to mean something? If causality has replaced mere chronology, what proof is required of the tenant in order to establish the right to compensation?

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[13] Italics added.

# BOOK REVIEW

*LEGITIMATE EXPECTATIONS IN ADMINISTRATIVE LAW. By Søren Schønberg [Oxford University Press, 2000, lxvii and (with index) 270pp, £40]*

Those who follow debates about the institutional role of courts in the United Kingdom will, in recent years, increasingly have had their attention drawn to the question of how judges should protect legitimate expectations. Although the various means of protection available to courts may not always or easily be distinguished, it is generally accepted that protection can be procedural, substantive and/or compensatory in form. In UK law, of course, the procedural protection of legitimate expectations has, ever since the Schmidt case [1969] 2 Ch 149, been recognised as established practice. The common law's emphasis on notions of fairness allowed the courts both to develop relatively far-reaching procedural guarantees and to keep such development of the law within the parameters of the *Wednesbury* paradigm of judicial review. But the more recent and explicit recognition of the need to afford substantive protection to legitimate expectations has raised questions about how far the institutional role of the courts has changed. Substantive protection of legitimate expectations is often taken to require that courts balance an individual's interests against those of the wider public in permitting changes in administrative policy, and any suggestion that courts should engage in balancing exercises has long been considered anathema to public law orthodoxy. The evolution of the courts' approach to the protection of legitimate expectations, therefore, has, consistent with other developments in judicial review, been argued to represent a shift away from traditional understandings about the constitutional role of the courts.

In assessing the implications of such an (arguable) shift, as well as the prospects for further reform and realignment, Søren Schønberg uses his book *Legitimate Expectations in Administrative Law* to place developments in UK law within a comparative and critical setting. Focusing in particular on the experiences of the French and EC legal orders, Schønberg presents an argument that identifies not only those features of UK law which already ensure strong protection of legitimate expectations, but also those features which are under-developed and suited to improvement. His study in this regard ranges across each of the means of procedural, substantive and compensatory protection, with his central argument being that expectations will only be fully protected when courts view each of the means as complementary principles. While the argument presented at first appears a little cluttered by detail, it soon becomes apparent that Schønberg has expertly assembled and structured his arguments around a range of sources. There is ample recourse to legal, social and political science literature, and the book also examines the issues from the different perspectives of courts and administrators. The result is a well written and researched book which integrates the comparative analysis with ease, makes its central points clearly, and forwards compelling proposals for reform.

The book's foundations are laid in chapter one. Here, Schønberg considers in more abstract terms the question of why courts should, in any event, seek to protect legitimate expectations. Focusing in the first instance on the needs of the individual, he points to 'reliance' and 'rule of law' theories by way of arguing that notions of fairness and trust demand effective protection of the citizen's interests. But beyond identifying the 'strong normative justification' for protecting the individual, Schønberg further uses chapter 1 to highlight how the courts must also try to protect the wider public interest in allowing government to change policies or depart from representations. It is axiomatic that the need to reconcile individual interests with those of the wider public is a central challenge facing administrative law, and Schønberg makes clear at an early stage that his book seeks to provide an informed analysis of the broader context within which the issue of legitimate expectations must be resolved. In other words, it is by situating the need for appropriate reconciliation at the heart of his book that he considers how best to protect expectations.

The comparative aspect of the book is developed through chapters 2-6. Chapter 2 deals with procedural protection of legitimate expectations, chapters 3 & 4 deal with substantive protection, and chapters 5 & 6 address compensatory protection. Although the reader is, as stated above, introduced to a vast amount of information, the structure of each of the chapters allows the reader easily to appreciate the key features of the English, French and EC legal orders, and also to identify the relative merits of each system. Indeed, it is when highlighting the relative merits of each system that Schønberg's approach is at its most constructive. The book at no time assumes in advance that one system is in every respect superior to the others, and there is a clear attempt to provide truly critical and insightful comparative commentary. Chapter 2, for example, emphasises the relatively advanced standard of procedural protection in UK law, while the chapters on compensatory protection highlight the strengths (and some of the weaknesses) of the French approach. Chapters 3 & 4 likewise provide some invaluable analysis of EC law's approach to substantive protection of legitimate expectations, with the points made being of obvious relevance in the emerging UK context.

The most enlightening sections of the book lie in the chapters on compensatory protection. Public authority liability is a subject that is notoriously complex, and it is no exaggeration to state that Schønberg's book provides one of the clearest statements of the law. While this is true of each of the systems surveyed, it is particularly true of his analysis of the UK order. The UK system is characterised by a series of conceptual difficulties associated with the public-private divide, and Schønberg provides a comprehensive and accessible overview of the (problematic) route to damages in UK law. His contribution in this regard is most telling in relation to liability for loss caused by unlawful decisions (see pp 182-192). Liability for such acts raises complex questions about the interface between administrative law, tort law and the law of the ECHR, and Schønberg deals with the questions in a manner that is always informative and never confusing. Some textbook writers would do well to follow suit.

Are there any criticisms of the book? Certainly, it would be churlish to suggest that there are significant flaws. The book is, as stated, expertly constructed, and Schønberg demonstrates an enviable capacity to understand different legal systems and 'discrete' areas of law within the systems.

One possible criticism, however, relates to Schønberg's arguments about how UK courts should seek to ensure substantive protection of legitimate expectations. The recent domestic recognition of the need to provide substantive protection has been accompanied by (heated) debate about how the courts might best 'balance' the individual's interests with those of the wider public. In addressing the issue, Schønberg suggests that the courts might usefully employ a test of "significant imbalance". This test, he posits, is flexible enough to allow varied application according to factual and legal circumstances, and it is also taken to offer a superior standard of review to that associated with the proportionality principle and the various strains of *Wednesbury* unreasonableness: "This test benefits from essentially the same advantages as proportionality: although the notion of significant imbalance is flexible to some extent, it is more precise, structured, and coherent than both the traditional *Wednesbury* test and the notion of substantive fairness. . . . It therefore adds consistency and certainty to the law, whilst facilitating the granting of reasons" (p 155).

The argument that the significant imbalance test is to be preferred to a proportionality test, this being despite the fact that the two tests share much in common, is the only part of Schønberg's book which is not entirely convincing. While his argument is predicated on an understanding that a significant imbalance test is conceptually clearer than a proportionality inquiry, the reader is left to ask whether it would really be beneficial to develop another test at a time when the proportionality principle is gaining increased prominence in the domestic order (see, most recently, the House of Lords decision in *ex p Daly* [2001] 3 All ER 433). The proportionality principle, for so long the pariah of UK administrative law, now seems poised to displace *Wednesbury* in its entirety, and, although elaboration of the principle will doubtless prove problematic, there can surely be little merit in developing parallel principles which will achieve analogous outcomes. Of course, that is not to say that Schønberg's arguments would be without value if UK law was at a different juncture: his proposals would undoubtedly assume a different dimension if the choice for the courts was an either/or choice between adopting proportionality or significant imbalance as the new touchstone of administrative law. But given that proportionality has fully and formally arrived in administrative law (at least in cases falling under the Human Rights Act), the addition of further standards may only clutter and confuse jurisprudence. In the end scenario, therefore, it may be better to disentangle the existing language and logic of proportionality rather than to try to reinvent the wheel.

Such comments should not be allowed to detract from the book's wider value, however. *Legitimate Expectations in Administrative Law* is an excellent volume which is highly readable and insightful. As one of a number of recent books on legitimate expectations, it is quite clearly the most impressive. It covers every conceivable aspect of the subject, and it does so with ready reference to related debates. For these reasons, it should be of interest to practitioners and academics alike.

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