NORTHERN IRELAND

LEGAL QUARTERLY

Vol. 53 No. 3 **Autumn 2002**

NORTHERN IRELAND LEGAL QUARTERLY

Vol 53, No. 3 **Autumn 2002**

CONTENTS

BOOK REVIEWS

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

ISSN 0029-3105

MARY AND JODIE – THE CASE OF THE CONJOINED TWINS*

The Right Honourable Lord Walker, Lord of Appeal in Ordinary

The case of the conjoined twins, Mary and Jodie, attracted worldwide publicity during September 2000. But memories fade quickly, and I should perhaps begin by reminding you of the basic facts. Then I want to devote most of my time to discussing the very unusual and difficult legal issues which the case raised. I want to concentrate especially on the impact of these issues on the surgeons, doctors and nurses who had the responsibility for caring for the twins. I want to talk primarily about legal principles, not about ethical or religious issues, but it is of course impossible, in a case of this sort, to keep them completely separate.

The twins were born on 8 August 2000. Mary and Jodie are not their real names but those are the names by which they became known to the world, and I will use those names, although most of the injunctions intended to secure the family's privacy have now been lifted. (I will come back to the injunctions later on.)

As is now well known, the twins' parents lived in Gozo, a small island near Malta. It is notable for the strong Roman Catholic faith of its inhabitants and the relatively poor state of its economy. The father had been unemployed, through no fault of his own, for eight years. The mother had had a low-paid job. They had been married for two years and this was her first pregnancy.

When the mother was about four months pregnant an ultrasound scan disclosed that she was carrying conjoined twins. A local doctor who had trained at St Mary's Hospital, Manchester advised that she should be referred there, and that was achieved under a long-standing financial arrangement between Malta and the United Kingdom. She travelled to Manchester in May 2000 and had numerous scans and investigations at Manchester and Sheffield. From these it became apparent that one of the twins was in a poor condition and might not survive birth.

The doctors who were caring for the mother discussed the situation fully with her and her husband. They at once recognised that the parents' religious beliefs not only excluded any consideration of termination of pregnancy, but also required the management of the birth to be as non-interventionist as possible. The consultant obstetrician described this in his written evidence:

> "I have had many discussions with [the parents] about their wishes with regard to their children. I have at all times tried to accommodate their wishes within what I believe to be ethical and acceptable guidelines. As a result of their desire for non-intervention I took the unusual step of allowing the twin

---

* An address given by Sir Robert Walker, as he then was, to the Medico-Legal Society of Northern Ireland on 15 January 2002.

> pregnancy to continue until she went into spontaneous labour at 42 weeks. Normally one considers delivery before that time because of a concern as to whether the placenta can adequately nourish both foetuses. Also, as agreed with them, I delivered them by Caesarean section at the last possible moment in labour. This was to meet their desire that the pregnancy was as non-interventionist as possible."

The conjoined twins were in medical terminology ischiopagus tetrapus (that is joined in the region of the pelvis and having four legs). Mary had grave cerebral and cardio-vascular defects. There is a full account of their medical condition at and soon after birth in the reported judgment of Ward LJ,[1] and no doubt detailed accounts have also been published in medical journals. For present purposes the short summary in my judgment may suffice:

> "The basic statistics are that about one in 90 live births produces twins. About one in 250 live births produces monozygotic twins (identical twins from the division of a single fertilised ovum). Very rarely (a suggested figure is once in 100,000 births, although this figure is far from precise and seems to vary in different parts of the world) monozygotic twins fail to separate completely, as normally occurs about a fortnight after conception, resulting in conjoined twins. Rather over half of all conjoined twins are stillborn, and a further third both die within 24 hours. Only about 6% of conjoined twins are classified as ischiopagus (joined at the pelvic level) and only about 2% as ischiopagus tetrapus (joined at the pelvic level and having four legs).
>
> Jodie's and Mary's medical condition is therefore very rare indeed. Their condition is even more exceptional in that – quite apart from abnormalities of their bodily organs in the region where they are joined – Mary has very grave defects in her brain, her heart and her lungs. For practical purposes her lungs are non-existent. She is wholly dependent for life on oxygenated blood circulated through Jodie's lungs and Jodie's heart. The consultant paediatric and neonatal surgeon, Mr B, has described her as "totally supported" by Jodie. It is the strain on Jodie of supporting her sister as well as herself which is very likely to lead to the deaths of both twins within a matter of months, if they remain joined, because Jodie is likely to suffer what is called high output heart failure. There is no practical possibility of Mary being put on a heart-lung machine or receiving a heart-lung transplant."

It was apparent to the doctors that there were three available options for treating the twins. The first was to leave them joined, with Mary being kept alive by Jodie's heart and lungs, and by feeding through a tube. This would place an increasing strain on Jodie and would be likely to lead to the deaths of both twins within weeks or months. The second option was elective surgery, which would lead to Mary's certain death and would give Jodie a

---

[1] [2001] Fam 147, 158-62.

very good chance of surviving, and a reasonable prospect of a good quality of life. The third option was to delay surgery until an acute emergency (such as Mary's death or incipient heart failure in Jodie.) That course would have involved a much less favourable prognosis for Jodie.

The parents (who were receiving support and advice not only from the hospital but also from a local priest) were strongly opposed to elective surgery. They set out their views in a simple and dignified statement which was in evidence:

> "We know our babies are in a very poor condition, we know the hospital doctors are trying to do their very best for each of them. We have very strong feelings that neither of our children should receive any medical treatment. We certainly do not want separation surgery to go ahead as we know and have been told very clearly that it will result in the death of our daughter, Mary. We cannot possibly agree to any surgery being undertaken that will kill one of our daughters. We have faith in God and are quite happy for God's will to decide what happens to our two young daughters. In addition we cannot see how we can possibly cope either financially or personally with a child where we live, who will have the serious disabilities that Jodie will have if she should survive any operation."

In these circumstances the hospital (or to be precise the Central Manchester Healthcare NHS Trust) decided to refer the matter to the court, and on 18 August it issued an originating summons in the Family Division of the High Court. This asked the court to make a declaration as to which option was lawful and in the twins' best interests.

The originating summons was heard within a week by Johnson J, a very experienced family judge. He gave judgment on 25 August declaring that elective surgery would be lawful and in the interests of both twins. Inevitably the evidence and argument before Johnson J was not as full as in the Court of Appeal. That is particularly true of the argument on the criminal law aspects of the matter. Moreover the Official Solicitor was at that stage acting as *guardian ad litem* to both twins. It was only at the appeal stage that it was appreciated that even as impartial and experienced an official as the Official Solicitor could not properly represent the conflicting interests of Mary and Jodie. Their conflicting interests were of course at the heart of the dilemma.

The Court of Appeal heard argument over five days in the first half of September. The Attorney General was asked to instruct counsel to assist on the issues of criminal law and he did so, while making plain that counsel was acting as a friend of the court and was not putting forward any positive case. The court received further evidence as to the latest position, including some brief oral evidence from the surgeon who would lead the team. The court also received written submissions from two interested parties, the Roman Catholic Archbishop of Westminster and the Pro-Life Alliance. On 22 September the court dismissed the appeal but gave permission to Mary and her parents for an appeal to the House of Lords. Urgent preparations were made for an appeal but the parents decided not to proceed with it. On 3 November the President of the Family Division dismissed an application (by

a director of the Pro-Life Alliance) for the removal of the Official Solicitor as Mary's guardian on the ground of his decision not to appeal, and on the same day the Court of Appeal refused permission for an appeal from the President.

The operation was carried out a few weeks later. Mary died, as the doctors and nurses knew she would, when the separation of a major blood vessel cut off the supply of oxygenated blood which she was receiving from Jodie. Jodie survived the operation and has since made good progress, according to all press reports that I have seen, although she is still likely to need more reconstructive surgery.

In addressing the legal issues I want to begin with a preliminary question which some of you may think abstract or even pointless, but which I regard as important: what sort of function was the court undertaking in adjudicating on the issues which the hospital placed before it? This is more of a lawyer's question than the layman's question or protest, which was often voiced at the time, as to what business the court had to interfere in a question of conscience between the parents and their spiritual and medical advisers. But the answer to the lawyer's question may be of some help in considering the court's right to concern itself with these anxious questions.

The answer to the lawyer's question is that the court was simultaneously exercising two jurisdictions, which are quite distinct but which sometimes (and especially on issues of medical ethics) fall to be exercised together. One is the court's jurisdiction to give directions and guidance as to the care of children, an ancient jurisdiction of non-statutory origin but now largely regulated by statute. The other is the court's inherent jurisdiction, now much enlarged by statute and by rules of court, to grant declaratory relief as to the lawfulness or unlawfulness of some future action.

May I comment on these jurisdictional points in reverse order? The old jurisdiction of the Court of Chancery to make declarations of right has grown enormously in the course of the last four generations.[2] But the court has been cautious about the use which it makes of the jurisdiction. In particular it has always been cautious about attempts to use the civil courts to determine questions of criminal liability (whether actual liability in respect of events which have happened, or prospective liability in respect of events which may happen in the future).

This general reluctance, and the exceptional circumstances in which the court overcomes it, are illustrated by two cases decided in the early 1980's. In *Imperial Tobacco Ltd v Attorney General*[3] the House of Lords held that a tobacco manufacturer, facing prosecution on the ground that a particular sales promotion scheme was an illegal lottery, could not forestall the prosecution by seeking a declaration in the civil court. But in *Royal College of Nursing v Department of Health and Social Security*[4] the House of Lords in civil proceedings decided a question of principle as to whether a particular form of termination of pregnancy (by medical induction using the extra-

---

[2] The process began with the Judicature Act 1875 and a change in the Rules of the Supreme Court in 1883.

[3] [1981] AC 718.

[4] [1981] AC 800.

amniotic method) was, if carried out in accordance with a departmental circular, termination "by a registered medical practitioner" within the meaning of section 1 of the Abortion Act 1967. The House of Lords split on the issue of substance – there are powerful speeches by Lord Wilberforce and Lord Diplock which reach opposite conclusions – but the whole House was satisfied that it was right to give guidance on an important general issue about which many nurses had serious concerns.

I can go on from there to the important and controversial decision of the House of Lords in the Tony Bland case, *Airedale NHS Trust* v *Bland*.[5] At this stage I want to quote Lord Goff's observations as to the appropriateness of declaratory relief in cases where doctors are facing life or death decisions. After referring to the *Imperial Tobacco* and *Royal College of Nursing* cases he said:[6]

> "It would, in my opinion, be a deplorable state of affairs if no authoritative guidance could be given to the medical profession in a case such as the present, so that a doctor would be compelled either to act contrary to the principles of medical ethics established by his professional body or to risk a prosecution for murder. As Compton J said in *Barber* v *Superior Court of State of California* (1983) 195 Cal. Rptr. 484, 486 "a murder prosecution is a poor way to design an ethical and moral code for doctors who are faced with decisions concerning the use of costly and extraordinary 'life support' equipment". In practice, authoritative guidance in circumstances such as these should in normal circumstances inhibit prosecution or, if (contrary to all expectation) criminal proceedings were launched, justify the Attorney-General in entering a *nolle prosequi*. In the present case, it is to be remembered that an *amicus curiae* has been instructed by the Treasury Solicitor; yet no representations have been made on behalf of the Attorney-General that declaratory relief is here inappropriate. In expressing this opinion, I draw comfort from the fact that declaratory rulings have been employed for the same purpose in other common law jurisdictions, . . . "

Lord Goff then referred to authorities in the United States, New Zealand and South Africa.[7]

One practical difficulty about making a declaration as to lawfulness of a future event may be uncertainty about precisely what action will be taken, and with what motives. That was one difficulty (although by no means the only difficulty) in the way of Mrs Diane Pretty, who suffers from motor neurone disease and wishes to ensure that her husband would not be prosecuted for assisting her to take her own life (a step which she is

---

[5] [1993] AC 789.
[6] *Ibid* at 862-3.
[7] *Re Gardner* (1987) 534 A2d 947; *Auckland Area Health Board* v *Attorney-General* (1993) 1 NZLR 235; *Clarke* v *Hurst* (unreported, 30 July 1992).

physically unable to take on her own).[8] In the conjoined twins case there was detailed evidence as to how the separation would be carried out in stages by different teams of surgeons. There was no question of any sort of organ donation from Mary to Jodie. The surgeon's evidence was as follows:

> "Separation of the twins would necessarily involve exploration of the internal abdominal and pelvic organs of both twins and particularly the united bladder. It is expected however that each twin would have all its own body structures and organs. It is not anticipated or expected to take any structure or organ from either twin to donate to the other."

So the court had a clear picture of the surgery that was proposed; and there was no doubt that the surgeons foresaw Mary's death as the inevitable, although unsought, consequence of the operation.

It seems likely that, if the parents had consented to the operation, the hospital would have proceeded without feeling it necessary to seek a court order. That may be illogical (if the surgery was intrinsically unlawful, the parents' consent could hardly make it lawful) but it accords with the general perception of how things should be. Nevertheless the hospital might still have wished to seek an order for the protection of its medical staff, as occurred in a comparable case in Philadelphia in 1977.[9]

That brings me back to the court's jurisdiction in respect of children. Normally consent to surgery on a child is given by the child's parents. The guiding principle, now embodied in section 1 of the Children Act 1989, is that whenever a court determines any question with regard to a child's upbringing (an expression which is widely defined and includes medical or surgical treatment) the child's welfare must be the court's paramount consideration. It necessarily follows that the parent's wishes, if contrary to the child's best interests, cannot be determinative. The court will always give anxious attention to the feelings and views of a conscientious parent, but must in the end form its own view. As Sir Thomas Bingham MR said in 1995 in a case[10] concerned with protecting a disabled child from media publicity:

> "I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect. It should certainly not be disregarded or lightly set aside. But the role of the court is to exercise an independent and objective judgment. If the judgment is in accord with that of the devoted and responsible parent, well and good. If it is not, then it is the duty of the court, after giving due weight to the view of the devoted and responsible

---

[8] *Queen (on the application of Pretty)* v *DPP* [2001] UKHL 61; [2002] 1 All ER 1. Editor's note: Mrs Pretty has since died. The use of the present tense describes the situation when the address was delivered.

[9] See George J Annas (1987) 17 Hastings Center Report 27: the parents, devout Jews, had consented to the operation after taking advice from a rabbi but the surgeons wished to be protected by an order of the Family Court.

[10] *Re Z (a minor)* [1997] Fam 1, 32-3.

> parent, to give effect to its own judgment. That is what it is there for."

Sometimes the court has to overrule the parents' religious convictions, for instance in treatment involving blood transfusion.[11] Occasionally the court has overruled a refusal by parents to consent to life-saving treatment for a disabled child.[12] In one case,[13] which the present President of the Family Division has described as exceptional, the Court of Appeal (reversing the trial judge) upheld the refusal of devoted parents to consent to their 18 month old child undergoing a second liver transplant operation, after an earlier unsuccessful operation had caused him pain and distress. Without a successful transplant the child was unlikely to live for more than a year. Waite LJ said:[14]

> "All these cases depend on their own facts and render generalisations – tempting though they may be to the legal or social analyst – wholly out of place. It can only be said safely that there is a scale, at one end of which lies the clear case where parental opposition to medical intervention is prompted by scruple or dogma of a kind which is patently irreconcilable with principles of child health and welfare widely accepted by the generality of mankind; and that at the other end lie highly problematic cases where there is genuine scope for a difference of view between parent and judge. In both situations it is the duty of the judge to allow the court's own opinion to prevail in the perceived paramount interests of the child concerned, but in cases at the latter end of the scale, there must be a likelihood (though never of course a certainty) that the greater the scope for genuine debate between one view and another the stronger will be the inclination of the court to be influenced by a reflection that in the last analysis the best interests of every child include an expectation that difficult decisions affecting the length and quality of its life will be taken for it by the parent to whom its care has been entrusted by nature."

What if the court has to consider the welfare of two children whose interests are in conflict? The House of Lords had to consider that issue in 1993[15] in a very different context: one child was a 16 year old mother and the other was her two year old son. The issue was resolved on the narrow ground that the proceedings were concerned only with the welfare of the boy. There is authority that the court may sometimes have to undertake a balancing exercise between two children's interests.[16] But the notion that the court should ever have to evaluate and choose between two innocent human lives

---

[11] See *Re R (a minor)(blood transfusion)* [1993] 2 FLR 757.
[12] See *Re B (a minor)(wardship: medical treatment)* [1981] 1 WLR 1421; this was the case of a very young baby with (not very severe) Down's syndrome and a life-threatening intestinal blockage.
[13] See Re T (a minor) (wardship: medical treatment) [1997] 1 WLR 242.
[14] *Ibid*, at 254.
[15] *Birmingham City Council* v *H* [1994] 2 AC 212.
[16] *Re T and E (Proceedings: conflicting interests)* [1995] 1 FLR 581.

is abhorrent. As Lord Mustill said in *Bland*,[17] the fact that a patient who is in pain and distress may wish to end his or her life:

> " . . . is not at all the same as the proposition that because of incapacity or infirmity one life is intrinsically worth less than another. This is the first step on a very dangerous road indeed, and one which I am not willing to take."

That echoes the Archbishop's affirmation that the indispensable foundation of justice is the basic equality of worth of every human being.

Nevertheless, in the conjoined twins case the majority of the court[18] reached the conclusion that a balancing exercise was unavoidable, not by comparing the values of Mary's and Jodie's lives but by comparing the worthwhileness of the treatment in terms of its known or probable outcome for each of the twins. On this point I took a rather different approach,[19] closer to that of Johnson J. It would be inappropriate for me to debate that point, which appears to be the only significant difference between the members of the court on any of the legal issues which arose. In that respect our three lengthy judgments may give a misleading impression: it was a case, like Pascal in his Lettres Provinciales, of not having time to make our reasons shorter.

The law's refusal to value one human life above another reflects its underlying view that human life is invaluable. As Sir Thomas Bingham MR said in the Court of Appeal in *Bland*:[20]

> "A profound respect for the sanctity of human life is embedded in our law and our moral philosophy, as it is in that of most civilised societies in the East and West. That is why murder (next only to treason) has always been treated here as the most grave and heinous of crimes."

Yet Mary's death was foreseen as the inevitable consequence of elective surgery. It was not suggested that she was not a human being who had been born alive. How then could the surgery be lawful?

Johnson J saw the surgical separation of the twins as amounting to the withdrawal from Mary of an extraneous supply of oxygenated blood, and so analogous with the withholding of treatment (artificial feeding and hydration) which the House of Lords had declared lawful in *Bland*. That was the case of the young man who had been severely crushed in the Hillsborough stadium disaster in 1989. Prolonged deprivation of oxygen had caused irreversible damage to the cerebral cortex, but his brain stem was still functioning. His condition was then termed 'persistent vegetative state'. He had no awareness at all, even at the most primitive level, and he was being kept alive only through artificial means and devoted nursing care.

The President of the Family Division made a declaration that the withdrawal of life-sustaining measures would be lawful, and the Court of Appeal (unanimously) and the House of Lords (also unanimously) upheld that

---

[17] [1993] AC 789, 894.
[18] See Ward LJ [2001] Fam at 188 and 196–7; Brooke LJ at 205.
[19] *Ibid* at 245–6.
[20] [1993] AC 789, 808.

decision. It must be said, however, that in the House of Lords several of their Lordships expressed disquiet about the process of reasoning which led to that result. The strongest statement of disquiet was that of Lord Mustill:[21]

> "The conclusion that the declarations can be upheld depends crucially on a distinction drawn by the criminal law between acts and omissions, and carries with it inescapably a distinction between, on the one hand what is often called 'mercy killing', where active steps are taken in a medical context to terminate the life of a suffering patient, and a situation such as the present where the proposed conduct has the aim for equally humane reasons of terminating the life of Anthony Bland by withholding from him the basic necessities of life. The acute unease which I feel about adopting this way through the legal and ethical maze is I believe due in an important part to the sensation that however much the terminologies may differ the ethical status of the two courses of action is for all relevant purposes indistinguishable."

Similarly Lord Browne-Wilkinson said[22] he was conscious that he had reached his conclusion on what he called narrow, legalistic grounds, and he called for Parliament to review the law. That was almost nine years ago and no such review has been undertaken. Parliament has legislated in relation to *in vitro* fertilisation and associated matters[23] but not in relation to the withdrawal of life-sustaining treatment, or palliative treatment which may hasten death. In the absence of guidance from Parliament the court has to decide these questions on common law principles since (as Sir Thomas Bingham put it) that is what the court is there for.

When the criminal law issues were considered in the Court of Appeal only counsel for the hospital attempted (without any great conviction) to uphold Johnson J's analogy with *Bland*. The other counsel recognised that the surgical separation was (in relation to each of the twins) an invasive act which had to be justified as such. It could not be justified as a withdrawal of treatment.

Instead the argument revolved round two distinct but converging themes: intention and necessity. I will introduce these separately and then see how they converge. It is a commonplace that although foreseeing a consequence, desiring a consequence and intending a consequence are different things:

> "When a man realises that it is for all practical purposes inevitable that his actions will result in death or serious harm, the inference may be irresistible that he intended that result, however little he may have desired or wished it to happen."

That is part of the model direction to the jury, on the mental element in the crime of murder, approved by the House of Lords in *R v Woollin*.[24]

---

[21] *Ibid* at 887.
[22] *Ibid*, at 878 and 885.
[23] Human Fertilisation and Embryology Act 1990, as amended by the Human Reproductive Cloning Act 2001 (see *R (on the application of Quintavalle)* v *Secretary of State for Health* [2001] 4 All ER 1013).
[24] [1999] 1 AC 82, 96.

The factual context of that case was an act of wanton violence as far removed as anything could be from any exercise of clinical judgment: an angry father threw his three-month-old son on to a hard surface, and he died of a fractured skull. The father was convicted of murder but the House of Lords substituted a conviction for manslaughter because of a serious error in the judge's direction to the jury.

In a clinical context a doctor may foresee that palliative treatment with powerful analgesics may accelerate death, but that does not make the treatment unethical or unlawful. Lord Goff recognised in *Bland*:[25]

> "the established rule that a doctor may, when caring for a patient who is, for example, dying of cancer, lawfully administer painkilling drugs despite the fact that he knows that an incidental effect of that application will be to abbreviate the patient's life. Such a decision may properly be made as part of the care of the living patient, in his best interests; and, on this basis, the treatment will be lawful."

Similarly Lord Donaldson MR had said in a case authorising non-resuscitation (on a future emergency) of a severely brain-damaged child:[26]

> "What doctors and the court have to decide is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken which *as a side effect* will render death more or less likely."

The emphasis is in the original text. The notion that death should be regarded as a side effect may be surprising (or even shocking) but it does serve to underline that the treatment in question is aimed at some good objective (generally the relief of pain and distress). That is sometimes called the doctrine of double effect.

Mary could probably not feel any pain or other sensation and the separation surgery would not have any palliative effect on her. If she alone is considered it is impossible to see any good objective to be achieved by the surgery, unless the establishment of her bodily integrity, even in the moment of death, can be viewed in that way. The position immediately changes, however, if Mary and Jodie are considered together, as two distinct human beings whose bodies and lives have however been linked together so as to make Mary's life utterly dependent on Jodie, and Jodie's life imminently threatened by Mary's dependency.

So I come to the doctrine of necessity in English law. It has a long and tortuous history which is described, at length and with great clarity, in the judgment of Brooke LJ.[27] Brooke LJ has served as a Chairman of the Law Commission and his survey reflects the deep research and deliberation which the Law Commission have devoted to this topic.[28] What follows is an inadequate summary of parts of his exposition.

---

[25] [1993] AC 789, 867.
[26] Re J (a minor) (wardship: medical treatment) [1991] Fam 33, 46.
[27] [2001] Fam 147 at 219-38.
[28] See especially its Reports on Criminal Law in 1989 (Law Com No 177) and 1993 (Law Com No 218).

Necessity has for many centuries been recognised by the common law as a defence to a criminal charge. It does not merely (like diminished responsibility or provocation) reduce the level of criminal liability; if established, it negatives liability, in the same way as a plea of self-defence or duress may negative liability.[29] Necessity is sometimes called duress of circumstances.[30]

The most notorious case in which necessity was relied on, unsuccessfully, as a defence to a charge of murder is *R v Dudley and Stephens*.[31] In 1884, after the wreck of the yacht Mignonette (which Dudley had been engaged to sail to Australia) he, two other men and the cabin boy were adrift in an open boat for 20 days with no water or food, except for two tins of turnips and a small turtle which they caught. In that extremity Dudley and Stephens agreed to kill the cabin boy (who had been drinking sea water and was near to death) and to eat his flesh. The third man refused to join in the enterprise. A few days later the survivors were picked up by a German barge.

There is not time to go further into this gruesome but fascinating story, which is well told in at least two published works.[32] One remarkable aspect of the story is that Dudley, a respectable and indeed religious man, could probably have escaped prosecution had he not insisted on telling the full story (and preserving for burial the remains of the cabin boy's body). It seems that the people of Falmouth (where the survivors were put ashore) were divided in their support for the accused only because there had been a failure to observe 'the custom of the sea', that is the custom of drawing lots; but the majority thought that that was excusable since the cabin boy was near to death, and the others were married men with families to support. Dudley and Stephens were convicted of murder and sentenced to death, but reprieved and released after six months' imprisonment.

In that Victorian *cause celebre* the accused had to rely on the defence of necessity in its starkest form. There was no question of double effect because, as they admitted, they intended to kill the cabin boy, and they had to achieve that purpose before they could assuage their hunger and thirst. But necessity and absence of intention to kill can converge where one and the same act has the effect of almost certainly saving one life and certainly or almost certainly ending another. Writers on moral philosophy are fond of dilemmas involving mountaineers, but Professor Sir John Smith has referred to a real-life incident which is stranger than fiction:[33]

---

[29] But duress by threats has never been a defence to a charge of murder: *R* v *Howe* [1987] AC 417; and see *R* v *Gotts* [1992] 2 AC 412, especially the dissenting speech of Lord Lowry.

[30] The most recent review by the Criminal Division of the Court of Appeal seems to be *R* v *Abdul-Hussain* [1999] Crim LR 570, a case of aircraft hijacking. See also *R* v *Bournewood Community and Mental Health Trust* [1999] 1 AC 458, 490 (Lord Goff).

[31] (1884) 14 QBD 273.

[32] AWB Simpson, *Cannibalism and the Common Law* (1984); N Hanson, *The Custom of the Sea* (1999).

[33] *Justification and Excuse in the Criminal Law* (The Hamlyn Lectures, 1989) p 79. The summary is from [2001] Fam at 252.

> "A mountaineer, Simon Yates . . . held his fellow climber, Joe Simpson, after he had slipped and was dangling on a rope over a precipice at 19,000 feet in the Andes. Yates held Simpson for an hour, unable to recover him and becoming increasingly exhausted. Yates then cut the rope. Almost miraculously Simpson landed on a snowy ice bridge 100 feet below, and survived. When they met again Simpson said to Yates 'You did right'."

So far as there is any meaningful analogy to the case of the conjoined twins, that comes somewhere close to it – except of course that there was no miracle in Mary's case. The clinical and ethical judgment of the surgeons and paediatricians (who owed professional duties to both twins) was that it was right to operate in order to save Jodie, even though Mary's death was foreseen (but not of course desired) as an inevitable consequence. Mary died because her defective body, on its own, was incapable of sustaining her life. The court's endorsement of the doctors' judgment reflects Lord Scarman's general observation in the *Gillick* case[34] that:

> "The bona fide exercise by a doctor of his clinical judgment must be a complete negation of the guilty mind which is an essential ingredient of [criminal liability]."

May I end with one or two footnotes about the hearing in the Court of Appeal? All the members of the court were greatly impressed by the professionalism of the doctors who assisted the court with written or oral evidence. They prepared their reports to meet demanding deadlines and they showed great sensitivity to the parents' feelings, without any loss of intellectual rigour. At one stage there seemed to be some danger of an issue arising as to whether there was room in England for more than one centre of excellence in this very complicated form of surgery, but fortunately the issue subsided and we did not have to adjudicate on it.

The case attracted huge publicity and the court made orders designed to protect the twins, their parents and the hospital from intrusive publicity. With generally good co-operation from the media, a fair degree of protection was achieved. But the fact that the family came from Gozo soon became an open secret and that part of the injunction was lifted: the court does itself no favours by trying to ignore the fact that, for better or worse, information has got into the public domain. I think it was also right, as we did, to allow one photograph of the twins (which had been shown to the court) to be used as the basis of a pastel sketch which was made by an artist and released to the press. That dispelled some mistaken ideas and gave the public some idea of the doctors' problem without the clinical precision of an actual photograph.

The injunctions were also limited so as to enable the parents, at a time and in a manner of their own choosing, to tell the media what they wished to say about their own experiences and feelings. The money which they have raised will, it is to be hoped, go a long way to meet the special expenses of Jodie's upbringing now and in the years to come.

---

[34] *Gillick* v *West Norfolk and Wisbech Area Health Authority* [1986] AC 112, 190.

THE DISQUALIFICATION OF UNFIT DIRECTORS AND THE PROTECTION OF THE PUBLIC INTEREST

Stephen Griffin, Reader in Law, University of Wolverhampton

INTRODUCTION

In the utilisation and generation of wealth and employment opportunities the limited liability company is a most effective and necessary economic tool. By pursuing legitimate objectives geared to profit maximisation, a company, providing it acts within the law, not only serves to benefit its own shareholders and employees but also the general economic well being of the public interest.[1] However, in circumstances where a company becomes insolvent, its potential demise and inability to discharge debts may inflict irreparable harm on society. The terminal decline of a company and the resulting non-repayment of corporate debts may severely prejudice corporate creditors and in addition may produce a spiralling decline in the fortunes of other individuals and businesses with interests related to the failed company or creditors of that company. Further, creditors will generally be precluded in respect of an ability to recover outstanding debts from the shareholders and directors of a company given that the company's limited liability status will ordinarily shield the company's human constituents from any responsibility in respect of the repayment of corporate debts.[2]

While corporate failure may be attributed to factors unrelated to managerial abuse or incompetence,[3] corporate malaise is frequently caused or compounded by managerial error or wrongdoing. As business decisions often incorporate an element of risk it may be plausible for the law to excuse mere managerial error, but the law must seek to penalise intentional,

---

[1] This may be considered as the accepted justification for corporate activity within a capitalist economy. However, profit maximisation may not always be beneficial to the public interest where, for example, the company is subject to a regulatory regime in which the calculation of profit fails to adequately consider the social costs of production. See further: Parkinson: *Corporate Power and Responsibility* (Oxford, Clarendon Press, 1993), especially, Chps 1 and 11.

[2] As the majority of registered companies are incorporated with both a share capital and a limited liability status, the members of such companies will cease to incur any liability to contribute to the debts of the company following the payment to the company of the nominal value of their shares, see *Salomon* v *A Salomon Ltd* [1897] AC 22. At common law the corporate veil will only be removed to expose a company's human constituents to a liability to contribute to the debts of the company where the incorporation of the company is considered to be a fraud or sham, or where the company is considered to be but an agent of its controlling shareholder, see, *Adams* v *Cape Industries* [1990] Ch 433, *Ord* v *Belhaven Pubs* [1998] BCC 607 and *Trustor AB* v *Smallbone* [2001] 2 BCLC 436.

[3] Business failure may be caused by circumstances beyond the control of a company's management, e.g., adverse fluctuations in national or global interest rates, the devaluation or overvaluation of currencies, trade union disputes unrelated to the particular business enterprise, trade embargoes resulting from international conflict, the unpredicted demise of a related industry, a shortage of skilled labour, natural disasters such as floods or fire, changes in government policy etc.

reckless, or incompetent conduct, for a failure to penalise such delinquency will serve to weaken the creditability of the corporate entity and encourage others to abuse the advantages afforded by the concept of limited liability.[4] To this end, the disqualification process, regulated by the Company Directors Disqualification Act 1986 (hereafter CDDA 1986)[5] seeks to protect the public interest from the activities of delinquent directors. The purpose of the disqualification process is to weed out company directors who have abused their positions to the detriment of the public interest.

This paper is specifically directed at an examination of section 6 of the CDDA 1986,[6] a provision, which explicitly deals with the disqualification of directors, deemed to have been unfit in the management of insolvent companies.[7] The paper proposes a radical overhaul of the disqualification system with the ultimate objective of promoting a regime which more readily serves to protect the public interest. Such proposals seek to extend the ambit of reforms advanced in the recently enacted Insolvency Act 2000.[8]

Section 6 of the CDDA 1986

Section 6(1) of the CDDA 1986 provides that the court is under a duty to impose a mandatory disqualification order against any person in circumstances where:

> (a) that person is or has been a director of a company which has at any time become insolvent (whether while the person was a director or subsequently); and
>
> (b) that person's conduct as a director of the company (either taken alone or taken together with the person's conduct as a director of another company or companies) makes the person unfit to be concerned in the management of a company.

In accordance with section 6(4) of the CDDA 1986, a contravention of section 6(1) results in a disqualification order for a minimum period of two years up to a maximum period of fifteen years. In addition to penalising an individual director by the removal of his capacity to act in the future management of a company, successful proceedings under section 6 may also serve to generally deter managerial conduct of a delinquent nature. The deterrent effect of a disqualification order may incorporate a director's fear of personal and professional humiliation, the loss of a future income earning

---

[4] Although, under current legislative provisions, delinquent directors may be held personally accountable to contribute to the repayment of corporate debts, such legislation is, to a large extent, ineffectual. See generally, Griffin: *The Personal Liability and Disqualification of Directors* (Oxford, Hart Publishing, 1999).

[5] The equivalent Northern Ireland legislation may be found in the Companies (Northern Ireland) Order 1989, Part II (hereafter the 1989 Order).

[6] Article 9 of the 1989 Order in Northern Ireland.

[7] Statistics taken from Table D1 of the Department of Trade and Industry publication: *Companies in 1999–2000* (HMSO) reveal that over 90 per-cent of all disqualifications imposed under the Companies Directors Disqualification Act 1986, are made under section 6.

[8] This Act does not apply to Northern Ireland and there is no equivalent Northern Ireland legislation.

capacity following the imposition of a disqualification order[9] and, in circumstances where an action is unsuccessfully defended, the incursion of substantial costs.[10]

The Public Interest

The primary purpose of section 6 of the CDDA 1986 is one which seeks to protect the public interest.[11] During the period in which a director is subject to a disqualification order, the public interest will be protected by the removal of a director's capacity to repeat his past misconduct in respect of the future management of another company. In assessing whether a director represents a future threat to the public interest the courts are exclusively concerned with the nature and extent of the director's past conduct and the effect such conduct had on the interests of businesses and individuals who were directly or indirectly prejudiced as a consequence of the insolvent company's demise. The provision imposes a strict form of liability to the point whereby mitigating factors indicative of a director's potential to reform his future conduct will be discarded in determining whether a disqualification order should be imposed.[12] Accordingly, unlike section 6's predecessor, namely section 300 of the Companies Act 1985, the court is not possessed of a general discretion to consider the likelihood of a director's ability to refrain from committing any future malpractice in the exercise of managerial responsibilities. Although it has been suggested that ". . . the protective policy of disqualification would be advanced by a less technical view of unfitness that does not only look to the past" and that, "the legislation should require the courts to consider evidence as to whether the director is likely to be a future danger to the public,"[13] it is submitted that the value of the mandatory two-year disqualification period required by section 6 is justifiable. The mandatory order promotes consistency and certainty in

---

[9] A disqualification order may be detrimental to the economic well being of the professional director whose income will be dependant upon holding a managerial position, but its effect is likely to be less extreme in relation to the small businessman who, following disqualification, may decide to continue to operate a business through the medium of a business partnership or as a sole trader.

[10] The costs are likely to be higher than any fine imposed in a criminal court. However, legal aid may be available to a defendant who is made subject to disqualification proceedings. See further, Birch, "Legal Aid for Directors Disqualification Proceedings" (2001) 151 *NLJ* 1063.

[11] CDDA 1986, s 7 provides that, "If it appears to the Secretary of State that it is expedient in the public interest that a disqualification order under s 6 should be made against any person, an application for the making of such an order against that person may be made . . . (a) by the Secretary of State, or (b) if the Secretary of State so directs in the case of a person who is or has been a director of a company which is being wound up by the court in England and Wales, by the Official Receiver." Article 10 of the 1989 Order is the Northern Ireland equivalent.

[12] However, factors indicative of a potential to reform may be considered as mitigating factors in respect of the courts' determination of appropriate disqualification periods. For judicial comments relating to issues concerning mitigation see e.g., *Re Sevenoaks Stationers (Retail) Ltd* [1991] Ch 164 at p 177, *Re Pamstock Ltd* [1996] BCC 341 at p 349 and *Re Westmid Packing Services Ltd* [1998] 2 All ER 124 at p 133.

[13] See Hicks, "Director Disqualification: Can it Deliver?" [2001] *JBL* 433 at 447.

respect of a positive requirement on the part of the courts to disqualify directors in circumstances where their conduct in the management of a company is considered to have been unfit. Indeed, if it was otherwise, judgments advancing judicial speculation as to a director's potential to reform past misconduct could seriously encourage a disturbance of the deterrent value attached to section 6. The following statement taken from the judgment of Henry LJ in *Re Grayan Building Services Ltd*,[14] amplifies this point:

> "The concept of limited liability and the sophistication of our corporate law offers great privileges and great opportunities for those who wish to trade under that regime. But the corporate environment carries with it the discipline that those who avail themselves of those privileges must accept the standards laid down and abide by the regulatory rules and disciplines in place to protect creditors and shareholders. . . . The Parliamentary intention to improve managerial safeguards and standards for the long term good of employees, creditors and investors is clear. Those who fail to reach those standards and whose failure contributes to others losing money will often be plausible and capable of inspiring initial trust, often later regretted. Those attributes may make them attractive witnesses. But as section 6 makes clear, the court's focus should be on their conduct – on the offence rather than the offender."[15]

In a wider sense, the protection of the future public interest may also encompass a consideration of the business interests of a regional or national economy or, given the prominence of the international market, may even incorporate business considerations of a global nature. The term "public interest" may also be interpreted to include the interests of a society, which in a political and economic context relies, in terms of its ability to function, on a free-market capitalist structure.[16] In this sense the disqualification system may serve to protect the free market system from unfair manipulation in so far as it affords society a measure of confidence, fairness and transparency in the legal system's ability to police and weed out directors who have abused and exploited the advantages afforded by the incorporation of a limited liability company.[17]

---

[14] [1995] BCC 554.

[15] *Ibid* at p 577.

[16] For a discussion on the meaning of the term "public interest" in the general context of insolvency law see, Keay, "Insolvency Law: A Matter of Public Interest?" (2000) 51 *NILQ* 509.

[17] See further: IF Fletcher, "The Genesis of Modern Insolvency Law – An Odyssey of Law Reform" [1989] *JBL* 365, at p 372. For a general discussion of theoretical justifications concerning the need for state intervention in the regulation of the market place, see A.Ogus, *Regulation: Legal Form and Economic Theory* (Oxford, Clarendon Press, 1994).

Conduct of an Unfit Nature

Section 9 of the CDDA 1986[18] provides that in assessing whether a director is unfit to act in the management of a company, the courts must have particular regard to the matters set out in both Part 1 and Part 2 of Schedule 1 to the CDDA 1986.[19] However, as section 9 directs the court to have *particular regard* to the matters contained in Schedule 1, it is possible for conduct establishing a director's unfitness to be found in circumstances other than those governed by the Schedule.[20]

As the concept of unfit conduct is absent of any precise meaning or definition, the ability of a court to label a particular course of business malpractice as "unfit" will ultimately depend upon the individual circumstances and facts of a given case and as such it is impossible to prescribe a minimum standard of misconduct to which the label "unfit conduct" can be equated. Indeed, in Re *Sevenoaks Stationers (Retail) Ltd*,[21] the Court of Appeal noted that the true question to be tried in section 6 proceedings was a question of fact. Dillon LJ expressed the nature of this question as one which,

---

[18] Article 12 of the 1989 Order in Northern Ireland.

[19] The matters mentioned in Part 1 of Schedule 1 require the court to consider, *inter alia*, the extent of a director's responsibility for: (a) any misfeasance or breach of duty in relation to a specified company; (b) the misapplication or retention of any money or property of the company; (c) corporate transactions contrary to Part XVI of the Insolvency Act 1986 (provisions against debt avoidance); (d) the company's failure to keep adequate accounting records and make annual returns; (e) the administration and updating of registers relating to directors and members and the creation of company charges. The matters mentioned in Part 2 of Schedule 1 govern a situation where a company is insolvent and require the court to consider, *inter alia*, the extent of a director's responsibility for: (a) the causes of the company's insolvent state; (b) any failure by the company to supply any goods or services which have been paid for (in whole or in part); (c) the company entering into any transaction or giving any preference liable to be set aside under IA 1986, s 127 or ss 238-240 or challengeable under ss 242 or 243 (or any rule of law in Scotland); (d) any failure by the directors of the company to comply with IA 1986, s 98 (duty to call creditors meeting in creditors voluntary winding up); (e) any failure by the director to comply with any obligation imposed on him by IA 1986, s 22 (company's statement of affairs in administration), s 47 (statement of affairs to administrative receiver), s 66 (statement of affairs in Scottish receivership), s 99 (directors' duty to attend meeting; statement of affairs in creditors' voluntary winding up), s131 (statement of affairs in winding up by the court); (f) s 234 (duty of any one with company property to deliver it up), s 235 (duty to co-operate with liquidator, etc.). The equivalent Northern Ireland provisions are in Parts 1 and 2 of Schedule 1 to the 1989 Order.

[20] Such matters may include: a director's connection with other failed companies, a director's failure to take positive steps to correct management errors, a director's failure to resign from office where that step was the only viable option open to him, a director's failure to co-operate with a liquidator (see, *Secretary of State for Trade and Industry* v *McTighe and Egan* [1997] BCC 224) and a director's potential culpability under IA 1986, s 216, see *Re Migration Services International Ltd* (1999) The Times, 2nd December.

[21] [1991] Ch 164. This was the first case in which the Court of Appeal was asked to consider the appropriateness of a disqualification order under CDDA 1986, s 6.

> ". . . used to be pejoratively described in the Chancery Division as 'a jury question'."[22]

In the identification of unfit conduct, the courts have expressed an unwillingness to impose a disqualification order in a situation where a director's culpability is attributable to imprudent business practices, albeit that such conduct was of an improper standard.[23] Further, although a director's business practices may have been improper, it is unlikely that a director will be deemed unfit in circumstances where he acted honestly in seeking to prevent or minimise any loss to creditors.[24] Instead, the courts have equated unfit conduct with conduct of a commercially culpable nature to the extent that the conduct, although not necessarily of a dishonest nature, must be harmful to the public interest so as to exhibit a clear and serious exploitation of the privileges attributable to the limited liability status of a company.[25] The courts have sought to explain the necessity of establishing a serious degree of misconduct on the premise that a disqualification order may dramatically infringe upon the commercial liberty of a director in respect of his ability to pursue future employment in the management of a company.[26] The general approach of the courts in determining the question of a director's potential unfitness is neatly summarised in a passage taken from the judgment of Browne-Wilkinson V-C, in *Re Lo-Line Electric Motors Ltd & Ors* [27]. His lordship opined,

> "The primary purpose of the section is not to punish the individual but to protect the public against the future conduct of companies by persons whose past records as directors of insolvent companies have shown them to be a danger to creditors and others. Therefore the power is not fundamentally penal. But if the power to disqualify is exercised, disqualification does involve a substantial interference with the freedom of the individual. It follows that the rights of the individual must be fully protected. Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained

---

[22] *Ibid*, at p 176

[23] A director may escape disqualification even if his conduct is considered to be unacceptable or improper, providing of course such conduct falls short of being viewed as unfit, see *e.g.*, Re Austinsuite Furniture Ltd [1992] BCLC 1047, Re Bath Glass Ltd 1988] BCLC 329 and *Re Wimbledon Village Restaurant Ltd* [1994] BCC 753.

[24] See, Re Bath Glass Ltd, *ibid*.

[25] For example, in Re Dawson Print Group Ltd (1987) 3 BCC 322 at p 324, Hoffmann J opined, "There must, I think, be something about the case, some conduct which if not dishonest is at any rate in breach of standards of commercial morality, or some really gross incompetence which persuades the court that it would be a danger to the public if [the respondent] were to be allowed to continue to be involved in the management of companies, before a disqualification order is made."

[26] On a more practical level, if a director's culpability was set at a too low a level, the resulting flood of disqualification cases could place the disqualification system under such a strain whereby its very ability to function would be seriously threatened.

[27] [1988] BCLC 698.

> of must display a lack of commercial probity although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate." [28]

In the majority of decided cases, unfit conduct will be established by evidence of an intentional or reckless disregard of managerial responsibilities or duties,[29] an obvious and serious (if not persistent) failure to comply with provisions of the companies' legislation,[30] or a combination of the above failings.[31] A finding of unfit conduct may often be expected to exceed evidence of conduct resulting in a mere breach of a fiduciary duty,[32] or a breach of duty which results in but a marginal decline in the company's financial position.[33] A disqualification order will be more readily imposed where managerial misconduct, being of such a serious nature, prevents the repayment of corporate debts, especially in circumstances where it causes a company to fall into an insolvent state or where the breach inflates a company's already insolvent position.

In some circumstances negligent conduct may also justify disqualification under section 6 of the CDDA 1986. For example, conduct which exhibits the hallmarks of gross incompetence as opposed to mere business folly, may, depending on the consequences of such conduct, give rise to a disqualification order. In assessing the requisite standard of competence to be expected of a director, the standard is measured in accordance with the expectations of a reasonable diligent person as opposed to the standards to be

---

[28] *Ibid* at p 703.

[29] See generally: Re T & D Services (Timber Preservation & Damp Proofing Contractors) Ltd [1990] BCC 592, *Re Melcast* (Wolverhampton) Ltd [1991] BCLC 288, *Re GSAR Realisations Ltd* [1993] BCLC 409, Re New Generation Engineers Ltd [1993] BCLC 435, Re Hitcho 2000 Ltd [1995] 2 BCLC 63, *Re Moorgate Metals Ltd* [1995] BCC 143.

[30] See generally: *Sec of State* v *Arif* [1996] BCC 586, *Re Cladrose* [1990] BCLC 204, *Sec of State* v *Ettinger*, *Re Swift* 736 Ltd [1993] BCLC 896, *Re Firedart Ltd* [1994] 2 BCLC 340, *Re Park Properties Ltd* [1997] 2 BCLC 530.

[31] In the majority of cases, it is rare to find proceedings which are commenced on the basis of just one count of alleged misconduct. Whilst it is possible for a disqualification order to be imposed on the basis of only one complaint of misconduct, or to indicate that a specific complaint, taken from a number of complaints of misconduct, was sufficient to justify disqualification, it is more common to find that unfitness will be established in relation to a series of delinquent acts.

[32] In *Re Barings plc (No5)* [1999] 1 BCLC 433 at p 486, Jonathan Parker J observed that it may be possible to find unfit conduct where, for example, a director was responsible for trading at the risk of creditors notwithstanding that the conduct did not involve a breach of duty or an act of wrongful trading under IA 1986, s 214. Further, the learned judge remarked that in addition to finding unfitness in a situation where a director made a negligent mistake it may also be possible to find unfit conduct in a situation where he erred in his judgment. However, with the greatest respect, such observations must be considered doubtful in accordance with the hitherto accepted interpretation of unfitness, i.e., misconduct of a most serious nature.

[33] See generally: Re Time Utilising Business [1990] BCLC 568, Re CSTC Ltd [1995] BCC 173, *Secretary of State* v *Van Hengel* [1995] BCLC 545, Re Dominion International Group plc (No2) [1996] 1 BCLC 572, *Secretary of State* v *Cleland* [1997] 1 BCLC 437, *Secretary of State* v *Lubrani* [1997] 2 BCLC 115.

expected of a professional businessman. Such an assessment may be regrettable, in so far as it ignores the fact that a director, as a professional businessman, may be expected to possess business skills in excess of those of a reasonable diligent person. However, following, for example, the judgment of Jonathan Parker J in *Re Barings Plc (No 5*)[34] it is still necessary for the court to consider the director's role and specific duties in respect of the management of the company in which he held office. The learned judge remarked thus,

> ". . . while the requisite standard of competence does not vary according to the nature of the company's business or to the respondent's role in the management of that business – and in that sense it may be said there is a universal standard – that standard must be applied to the facts of each particular case. Hence to say that the Act envisages a universal standard of competence applicable in all circumstances takes the matter little further since it says nothing about whether the requisite standard has been met in a particular case. What can be said is that the court, whilst taking full account of the demands made upon a respondent by his management role, will recognise incompetence in whatever circumstances and at whatever level of management it occurs, from the chairman of the board down to the most junior director. In that sense, there is an element of universality in the courts' approach."[35]

Therefore, in accordance with the above approach, the expectations of the reasonable diligent person are assessed as the expectations of a reasonable diligent person occupying a position akin to that held by the respondent. In effect, the standard against which a director's competence will be measured is akin to the standard set by section 214[36] of the Insolvency Act 1986 [37] and indeed, the general standard applicable to determine a director's breach of a duty of care as advocated in the Final Report of the Company Law Review Steering Group.[38]

Nevertheless, while the measure of competence required to substantiate a finding of negligence for the purposes of disqualification under section 6 of the CDDA 1986 may share similar characteristics to that which is required by section 214 of the Insolvency Act 1986,[39] it must be stressed that one

---

[34] [1999] 1 BCLC 433.

[35] *Ibid* at p 484.

[36] For Northern Ireland see Insolvency (NI) Order 1989, art 178.

[37] Section 214(4) provides that: . . . the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both–
(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as those which were carried out by that director in relation to the company, and,
(b) the general knowledge, skill and experience of the director.

[38] See, Modern Company Law For a Competitive Economy – Final Report (London, DTI, June 2001) Annex C at p 346.

[39] See further, Walters, "Directors Duties: The Impact of the Company Directors Disqualification Act 1986" (2000) 21 Co Law 110.

would expect the minimum degree of incompetence deemed necessary to justify disqualification under section 6 to be in excess of that which would found a charge of wrongful trading under section 214. For incompetent conduct to validate the imposition of a disqualification order the negligence must substantiate a finding of unfitness, and must be of a gross standard.[40] However, the extent and degree of negligence, deemed necessary to justify a finding of gross incompetence, is unclear. The inconsistency in seeking to define the hallmarks of gross incompetence may, in part, be illustrated by the language adopted by the courts in equating a negligent act with a finding of unfitness. For example, the expressions, "total incompetence",[41] "incompetence in a very marked degree",[42] "really gross incompetence"[43] and "incompetence of a very high degree"[44] have all been employed to describe the requisite degree of negligence. While such expressions are indicative of a standard which exceeds an act of mere negligence, the extent by which conduct may be defined at a level in excess of mere incompetence remains blurred. Such inconstancy is exemplified by a number of cases involving a director's failure to involve himself in the affairs of the company. For example, in *Re A & C Group Services Ltd*,[45] prior to suffering ill health, X, a director and majority shareholder of a company had been actively involved in the management of the company's business. The company had been solvent during X's guardianship of its affairs. However, following X's illness, the fortunes of the company declined and in an attempt to halt its demise another director (Y) was appointed to the company's board. Y was entrusted with the day-to-day responsibility of running the company's affairs. However, as a direct consequence of Y's appointment the company's fortunes rapidly declined and the company was subsequently wound up with debts in excess of £413,000. Y was disqualified for a period of six years and X for a period of two years. X was disqualified on the premise that he had continued to act as a director of the company during the period in which Y controlled its affairs but in so acting, had failed to involve himself in the management of the company's affairs. By contrast, in *Re Wimbledon Village Restaurant Ltd*,[46] Michael Hart QC, sitting as a deputy High Court judge, found that W, a director of Wimbledon Village Restaurant Ltd, a company which had been put into creditors' voluntary liquidation with debts of over

---

[40] However, where a director's incompetence causes the company to trade whilst insolvent, the company having no reasonable prospect of meeting creditors claims (a scenario akin to an act of wrongful trading under IA 1986, s 214), the courts have not sought to determine culpability on the basis of establishing gross misconduct, see *e.g.*, *Secretary of State* v *Creegan* [2002] 1 BCLC 99. Nevertheless, it may be possible to contend that such conduct should be impliedly viewed as gross misconduct in that the nature of this incompetence conveys a complete misunderstanding of the company's financial standing in a manner which is likely to severely prejudice the interests of corporate creditors.

[41] See, Re Lo-Line Electric Motors Ltd [1988] Ch 477 at 486 per Browne Wilkinson V-C.

[42] See, Re Sevenoaks Stationers (Retail) Ltd [1991] Ch 164 at 184 per Dillon LJ.

[43] See, Re Dawson Print Group Ltd [1987] BCLC 601 at 604 per Hoffmann J.

[44] See, Re Barings plc (No5) [1999] 1 BCLC 433 at 483 per Jonathan Parker J.

[45] [1993] BCLC 1297. See also, Re Continental Assurance Ltd [1997] BCLC 48, and Re Barings plc (No5) [1999] 1 BCLC 433.

[46] [1994] BCC 753. See also, Re Austinsuite [1992] BCLC 1047 and Re Cladrose [1992] BCLC 204.

£327,000, should not be subjected to a disqualification order in so far as W had not played an active part in the management of the company. W became a director of the company as a means of protecting her own position as the unlimited guarantor of the company's overdraft. The deputy judge held that W should have been entitled to rely on the skill and experience of the company's other two directors.

The Requisite Standard of Proof

As a contravention of section 6 invokes no form of criminal liability, the assessment of whether a director's conduct is of an unfit nature will be determined by the civil standard of proof, that is, on the balance of probabilities. Given the civil nature of the proceedings, it follows that hearsay evidence and findings of primary and secondary fact will be more readily admissible than had the proceedings been dealt with under the criminal law. Further, as section 6 proceedings are of a regulatory as opposed to criminal nature, it is probable that Article 6 of the European Convention on Human Rights[47] will have limited application.[48]

Nevertheless, because allegations made in the course of disqualification proceedings may invoke very serious insinuations of personal misconduct, in some instances the courts have failed to interpret the civil standard of proof in its purest form, instead, interpreting the provision as one whereby a director's culpability must be established at a standard which is reasonably conclusive of a finding of unfitness. For example, in *Re Polly Peck International plc*,[49] Lindsay J, opined that the court should, in accordance with the quasi-penal nature of a disqualification order, seek to give a director the benefit of any reasonable doubt in respect of determining culpability. The learned judge remarked,

---

[47] The Human Rights Act 1998 gives effect to the rights and freedoms guaranteed under the European Convention of Human Rights (ECHR). According to ECHR, art 6(1): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." Following *Saunders* v *United Kingdom* [1997] BCC 872, art 6(1) is especially pertinent in instances of self-incrimination, i.e., where the use of statements made under compulsion under the Companies Act 1985 to Department of Trade and Industry inspectors are used in a subsequent criminal trial against the person making the statement. Disqualification cases have not been found to be within the ambit of art 6(1), largely because disqualification is regarded by both the domestic courts, see *R* v *Secretary of State for Trade and Industry, ex parte* McCormick [1998] BCC 379 and by the ECHR, see, *DC, HS and AD* v *United Kingdom* [2000] BCC 710, as a civil regulatory matter, and not a criminal charge. See also, Re Westminster Property Management Ltd [2001] BCC 121.

[48] See, *DC, HS and AD* v *UK* [2000] BCC 710 and *WGS and MSLS* v *UK* [2000] BCC 719. However as observed in the latter case, the fact that disqualification proceedings are to be treated as regulatory civil proceedings and not criminal proceedings for the purposes of art 6(1) will not remove the applicant's right to a fair hearing. Following *EDC* v *United Kingdom* [1998] BCC 370, delays in the prosecution of civil proceedings against a director under the CDDA 1986 may constitute a violation of art 6(1). See also, Re Abermeadow Ltd [2001] BCC 724.

[49] [1994] 1BCLC 574. See also, Re Living Images Ltd [1996] 1 BCLC 348 and Re Swift 736 Ltd [1993] BCLC 1.

> "Where a provision, here s 6(1)(b), whilst not wholly or even primarily penal in intent, is none the less plainly quasi-penal in effect, it would, in my view, be wrong of a court, unless constrained to do so, to make the threshold which a complainant has to cross other than, and certainly not lower than, whatever Parliament shall by its language have provided."[50]

Although more recent judgments have reiterated the necessity for the application of the civil standard of proof as opposed to a criminal or some form of quasi criminal standard,[51] in practice, given the courts' reluctance to afford the concept of unfit conduct a more liberal definition, there is a danger that the standard of proof may continue to be determined in a manner which is cautious of an affirmative allegiance to the civil standard of proof. While such an approach may serve to safeguard the interests of company directors, it is one which may seriously restrict the effectiveness of the disqualification system and as such cause prejudice to the public interest.

The Effectiveness of Section 6 of the CDDA 1986

Notwithstanding that it is a problematic task to gauge the effectiveness of section 6, it is suggested that the success or otherwise of the provision may, in the first instance, be tentatively measured by considering whether the number of disqualification orders hitherto imposed provides evidence of an effective and workable provision. In this respect, DTI statistics confirm a progressive increase in the annual number of disqualification orders imposed under section 6. For example, between the years 1992-1995, an annual average of approximately 400 disqualification orders were imposed, whereas for the period 1995-1997 the annual average had risen to approximately 900 disqualifications, and between 1997-2001, the annual average had escalated to approximately 1300 disqualifications.[52] The impressive percentage growth in disqualification orders between 1995 and 2001 is indicative of a positive advancement in the enforcement of section 6. The increase is even more striking when, compared to the period 1990 to 1995, the period 1995 to 2000 witnessed an approximate decline of 40 per-cent in the total number of insolvent liquidations; statistics which suggest that within this latter period there was a significant decline in the pool of delinquent directors. However, while the statistics confirm a sustained increase in the number of section 6 disqualifications, the apparent success of the provision may be unrealistically

---

[50] *Ibid*, at p 581.

[51] See *e.g.*, the judgment of the Court of Appeal in *Secretary of State* v *Deverell* [2000] 2 All ER 365, at p 377.

[52] For the period 2000–01, the number of disqualification proceedings issued under section 6 totalled 1,456. As a result of these proceedings 1,548 disqualifications orders were imposed. Obviously, in some cases, disqualification proceedings would have been commenced in circumstances where more than one delinquent director was involved in the management of the insolvent company. (The 2000-01 figures represent a small increase (a total of 8) in the number of disqualifications imposed under s 6 for the period 1999-2000 but an increase of 264 orders against the period 1998-99). Of the 1,548 disqualified directors, 887 were disqualified for a period of between two and five years. Only 47 directors were disqualified for a period of between 11 and 15 years. See, The Insolvency Service Annual Report and Accounts 2000-01, at http://www.insolvency.gov.uk.

embellished. For example, between the periods 1995 to 2000, out of a total of over 70,000 insolvent liquidations, it is remarkable that only 5,808 recorded disqualification orders were imposed under section 6.[53]

The Prosecution of Section 6 Actions

In accordance with section 7(3) of the CDDA 1986, insolvency practitioners are under a statutory obligation to report to the Department of Trade and Industry (DTI) any director who is suspected of conducting the affairs of a company in an unfit manner. In submitting a report, the office holder must investigate conduct by reference to guidelines set out in Schedule 1 of the CDDA 1986. In forming a view as to whether conduct may be considered unfit, an insolvency practitioner should not take a pedantic view of isolated technical failures, for example, the occasional lapse in filing annual returns. The insolvency practitioner is required to consider matters of conduct on the basis of information acquired in the course of his normal duties and by reference to the books and records available to him. An insolvency practitioner is not obliged to undertake investigations, which he would not otherwise have considered necessary for the purposes of his administration.[54]

The Insolvency Service, a department of the DTI, is, through its Disqualification Unit, responsible for determining whether to commence

---

[53] For this period, given that on average insolvent companies have between 2 to 4 directors, it may be assumed that approximately 160,000 directors were involved in the management of such companies. On the basis of these figures, less than 4% of all such directors were made subject to a disqualification order under s 6.

[54] In 1993, a National Audit Office (NAO) report, see Company Director Disqualification HMSO 1993, containing a survey of 103 insolvency practitioners (IPs) showed that a significant majority of the IPs considered that the CDDA 1986 had been unsuccessful in meeting its objectives. In 1997 Andrew Hicks conducted an independent survey of IPs, see The Disqualification of Unfit Directors: No Hiding Place for the Unfit? (1998) ACCA Research Report 59, at pp15-20 and pp 135-146. Here, of the IPs who responded to the survey, although the vast majority were positive and clear about their professional obligation to report on directors of failed companies many were unsure as to what level of unfitness would be necessary to justify a court disqualification under CDDA 1986, s 6. Attitudes of the IPs to the success of the CDDA 1986 were, as with the 1993 NAO report, unfavourable, and despite a considerable increase in the number of disqualifications between 1992 and 1998, a large majority thought insufficient government funding was a primary reason why a greater number of disqualification proceedings had not been commenced. Although a majority of the IPs considered that disqualification orders were inadequately publicised and difficult to enforce, disqualification was still considered to be a worthy sanction. It is also interesting to note that very few IPs criticised the performance of the Insolvency Service. Indeed, the increased rate in the number of disqualification orders imposed under s 6 is probably attributable to an improvement in the working practices of the Insolvency Service. The improvements were prompted as a result of the 1993 NAO report. The improved performance of the Insolvency Service was highlighted in a follow up report by the NAO, see, HCP 1998-99 No 424. Here the Insolvency Service was shown to have more than doubled the resources spent on disqualification from £9m in 1993–94 to £22m in 1997–98. Further, it allocated more high-grade and support staff to improve the vetting, targeting and processing of cases. However, it should be noted that the Insolvency Service's annual funding for disqualification cases has not been so dramatically increased since 1997-98.

proceedings under section 6. The current success rate of the Unit in the prosecution of actions is most creditable as approximately 94 per-cent of all cases which are prosecuted under section 6 result in the imposition of a disqualification order. However, this figure may overstate the Unit's achievements especially as the policy of prosecuting section 6 cases is unquestionably influenced by financial considerations. As with all government departments, the Unit's funding would appear limited, to the extent that only prosecutions which are virtually certain to result in the imposition of a disqualification order are likely to be pursued. Accordingly, it is probable that many instances of commercially culpable conduct will go unpunished. The disqualification process is a natural slave to the economic pressures and constraints of government funding.[55]

Section 17 CDDA 1986[56] – Evading Mandatory Disqualification

To establish a director's unfitness under section 6, the director's conduct must be of a most incompetent standard. As such, it is perhaps surprising to discover that the mandatory nature of a section 6 order may be disturbed by section 17 of the CDDA 1986. Section 17 provides that a director may be granted leave to continue in the management of a specified company or companies in circumstances where he is successfully involved in the management of that company or companies.[57] In reality, the effect of a section 17 order pulls the public interest consideration in two quite distinct directions. The practical effect of section 17 is one which impliedly contradicts the mandatory nature of section 6. However, section 17 will only be invoked in circumstances where the imposition of a disqualification order would adversely affect the interests of the specified company; causing prejudice to the company's employees and creditors.[58] Clearly, the courts must strike a delicate balance in determining public policy considerations, always mindful that in invoking section 17 and thereby allowing an unfit director a "second chance" in respect of the management of the specified company, the public interest may be further prejudiced in circumstances where the director fails to sustain a commitment to the nominated company or, worse still, is a party to future delinquent acts of mismanagement.[59]

---

[55] The public costs involved in respect of the disqualification process include the costs of the Disqualification Unit, the provision of legal aid, social security benefits payable to directors made unemployed as a consequence of disqualification, and the costs incurred by the courts. See generally, Wheeler, "Directors Disqualification: Insolvency Practitioners and the Decision Making Process". (1995) 15 LS 283.

[56] In Northern Ireland see 1989 Order, art 20.

[57] The courts have an absolute discretion in determining whether leave should be granted. The grant of leave is not reserved for exceptional cases, see *Secretary of State for Trade and Industry* v *Rosenfield* [1999] BCC 413.

[58] See *e.g.*, Re Gibson Davies Ltd, [1995] BCC 11, *Secretary of State* v *Barnett* [1998] 2 BCLC 64.

[59] Where a director is granted leave to act under s 17 and breaches the conditions imposed under the leave agreement, it is probable that he will be severely penalised. For example, in *Secretary of State* v *Davies* (6th March 1998, unreported) a director who was made subject to a five-year disqualification period (see, Re Gibson Davies Ltd [1995] BCC 11) breached conditions of a leave agreement and in addition committed further delinquent acts in the management of

The Insolvency Act 2000 - Reforming the Prosecution of Actions under Section 6 of the CDDA 1986

If the Disqualification Unit was financially unfettered in respect of its ability to commence prosecutions under section 6, it is most probable that a far greater number of directors would be subject to the threat of disqualification. However, up until 2000, an increase in the number of prosecutions under section 6 would have inevitably collapsed an already overburdened court system. Evidence of the strain on the court system may be illustrated by the fact that during the period 1997 to 2001, as an annual average, in excess of 1000 cases were pending prosecution**.** Further, for the period 2000-01, 58 per-cent of section 6 cases had not been concluded within two years from the commencement of proceedings and as such exceeded the two year limit specified by section 7(2) of the Company Directors Disqualification Act 1986.[60] Indeed, had it not been for the courts' willingness to adopt a summary form of procedure, the strain on the disqualification system would have been far more transparent. In 2000-01, the summary form of procedure (the *Carecraft* procedure),[61] was employed in approximately 30 per cent of all section 6 cases. Basically, the procedure provides that a director is permitted to reach an agreement with the Secretary of State to proceed to court on the understanding that a disqualification order will be made for a pre-determined period.

By 2000, the disqualification system had, in respect of section 6 of the CDDA 1986, been stretched to a point of optimum capacity to the extent that its reform was an essential pre-requisite in seeking to safeguard its future efficiency. Clearly, a fundamental requirement for the reform of the disqualification system was to devise a more competent mechanism for the prosecution of section 6 cases and to this end the enactment of the Insolvency Act 2000[62] may afford a viable means of attaining this goal. As a result of the Insolvency Act 2000,[63] section 1A of the CDDA 1986 now permits the Secretary of State to accept a disqualification undertaking as an

---

the nominated company. As a consequence of his conduct, the director was disqualified for 12 years. It is suggested that if the director had not previously been disqualified and in breach of the leave agreement, the penalty would have been significantly less severe.

60 See, The Insolvency Service Annual Report and Accounts 2000-01, at http:// www.insolvency.gov.uk.

61 This type of summary procedure was first sanctioned by Ferris J in Re Carecraft Construction Co Ltd [1994] 1 WLR 172. Whenever a Carecraft application is made, the applicant must:
(a) except in simple cases where the circumstances do not merit it or when the court otherwise directs, submit a written statement containing in respect of each respondent any material facts which (for the purposes of the application) are either agreed or not opposed (by either party); and,
(b) specify in the written statement or, a separate document, the period of disqualification which the parties will invite the court to make or the bracket (i.e. 2-5 years; 6-10 years; 11-15 years) into which they will submit that the case falls.

62 In relation to the undertaking procedure and general reforms to disqualification procedures, IA 2000, ss 5,6,7,8 and Sch.4 were brought into force on April 2, 2001 by the Insolvency Act 2000 (Commencement No 1 and Transitional Provisions Order) – (SI No 766).

63 See, IA 2000, s 6.

alternative to the imposition of a disqualification order.[64] The Secretary of State may accept an undertaking if it appears expedient in the public interest to do so.[65] In determining whether to accept a disqualification undertaking, the Secretary of State may take account of any matter other than previous criminal convictions.[66]

Therefore, in accordance with the statutory undertaking procedure a defendant will agree to refrain from acting as a director or in any other capacity specified by s 1A(1)(a) and (b) of the CDDA 1986, for a pre-determined period.[67] As with a disqualification order, the minimum duration for an undertaking is two years[68] and the maximum period, fifteen years.[69] A person who agrees to an undertaking may, in accordance with section 17 of the CDDA 1986, still apply for leave to continue to act in a capacity specified by s.1A(1)(a) of the CDDA 1986.

The principal objective of the statutory undertaking procedure will be to significantly reduce the need for disqualification actions to proceed by way of a full trial. In the light of an ever-expanding number of disqualification cases, it is to be expected that the statutory undertaking procedure will significantly reduce the pressure on the court system and considerably reduce the costs incurred by the parties involved in disqualification proceedings. As such the statutory undertaking procedure will advance the advantages of the *Carecraft* procedure in a most logical way. Indeed, the merits of the undertaking procedure may completely extinguish any future need for section 6 disqualification proceedings to be determined by way of the *Carecraft* procedure.

The statutory undertaking procedure will also permit the resources of the Insolvency Service to be more effectively taken up with the prosecution of cases in which there is a real dispute between the parties, either in relation to the extent or nature of the alleged misconduct, or to a disputed period of disqualification. Further, it may be assumed that the efficiency of the statutory undertaking procedure will permit the Insolvency Service to

---

[64] The new undertaking procedure only applies to disqualification cases falling within the terms of CDDA 1986, ss 6 and 8. Section 8 provides that following a DTI investigation a person may be disqualified as a director on the ground that the person is unfit to be concerned in the management of a company and that the disqualification order would be in the public interest. The maximum period of disqualification under s 8 is fifteen years. Article 11 of the 1989 Order is the Northern Ireland equivalent.

[65] See, CDDA 1986, s 2A.

[66] CDDA 1986, s 1A (4), inserted by s 6(2) IA 2000. The Secretary of State may take account of all matters even if the defendant may be criminally liable in respect of such matters.

[67] CDDA 1986, s 1A(1)(a)&(b) contains exactly the same restrictions as those contained in CDDA 1986 s 1, as amended by IA 2000, s 5, namely a person who is made the subject of a disqualification order will not be permitted to be "a director of a company, act as a receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company unless (in each case) he has the leave of the court, and (b) will not act as an insolvency practitioner".

[68] The minimum period does not apply to undertakings or disqualification orders in respect of CDDA 1986, s 8.

[69] CDDA 1986, s 1A(2) as inserted by IA 2000, s 6(2).

prosecute disqualification cases with greater speed and possibly in greater numbers. However, such enthusiasm may need a degree of caution. Although in one sense the statutory undertaking procedure will reduce the pressure on the financial and human resources of the Disqualification Unit, the additional financial and human resources involved in managing and administrating disqualification undertakings may negate some part of any of the expected economic gains. In addition, an expected increase in the number of section 6 prosecutions may be tempered by the hitherto accepted interpretation of case precedents which establish that only the very serious instances of corporate malpractice will justify disqualification under section 6. In effect, the Disqualification Unit's past history of pursuing prosecutions involving only the most serious examples of commercially culpable behaviour may adversely inhibit any substantial increase in the future number of attainable prosecutions.

Although it may be expected that the statutory undertaking system will improve the efficiency of the present disqualification system, conversely, it is possible to contend that it may cause prejudice to the public interest. For example, as a consequence of the statutory undertaking procedure, matters relating to the accountability of delinquent directors will largely be dealt with in the absence of judicial and public scrutiny. Although the Secretary of State must include in the register of disqualified directors such particulars which he considers appropriate of disqualification undertakings accepted by him,[70] the CDDA 1986 fails to define the extent and nature of "such particulars". Accordingly, the Act does not specifically require the publication of the issues, facts and circumstances that may give rise to an undertaking, or factors which are relevant to determining the length of an undertaking.[71] Not only will disqualification cases be dealt with "behind closed doors" but once an undertaking is agreed, the courts will only be called upon to consider the merits or otherwise of the undertaking in a situation where a defendant applies to have its duration varied. The power of the court to vary the duration of an undertaking is provided for by s 8A of the CDDA 1986.[72]

Therefore, in contrast with the *Carecraft* procedure, other than where a director makes an application under s 8A, the undertaking procedure will provide no means of judicial scrutiny as to the nature and extent of an agreed disqualification period. In respect of disqualification proceedings under

---

[70] See, CDDA 1986, s 18(2A), inserted by IA 2000, s 5. The register of disqualification orders is provided for by art 21 of the 1989 Order in Northern Ireland.

[71] However, following the recent decision of the Court of Appeal in *Sec of State* v *Davies*, Re Blackspur Group plc (unreported, 13th September 2002) affirming the first instance decision of Patten J [2001] 1 BCLC 653, the acceptance of an undertaking may be made conditional on the inclusion of a statement setting out the facts surrounding a finding that a director's conduct was of an unfit nature. Whether the Secretary of State requests such a statement will be a matter for his discretion, although it is probable that such a request will be a common condition attached to the acceptance of future undertakings.

[72] Inserted by IA 2000, s 5. Section 8A(1) provides that: "The court may, on the application of a person who is subject to a disqualification undertaking – (a) reduce the period for which the undertaking is to be in force, or (b) provide for it to cease to be in force.

section 6 of the CDDA 1986, the courts will generally cease to operate as the nominal guardian of justice and the protector of the public interest.

A legislative procedure which permits the acceptance of formal undertakings and as such is devoid of the adverse publicity and costs associated with a full trial may also be criticised in so far as it fails to offer a sufficiently effective deterrent in comparison to a court imposed disqualification order. Further, as the statutory undertaking system provides an attractive and far less expensive alternative to court proceedings, its expediency may serve as an economic incentive for the parties involved to agree to an undertaking, the duration of which may be fixed for a period which is disproportionate to the nature and extent of the defendant's conduct. As the factual circumstances surrounding the terms of a disqualification undertaking may not always be in the public domain, the existence of this economic incentive may prove to be no more than conjecture, but as the primary justification for the undertaking procedure is, itself, coloured by economic necessity, then in terms of the public interest, this concern may be viewed with some anxiety. Apprehension may be especially justified in the more serious instances of commercially culpable conduct where both the Disqualification Unit and defence may, in an attempt to save time and reduce costs, accept a disqualification undertaking the duration of which may have been for a more extensive period had the case proceeded by way of a full trail. While the adoption of the statutory undertaking procedure represents an essential reform in maintaining the efficiency of the disqualification system, the procedure, given its availability in all uncontested disqualification cases, should be viewed with some degree of concern.

In seeking to capitalise on the advantages of the statutory undertaking procedure but in an attempt to minimise its potential prejudice to the public interest, it is suggested that the procedure's availability should have been restricted to cases warranting a disqualification period of up to a maximum of five years, that is, cases involving less serious instances of unfit conduct and falling within the lower bracket of the disqualification periods set out in *Re Sevenoaks Stationers.*[73] In an attempt to mitigate costs, the *Carecraft* procedure could have been employed in all other undisputed cases. The *Carecraft* procedure saves the court and the parties involved in disqualification proceedings the time and expense that would otherwise have been incurred had the application proceeded to a full trial, but unlike the statutory undertaking procedure, retains the advantage of permitting the courts (albeit in exceptional circumstances) to overturn or adjust the findings of any agreement made between the defendant and the Secretary of State. It is suggested that had the prominence of the *Carecraft* procedure been maintained, the courts would have retained some nominal form of safeguard in respect of the public interest in cases involving more serious instances of commercially culpable behaviour.

The Future Reform of Section 6 of the CDDA 1986

While the standard of culpability under section 6 of the Company Directors Disqualification Act 1986 may be criticised on the basis that the conceptual boundaries of "unfitness" are vague and as such liable to produce

---

[73] [1991] Ch 164.

inconsistency, the term "unfit conduct" does at least serve to reinforce the provision's intention of seeking to penalise only serious instances of managerial malpractice. However, as virtually all prosecutions under section 6 are instigated in circumstances indicative of misconduct which is of a blatant nature, the resulting case precedents which identify, establish and set the requisite norm for determining the standard of unfitness, are comprised of only the most obvious examples of delinquent conduct. Although the term "unfit conduct" is absent of any specific definition, in practice, it is probable that the Disqualification Unit and the courts have inadvertently exaggerated the seriousness of the degree of misconduct required to merit conduct being labelled as unfit. At present, a director may escape being labeled unfit, even in circumstances where his conduct is considered to be of an unacceptable nature.[74] Accordingly, it is suggested that section 6 is failing to adequately police the activities of directors who, in abusing or neglecting the standards and duties incumbent upon their positions, conduct the affairs of a company in a manner prejudicial to the public interest.

Therefore, as a matter of fundamental reform and in an attempt to fulfil its primary purpose of protecting the public interest, it is submitted that culpability under section 6 should be set at a standard which is more appropriate to a finding that a director's conduct exceeded mere business folly and as a result was prejudicial to the public interest. Further, any revised test should exhibit a greater degree of certainty and consistency in respect of identifying conduct which exceeds mere business folly. Accordingly, it is submitted that section 6 could be reformed to the extent that a director of an insolvent company should, in holding a position of commercial responsibility, be made subject to a disqualification order in circumstances where the affairs of the insolvent company were conducted in a manner prejudicial to the public interest, to the extent that the director's conduct was of a standard which could not be equated with one to be reasonably expected from a director occupying a similar type of management position to that held by the defendant. In determining whether a director's conduct caused prejudice to the public interest, it is suggested that prejudicial conduct would *prima facie* be established in circumstances where the director's conduct resulted in commercial damage of more than of a trivial nature.[75]

In terms of the standard to be expected of a "reasonable director," much would depend upon the nature and size of the business in which the director was involved and any specialist skills which the director possessed. For example, a finance director with a professional accountancy qualification or with a considerable degree of experience in financial matters would be expected to possess a higher degree of proficiency than a finance director who had no formal qualifications, or little financial experience. However, in all cases, a director's expected standard of proficiency would be assessed on the basis of a standard to be reasonably expected of a director occupying a similar type of management position to that held by the defendant.

---

[74] See, Re Bath Glass Ltd [1988] BCLC 329, Re Austinsuite Furniture Ltd [1992] BCLC 1047, Re Wimbledon Village Restaurant Ltd [1994] BCC 753.

[75] Prejudicial conduct is damaging conduct which is caused in a commercial as opposed to an emotional sense. By analogy, see e.g., the judgment of Harman J in Re Unisoft Group Ltd (No3) [1994] 2 BCLC 609 at 611.

Therefore, in the given example, even an inexperienced finance director would be expected to exhibit a degree of proficiency to be reasonably expected of a finance director involved in the management of a company of a comparable size and nature.

In many respects, the reformed test advanced to determine culpability under section 6, hereafter referred to as the prejudice based test, echoes the one prescribed to determine a director's liability under section 214 of the Insolvency Act 1986.[76] However, in attaching a standard of proficiency to be measured in accordance with the standards expected of a "reasonable director", the benchmark of competence expected of a director would exceed that of a reasonable diligent person so prescribed by section 214 of the Insolvency Act 1986.[77] The prejudice based test would also differ from the section 214 test in so far as the threshold of proficiency against which a director's culpability would be measured would include all types and degrees of commercial misconduct (this would naturally include all matters currently prescribed by Schedule 1 of the CDDA 1986) as opposed to conduct which specifically related to an act of wrongful trading. Accordingly, unlike the determination of liability under section 214, the prejudice based test would not require any proof that at some time prior to the commencement of the winding up of the company, the director in question knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation.[78]

---

[76] To establish a director's *prima facie* liability under section IA 1986, s 214, the liquidator must show that at a specified time prior to the liquidation of the company, the director, in conducting the affairs of the company, was aware or ought to have been aware that there was no reasonable prospect of the company avoiding liquidation. In determining whether a director ought to have been aware that there was no reasonable prospect of the company avoiding liquidation, section 214(4) provides that: ". . . the facts which a director of a company ought to know or ascertain, the conclusions which he ought to reach and the steps which he ought to take are those which would be known or ascertained, or reached or taken, by a reasonably diligent person having both–
(a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as those which were carried out by that director in relation to the company, and,
(b) the general knowledge, skill and experience of the director.

[77] Although the courts have exhibited a reluctance to identify a director's standard of care other than at the level of an ordinary diligent or prudent person, such reluctance is most probably born of a perceived (but probably artificial) difficulty on the part of the judiciary in identifying an appropriate professional standard to be applied to determine an objective measure for calculating a director's standard of care. The reluctance may also be explained on the basis that the judiciary has historically veered away from involving itself in monitoring the effectiveness of business decisions and methods relating to business efficiency, instead they have left this role to the company's shareholders. See further, Parkinson, *Corporate Power and Responsibility* (Oxford, Clarendon Press, 1993), at pp 97-113.

[78] In relation to IA 1986, s 214 the selection of a specified date will often be problematic, especially where the company's financial records are incomplete, or, in some cases, non-existent. In seeking to maximise the amount of the director's potential contribution, the liquidator will seek to select a time period which accentuates the possibility of the highest attainable contribution. However, whilst seeking to maximise the amount of the contribution, the liquidator must ensure

Although under this revised prejudice based test, disqualification would be determined in accordance with the standards to be expected of a "reasonable director," it is submitted that there should be a statutory defence to a charge of causing prejudice to the public interest. The said defence would be forged in a manner akin to the defence provided by section 214(3) of the Insolvency Act 1986 in respect of an allegation of wrongful trading.[79] Therefore, it is suggested that the defence would operate in circumstances where, notwithstanding evidence of prejudicial conduct, a director took successful steps to alleviate the extent and degree of prejudice which may have otherwise been caused to the public interest had there been no such intervention.[80] However, it is contended that the defence would not override the obligatory imposition of a disqualification order or undertaking under section 6, rather, it would provide the court or Secretary of State with a discretion to reduce the duration of the disqualification or undertaking period to reflect the extent by which the director sought to alleviate the extent of the prejudicial conduct. Although mitigating factors may currently be considered in setting disqualification periods, it is suggested that the creation of a statutory defence would, in anticipation of potential disqualification proceedings, more readily promote directors to minimise the extent of any prejudice caused to the public interest.

Reforming the Nature of the Penalty

Under section 6 of the CDDA 1986, a finding of a director's unfitness necessarily implies the existence of a serious instance(s) of misconduct which for the protection of the public interest demands the imposition of a disqualification order. If, however, a director's culpability was to be determined by the prejudice based test, then clearly the necessity of imposing a mandatory disqualification penalty would need to be reconsidered given the less arduous nature of the threshold of misconduct required to justify disqualification. Indeed, under the prejudice-based test it would appear logical to suggest that the minimum disqualification period could safely be reduced to a period of one year without detrimentally affecting the public interest. Although one could go further and advance the complete abrogation of the mandatory penalty, it is submitted that the degree of misconduct

---

that the specified date is conclusive of a finding that, as of that date, there was no reasonable prospect of the company avoiding liquidation. The selection of the specified date is crucial and will, if it does not accurately prescribe the period of wrongful trading, be fatal to the liquidator's case, see e.g., *Re Sherborne Associates Ltd* [1995] BCC 40. For a detailed analysis of accounting issues illustrating the difficulties faced by a liquidator in assessing whether the directors of a company were correct in their determination that the company's continued trading would not be conclusive of it going into liquidation, see *Re Continental Assurance Co* [2001] BPIR 733.

[79] The defence is represented by IA 1986, s 214(3) and will apply to a director where, on first becoming aware that there was no reasonable prospect that the company could avoid going into insolvent liquidation, the director took every step with a view to minimising the potential loss to the company's creditors.

[80] For this defence (unlike IA 1986, s 214 (3)), it is submitted that a director would not need to take *every step* with a view to minimising any potential loss to the company's creditors. However, obviously the more steps that were successfully taken then the greater the likelihood that the director would qualify for a more significant reduction in the disqualification period.

deemed necessary to justify disqualification under the prejudice based test would, in terms of protecting the public interest, still justify a mandatory disqualification period of one year. Further, the maintenance of a mandatory penalty would serve as a positive deterrent in discouraging directors from participating in delinquent conduct.

In addition, it is also suggested that an undertaking/disqualification order should be capable of being suspended for up to a maximum period of five years. Under such a scheme, the terms of the suspended undertaking/disqualification order would allow a director to escape the immediate consequences of an undertaking/disqualification order. If however, during the period of the suspended order, the director was made subject to a subsequent undertaking/disqualification order, then, in addition to the duration of this subsequent order, the director would be made subject to the additional period of disqualification as represented by the suspended order. It is submitted that the suspended undertaking/disqualification order would only be applicable in cases which would otherwise have justified an undertaking/disqualification order for up to a maximum period of five years. In cases involving disqualification periods in excess of five years, it is submitted that the power to grant leave to act under section 17 should be abrogated given that in such cases the economic advantages of permitting a director to continue to act in respect of a nominated company will rarely, if ever, outweigh the court's desire to protect the public interest from a potential reoccurrence of very serious misconduct.

In respect of cases where the suspended order was applicable, section 17 of the CDDA 1986 would be rendered redundant. The adoption of the suspended order would allow the courts to exercise leniency in cases where, for example, a director exhibited a strong potential to reform past instances of misconduct. However, where the exercise of such leniency was subsequently betrayed by a director's misconduct in the future management of a company, the terms of the suspended order would have the effect of severely punishing the betrayal, as the director would in effect be obliged to serve two consecutive periods of disqualification. The adoption of the suspended order would also have the effect of reducing the costs incurred under the disqualification process because under the new undertaking procedure the grant of a section 17 order will necessarily involve court proceedings.[81]

A final point in the context of the disqualification penalty concerns the present sanction for a breach of a disqualification order, namely a maximum term of two years imprisonment and/or fine.[82] It is contended that such a penalty is far too lenient to the extent that it may encourage disqualified directors to continue to act in a managerial position in contravention of the terms of a disqualification order; especially in the capacity of a *de facto*[83] or

---

[81] CDDA 1986, s 17 provides that an application for leave to promote or form a company must be made to any court with a jurisdiction to wind up companies and that an application for leave to take part in the management of a company must be made to a court having a jurisdiction to wind up that company.

[82] See, CDDA 1986, s 13; art. 17 of the 1989 Order in Northern Ireland.

[83] See, *Re Kaytech International plc Potier v Secretary of State for Trade and Industry* [1999] BCC 390.

shadow director.[84] At present, a disqualified director may consider that the financial rewards of participating in a managerial capacity outweigh the risk of his detection and the possibility of imprisonment or a fine.[85] Accordingly, as a matter of reform, it is suggested that a breach of a disqualification order should be punished by a criminal sanction of a minimum term of imprisonment of one year and fine and a maximum term of imprisonment of five years and fine.

Increasing the Effectiveness of the Disqualification Process

The introduction of the statutory undertaking procedure will undoubtedly reduce the number of section 6 cases which have hitherto been determined by the courts and accordingly reduce the pressure on the resources of the Disqualification Unit in the preparation and prosecution of such cases. However, given that the majority of disqualification cases under section 6 will now be by way of the new undertaking procedure, it is likely that the Disqualification Unit will encounter additional burdens in respect of managing and administering the procedure. Also, if, as suggested, the standard of culpability for section 6 cases was to be determined by the application of the prejudice based test, it is evident, given the less stringent standard of culpability required to justify disqualification, that the resulting flood of disqualification cases could seriously swamp the disqualification system.

Therefore, in an attempt to safeguard the efficiency of the disqualification process it is suggested that a far greater number of disqualifications cases could, *prima facie*, proceed via section 10 of the CDDA 1986.[86] Section 10 provides that the court may, of its own volition, impose a disqualification order in circumstances where, following an application from the company's liquidator, the court finds a person is liable to make a contribution under section 213 or 214 of the Insolvency Act 1986.[87] The court may, at its discretion, impose a disqualification order for up to a maximum period of fifteen years.[88]

---

[84] See, *Secretary of State v Deverell* [2000] 2 All ER 365.

[85] It should be noted that the risks of detection may have increased as a result of the "Disqualification Hotline", a telephone service to which members of the public can report any person they believe to have been acting in contravention of a disqualification order. As of October 2001, over 2,500 calls had been made to the Hotline since its launch in January 1998, with approximately one third of the said calls resulting in an investigation.

[86] For Northern Ireland see art 13 of the 1989 Order.

[87] The equivalent Northern Ireland provisions are arts 177 and 178 of the Insolvency (NI) Order 1989.

[88] In respect of establishing liability under IA 1986, s 213 it must be shown that a person was knowingly a party to the carrying on of the company's business and was aware that the company had no reasonable prospect of being able to re-pay its debts, see, *Re Patrick Lyon Ltd* [1933] 1 Ch 786 and *R v Grantham* [1984] QB 675. IA 1986, s 214 was introduced following the recommendations of the Cork Committee Report (Cmnd. 8558), see paras: 1781-1806. Section 214 seeks to penalise a director in circumstances where the director allows the company to continue to trade, at a date up to the commencement of the company's winding up, when he knew or ought to have concluded that there was no reasonable prospect of the company being able to avoid insolvent liquidation. Where a director is liable

While at present the courts' ability to impose a disqualification order under section 10 of the CDDA 1986 is comprised of a discretionary power (a power which would be unlikely to be exercised save for where a director's conduct was also deemed to be of an unfit nature) it is suggested that if section 6 of the Company Directors Disqualification Act 1986 was reformed in accordance with the prejudice based test, then in such circumstances, section 10 could also be reformed to the extent that culpability under section 213 or 214 would give rise to an automatic disqualification order. Disqualification could be deemed automatic in so far as if liability was established under section 213 or 214, it would follow that the necessary degree of culpability would also have been established in respect of the prejudice based disqualification test.[89]

Further it is also suggested that in an attempt to accelerate disqualification actions other than under section 6 of the CDDA 1986, the ambit of section 10 could be extended by, for example, providing for the provision's applicability in respect of misfeasance proceedings under section 212[90] of the Insolvency Act 1986.[91] Section 212 is a procedural device and provides a summary remedy whereby persons who were involved in the management of a company may be held accountable for any breach of duty, or other act of misfeasance. Proceedings under section 212 may only be pursued where, prior to a company's liquidation, the misconduct which formed the subject matter of the misfeasance claim was capable of being made the subject of an action by the company.[92] While at present, conduct supporting a misfeasance action may not necessarily justify its description as unfit conduct for the purposes of section 6 of the CDDA 1986, if section 6 was to be reformed in accordance with the prejudice based test, factual circumstances giving rise to a successful action under section 212 would also satisfy the prejudice requirement. Therefore, as with a finding of fraudulent or wrongful trading,

---

under the terms of s 213 or s 214 the director will, at the discretion of the court, be liable to pay a contribution order into the general assets of the company.

89 However, it must be pointed out that at present the number of actions commenced under IA 1986 ss 213 and 214 are relatively few and as such reform of these provisions will be necessary to accelerate the possibility of commencing more disqualification cases under CDDA 1986, s 10. In proving liability under s 213 the liquidator has a most arduous task in so far as he must establish an intention to perpetrate the fraudulent act, an intention confirmed by proving that the respondent acted in a dishonest manner. While the introduction of s 214 sought to provide a more accessible mechanism by which directors of insolvent companies could be held accountable for acts of wrongful trading, the provision is currently hampered by a number of procedural constraints, see further, Griffin, "Accelerating Disqualification under Section 10 of the Company Directors Disqualification Act 1986" [2002] *Insolvency Lawyer* 32.

90 In Northern Ireland see art. 177 of the Insolvency (NI) Order 1989.

91 The applicability of CDDA1986, s 10 could (if culpability under CDDA 1986, s 6 was based upon a prejudice based test) also be extended by providing that its ambit should include successful actions brought in respect of proceedings under IA 1986, s 216 (phoenix companies) (art. 180 in Northern Ireland), s 238 (transactions at an undervalue) and s 239 (preferences) (arts 202-203 in Northern Ireland).

92 See generally, *Regal Hastings Ltd* v *Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134 and *Re D'Jan of London Ltd* [1993] BCC 646.

a director who was found culpable under section 212 could justifiably be made subject to an automatic disqualification order.

CONCLUSION

Section 6 of the CDDA 1986 aims to penalise the delinquent conduct of company directors who have sought to abuse the advantages afforded by the concept of limited liability and as such the provision affords an essential safeguard to the exploitation of an enterprise culture which all too readily encourages entrepreneurs to risk capital in the pursuit of profit.[93] Although section 6 represents a potentially effective form of penalty, its effectiveness has thus far been limited by procedural constraints and an austere interpretation afforded to the concept of unfit conduct. While, in respect of section 6, it is probable that the introduction of the statutory undertaking procedure will increase the efficiency of the disqualification process, it is unlikely whether the new procedure will, in the long term, result in a substantial increase in disqualification orders. Therefore, if section 6 is to achieve a more effective method of penalising and deterring the delinquent activities of directors and thereby serve as a more viable and visible means of protecting the public interest, the measure of culpability required to activate the provision must be subject to reform. In addition, and to ease the burdens of the Insolvency Service, there must also be an alternative and effective means of disqualifying delinquent directors other than by proceedings under section 6 of the CDDA 1986. To this end it is essential to have an expansion in disqualification proceedings under a revised section 10 of the CDDA 1986. Sections 6 and 10 of the CDDA 1986 must be transformed into far more effective weapons if the disqualification process is to more readily attain its objective of protecting the public interest.

While a stricter disqualification regime could be criticised as one which would "discourage legitimate risk-taking, stigmatise business failure and adversely affect the promotion of an entrepreneurial society,"[94] it is contended that a more effective system of disqualifying delinquent directors would serve as potent notice of a just and fair regulation of the limited liability company, whereby the exploitation of limited liability would be strictly penalised to the detriment of the delinquent director and the ultimate benefit of the future public interest. Indeed, a stricter disqualification regime would discourage commercial folly, enhance public confidence in the workings of commerce and as such promote a more equitable and responsible entrepreneurial society.

* The author wishes to express his thanks to Professor Dan Prentice, Professor David Campbell and for reading and commenting on an earlier draft of this paper. The author would also like to express his gratitude to the

---

[93] In an attempt to curb the potential exploitation of the limited liability company further measures could be introduced to limit a potential delinquency in company directors, for example, compulsory training courses educating directors in respect of the legal requirements and responsibilities attached to their positions, or a minimum capital requirement for private companies to discourage undercapitalised concerns, see Hicks, "Director Disqualification: Can it Deliver?" [2001] *JBL* 433 at 451-452.

[94] *Ibid* at p 459.

anonymous referee for his/her helpful suggestions. A final vote of thanks to David Capper for his valuable observations and for his assistance with the Northern Ireland references. The opinions expressed within this paper and any errors contained therein are the sole responsibility of the author.

THE PROTECTION OF HUMAN RIGHTS IN DOMESTIC LAW: LEARNING LESSONS FROM THE EUROPEAN COURT OF HUMAN RIGHTS.

Steve Foster*

ABSTRACT

The Human Rights Act 1998 came into force in October 2000, its purpose to allow victims of alleged violations of rights contained in the European Convention on Human Rights (1950) to pursue a remedy in the domestic courts. Thus, central to the Act's purpose is to enable the access of the rights and remedies already provided by the machinery of the European Convention, subject only to those provisions of the Act which seek to retain the principle of parliamentary sovereignty. The purpose of this article is to study the case law of the European Court of Human Rights in relation to cases brought against the United Kingdom in order to examine the United Kingdom's record under the Convention and, hopefully, of identifying common themes of human rights violations for which the United Kingdom has consistently been held responsible, and for which they may remain vulnerable to challenge in the future. At this stage it will be submitted that the European Convention has exposed the limitations of human rights protection in domestic law, and that on many occasions both the courts and Parliament have failed to adopt the necessary jurisprudence of the European Court in their respective roles. Finally, in the light of that evidence the article will examine the provisions of the Human Rights Act 1998 in order to assess the likely impact of that Act on the protection of rights and liberties in the United Kingdom.

INTRODUCTION

The decisions of the European Court of Human Rights concerning cases involving the United Kingdom continues to draw attention to possible defects within domestic law relating to the protection of fundamental rights. Cases concerning the ban of homosexuals in the armed forces,[1] the fairness of criminal proceedings applied to young offenders,[2] and the release of mandatory life sentence prisoners[3] have fuelled this debate and the government was forced to introduce reforms in some of these areas.[4] In

---

* School of International Studies and Law, Coventry University. I am grateful to my colleague Mark Ryan, and to Kevin Bampton at Derby University for their constructive comments on earlier drafts of this article. All errors remain mine.

1 *Smith and Grady* v *United Kingdom* (2000) 29 EHRR 493, and *Lustig-Prean and Beckett* v *United Kingdom* (2000) 29 EHRR 548.

2 *V and T* v *United Kingdom* (2000) 30 EHRR 121.

3 Recently, the Grand Chamber of the European Court of Human Rights decided in *Stafford* v *United Kingdom*, *The Times*, 28 May 2002, that the power of the Home Secretary to determine the release of mandatory life-sentence prisoners was in violation of art 5.

4 In response to the European Court's ruling in A *v United Kingdom* the government issued a consultation document entitled *Protecting Children, Supporting Parents,*

addition to those high profile cases, the European Court continues to find against the government in areas including freedom of speech and protest,[5] private life[6] and various aspects of due process[7] and liberty of the person.[8] These cases, along with many others involving the United Kingdom, will be presented as typical examples of human rights violations in the United Kingdom and will be referred to in an attempt to identify what has been an apparent gulf in the method of human rights protection between domestic law and of the European Convention. Whilst it is hoped that this discrepancy will be addressed now that the Human Rights Act 1998 is in operation, this article suggests that such a transformation will not happen simply because the courts are armed with European principles and case law, and that the success of the Act will depend primarily on whether those responsible for making and adjudicating upon the law are prepared to embrace the true spirit of fundamental human rights.

As examined below, many judges have insisted that that the British method of securing rights and liberties is comparable and compatible with the system contained under the European Convention. In order to decide whether the domestic system of rights protection has ever, or is capable of matching that of the Convention it is thus necessary to make a study of the traditional method of protecting human rights in domestic law. With no constitutional or higher law as such, and no formal bill of rights, individuals have had to

---

inviting public response. Shortly after the decision in *V and T* v *United Kingdom*, the Lord Chief Justice issued a Practice Direction: *Practice Direction (Crown Court: trial of children and young persons*) with directions reflecting the European Court's decision.

5 *Steel* v *United Kingdom* (1999) 28 EHRR 603, and *Hashman and Harrap* v *United Kingdom* (2000) 30 EHRR 241.

6 See *McLeod* v *United Kingdom* (1999) 27 EHRR 493, *Khan* v *United Kingdom* (2001) 31 EHRR 45 and *PG and JH* v *United Kingdom*, *The Times*, 19 October 2001, *Foxley* v *United Kingdom* (2000) 8 BHRC 571), *ADT* v *United Kingdom* (2000) 9 BHRC 112, and *TP and KM* v *United Kingdom*, (2002) 34 EHRR 2, and most recently the judgments in *Goodwin* v *United Kingdom* and *I* v *United Kingdom*, *The Times*, 12 July 2002. See also the recent judgment of the European Court in *Hatton* v *United Kingdom*, (2002) 34 EHRR 1, where the Court held that the applicants' right to family and private life had been violated by night flights to and from Heathrow airport. The government has appealed to the Grand Chamber under art 43 of the Convention.

7 See, for example, *Rowe and Davis* v *United Kingdom* (2000) 30 EHRR 1, *Jasper* v *United Kingdom* and *Fitt* v *United Kingdom* (2000) 30 EHRR 1; *McGonnell* v *United Kingdom* (2000) 30 EHRR 289; *Condron* v *United Kingdom* (2001) 31 EHRR 1, *Stanford* v *United Kingdom* (*The Times*, 12 May, 2000), *Mageee* v *United Kingdom* (2000) 8 BHRC 646; *Averill* v *United Kingdom* (2000) 8 BHRC 430; *Kingsley* v *United Kingdom* (*The Times*, January 9 2001), *Howarth* v *United Kingdom* 9 BHRC 253 and *Atlan* v *United Kingdom*, (2002) 34 EHRR 33. See also the recent judgment in *Morris* v *United Kingdom* (2002) 34 EHRR 52, decision of the European Court 26 February 2002, on the incompatibility of the court martial system with art 6, and *Ezeh and Connors* v *United Kingdom*, judgment of the European Court 15 July 2002, *The Times*, 30 July 2002, on the denial of legal representation to prisoners at prison disciplinary hearings.

8 See, for example, *Jordan* v *United Kingdom* (2001) 11 BHRC 1; *Caballero* v *United Kingdom* (2000) 30 EHRR 643; *Oldham* v *United Kingdom* (2001) 31 EHRR 34, *SBC* v *United Kingdom* (2002) 34 EHRR 21, *Hirst* v *United Kingdom*, The Times, August 3 2001 and *O'Hara* v *United Kingdom* (2002) 34 EHRR 32.

rely on the common law, statute and public opinion to safeguard their civil liberties.[9] In the absence of a tangible bill of rights, the enjoyment of civil liberties has been governed by the principle of residual liberty: we are free to do anything that the law does not forbid.[10] In addition to this laudable, yet precarious state of affairs, the rights of individuals are bolstered by statutory provisions which either provide specific protection of civil liberties,[11] or which temper the restriction of civil liberty which has otherwise been authorised by the law.[12] More importantly the courts have taken it upon themselves to protect individual liberty from unlawful and arbitrary interference[13] and have developed a human rights jurisprudence which assumes that Parliament does not intend to interfere with certain fundamental rights,[14] and which subjects any *prima facie* lawful interference to a more intense judicial review.[15] More specifically, domestic law embraced, to a limited extent, the rights and the case law of the European Convention on

---

[9] For a general account of the domestic situation see H Fenwick, *Civil Liberties and Human Rights* (2002) and D Feldman, *Civil Liberties and Human Rights in England and Wales* (2002). For a critical analysis of recent government legislation and human rights protection in domestic law, see H Fenwick, *Civil Rights: New Labour, Freedom and the Human Rights Act* (2000).

[10] See McGarry VC in *Malone* v *Metropolitan Police Commissioner* [1979] Ch 344, at 366E. For a criticism of this method, and of the decision in *Malone*, see Sedley, *Freedom Law and Justice* (1999), pp10–12.

[11] In addition to the Human Rights Act 1998 various legislation provides protection against discrimination: the Sex Discrimination Act 1975, the Race Relations Act 1976 and the Disability Discrimination Act 1988. Freedom of speech is protected is by a variety of specific provisions: see s1 Public Meetings Act 1908, s43 Education (No 2) Act 1986, and The Public Interest Disclosure Act 1998 and the Freedom of Information Act 2000.

[12] For example, the Police and Criminal Evidence Act 1984 contains a variety of safeguards against arbitrary use of the police powers contained in the Act. See also s4 of the Obscene Publications Act 1959, which provides a public good defence to a charge of publishing obscene material.

[13] See, for example, *Webb* v *Chief Constable of Merseyside Police; Porter and another* v *Chief Constable of Merseyside Police* [2000] 1 All ER 29, where the Court of Appeal held that the courts would not countenance the expropriation of property by a public authority without clear statutory authority.

[14] On access to the courts, see *Chester* v *Bateson* [1920] 1KB 829; *Raymond* v *Honey* [1983] 1 AC 1; *R* v *Secretary of State for the Home Department Ex parte O'Brien and Simms* [1999] 3 All ER 400, *R* v *Secretary of State for the Home Department Ex parte Saleem* [2001] 1WLR 443 and *R* v *Secretary of State for the Home Department, Ex parte Daly*, [2001] 2 WLR 1622. See also the recent House of Lords' decision in *R (on the application of Morgan Grenfell and Co Ltd)* v *Special Commissioner* [2002] 2 WLR 1299 on the protection of documents covered by legal professional privilege. See in particular Lord Irvine, "Activism and Restraint: Human Rights and the Interpretative Process" [1999] *EHRLR* 350 and J Jowell, "Beyond the Rule of Law: Towards Constitutional Judicial Review"[2000] *PL* 671.

[15] See *R* v *Ministry of Defence Ex parte Smith* [1996] 1 All ER 257; *R* v *Secretary of State for the Home Department Ex parte Bugdaycay* [1986] 1 All ER 458; and *R* v *Lord Saville of Newdigate Ex parte A* (*The Times*, 22 June 1999), affirmed in the Court of Appeal [1999] 4 All ER 860.

Human Rights (1950).[16] Thus, it was permissible for the courts to use the Convention in cases of statutory ambiguity,[17] or to develop uncertain common law,[18] and the courts eventually, after some initial reticence,[19] referred to the case law of the European Court of Human Rights when determining issues under domestic law.[20]

Despite the existence and application of these constitutional techniques, the domestic arrangements for securing civil liberties continued to come under fire.[21] As explained below, the United Kingdom government has been repeatedly brought before the European Commission and Court of Human Rights to defend, mostly unsuccessfully, domestic laws and practices that have violated the Convention rights of individuals within its jurisdiction. Indeed, despite the wider aim of the Human Rights Act 1998 to introduce a culture of human rights protection into domestic law, the Act has been primarily introduced to meet the government's responsibilities under the Convention and so to offer a human rights protection equivalent to the one provided by the European Convention.[22] If this primary aim is to be realised, therefore, the domestic authorities must pay heed to the essential principles enshrined in the European Convention and, in particular, to the jurisprudence of the European Court of Human Rights. An analysis of the case law of the European Court which has involved the United Kingdom government should, therefore, reveal not only the deficiencies of our domestic system of protecting civil liberties, but should also provide the relevant domestic authorities with an insight into the philosophy of a human rights protection which they must embrace with the passing of the Human Rights Act 1998. In particular, it is suggested that the cases reveal inevitable deficiencies of the traditional system, allowing us to draw some conclusions as to how the domestic authorities must proceed if the aims and spirit of the Human Rights Act are to be realised.

---

[16] Even before October 2000, the courts had begun to consider some cases in the light of the Human Rights Act 1998. See *R* v *DPP, Ex parte Kebilene* [1999] 4 All ER 801.

[17] *R* v *Secretary of State for the Home Department Ex parte Brind* [1991] AC 696.

[18] *Attorney General* v *Guardian Newspapers* (No 2) [1990] 1 AC 109; *R* v *Chief Metropolitan Magistrate ex parte Choudhury* [1991] 1 QB 429; and *Derbyshire CC* v *Times Newspapers* [1993] AC 534.

[19] See *R* v *Morrissey and Staines* (*The Times*, May 1, 1997, and the High Court decision in *Camelot* v *Centaur Communications* (*The Times*, July 17, 1997)

[20] See the Court of Appeal decision in *Camelot* v *Centaur Communications* [1998] 1 All ER 251. See also the decision of the High Court in *R* v *DPP Ex parte Kebeline* (*The Times*, March 31, 1999).

[21] See R Gordon and Wilmott-Smith (eds), *Human Rights in the United Kingdom* (1996); M Zander, *A Bill of Rights?* (1997); and R Singh, *The Future of Human Rights in the United Kingdom* (1997) chaps 1 and 2.

[22] The Human Rights Act resulted from the Labour Party consultation paper: *Bringing Rights Home: Labour's Plans to incorporate the ECHR into UK law*. See J Straw and P Boateng, "Bringing Rights Home: Labour's plans to incorporate the European Convention on Human Rights into UK law" [1997] *EHRLR* 71.

THE UNITED KINGDOM BEFORE THE EUROPEAN COURT OF HUMAN RIGHTS

The cases that we will study in this section of the article fall into two broad categories: those where there was held to be a violation because the human right in question was not recognised in domestic law, and those where the right, although recognised, was given insufficient weight or recognition by the law or its application. By grouping the cases in this way, it is hoped that many of the cases that have been decided by the European Court can be explained in relation to particular characteristics and deficiencies of the traditional method of rights protection.

For example, in the first category we will look at cases where the domestic law has failed to accommodate certain human rights, or has failed to extend certain human rights to particular persons. This will, hopefully, highlight both the failure of the common law to recognise certain rights, as well as exposing the consequences of the lack of a formal bill of rights. Within this second broad category we will also look at a host of cases where the United Kingdom government was held accountable for what, it is submitted, are the natural consequences of its human rights arrangements: the interference of liberty via the granting of excessive executive discretion, and the violation of the rights of minority and other vulnerable groups. In certain cases, there will be an evident overlap between the two broad categories, and the divisions within the second category. For example, the cases involving prisoners is studied under both broad categories and is put forward as evidence of the abuse of minority rights and the excessive granting of executive discretion. Nevertheless, it is hoped that by examining the cases within these categories that it will be possible to identify and highlight several characteristics and failings of the domestic law's system of rights protection, and of providing a possible solution to the United Kingdom's worrying record under the Convention.

1. Where The Convention Right Is Not Recognised In Domestic Law

There have been a number of cases where the European Court has held that the United Kingdom was in violation of the Convention as a direct consequence of the failure of the domestic legal system to recognise a particular Convention right. The clearest example of this type of case is *Malone* v *United Kingdom*.[23] Here, the domestic courts were unable to provide the applicant with a remedy for what was a clear violation of his right to private life and correspondence.[24] Thus, inevitably, the European Court held that such a violation could not be justified within the restrictions permitted by Article 8(2) because the restrictions were both administrative and secretive and not contained in the law so as to be 'in accordance with law.'[25] Dealing with the issue of whether there had been a violation of Article

---

[23] (1985) 7 EHRR 14. The applicant's telephone had been tapped during police investigations.

[24] *Malone* v *Metropolitan Police Commissioner*, see n 10 above.

[25] To be in accordance with or prescribed by law for the purposes of the Convention a restriction must emanate from a recognised legal source and must be sufficiently accessible and clear. See *Sunday Times* v *United Kingdom* (1979) 2 EHRR 245.

8 of the Convention, the European Court agreed with the Commission's findings that the existence of practices that establish a system for affecting such secret surveillance constituted a violation of Malone's rights under Article 8.[26] Having established such, the Court then went on to consider whether the restriction on Malone's rights were in accordance with law as required by Article 8(2). It concluded that it could not be said with any reasonable certainty what elements of the powers to intercept are incorporated in legal rules and what elements remain within the discretion of the executive. To that extent, the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society was lacking.[27]

As a result of the European Court's judgement, Parliament was forced to pass the Interception of Communications Act 1985, which at least put the practice of telephone tapping on a legal basis.[28] However, the failure of Parliament to fully address the issue and to legislate for a general right of privacy led to further defeats for the government. Thus, in *Halford* v *United Kingdom* [29] the European Court held that the right to private life and correspondence under Article 8 also applied to conversations held on the employer's premises. As the Interception to Communications Act 1985 did not cover the tapping of such conversations, the United Kingdom again fell foul of Article 8 of the Convention. More recently the European Court found a violation of Article 8 of the Convention when it held that the absence of domestic law warranting and regulating the use of covert listening devises constituted an interference with the applicant's right of private life. As the interference had been authorised via unpublished Home Office guidelines such interference were not, in the Court's opinion, in accordance with law' as required by Article 8 (2).[30] These cases clearly illustrate a particular deficiency of the common law system of protecting human rights: a right which is not recognised at the domestic level is a right which is clearly protected in international law and consequently the government are held to account by the European Court without any consideration of whether the restrictions, had they been in legal form, were necessary in a democratic society for the purpose of achieving a legitimate social aim.

See H Mountfield, "The concept of a lawful interference with fundamental human rights", in *Understanding Human Rights Principles* (2001), p 5.

[26] (1985) 7 EHRRR 14, at para 64. The previous decision in *Klass* v *Federal Republic of Germany* (1979) 2 EHRR 214 had established that telephone conversations were covered by the notions of private life and correspondence under Art 8.

[27] *Ibid*, at para 79.

[28] See now the Regulation of Investigatory Powers Act 2000.

[29] (1997) 24 EHRR 523

[30] *Khan* v *United Kingdom* (2001) 31 EHRR 45, and *PG and JH* v *United Kingdom*, *The Times*, October 21 2001. For these reasons, the Court also found a breach of Art 13 of the Convention: the right of an individual to an effective remedy for breach of Convention rights. Covert surveillance is now covered by s 93 of the Police Act 1997. See also the admissibility decision in *Govell* v *United Kingdom* (Application No 27237/95), and the decision of the European Court in *Arnott* v *United Kingdom*, judgment of the European Court of Human Rights, November 7, 2000) and *Armstrong* v *United Kingdom* (judgment of the European Court of Human Rights, 15 July 2002, *The Times*, August 6 2002).

This deficiency in our domestic arrangements was also apparent in the recent case involving the banning of homosexuals in the armed forces: *Smith and Grady* v *United Kingdom***;** *Lustig-Prean* and *Beckett* v *United Kingdom*.[31] This ban was challenged in the domestic courts[32] on the grounds, *inter alia*, that it was in contravention of both Article 8 of the European Convention and EC Council Directive (EC) 76/207. Both the High Court and the Court of Appeal held that Article 8 of the Convention could not be used directly to challenge the ban and that the European directive did not cover discrimination on grounds of sexual orientation.[33] This case highlights the lack of intensity in judicial review cases involving human rights issues and will be discussed in that context later in the article. However, with regard to our present discussions, the judicial review proceedings highlighted the failure of domestic law to recognise and protect the fundamental right of private life. The absence of a clear law of private life forced the courts to decide the case on traditional judicial review grounds. Although the domestic courts were sympathetic to the applicants' plight, they were powerless to find that the Ministry had acted in such a way as to permit the courts to interfere. Indeed, the allegations that the investigations conducted by military personnel into the sexual activities of the applicants constituted a violation of their private lives were not debated in the domestic proceedings. There being no general law of privacy, such allegations were not relevant and the courts were forced to concentrate on the rationality of continuing the ban, albeit in the light of the fact that the decision affected the fundamental rights of the applicants.[34] Of course, when the case reached the European Court of Human Rights it found a clear violation of Article 8, in particular with regard to the manner in which the applicants' homosexuality had been investigated. Thus, the European Court found that the investigations conducted by the Ministry, and in particular the interviews of the applicants, were especially intrusive, and that in combination with the profound affect that their discharges had on the applicants' careers and prospects there had been an especially grave interference with their private lives.[35]

Cases such as *Malone* and *Smith* are, of course, the clearest examples of the deficiencies of the traditional system, and a development of a coherent and complete law of privacy was perhaps the most glaring gap in our system of

---

[31] See n 1 above.

[32] *R* v *Ministry of Defence*, *Ex parte Smith* [1995] 4 All ER 427, affirmed in the Court of Appeal: [1996] 1 All ER 257.

[33] See *Grant* v *South West-Trains* [1998] ECR I-621. See now *Macdonald* v *Ministry of Defence* (2001) IRLR 431.

[34] [1996] 1 All ER 257, Sir Thomas Bingham MR at 263e–264f. It is difficult to see which fundamental right the domestic courts were actually referring to in this case. Having rejected the arguments based on the EC Directive and the direct use of Art 8 of the European Convention, the only right the applicants would have would be a common law constitutional right. Unfortunately domestic law does not recognise the right of private life as such and thus the courts reference to human rights appears to be purely rhetorical.

[35] *Smith and Grady* v *United Kingdom*, at para 89; *Lustig-Prean and Beckett* v *United Kingdom*, at para 64. In a separate judgment the European Court awarded each applicant £19,000 for pecuniary damage, representing especially grave violations of their Convention rights: Judgment of the European Court, 25 July 2000.

human rights protection.[36] Although many privacy interests were safeguarded under the traditional laws of trespass and confidentiality, the lack of a general right of private life led to gaps in that protection, where gross invasions of privacy remained unchecked.[37] This, it is suggested, is the consequence of rights being protected within a remedy driven by legal rules, rather than human rights theory.[38] Of equal concern are those cases, such as *Smith*, where the absence of a formally recognised right of privacy has resulted in the courts referring to a vague notion of private life in order to justify a more intense judicial supervision.

This failure to recognise Convention rights is again evident in cases where the particular right, although formally recognised in domestic law, is, for some reason of legal policy, effectively removed in particular circumstances. For example, the provision of legal immunity to certain bodies, capable of restricting individual human rights, was the subject of litigation in the case of *Osman* v *United Kingdom*.[39] In this case the failure of domestic law to allow a plaintiff to sue the police in negligence resulted in a finding by the European Court that the United Kingdom was in violation of Article 6 of the Convention, which guarantees the right to a fair trial:

> " . . . the application of the rule in this manner without further enquiry into the existence of competing public interest considerations only serves to confer a blanket immunity on the police for their actions and omissions. . . and amounts to an unjustifiable restriction on an applicant's right to have a determination on the merits of his or her claim against the police in deserving cases."[40]

---

[36] See in general Michael, "Privacy", in McCrudden and Chambers, *Individual Rights and the Law in Britain* (OUP 1995) and Birks (ed), *Privacy and Loyalty* (Clarendon 1998). See also T Bingham, "Should there be a law to Protect Rights of Personal Privacy?" [1996] *EHRLR* 450.

[37] See *Kaye* v *Robertson* [1991] FSR 62. For suggestions on how the domestic law could be used to develop protection of privacy interests, see G Phillipson and H Fenwick, "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era" (2000) 63 *MLR* 660.

[38] The absence of a right to privacy before the Human Rights Act 1998 was confirmed recently by the Court of Appeal in *Secretary of State for the Home Department* v *Wainwright and another*, *The Times*, January 4 2002, a case involving an act committed before the Act came into operation. Since the Act came into force the courts have begun to develop existing common law in line with the right to private life. See, for example, *Douglas and others* v *Hello! Ltd* [2001] 2 WLR 992 and *Venables and Thompson* v *News Group Newspapers Ltd and others* [2001] 1 All ER 908. See also *A* v *B plc and another* [2002] 2 All ER 545. See R Singh and J Strachan, "The Right to Privacy in English Law" [2002] *EHRLR* 129, and Wright J, *Tort Law and Human Rights* (Hart 2001), chapter 7.

[39] (2000) 29 EHRR 245. See Wright J, *Tort Law and Human Rights* (Hart 2001), chapter 4, where the author analyses the domestic and European case law involved in this case.

[40] *Ibid*, at para 151. See also the decisions of the European Court in *Z* v *United Kingdom* (2002) 34 EHRR 3 and *TP and KM* v *United Kingdom* (2002) 34 EHRR 2. In those cases the Court held, *inter alia*, that art 6 was not violated by the striking out of the applicant's cases on public policy grounds, thus substantially limiting the impact of its decision in *Osman*. See Gearty, C 'Osman Unravels' (2000) 65 *MLR*, 87. However, the Court did find a violation of Art 13 of the

In a similar group of cases the European Court have been called upon to adjudicate in cases involving persons whose rights have for some reason been excluded from the protection of domestic law. In this context the treatment of prisoners provides the clearest example. Until the late 1970's, the domestic courts were adamant that prison law and practice was not subject to judicial review.[41] Thus, although prisoners had some private law rights, the domestic courts insisted that the public law decisions of prison authorities were not subject to judicial interference. This position resulted in a number of decisions of the European Court, which fundamentally altered the rights of prisoners, not only within the Convention itself, but also within domestic law.[42]

Cases before the European Court involving prisoners and other detainees, and other cases relating to claims made by homosexuals and transsexuals who have had their rights either removed or ignored by domestic law, highlight the deficiencies of an incomplete system of human rights protection. Either the system is not sophisticated enough to accommodate the specific claims of individuals – as evidenced, for example, by the lack of a law of privacy – or political or legal opinion has conspired against a group of individuals to give them little or no protection of their basic rights. These deficiencies have been highlighted by a number of European Court decisions, reminding the United Kingdom government that the rights laid out in the Convention are for all, and that it is not permissible to offer a sub-standard protection of such rights to particular persons or class of persons.

2. Where Insufficient Weight Has Been Given To The Convention Right

i) The balancing of freedoms in general

Many of the Convention rights are not absolute, but may be interfered with in certain situations, provided the interference satisfies the tests of legality and proportionality that are laid out in the Convention. In many cases, therefore, it is incumbent upon the domestic authorities to balance those Convention rights with either other Convention rights or other individual or group interests.[43] Disputes will thus arise when an individual feels that the domestic law and practice have failed to give due weight to their rights, and have as a consequence failed to safeguard such rights against unnecessary and arbitrary interference. This section of the article looks at cases where the

---

Convention in that they failed to provide the applicants with an effective remedy with respect to violations of arts 3 and 8 of the Convention.

41 See *Arbon* v *Anderson* [1943] KB 252, and *Becker* v *Home Office* [1972] 2 QB 407. The position was altered following the decision in *R* v *Hull Board of Visitors Ex parte St Germaine* [1979] QB 425. Later decisions in *Leech* v *Deputy Governor of Parkhurst* [1988] 1 AC 533, and *R* v *Deputy Governor of Parkhurst Prison Ex parte Hague* [1992] 1 AC 58 opened up all prison law decisions to judicial review.

42 In particular *Golder* v *United Kingdom* (1979–80) 1 EHRR 524 and *Silver* v *United Kingdom* (1983) 5 EHRR 347.

43 See A McHarg, "Reconciling Human Rights and Public Interest: Conceptual Problems and Doctrinal Uncertainty in the Jurisprudence of the European Court of Human Rights" (1999) 62 *ML R* 671.

European Court has decided that the domestic authorities have quite simply got the balance wrong. Although this may be the consequence of any appeal system, it is suggested that these defeats can be traced back to the deficiencies of our traditional system of rights protection, and more particularly to a failure of those authorities to appreciate the value of Convention rights.

This category of cases is, therefore, characterised by the failure of the domestic law, including the courts, to give *adequate* weight to a right, which although recognised in domestic law is not given sufficient legal or moral weight by those who enforce, or adjudicate upon the law. Consequently, the competing right or interest is given an elevated status that is inconsistent with the case law of the Convention. Although the courts are (generally) insistent that certain rights are constitutional, and thus should be protected from undue or arbitrary interference,[44] the case law of the European Convention discussed below shows that in cases where a particular right is in conflict with other rights or other social policy that the domestic courts are paying insufficient attention to the claimed right.[45] The disparity between the domestic principle of irrationality and the European Court's application of the doctrine of proportionality will be highlighted later in this article, but a study of one or two examples at this stage may serve to illustrate the frailty of human rights in disputes involving the balancing of competing interests.

For example, in *Ex parte Brind* [46] the House of Lords unanimously upheld the legality and rationality of the Home Secretary's decision to use section 29 (3) of the Broadcasting Act 1981 to place restrictions on the reporting of words spoken by or on behalf of certain terrorist organisations. Despite their Lordships' insistence that freedom of expression was of fundamental importance in domestic law, and that any interference would need to be justified by strong evidence, all three courts upheld restrictions which imposed a form of censorship on the broadcasting authorities and which extended to the speech of elected political representatives. The decision of the House of Lords is famous for its rejection both of the doctrine of proportionality and the direct use of (Article 10) of the European

---

[44] See for example the comments made by Lord Bridge in *R* v *Secretary of State for the Home Department Ex parte Brind* [1991] AC 696, at 748H–749A where he stated that ". . . we are entitled to start from the premise that any restriction of the right of freedom of expression requires to be justified and nothing less than an important competing public interest will be sufficient to justify it." This principle was applied by the High Court when it was decided that the decision of the Health Secretary to hold the inquiry into the murder of patients by Harold Shipman in private was unlawful as being, *inter alia*, contrary to the principle of free speech: *R* v *Secretary of State for Health, Ex parte Wagstaff and another* [2001] 1 WLR 292. See also *R (on the application of ProLife Alliance)* v *British Broadcasting Corporation*, [2002] 2 All ER 756.

[45] This judicial attitude is highlighted in particular by cases such as *R* v *Ministry of Defence, Ex parte Smith* [1996] 1 All ER 257, *R* v *Secretary of State for the Home Department Ex parte Brind* [1991] AC 696, and *R* v *Secretary of State for the Home Department, Ex parte McQuillan* [1995] 3 All ER 400, all of which will be studied in this article. For a comprehensive account of how the domestic courts have used human rights law to resolve disputes see M Hunt, *Using Human Rights Law in English Courts* (1997).

[46] *Supra*, n 43.

Convention. Consequently the question was asked whether a reasonable Home Secretary, being aware of the importance of free speech and broadcasting, would have imposed such restrictions. Given that the Home Secretary received approval from Parliament for such actions, and that the Court was stressed that the decision was that of the Home Secretary and not of the court, it was not surprising that their Lordships felt that the Home Secretary's actions were consistent with domestic law, and indeed any test prescribed under treaties such as the European Convention.

Some of their Lordships' comments are worthy of note. In the House of Lords, Lord Lowry concluded that he could not see how 'the *modest invasion of liberties* (italics added) which has occurred in this case could fail to satisfy any of the criteria which have been suggested, including those criteria which, in point of law I, in common with your Lordships, have found unacceptable."[47] Also, Lord Bridge expressed his surprise that the restrictions did not go further: they did not restrict the matter that was to be broadcast and were viewed by his Lordship as a mere irritant to journalists.[48] As will be illustrated below, these comments are inconsistent with the philosophy of the Convention and the European Court and will need to be revised once the courts are armed with increased supervisory powers.[49]

A further inadequacy of judicial supervision is highlighted in cases such as *ex parte McQuillan*.[50] In this case the applicant had been made the subject of an exclusion order under section 5 of the Prevention of Terrorism (Temporary Provisions) Act 1989. He claimed that his and his family's life was in danger as long as they continued to live in Northern Ireland, and he challenged the decision on the basis, *inter alia*, that it was contrary to Articles 2 and 3 of the European Convention. In the High Court, Sedley J recognised that the right to life and the right not to be subject to inhuman treatment by executive action, were fundamental values of the common law and that it was the duty of the court to scrutinise administrative decision-making which infringed such rights to ensure that all relevant considerations

---

47 *Ibid*, p 764, E–F, italics added.

48 *Ibid*, at p 749, D–F, italics added. See also Lord Donaldson MR in the Court of Appeal: "If the directives are to be criticised at all, it must be on the basis that any use of the power will or may damage the reputation of the broadcasting authorities for total independence from the government of the day and that this price was not worth paying for so small an effect." [1990] 1 All ER 469 at p 482, a–b.

49 This view is not, it is submitted, rendered nugatory by the European Commission's decision to declare Brind's application inadmissible: *Brind* v *United Kingdom*, (1994) 77–A DR 42. At that stage the restrictions had been lifted and, in any case, the European Court would have approached the issue very differently from that of the domestic courts.

50 *R* v *Secretary of State for the Home Department, Ex parte McQuillan* [1995] 4 All ER 400. See also *R* v *Secretary of State for the Home Department, Ex parte Adams* [1995] All ER 177. For the courts' general reluctance to look behind the Home Secretary's decisions in this context see *R* v *Secretary of State for the Home Department, Ex parte Cheblak* [1991] 2 All ER 319, and *R* v *Secretary of State for the Home Department Ex parte Hosenball* [1977] 3 All ER 452. Contrast the decision of the High Court in *R* v *Secretary of State for the Home Department, ex Parte Louis Farrakhan, The Daily Telegraph*, October 9, 2001, a post-Human Rights Act case, which is discussed later in the article but which was overturned by the Court of Appeal: [2002] 3WLR 481.

had been taken into account.[51] Nevertheless, his Lordship stated that authority dictated that where an executive decision affecting such rights was made in the interests of national security that was sufficient to preclude any enquiry into the rationality of the decision. Thus, the decision had to be accepted by the Court without further scrutiny.[52]

These two cases provide evidence of two related problems of judicial activity in the area of human rights protection. Either the courts are reluctant to apply the stringent tests applied by the European Court, or, more dangerously, fail to see the significance of a particular breach and thus the inadequacy of their traditional tools of supervision. Indeed, in cases such as *Brind*, the courts have convinced themselves that the traditional method is consistent with the standards laid down in the Convention, and that such decisions would stand up to the European Court's scrutiny. In the light of such judicial reticence, it is not surprising that the European Court has found United Kingdom law and practice to be deficient in cases where the law and the courts have sought to balance fundamental rights with other rights and social interests.

The case of *Sunday Times* v *United Kingdom* [53] provides a prime example. In that case, the European Court found that the finding of *The Sunday Times* in contempt of court for publishing two articles which commented on the Thalidomide case at a time when some litigation relating to the incident was pending was an unjustified interference with the newspaper's, and the public's, right to freedom of expression under Article 10 of the Convention. In the domestic proceedings the courts had attempted to strike a balance between the right to a fair trial and the impartiality of judicial proceedings on the one hand, and freedom of expression on the other, but had concluded that the articles were still a real threat to the impartiality of the relevant proceedings.[54] In assessing this judgment, the European Court stressed that Article 10 did not involve a balancing exercise, but instead guaranteed freedom of expression subject to specific and tightly drawn exceptions.[55] In the Court's opinion the thalidomide disaster was a matter of undisputed public concern: fundamental issues concerning protection against and compensation for injuries resulting from scientific developments were raised.[56] This difference of emphasis, and the Court's stance on press freedom, and its duty to inform the public, led it to conclude that in the circumstances the contempt proceedings were neither necessary nor proportionate:

---

[51] [1995] 4 All ER 400, at p 422, d–j.
[52] *Ibid*, at p 423, f–h.
[53] (1979) 2 EHRR 245
[54] *Attorney General* v *Times Newspapers* [1974] AC 273.
[55] (1979) 2 EHRR, at paragraph 65. However, see the decision in *Imutran Ltd* v *Uncaged Campaigns Ltd and another* [2001] 2 All ER 386, in which Sir Andrew Morritt VC held that s 12(4) of the Human Rights Act 1998 did not place a duty on the court to place even greater weight on the importance of freedom of expression than it already did. This aspect of the decision seemed to be called into question by the Court of Appeal decision in *A* v *B plc and another* [2002] 2 All ER 545.
[56] *Ibid*, at para 66.

> "It is true that if the. . . article had appeared at the intended time, Distillers might have felt obliged to develop in public, and in advance of any trial, their arguments on the facts of the case; however, those facts did not cease to be a matter of public interest merely because they formed the background of pending litigation."[57]

Cases such as *Sunday Times* provide clear evidence of the European Court's desire to protect freedom of expression and, in particular, press freedom. The Court have consistently held that such freedom is essential to both the rights contained in Article 10 and to the goals of a democratic society in general.[58] For example in *Lingens* v *Austria*[59] the European Court reminded itself that freedom of expression was one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.[60] It also held that those principles were of particular importance as far as the press was concerned:

"Whilst the press must not overstep the bounds set, *inter alia*, for the protection of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them.[61]

In this respect the domestic courts have not been idle in responding to the acceptance of those principles of press freedom which the European Court have stressed lie at the heart of free speech in any democratic society.[62] Thus in the law of defamation the House of Lords have held that it is not possible for democratically elected bodies to sue in defamation, their judgement being based on the idea that such would have a chilling effect on the discussion of democratic issues.[63] Even though this allows individuals within such bodies to sue in defamation, in *Reynolds* [64] the House of Lords have developed the

---

[57] *Ibid*. See also *Observer and Guardian* v *United Kingdom* (1991) 14 EHRR 153 on the question of press freedom and prior restraint.

[58] See in particular *Sunday Times* v *United Kingdom* (1979) 2 EHHR 245; *Lingens* v *Austria* (1986) 8 EHRR 407; *Jersild* v *Denmark* (1994) 19 EHRRR 1; and *Oberschlick* v *Austria* (1998) 25 EHRR 357. See also S Tierney, "Press Freedom and the Public Interest: The Developing Jurisprudence of the European Court of Human Rights" [1998] *EHRLR* 419.

[59] *Supra*, n 58.

[60] *Lingens* v *Austria* (1986) 8 EHRR 407, at para 41. See also *Handyside* v *United Kingdom* (1976) 1 EHRR 737, at para 49.

[61] *Ibid*, at para 41.

[62] A good example of judicial support of press freedom can be seen in the Court of Appeal's judgment in *Attorney-General* v *Punch Ltd and Another* [2001] 2 All ER 655. Here the Court of Appeal held that for a third party to be bound by a court order forbidding disclosure of information if they knowingly defeated the purpose of the order; the publication of material specified in the injunction did not automatically constitute contempt.

[63] *Derbyshire County Council* v *Times Newspapers* [1993] AC 534. Followed in *Goldsmith* v *Bhoyral* [1997] 4 All ER 268 and applied to democratically elected political parties.

[64] *Reynolds* v *Times Newspapers* [1999] 4 All ER 609. See I Loveland, "A new legal landscape? Libel Law and Freedom of Political Expression in the United Kingdom" (2000) *EHRLR* 476. Also note the recent House of Lords' decision in

defences of law of fair comment and qualified privilege so as to recognise, at least partially, the right of the press to comment on matters of public interest.[65] Although the House of Lords in *Reynolds* did not go so far as to develop 'political information' as a generic category of information which would attract qualified privilege, and thus give the press the freedom that they enjoy in the United States,[66] its judgement appears to sufficiently consistent with the case law of the European Court to ensure compatibility within article 10.[67]

In the area of press freedom and the disclosure of press sources, the case of *Goodwin* v *United Kingdom*,[68] provides a very interesting illustration of the different perceptions of the domestic and European courts towards issues of press freedom. A journalist had been forced to disclose the identity of his source and had been held in contempt of court for refusing to do so.[69] When the case was referred to the European Court it was held that the domestic proceedings amounted to a disproportionate interference with his rights under Article 10. In the Court's view the original injunctions, which had stopped the journalist from disclosing the relevant information, were sufficient to protect the rights of the owners of the information and thus any further restriction was not necessary in a democratic society, as required under Article 10(2). The Court paid particular attention to the need to protect press sources and the importance of such a right within the context of Article 10:

> "Protection of journalistic sources is one of the basic conditions for press freedom. . . Without such protection, sources may be deterred from assisting the press in informing the public on matters of public interest. . . . Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10. . . unless it is justified by an overriding requirement in the public interest"[70]

McCartan Turkington Breen v *Times Newspapers Ltd* [2000] 3 WLR 1670, where the House of Lords held that a press conference was a public meeting for the purposes of s7 of the Defamation (Northern Ireland) Act 1955, thus providing the press with a defence of qualified privilege to report such matters. See I Loveland, "Freedom of Political expression: who needs the Human Rights Act?" [2001] *PL* 233.

65 See *Loutchansky* v *Times Newspapers Ltd* (No 2) [2002] 1 All ER 652.

66 *New York Times* v *Sullivan* (1964) 376 US 254. In the *Derbyshire* case the House of Lords preferred to base their judgment on common law, including that of the United States, rather than Art 10 of the European Convention.

67 With regard to the compatibility of the *Reynolds* decision with Art 10, see the recent European Court decision in *Bladet Tromso and Stensass* v *Norway* (2000) 29 EHRR 125. See also, Wright J, *Tort Law and Human Rights* (Hart 2001), chapter 5.

68 (1996) 22 EHRR 128.

69 *X Ltd* v *Morgan Grampian* [1991] AC 1.

70 (1996) 22 EHRR 128, at para 39.

The domestic law fundamentally reflects this stance and provides against disclosure unless such is necessary in the interests of specifically named interests.[71] Notwithstanding this, a number of decisions of the domestic courts after the *Goodwin* judgment have allowed press sources to be disclosed on almost identical facts.[72] The courts have attempted to explain such decisions on the basis that the facts in the particular case were distinguishable. For example, the Court of Appeal in *Centaur* distinguished the *Goodwin* case on the basis that in the present case the unknown source was still employed by the company. This, according to the Court of Appeal allowed the court at first instance to uphold the orders in spite of their consequences on the disclosure of press sources. However, in *Goodwin*, the European Court made specific provision for such a case, and safeguarded the disclosure of press sources despite such a possibility:

> "Unless aware of the identity of the source, Tetra would not be in the position to stop such further dissemination of the contents of the plan. . . . It also had a legitimate reason as a commercial enterprise in unmasking a disloyal employee. . . who might have continuing access to its premises, in order to terminate his or her association with the company. These are undoubtedly relevant reasons."[73]

Yet despite the recognition of the company's claims, the European Court upheld the importance of preserving press sources. The true import of the decision in *Goodwin*, including the principles it advocates, appear to be lost on the domestic courts in *Centaur*, who appear to find it difficult to put the rights of press freedom above commercial and other interests.[74] In such cases it is submitted that unless the domestic courts adopt the true spirit of the Convention they will continue to be at odds with the decisions of the European Court. Indeed, there are signs from a recent Court of Appeal decision in this area that the courts are prepared to do this, and thus to give this aspect of press freedom an enhanced status. In *John and others* v *Express Newspapers and others* the High Court[75] had ordered the disclosure of a journalist's source who had disclosed privileged information of a client of a Barrister's chambers to the journalist. This decision was overturned on appeal to the Court of Appeal[76] because it found that there had been

---

[71] See s 10 Contempt of Court Act 1981. There was, therefore, no need to change this law following the *Goodwin* judgment.

[72] See *Camelot* v *Centaur Communications* [1998] 1 All ER 251, and *Michael O'Hara Books Ltd* v *Express Newspapers plc*, The Times, March 6, 1998.

[73] (1986) 22 EHRR 128, at paras 44–45. In *John and others* v *Express Newspapers and others* (below) the Court of Appeal rejected the argument that the incident might have created a sense of mistrust in the workplace as unlikely, Lord Woolf MR at p 266, d–e.

[74] See Professor Smith, "The Press the Courts and the Constitution" in (1999) *CLP* 127, pp 130–137. See also the recent decision in *Interbrew SA* v *Financial Times Ltd and another*, *The Times*, January 4 2002, where Lightman J granted an order for the disclosure of a source that had disclosed deliberately misleading information about the claimant's business affairs. This decision was upheld by the Court of Appeal: *The Times*, March 21 2002. The House of Lords has refused leave to appeal, but the company did not insist on the source being revealed.

[75] Reported in [2000] *New Law Journal*, 342.

[76] *John and others* v *Express Newspapers and others* [2000] 3 All ER 257.

insufficient efforts made to find the source of the information. According to Lord Woolf MR, the failure of the High Court to show a demonstrable public interest in ordering disclosure gave a disproportionate weighting to professional privilege and undervalued the interests of journalists.[77]

The government has not been defeated in all cases involving the balancing of such rights and interests.[78] Nevertheless, as cases such as *Sunday Times* show, domestic law and enforcement agencies can often take an excessive or unsympathetic approach to this dilemma.[79] The cases in this section highlight that the European Court has *consistently* found the United Kingdom government in violation of the Convention despite the domestic law's efforts to accommodate the right and to provide with necessary protection against unnecessary interferences. Doctrines such as proportionality will, no doubt, assist the courts in redressing this balance, but if the government's record in Strasbourg is to improve in this aspect, the courts and Parliament will need to take heed of the case law, and the principles it expounds. This, it is submitted, must be the case particularly *vis a vis* cases involving excessive executive discretion and the tendency of the law to undermine the rights of minority and vulnerable groups, areas which will now be examined specifically.

ii) Where the law and the courts allow too much administrative discretion

There have been numerous cases where the European Court has found the United Kingdom to be in violation of the Convention because domestic law has given administrators a level of discretion incompatible with the provisions and ideals of the Convention. Related to this statutory empowerment is, of course, the refusal, or constitutional inability, of the courts to scrutinise such acts or decisions to an extent consistent with the principles of the Convention and its case law.[80] This state of affairs,

---

[77] *Ibid*, Lord Woolf MR, at p 266, c. Contrast the decision in *Ashworth Hospital Authority* v *MGN Ltd* [2001] 1 WLR 515 where the Court of Appeal ordered disclosure when confidential medical files had been leaked. The House of Lords dismissed an appeal, confirming that the situation was exceptional and thus justified disclosure: *Ashworth Security Hospital* v *MGN Ltd*, *The Times*, 1 July 2002, [2002] 1 WLR 2033.

[78] In addition to the cases involving morality and free speech and the cases involving claims made by transsexuals (dealt with below), see, for example, *Ahmed* v *United Kingdom* (2000) 29 EHRR 1, where the European Court upheld the restrictions placed on certain local government officers holding political office. See also *Buckley* v *United Kingdom* (1997) 23 EHRR 101 and the more recent case of *Chapman, Coster, Beard, Lee and Smith* v *United Kingdom* (2001) 33 EHRR 18: rights of the community overrode gypsies' right to enjoy family and home life by living in a caravan on her land. See also *B and P* v *United Kingdom*, (*The Times*, May 15, 2001: denial of a public hearing and a public judgment in custody proceedings was not incompatible with arts 6 or 10 of the Convention.

[79] This is further highlighted in two recent judgements regarding freedom of expression and the right of peaceful assembly: *Steel* v *United Kingdom* (1999) 28 EHRR 603 and *Hashman and Harrap* v *United Kingdom* (2000) 30 EHRR 241.

[80] See in particular *R* v *Secretary of State for the Home Department Ex parte Brind* [1991] AC 696, where the House of Lords held that the Convention could only be used in cases of statutory ambiguity, and not in cases where the *width* of executive

exacerbated by the absence of a true separation of powers within the British Constitution, has led to the United Kingdom government being called to account before the European Court on a number of occasions.

The recent decision of the European Court in *Lustig-Prean and Beckett* [81] provides a perfect illustration of the law's inability or reluctance to challenge decisions in cases where the rights of individuals have been compromised by official discretion. In that case the European Court not only concluded that the applicants' rights under Articles 8 and 14 of the Convention had been violated by the ban and the investigations, but also decided that the remedy of judicial review failed to provide an adequate remedy to the applicants as required by Article 13 of the Convention.[82] In the Court' opinion, the judicial review proceedings failed to comply with Article 13:

> ". . . even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims perused, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention."[83]

Among the more important and high profile cases in this category are those that involved the challenge by prisoners (and other persons in detention) of ministerial discretion relating to their release.[84] The decisions in *Weeks* v *United Kingdom* [85] and *Thynne, Wilson and Gunnell* v *United Kingdom*,[86] that following the serving of a discretionary life sentence prisoner's tariff period his or her continued detention should be decided by a judicial body and should not be dependant on the administrative discretion of the Home Secretary, resulted in the modification of such discretionary powers via the passing of the Criminal Justice Act 1991.[87] In *Thynne Wilson and Gunnell*,

---

discretion was at issue. The House of Lords also held that it was not appropriate to use the doctrine of proportionality in judicial review cases of this nature.

[81] See n 1 above.

[82] Contrast *Vilvarajah* v *United Kingdom* (1991) 14 EHRR 248 and *Soering* v *United Kingdom* 11 (1989) EHRR 439, with *Thynne Wilson and Gunnel* v *United Kingdom* (1990) 13 EHRR 666 and *X* v *United Kingdom* (1981) 4 EHRR 188.

[83] *Smith and Grady* v *United Kingdom*, at para 138. The inadequacies of traditional review was highlighted by Lord Steyn in *R* v *Secretary of State for the Home Department, Ex parte Daly* [2001] 2 WLR 1622, at 1635 B–1636 C, dealt with later in the article.

[84] See G Richardson, "Discretionary life Sentences and the ECHR" [1991] *PL* 34 and E Fitzgerald, "The Criminal Justice Act 1991: Preventative Detention of the Dangerous Offender" [1995] *EHRLR* 39.

[85] (1988) 10 EHRR 293.

[86] (1990) 13 EHRR 666.

[87] S 34 Criminal Justice Act 1991, now contained in s 29 of the Crime (Sentences) Act 1997. The position regarding mandatory life sentence prisoners was left intact, and had been upheld by the European Court: *Wynne* v *United Kingdom* (1994) 19 EHRR 333 and by the domestic courts: *R* v *Secretary of State for the Home*

relying on its previous decision in *Weeks*, the European Court stressed the importance of independent and judicial investigation into the legality of the applicants' continued detention:

> ". . . the factors of mental instability and dangerousness are susceptible to change over the passage of time and new issues of lawfulness may thus arise in the course of detention. It follows that at this phase in the execution of their sentences the applicants are entitled under Article 5(4) to take proceedings to have the lawfulness of their continued detention decided by a court at reasonable intervals and to have the lawfulness of re-detention determined by a court."[88]

Accordingly, the Court concluded that neither the Parole Board nor judicial review proceedings satisfied Article 5(4) in this respect.[89] Similar amending statutory provisions were necessary in response to the Court's decision in *Hussain and* S*ingh* v *United Kingdom* [90] in relation to the power of the Home Secretary to detain young persons at Her Majesty's Pleasure.[91]

Again, in the context of the detention of persons under mental health legislation, the case of *X* v *United Kingdom* [92] illustrates perfectly both the willingness of Parliament to bestow administrative discretion on government ministers and the court's resultant inability to control the exercise of such discretion. In this case, following a conditional discharge, the applicant had been recalled, by the Home Secretary, to Broadmoor Hospital under the section 66 of The Mental Health Act 1959. This order was made following complaints, made by his wife, regarding his recent behaviour. An application for judicial review, and *habeas corpus* proceedings, were unsuccessful. The applicant claimed a violation of Article 5 of the Convention. The European Court found there to be a basic violation of the right under Article 5 (4) of the Convention to challenge the legality of a person's detention, noting that the remedies of *habeas corpus* and judicial review failed to provide an adequate remedy in such circumstances. The Court held as follows:

> "Article 5(4) . . . does not embody a right to judicial control of such scope as to empower the court, on all aspects of the case, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to

---

Department, Ex parte Anderson and Taylor [2002] 2 WLR 1143. However, the ruling in *Wynne* was questioned in the recent European Court decision in *Stafford* v *United Kingdom*, *The Times*, 31 May 2002, where the European Court held that there was no longer a basis for distinguishing the sentences.

88 (1990) 13 EHRR 666, at para 76. See also *Oldham* v *United Kingdom* (2001) 31 EHRR 34 and *Hirst* v *United Kingdom*, *The Times*, August 3 2001 on the incompatibility of unreasonable delays between reviews with art 5(4) of the Convention of delays between reviews

89 *Ibid*, at para 80.

90 (1996) 21 EHRR 1.

91 See now s 90 of the Powers of Criminal Courts (Sentencing) Act 2000. See also 60 Criminal Justice and Court Services Act 2000, which equates such detainees with discretionary life sentence prisoners.

92 (1981) 4 EHRR 235.

> bear on those conditions which, according to the Convention, are essential for the "lawful" detention of a person on the ground of unsoundness of mind. . . This means that in the instant case Article 5(4) required an appropriate procedure allowing a court to examine whether the patient's disorder still persisted and whether the Home Secretary was entitled to think that a continuation of the compulsory confinement was necessary in the interests of public safety."[93]

The European Court has also questioned the use of administrative discretion in the deportation and extradition cases discussed below[94] and in *Chahal* v *United Kingdom*[95] the Court was of the opinion that the inability of the applicant to question the findings of the Home Secretary in relation to his deportation constituted a violation of Article 5 of the Convention. For that reason, the Court took the unusual step of finding a violation of Article 13, which guarantees an effective remedy to anyone whose Convention rights have been infringed.[96]

The above cases illustrate the inadequacy of a system of judicial review which is restricted to looking at the strict legality of administrative decisions and which makes too little allowance for cases which have a human rights context.[97] Equally importantly, the cases show that the legal system is often prepared to put what should be independent and impartial judicial discretion into the hands of administrators and thus put the rights and liberty of individuals at the discretion of inappropriate personnel.

Even prior to the 1998 Act there were some signs that the courts were responding to the principles of the Convention and to the rulings of the European Court of Human Rights by taking a harder look at acts and decisions that interfere with human rights. The case of *ex parte Saville*[98] provides an example. In that case a tribunal which had been set up to inquire into the Bloody Sunday shootings decided to take away the anonymity of several soldiers so as to provide a fairer and more open procedure. Both the High Court and the Court of Appeal quashed the decision, and the wording of the judgment in the Court of Appeal is revealing. In the Court's opinion the tribunal had failed to attach *sufficient* significance to the risk posed to the safety of the former soldiers.[99] Furthermore, it felt that the tribunal had not been *sufficiently* aware that the denial of anonymity would affect the soldier's perception of the fairness of the inquiry.[100] The Court concluded

---

93 At para 58. See also *Johnson* v *United Kingdom* (1999) 27 EHRR 296, but contrast *Cottenham* v *United Kingdom* (Application No. 36509/97).

94 Under the heading 'Where the Law Failed to Protect Vulnerable Sections of Society.'

95 (1997) 23 EHRR 413.

96 Following the decision in *Chahal*, Parliament passed the Special Immigration Appeals Commission Act 1997 which set up the Special Immigration Appeals Commission to hear appeals against deportation orders made by the Secretary of State.

97 See N Blake, "Judicial Review of Discretion in Human Rights Cases" [1997] *EHRLR* 391, pp 400–403.

98 *R* v *Lord Saville of Newdigate, Ex parte A* [1999] 4 All ER 860.

99 *Ibid*, per Lord Woolf, at p 882, b.

100 *Ibid*, at pp 880, j–881, a.

that anonymity for the soldiers would only have had a limited effect on the openness of the inquiry and thus the granting of anonymity was the only possible decision open to the tribunal.[101]

This case shows that the court was prepared to assess the reasonableness of the initial decision, and to overturn it if the court felt that it failed to give sufficient weight to a relevant human right. This level of review has been inconsistent within the established limits of judicial review,[102] but, notwithstanding the margin of appreciation afforded to respondent Member States, *is* consistent with the legitimate role of the European Court of Human Rights. Accordingly, in the post Human Rights Act era the courts must be prepared to employ these doctrines in hard cases and to demand strong justification from decision-makers who have violated Convention rights.[103] In order to comply with the European Convention, the judiciary need to abandon their previous deferential role and to be prepared to challenge the basis and proportionality of government action. Indeed, in the post-Human Rights era there is strong evidence that the courts are prepared to embrace their new role.[104]

To conclude this section, although the European Court does provide a generous margin of appreciation in many cases where the authorities have to resolve conflicting rights and interests, which has led to unpredictability in the case law of the European Court, the domestic courts will need to adapt a more consistently intense review of administrative decisions which impinge

---

[101] *Ibid*, p 882, f–g. See also *B* v *Secretary of State for the Home Department* [2000] HRLR 439, where the Court of Appeal held that the deportation of someone who had been convicted of assaulting his children was, given the fact that he had lived in the United Kingdom for more than 35 years, disproportionate and thus contrary to both EC law and Art 8 of the European Convention. A similarly anxious scrutiny was applied by the Court of Appeal in *R (A and others)* v *Lord Saville of Newdigate and others*, *The Times*, December 21, 2001, a post-Human Rights Act case, where it was held that the decision that soldiers give evidence for the inquiry in Northern Ireland should be quashed as being incompatible with art 2 of the Convention.

[102] See in particular *R* v *Cambridge Area Health Authority Ex parte B* [1995] 2 All ER 129, where the Court of Appeal made it clear that the court should not interfere with the *weight* given by a decision-maker to a particular relevant factor. Note that in that case the right to life was also at issue. Contrast the decision in *A (children) (conjoined twins; surgical separation), R*) [2000] 4 All ER 961 where the court conducted an intensive review in relation to Art 2 of the Convention.

[103] The role of the courts in post-Human Rights Act cases has been confirmed by the Court of Appeal in *R* v *Secretary of State for the Home Department, Ex parte Mahmood* [2001] 1 WLR 840 and by the House of Lords in *R* v *Secretary of State for the Home Department, Ex parte Daly*, [2001] 2 WLR 1622. See P Craig, "The Courts, the Human Rights Act and Judicial Review" (2001) 117 *LQR* 389, pp 395–397. For a critical account of the distinction between *Wednesbury* unreasonableness and proportionality, see M Elliot, "The Human Rights Act 1998 and the standard of Substantive Review" (2001) *CLJ* 301.

[104] See in particular *R* v *Secretary of State for the Home Department, Ex parte* Daly, n 129 above, *R* v *Secretary of State for the Home Department, Ex parte* Louis Farrakhan, unreported, decision of the Court of Appeal [2001] EWHC Admin 781, *R (A and another)* v *Lord Saville of Newdigate and others*, *The Times*, December 21, 2001, and *R (on the application of Samaroo)* v *Secretary of State for the Home Department*, *The Times*, September 18, 2001.

on Convention rights.[105] Cases such as *Smith and Grady* and *Chahal* serve as perfect illustrations of the limits of traditional grounds of judicial review. Equally, cases such as *Thynne, Wilson and Gunnell* and *Hussain and Singh* illustrate the willingness of the Parliament and the public to bestow impartial judicial functions on the executive. In both areas, the European Court has ruled against the government in a variety of cases, and in the post Human Rights Act era both Parliament and the courts need to take these examples on board in reformulating their powers and duties.

ii) Where the law failed to protect the rights of vulnerable sections of society

It is hardly surprising that in a jurisdiction which does not have an enforceable bill of rights, and practices parliamentary sovereignty within its constitutional arrangements, that the rights and liberties of minority and vulnerable groups are neglected. Into this category fall groups such as prisoners and those under arrest or in detention, asyleees and deportees, sexual minorities and children.[106] The rights of prisoners have benefited greatly from the intervention of the European Court. In *Golder* v *United Kingdom* [107] the Court held that there had been a violation of Golder's rights under Articles 6 and 8 of the Convention when he had been refused the right to bring legal proceedings against a prison officer. Rejecting the government's contentions that the rights of prisoners, due to the fact of their incarceration, were subject to implied restrictions, the Court held that such a submission was not in keeping with Article 8 or the case law. The restrictive formulation used in Article 8 (2) – " there shall be no interference. . . except such as. . ." left no room for the concept of implied limitations.[108] This case was followed by *Silver* v *United Kingdom* [109] in which the Court held that a large number of restrictions relating to prisoners' correspondence were unlawful under the Convention as being either insufficiently accessible or clear to be prescribed by law, or so excessive as to be disproportionate.[110] In the Courts' judgement any restrictions had to be based in law, adequately accessible and formulated with sufficient precision. In addition, in order for such restrictions to be necessary in a democratic society they must not be excessive.[111]

The cases of *Golder* and *Silver* were, therefore, instrumental in controlling arbitrary interference with prisoners' rights, and of alerting Parliament and

---

[105] See S Fredman, "Judging Democracy: The Role of the Judiciary Under the Human Rights Act 1998" (2000) *CLP* 99. A warning *against* increased judicial interference in the area of, *inter alia,* human rights is given by JAG Griffiths: "The Brave New World Of Sir John Laws" (2000) 63 *MLR* 159.

[106] See C Harvey and S Livingstone, "Protecting the Marginalised: The Role of the European Convention on Human Rights" (2000) 51 *NILQ* 445, discussing, in particular, the protection of prisoners, immigrants and asylum seekers under the European Convention.

[107] (1975) 1 EHRR 524.

[108] At para 44. The European Court did accept that the rights under Art 6 might be subject to implied limitations.

[109] (1983) 5 EHRR 347.

[110] The equivalent rules and regulations of the Scottish legislation were successfully challenged in *Campbell* v *United Kingdom* (1993) 15 EHRR 137.

[111] At paras 85–88, and para 99.

the courts of the unlawfulness of refusing to accommodate such rights. Although not all cases brought in the area of prisoners' rights have been successful,[112] the cases highlighted the fundamentally different attitudes of the European Court and the domestic authorities towards prisoners and the enjoyment of their human rights.[113]

The law and practice relating to the treatment of asylees and deportees has also given rise to a good deal of litigation involving the United Kingdom before the European Court and most cases have been decided in favour of the applicant. In *Soering* v *United Kingdom* [114] it was held that the proposed deportation of a young German national to the United States to face a charge of murder and, possibly, the death penalty, was in violation of Article 3 of the Convention. The Court concluded that the applicant had been subjected to a real risk that he would face the degrading and inhuman conditions of death row. This was followed in *Chahal* v *United Kingdom* [115] where it was held that the deportation of an Indian national who was likely to face persecution on his return was in violation of Articles 3 and 5 of the Convention. In relation to its determination under Article 3, the Court held that in cases such as the present the Court's examination of the existence of a real risk of ill-treatment must necessarily be a rigorous one, in view of the absolute character of Article 3 and the fact that it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.[116] Although the government has successfully defended some deportation and extradition cases,[117] in general the cases suggest that interests of national security and general public interest are more important to government ministers and the supervisory domestic courts than the protection of the individual's fundamental human rights.[118] This is borne out by the comments of the European Court in *Chahal*, where in concluding that there was a sufficient risk of ill treatment to the applicant, and finding that there was a breach of Article 13 of the Convention they observed:

> ". . . neither the advisory panel nor the courts could review the decision of the Home Secretary to deport Mr Chahal to India with reference solely to the question of risk, leaving aside national security considerations. On the contrary, the courts' approach was one of satisfying themselves that the Home

---

[112] See, in particular, *Boyle and Rice* v *United Kingdom* (1988) 10 EHRR 425.

[113] See S Livingstone, "Judicial Review in Prisons", in Hatfield (ed) *Judicial Review: A Thematic Approach* (1996)

[114] (1989) 11 EHRR 439.

[115] (1997) 23 EHRR 413.

[116] At para 96. After considering all the claims of the applicant, and the current political climate in India, at the time of the applicant's deportation proceedings, and after, the Court was of the opinion that, despite the assurances given by the Indian authorities, there was a real risk of the applicant being subjected to treatment contrary to Art 3 (para 107).

[117] See *Vilvarajah* v *United Kingdom* (1991) 14 EHRR 248, *Launder* v *United Kingdom* (European Commission of Human Rights, [1998] *European Human Rights Law Review*, 337) and *Singh* v *United Kingdom*, admissibility decision of the European Court, September 26 2000.

[118] See A Nicol, National Security and Free Speech [1996] *EHRLR* 37. See also the cases referred to in n 48 above.

> Secretary had balanced the risk to Mr Chahal against the danger to national security."[119]

Sexual minorities – most notably homosexuals and transsexuals – have brought a host of cases against the United Kingdom government claiming that the law failed to safeguard their basic rights under the Convention. In *Dudgeon* v *United Kingdom*[120] the European Court held that the applicant's right to private life had been violated by the existence of laws in Northern Ireland which prohibited sexual relations between homosexuals, irrespective of the age of the participants.[121] In that case the European Court warned of the danger of suppressing individual rights by means of majority opinion based on intolerance. Referring to the government's contention that there was a substantial body of opinion opposed to a change in the law, the Court stressed that ". . . this cannot of itself be decisive as to the necessity for the interference with the applicant's private life. . . it is for the Court to make the final evaluation as to whether the reasons it has found to be relevant were sufficient in the circumstances. . ."[122] More recently the European Commission have held that domestic laws which distinguished between heterosexuals and homosexuals with regard to the age of sexual consent were contrary to article 8.[123] The right of homosexuals to equal treatment and freedom from arbitrary treatment was also the subject of the litigation surrounding the ban on homosexuals in the armed force.[124] In those cases the European Court found that the treatment of those individuals was justified on no greater basis than the intolerance of the views of the majority of serviceman, reiterating the unacceptability of such grounds for violating individual human rights.[125]

Cases involving transsexuals who claim that their treatment in domestic law is contrary to their Convention rights to private life and to marry have also been before the European Court on numerous occasions.[126] Until very recently, all such challenges had been unsuccessful, but in *Goodwin* v *United* Kingdom and *I* v *United Kingdom*[127] the European Court ruled that the government's margin of appreciation in this area a could no longer be used to justify the discriminatory treatment afforded to such persons. Although, to date, all such challenges have been unsuccessful, the number of cases is indicative of the treatment in domestic law of minority groups who are

---

[119] At para 153.
[120] (1981) 4 EHRR 149.
[121] Ss 61 and 62 of the Offences Against the Persons Act 1861 and s 11 of the Criminal Law Amendment Act 1885.
[122] At para 59.
[123] *Sutherland* v *United Kingdom*, *The Times,* April 13 2001. The European Court of Human Rights struck the case out on 27 March, 2001 after the Sexual Offences (Amendment) Act 2000 was passed, equalising the age of sexual consent for heterosexuals and homosexuals.
[124] *Smith and Grady* v *United Kingdom* and *Lustig Prean and Beckett* v *United Kingdom,* n 1 above.
[125] *Ibid*, at paras 104–105, and 97–98 respectively.
[126] See *Rees* v *United Kingdom* (1987) 9 EHRR 56; *Cossey* v *United Kingdom* (1990) 13 EHRR 622; *X, Y and Z* v *UK* (1997) 24 EHRR 143; and *Sheffield and Horsham* v *United Kingdom* (1999) 27 EHRR 163.
[127] *The Times*, 12 May 2002.

vulnerable to the intolerance of public opinion, and whose rights are violated often on the basis of no more justification than administrative convenience.[128]

The rights of young persons are also vulnerable to the law and its practice, and in particular to the vagaries of public opinion, which feel that such persons are not worthy of the full protection of their civil liberties. The United Kingdom Government had been the respondent in several high profile cases involving judicial or other forms of corporal punishment, some finding that the applicants had been subjected to treatment which was degrading and thus contrary to Article 3. In *Tyrer* v *United Kingdom* [129] the government was held accountable for the carrying out of birching in the Isle of Man. The Court held that the subjection of the applicant to corporal punishment was clearly contrary to Article 3. In that case the majority of the Court rejected arguments that such punishment was excusable on the basis that it acted as a deterrent and that it was not regarded as inhuman or degrading by the local community.[130] Significantly the British judge, offering a dissenting judgement, refused to find that the practice was contrary to Article 3 on the ground that the treatment was meted out to a young person.[131]

More generally there have been complaints regarding corporal punishment in schools, which were defended by the government on the basis that the applicants, not being adults, had limited rights under the Convention. The European Court has not outlawed such punishment *per se*, provided the parents agree to such punishment and provided such punishment is not excessive in the circumstances,[132] and eventually such punishment has been outlawed in both state and private sector schools.[133] However, the recent case of *A* v *United Kingdom*[134] illustrates that the government's insistence on compromising the rights of young persons may continue to be at odds with the views of the European Court and in violation of the rights of children under the Convention. In this case the Court held that the failure of the domestic law to provide adequate protection against excessive parental chastisement was in violation of Article 3 of the Convention,[135] thus calling for specific law reform in this area and alerting the government to the fact that their attitude towards the rights of children in general may well be incompatible with the Convention.[136]

---

[128] See, however, *B* v *France* (1992) 16 EHRRR, 1. Domestic law protects transsexuals from discrimination in employment: The Sex Discrimination (Gender Reassignment) Regulations 1999. In *Elizabeth Anne Bellinger* v *Michael Jeffrey Bellinger and HM Attorney-General* [2002] 2 WLR 411 it was held (Thorpe LJ dissenting) that it was not appropriate for the courts to depart from previous domestic and European Convention law, and that the matter should be resolved by Parliament. The House of Lords will hear the case in March 2003.

[129] (1978) 2 EHRR 1.

[130] *Ibid*, at para 31.

[131] Dissenting Opinion of Judge Sir Gerald Fitzmaurice.

[132] See *Costello-Roberts* v *United Kingdom* (1993) 19 EHRR 112.

[133] See the Education (No 2) Act 1988. The School Standards and Framework Act 1998 has abolished corporal punishment in other schools.

[134] (1999) 27 EHRR 611.

[135] See also the European Court of Human Rights decision in *Z* v *United Kingdom* (n 39 above).

[136] In *R* v *H (Reasonable chastisement)*, *The Times*, May 17, 2001, it was held that for the purpose of the defence of parental chastisement, the jury should be

The case of *A* illustrates the requirement under the Convention to treat young persons not only without discrimination, but also, in certain situations, to provide them with added protection.[137] Further evidence is provided by the ruling of the European Court in *T and V* v *United Kingdom* [138] where it was held that the applicants, two young boys found guilty of murdering a two year old, had their right to a fair trial violated. In this case it was held that the subjection of the boys to a high public profile, adult trial was in contravention of Article 6 of the European Convention. The European Court, in deciding whether there had been a violation, noted that Article 6(1) guarantees the right of an accused person to participate effectively in his criminal trial.[139] It then considered whether procedures such as publicity, which in general were considered to safeguard the rights of adults on trial, should be abrogated in respect of children so as to promote their understanding and participation. The Court concluded that:

> ". . . the formality and ritual of the Crown Court must at times have seemed incomprehensible and intimidating for a child of eleven, and there is evidence that certain of the modifications to the courtroom, in particular the raised dock which was designed to enable the defendants to see what was going on, had the effect of increasing the applicant's sense of discomfort during the trial, since he felt exposed to the scrutiny of the press and the public."[140]

Cases such as *Venables and Thompson* and *A* illustrate the fine line that governments must tread in the protection of children's rights.[141] They also typify the government's vulnerability to claims brought by groups who have no or little political voice and whose rights as a consequence are often neglected or given insufficient weight by the government and the law, often with the acquiescence and positive approval of public opinion. The courts can expect a flood of challenges from such groups under the Human Rights Act and cases from the European Court involving prisoners, asylees and deportees, children and sexual minorities provide ample evidence of the

---

directed on the factors identified in *A* v *United Kingdom* as to whether the punishment was contrary to Art 3 of the Convention.

137 See Opromolla, "Children's rights under art 3 and 8 of the European Convention on Human Rights: recent case law" (2001) *ELR* HR/42.

138 (2000) 30 EHRR 121.

139 On the question of the trial and detention of young offenders and the European Convention, see Kilkelly, "The Human Rights Act 1998: Implications for the Detention and Trial of Young Offenders" (2000) 53 *NILQ* 446.

140 *T* v *United Kingdom* at para 86. See now the Lord Chief Justice's Practice Direction (Crown Court: Trial of Children and Young Persons), *The Times*, 17 February 2000 which gives guidance on the arrangements for the trial of young defendants. On 26 October 2000 Lord Woolf CJ announced a tariff period of 8 years for both Venables and Thompson, following a practice statement made on 27 July, 2000: [2000] 4 All ER 831, which has now been amended by the Lord Chief Justices *Opractice Statement: life sentences*, *The Times*, 4 June 2002. [2002] All ER***.

141 See Haydon and Scraton, "Condemn a Little More, Understand a Little Less': The Political Context and Rights Implications of the Domestic and European Rulings in the Venables-Thompson Case" (2000) 27(3) *JLS* 416.

law's past intolerance of such groups, and of the unacceptable interference with their Convention rights.

THE HUMAN RIGHTS ACT 1998

It is not my intention to look at the provisions of the Human Rights Act 1998 in any detail.[142] In particular the constitutional difficulties involved in the courts' ability to issue a declaration of incompatibility,[143] and the procedures whereby relevant Ministers can rectify or endorse such legislation have already been the source of intense and voluminous academic coverage.[144] Rather, I intend to look at some central provisions of the Act, and, in passing, at the post-Act case law, to identify whether the Act's implementation is capable of redressing the deficiencies of the traditional system of rights protection that have been highlighted by the European Court.

Of particular relevance are sections 2, 3 and 4 of the Act, which provide the courts with the power to interpret and develop domestic law in the light of the European Convention and its case law and, in exceptional cases, to declare legislative provisions incompatible with the Convention. Again, much has been written on this subject,[145] but this part of the article shall concentrate on the potential impact of these sections on the development of suitably compatible human rights jurisprudence in domestic law. In particular, I will address the question of whether the 'incorporation' of the Convention via the 1998 Act is capable of redressing the problems that have been highlighted in this article and which have so marred the United Kingdom's record of human rights protection under the Convention over the last thirty years.

Section 2 of the Act provides that a court or tribunal must take into account the case law of, *inter alia*, the European Court of Human Rights when determining questions which arise in connection with a Convention right. Although, as we have seen, the Convention has played some part in the development of domestic human rights law, the courts have not always allowed themselves to refer to the specific case law of the Convention in

---

142 For a comprehensive account of the Act and its implications see R Clayton and H Tomlinson, *Law of Human Rights* (2000); S Grosz and J Beatson, *Human Rights: the 1998 Act and the European Convention* (2000) and J Coppel, *The Human Rights Act 1998: enforcing the European Convention on Human Rights in domestic law* (1999).

143 Under s4 of the Human Rights Act 1988

144 See, for example, D Feldman, "The Human Rights Act 1998 and constitutional principles" (1999) *LS* 165, and N Bamforth, "The Human Rights Act 1998 and Parliamentary Sovereignty" [1998] *PL* 572.

145 See in particular M Beloff, "What does it all mean? Interpreting the Human Rights Act 1998" in L Betten (ed) *The Human Rights Act 1998 – What it Means* (1999), chapter 1; A Lester, "The Art of the Possible [1998] *EHRLR* 665; Hooper "The Impact of the Human Rights Act on Judicial Decision-making [1998] *EHRLR* 676; Lord Irvine, "The Development of Human Rights in Britain under an incorporated Convention on Human Rights" [1998] *PL* 221; Martens, "Incorporating the European Convention: The Role of the Judiciary [1998] *EHRLR* 5; H Wade, "The Human Rights Act and the Judiciary" [1998] *EHRLR* 520.

determining cases under domestic law.[146] Section 2 of the Act allows the domestic courts to have full access to the case law, and, more importantly, to the principles of human rights protection advocated by the European Court, including the previously forbidden doctrine of proportionality.[147] This should intensify the review of administrative (and, within the boundaries of the Human Rights Act, legislative) interferences with human rights, subjecting such interferences to scrutiny consistent with that of the European Court. The distinction between proportionality and the traditional grounds of review was highlighted by Lord Steyn in *R* v *Secretary of State for the Home Department, ex parte Daly*.[148] His Lordship first noted that proportionality required the reviewing court to assess the balance that the decision maker had struck, not merely whether the decision was within the range of reasonable decisions. Secondly, proportionality required attention to be directed to the relative weight accorded to the interests and considerations. Thirdly, his Lordship noted that the decision of the European Court of Human Rights in *Smith and Grady* v *United Kingdom* clearly showed that even the heightened scrutiny test developed by the domestic courts was not necessarily appropriate to the protection of human rights because it failed to address the question of whether the interference met a pressing social need and was proportionate to the legitimate aim being pursued.[149] Significantly, his Lordship felt that the test applied by Lord Phillips MR in *ex parte Mahmood*, [150] whether a decision-maker could reasonably have concluded that the interference was necessary to achieve one or more of the legitimate aims recognised by the Convention was insufficiently intense to comply with the jurisprudence of the European Court.[151]

There are indeed signs that the courts are prepared to use these new powers and to subject administrative acts to intense scrutiny in order to assess their

---

[146] See the cases referred to in n 15 and n 16, above. The limited effect of Convention decisions was confirmed by the Court of Appeal recently in *R* v *Lyons and others*, *The Times*, February 1, 2002.

[147] See P Mahoney, "Principles of Judicial Review as Developed by the European Court of Human Rights: Their Relevance in a National Context," in Betten, *The Human Rights Act 1998 – What it means* (1999), chapter 3. See also P Craig, "The Courts, the Human Rights Act 1998 and Judicial Review (2001) 117 *LQR* 389.

[148] [2001] 2 WLR 1622.

[149] *Ibid*, at 1635D–1636A. See M Elliot, "The Human Rights Act 1998 and the Standard of Substantive Review" (2001) *CLJ*, 301.

[150] *R* v *Secretary of State for the Home Department, ex parte Mahmood* [2001] 1 WLR 840, at 857. The Master of the Rolls was indicating the appropriate test of review once the Act came into operation. For a critical account of this case see R Clayton, "Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle" [2001] *EHRLR* 504. See also N Blake, "Importing Proportionality: Clarification or Confusion" [2002] *EHRLR* 19, R Clayton, "Developing Principles for Human Rights" [2002] *EHRLR* 175, 185–188, and Leigh, " Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg" [2002] *PL* 265.

[151] For a clear application of the *Daly* principle, see *R (on the application of Hirst)* v *Secretary of State for the Home Department*, *The Times*, April 10 2002, where a blanket policy on prisoners contacting the media was successfully challenged.

compatibility with an individual's Convention rights.[152] In particular, in a number of cases involving freedom of expression, the courts have been prepared to question any interference that they regard as unnecessary and disproportionate.[153] More specifically, there is evidence that the courts are prepared to scrutinise cases that might previously be regarded as non-justiciable. For example in *R* v *Secretary of State for the Home Department, ex parte Farrakhan*, [154] the Administrative Court quashed the Home Secretary's order prohibiting the claimant from entering the country, finding that such an order constituted a disproportionate interference with the claimant's rights under article 10 of the European Convention. In the court's opinion, although the Home Secretary was to be afforded a wide margin of appreciation in deciding whether to continue the exclusion order, that did not mean that the court was inhibited from embarking upon a review of the reasons provided and the underlying circumstances in order to determine whether he had come to a conclusion that was open to a reasonable decision maker. This decision represents a radical departure from the traditional approach taken by the courts in this area,[155] and, hopefully, is evidence of the courts' acceptance of the universal application of rights' protection granted under the European Convention.[156]

Of course, although the courts will have to take account of the case law, there will be no compulsion to follow it.[157] Thus courts may wish to ignore a particular ruling of the Court, and, of course, will be bound to do so if the domestic law cannot be read in the light of the Convention.[158] In addition, the courts may refuse to apply a particular case that they have taken into account, for the purpose of giving a more restrictive, or more generous, interpretation of the Convention and its rights. Evidence from the post-Act case law suggests that the courts are keen to follow the case law of the European Convention and are reluctant to take the Convention rights beyond

---

[152] See for example *R (A and others)* v *Lord Saville of Newdigate and others*, *supra* n 103. See also *R* v *Secretary of State for the Home Department, ex parte P and Q* [2001] 1 WLR 2002, where the Court of Appeal held that the Prison Service's mother and baby policy was a disproportionate interference with the claimant's right to family life.

[153] See, in particular *R* v *Secretary of State for Health, ex parte Wagstaff* [2001] 1 WLR 292 and *Attorney General* v *Punch and another* [2001] 2 All ER 655. See also the Court of Appeal decisions in *A* v *B plc and another*, *The Times*, March 13 2002 and *R (on the application of ProLife Alliance)* v *British Broadcasting Standards* Corporation [2002] 2 All ER 756.

[154] *The Daily Telegraph*, October 9, 2001.

[155] See the cases dealt with in n 48 above.

[156] The decision of the High Court was overturned on appeal, decision of the Court of Appeal 30 April 2002, [2002] 3 WLR 481, although the Court accepted that the Home Secretary was subject to the doctrine of proportionality, albeit circumscribed by a wide margin of appreciation on behalf of the Secretary.

[157] See J Wadham and H Mountfield, *The Human Rights Act 1998* (1999), pp 30–33, and Klug, "The Human Rights Act 1998, *Pepper* v *Hart* and All That" [1999] *PL* 246, pp 250–252. Klug points out that this provision will also allow the courts to consider the jurisprudence under other international instruments.

[158] S 3(1) Human Rights Act 1998. This is re-iterated in s 6 (2) (a) and (b) of the Act, which precludes a court granting a victim a remedy if such would be incompatible with clear primary or secondary legislation.

such decisions.[159] This restrictive approach, although legitimate, may, of course, result in further challenges under the Convention by applicants hoping that the European Court will adopt a more liberal approach to the relevant Convention right. Consequently, the domestic courts will need to be aware of the dynamic nature of the Convention and the flexibility of the Court's attitude to precedent.

In addition, two possible judicial tactics may be employed giving rise to concern. The first is that although the courts will refer to the case law of the Convention, they will fail to appreciate the true import of the case and the principles it is expounding. As explained above, there have been many cases where the domestic courts have ostensibly applied human rights concepts to the resolution of disputes, yet still failed to appreciate the significance of the human rights issue. This, accordingly, has led to the domestic court's ruling being out of line with subsequent decisions of the European Court.[160] Secondly, the courts may be very tempted to restrict their jurisdiction, and in particular their power to interfere with administrative discretion, by relying on the doctrine of the margin of appreciation which has been employed by the European Court to temper their interference of the domestic laws and practices of the Member States.[161] Although it has been argued that the doctrine, being one of international law, should not play a part in domestic law,[162] it will be tempting for many judges to use the caution of the doctrine of *Wednesbury* Unreasonableness[163] via the employment of the doctrine of the margin of appreciation whilst exercising their jurisdiction under the 1998 Act. Indeed, in the House of Lords' judgment in *ex parte Kebeline*, Lord Hope, whilst stating that the doctrine was not available to domestic courts as

---

[159] See for example the Court of Appeal decision in *Bellinger* v *Bellinger*, *supra* n 128, upholding the refusal of domestic law to recognise a marriage between a man and a male to female transsexual. In fact, in *R* v *Secretary of Stat for the Home Department, ex parte Anderson and Taylor* [2002] 2 WLR 1143, the Court of Appeal suggested that it would not be appropriate for the domestic courts to go against consistent rulings of the European Court of Human Rights, particularly when cases of a similar nature were pending before the European Court.

[160] See, for example, the difference between the respective judgments of the domestic courts and the European Court of Human Rights in the area of free speech and contempt of court: *contra Attorney General* v *Times Newspapers* [1974] AC 273, with *Sunday Times* v *United Kingdom* (1979) 2 EHRR 245. Also contrast the decision of the European Court in the case of *Goodwin* v *United Kingdom* (1996) 22 EHRR 128, not only with the House of Lords decision in *X Ltd* v *Morgan Grampian* [1991] AC 1, which led to the journalist talking the case to the Convention, but also the case law subsequent to the *Goodwin* judgment: *Camelot* v *Centaur Communications* [1998] 1 All ER 251.

[161] See *Handyside* v *United Kingdom* (1976) 1 EHRR 737. For a detailed discussion on the doctrine of the margin of appreciation see Yourow, *The Margin of Appreciation in the Dynamics of the European Human Rights Jurisprudence* (Martinus Nijhoff 1997). See also H Lavender, "The Problem of the Margin of Appreciation [1997] *EHRLR* 360, and H Jones, "The Devaluation of Human Rights" [1995] *PL* 430.

[162] See R Singh, M Hunt and Demitrou, "Is there a Role for the "Margin of Appreciation" in National Law after the Human Rights Act?" [1999] *EHRLR* 15

[163] *Associated Provincial Picture House Ltd* v *Wednesbury Corporation* [1948] 1 KB 223.

such, recognised that the questions that the courts had to decide under the Human Rights Act would involve a balance between competing interests:

> "In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention . . ."[164]

Given the historical reluctance of the courts to interfere in executive decision-making, particularly in matters of political sensitivity as evidenced in cases such as *Brind* and *Smith*, and the cases on national security, there is understandable concern that the courts will be unwilling to adopt a consistent hands on approach in its review of decisions impacting on human rights. As we saw in those cases, not only did the courts refuse to sanction a European approach to the resolution of such disputes, they were also adamant that the decisions in question would have stood the tests laid down in international human rights instruments. This attitude may be strengthened by judicial views that even the European Court give a large area of latitude to member states and their law enforcement agencies, and consequently the courts may develop their own doctrine of the margin of appreciation in a desire to reduce the effect of human rights protection.[165]

Section 3 of the Act on the other hand obliges the courts to interpret domestic statues, wherever possible, in the light of the European Convention. As we have seen the courts, where they have a mind to at least, are capable of interpreting most legislative provisions in the light of constitutional principles and thus avoiding the unpalatable conclusion that Parliament intended to interfere with basic rights.[166] This practice was continued after the Act in *R* v *Offen and others* [167] where the Court of Appeal used its powers under the Human Rights Act 1998 to interpret the controversial section 2 of the Crime (Sentences) Act 1997, which imposes a duty on the courts to grant a life sentence on defendants who have committed two serious offences, unless there were exceptional circumstances. In the Court of Appeal's judgment, if an offender did not constitute a significant risk to the public then that would be an exceptional circumstance which would justify the court in not imposing an automatic life sentence. The judgment was, therefore, based not only on the interpretation of the Act and Parliament's purposes in passing it, but also on the finding that such an interpretation would be compatible with the European Convention on Human Rights.[168] A more

---

[164] *R* v *DPP, Ex parte Kebilene* [1999] 4 All ER 801, Lord Hope at p 844.

[165] In *R* v *Secretary of State for the Home Department, ex parte Farrakhan, The Times*, 6 May 2002, [2002] 3 WLR 481, the Court of Appeal held that the margin of appreciation accorded to a decision-maker was all important, for it was only by recognizing the margin of discretion that the court avoided substituting its own decision for that of the decision-maker. In that case the Court of Appeal held that there were very good reasons to accord a particularly wide margin of discretion to the Secretary of State when making a decision on the exclusion of a person from the country on the grounds of national security.

[166] See, for example, *Waddington* v *Miah* [1974] 2 All ER 377.

[167] [2001] 2 All ER 154.

radical approach to interpretation was evident in the House of Lords' judgment in *R* v *A (Sexual Offence: Complainant's Sexual History*.[169] In that case it was suggested that the traditional approach to statutory interpretation should be abandoned if the wording was not capable of rendering a result consistent with Convention rights.[170] There will, therefore, be plenty of opportunity for innovation.[171]

The power of the courts under section 4 of the Act to declare inconsistent legislation incompatible with the Convention provides the courts with an opportunity to expose the inconsistency of domestic law with the principles and case law of the Convention. This power will only be used if the courts are unable to interpret domestic legislation as being compatible with the Convention and the House of Lords has suggested that the power should be used sparingly and as a last resort.[172] Thus far very few provisions have been declared incompatible and the courts appear to be adopting a cautious approach, particularly where the provision in question appears to be consistent with the case law of the European Convention itself,[173] or where such a declaration would undermine legislation passed by a democratically elected Parliament.[174] As with the some of the cases under section 3 of the

---

[168] According to Lord Woolf CJ an alternative interpretation would lead to the sentence being arbitrary and disproportionate and thus in violation of Art 5, and possibly Art 3 of the European Convention. See also the decision of the House of Lords in *R* v *A* (*Sexual Offence: Complainant's Sexual History*) [2001] 3 All ER 1 on the interpretation of s41 of the Youth Justice and Criminal Evidence Act 1999.

[169] [2001] 3 All ER 1.

[170] The House of Lords took a more cautious approach in *Re S; Re W* [2002] 2 WLR 720, where it was held that it was impermissible to use s3 avoid the clear words and policy of legislation passed by Parliament

[171] See Young, "Judicial Sovereignty and the Human Rights Act 1998" (2002) *CLJ* 53.

[172] *R* v *A, supra* n 166.

[173] See *R* v *Secretary of State for the Environment, Transport and Regions, Ex parte Holding and Barnes* [2001] 2 WLR 1389, where it was held that the Secretary of State's power to call in planning applications was not in violation of art 6. See also the decision of the Court of Appeal in *Wilson* v *First County Trust* [2001] 3 All ER 229, that s 127(3) of the Consumer Credit Act 1974 was incompatible with both Art 1 of Protocol 1 and Art 6 of the Convention. See also *R* v *Mental Health Review Tribunal, Ex parte H*, [2001] 3 WLR 512 However, in *R* v *Secretary of State for the Home Department, Ex parte Martinez and Pearson; Hirst* v *Attorney-General* (*The Times*, 5 April 2001) the High Court held that s3 of the Representation of the Peoples Act 1983, which bars convicted prisoners from voting, was not incompatible with Art 3 of the First Protocol of the European Convention. Also, in R v *Shayler* [2002] 2 WLR 754, the House of Lords held that ss 1 and 4 of the Official Secrets Act 1989 were not incompatible with art 10 of the European Convention in not providing a public interest defence. For an overview of the impact of the Act in the first year, see J Wadham, "The Human Rights Act 1998: one year on" [2001] *EHRLR* 620.

[174] See in particular *Hirst* v *Attorney-General* and *R* v *Shayler, supra* n 170 and *R* v *DPP, ex parte Pretty* [2001] 3 WLR 1598, where the House of Lords refused to declare s 2(1) of the Suicide Act 1961, which makes it unlawful to assist a person's suicide, incompatible with arts 2,3, 8 or 9 of the Convention. See now *Pretty* v *United Kingdom* (2002) 35 EHRR 1. The European Court declared the

Act, many of these decisions will be challenged afresh before the European Court of Human Rights and time will tell as to whether the domestic courts are taking too restrictive approach to the Convention and whether they are paying undue deference to parliamentary sovereignty.

Thus, it is in the application of the law, and the consequent balancing of human rights with other interests that will pose the greatest challenge to the domestic courts. In the post-Act era, although there is evidence that the courts are more prepared to interfere with *administrative* decisions that interfere with fundamental rights, a very wide margin of appreciation appears to be given to legislative decisions passed by Parliament. In most cases this reticence to override legislation passed by a democratic body will be supported by the European Court, but in other cases the courts will need to rid themselves of an inherent reluctance to interfere with decisions that, although taken legally and for good reason, are disproportionate in the circumstances. For this to happen, the courts not only have to be aware of the case law of the Convention, but also need to examine the jurisprudence of the European Court in detail.

Finally, one area that appears to have been addressed by the courts in the post-Act era is the development of a common law of privacy. As noted above, the absence of a legal right to private life had led to a number of unfavourable rulings from the European Court of Human Rights. Under the Human Rights Act, the courts have assumed their responsibilities as a public body under section 6 and have developed the common law in such a way as to accommodate the right to private life as recognised in article 8 of the Convention.[175] The courts have also recognised their duty under section 12(4) of the Act to take into account relevant privacy codes in deciding whether to interfere with freedom of expression and will thus need to employ the doctrine of proportionality to resolve such dilemmas.[176] In this respect, the courts will need to take heed of the relevant Convention case law and to ensure that the correct balance is maintained. In addition, the courts will need to be careful that previous attitudes on the application of Convention rights to certain groups, such as prisoners, do not obstruct the protection of this particular right.[177]

---

case admissible, yet found there to be no violation of articles 2, 3, 8, 9 or 14 of the convention.

[175] See *Douglas and others* v *Hello! Ltd* [2001] 2 WLR 992 and *Venables and Thompson* v *News Group Newspapers Ltd and others* [2001] 1 All ER 908. See R Singh and Strachan, "The Right to Privacy in English Law" [2002] *EHRLR* 129. However, in *Secretary of State for the Home Department* v *Wainwright*, *The Times*, January 4 2001, the Court of Appeal held that the Act could not have retrospective effect and confirmed that before the Act there was no common law right of private life.

[176] See, in particular *Venables and Thompson*, *supra* n 174 and *A* v *B plc*, *The Times*, [2002] 2 All ER 545.

[177] Contrast *R* v *Secretary of State for the Home Department, ex parte P and Q*, [2002] 1 WLR 2002, where the Court of Appeal held that a Prison Service Policy on babies in prison was inflexible and constituted an unjustifiable interference with the prisoners' right to family life under art 8 of the European Convention, with *R* v *Secretary of State for the Home Department, Ex parte Mellor* [2001] 3 WLR 533, where the court rejected a submission that the prisoner had the right to artificially inseminate his wife.

CONCLUSIONS

Through a study of the relevant case law, it is submitted that several conclusions may be drawn relating to the traditional arrangements for protecting human rights, the United Kingdom government's record before the European Court of Human Rights and the impact that the Human Rights Act 1998 may have in these areas.

On a general level, the traditional constitutional and legal arrangements for protecting human rights could be said to have provided, at best, a system that was a genuine but inconsistent attempt to protect fundamental rights. The cases dealt with under the first broad category, in particular cases such as *Malone* and *Smith and Grady*, revealed the danger of attempting to resolve human rights claims by the application of strict legal doctrines. In addition, the lack of a general bill of rights in domestic law led to many cases where the fundamental rights of individuals, such as prisoners, were exempted from legal protection. More specifically, the constitutional restraints placed on the judiciary have resulted in many cases where the domestic courts were unable, or unwilling to attach sufficient significance and weight to the human rights issue involved in the case. Thus in cases such as *Sunday Times* v *United Kingdom* and *Observer and Guardian* v *United Kingdom*, the European Court in finding a violation of the Convention, was critical of the approach taken by the domestic courts in attempting to balance human rights with other competing interests. Although there were signs that the judiciary were beginning to attach greater significance to matters such as freedom of the press,[178] and to embrace the doctrine of proportionality,[179] cases such as *Brind* not only stood for the rejection of proportionality, but illustrated perfectly the court's failure to appreciate the true import of the doctrine and the role that it given to them as protectors of human rights. At worst, however, the system left the individual vulnerable not only to the doctrine of parliamentary sovereignty, but also to the inconsistency and inadequacy of judicial activism[180] and to the threat of majority public opinion.[181] Although the case law of the Convention involving the United Kingdom covers a multitude of human rights violations, most of the defeats in Strasbourg can be related to our constitutional characteristics and to the nature and outcome of our system of rights protection: the failure to recognise certain human rights; the law's insistence on applying legal rules rather than concentrating on human rights principles; an absence of a uniform and principled approach to challenging official action; and the inevitable exclusion or restriction of minority rights or interests.

The case law also clearly illustrates the lack an effective domestic 'filtering' system for dealing with human rights disputes at the domestic level. Had

---

[178] See, for example, the House of Lords' decisions in *Reynolds* and *Turkington*, n 68 above.

[179] See, for example the Court of Appeal decision in *R* v *Lord Saville of Newdigate, Ex parte A*, n 121 above.

[180] As evidenced by cases such as *Smith and Grady*, as well as in the cases involving asylees and deportees and the numerous cases on free speech and freedom of the press.

[181] In particular cases such as *V and T*, and the cases on prisoners and sexual minorities.

domestic law possessed a constitutional mechanism to deal with human rights cases then the European Court would not have been required to pronounce upon the compatibility of our law with the Convention on so many occasions. For those seeking to justify our record before the European Court, this argument would explain the number of appearances before the Court. It would not, however, explain the success rate of claims brought against the government. If the domestic arrangements *are* sound then although in the absence of a domestic constitutional court cases will be *tested* in the formal arena of Strasbourg, the majority of those cases should be defended successfully. The evidence, especially in the areas under the headings studied above, does not support this and it is clear that in certain areas the government and the domestic system is continually open to challenge as being incompatible with the Convention and other instruments of international human rights law. Again, the doctrine of Parliamentary Sovereignty, the absence of a bill of rights, the limited ability and willingness of the judiciary to embrace the full panalopy of principles of human rights protection, the over reliance on administrative discretion and the willingness to subject minority rights to the will of the majority all combine to leave human rights inadequately protected in the United Kingdom

And thus to the Human Rights Act 1998 and the future. As we have seen, domestic law had already accepted much of the Convention and its jurisprudence. Indeed, in certain areas domestic law and judicial decisions had gone beyond the Convention and provided a protection greater than available under the Convention.[182] For example, in cases such as *ex parte Venables and Thompson* [183] in the House of Lords went further than the decision of the European Court in *Hussain and Singh*, although not as far as the decision of the European Court in *V and T* v *United Kingdom*, and there are constant judicial and political calls to rectify the anomaly of the mandatory life sentence despite such a system passing muster with the European Court.[184] The developments in the law of freedom of assembly provide another example of judicial activism, which appears to go further

---

[182] For example, in *R* v *Secretary of State for the Home Department Ex parte Anderson* [1984] QB 778, the Court of Appeal found the 'simultaneous ventilation' rule (restricting the right of prisoners to take civil actions until they had lodged an internal grievance) to be *ultra vires* the Prison Act 1952, despite the European Court Of Human Rights appearing to uphold its validity in *Silver* v *United Kingdom* (1983) 5 EHRR 347.

[183] *R* v *Secretary of State for the Home Department, ex parte Venables and Thompson* [1998] 3 All ER 97.

[184] The domestic courts have held that the Home Secretary's powers to set tariffs in the case of mandatory life sentence prisoners is both lawful and compatible with the European Convention: *R* v *Secretary of State for the Home Department, ex parte Anderson and Taylor* [2002] 2 WLR 1143, leave to appeal to the House of Lords granted. The European Court appear to have resolved the dilemma by assimilating mandatory sentences with those of other life sentences: *Stafford* v *United Kingdom*, *The Times*, 31 May, 2002. See also *R* v *Secretary of State for the Home Department, Ex parte Lichniak and Pyrah* [2001] 4 All ER 934, where it was held that automatic mandatory life sentences did not violate either art 3 or 5 of the Convention, although leave to appeal to the House of Lords has been granted.

than is advocated by the text and case law of the Convention.[185] These developments are, of course, to be welcomed, and should not be discouraged merely because the purpose of the 1998 Act is to bring the Convention home. The Act itself does not forbid the greater protection of human rights at the domestic level, and the Act should merely ensure that the *minimum* requirements of the Convention are met in English law.[186] More specifically, it is hoped that the margin of appreciation, which has been adopted by the European Court to give deference to Member States in relation to the Court's supervision of alleged human rights violations, should not play an overly influential role in domestic law, either directly or indirectly.

Notwithstanding the development of a human rights jurisprudence in domestic law before the Human Rights Act 1998, it was clear that a number of laws and practices were in violation of the European Convention. Equally the judiciary showed a reluctance to interfere in certain areas and with certain decisions, and it is by no means certain that judges, armed with the doctrine of proportionality and other human rights norms, will be any more generous to certain human rights than they have in the past. In such cases both Parliament and the courts may be prepared to retain the status quo and wait and see what the European Court has to say on the matter, rather than adopting a brave, interventionist approach. There remains the fear, therefore, that rights that have attracted parliamentary and judicial support will continue to be safeguarded, within, and possibly beyond, that required by international law. On the other hand, those rights which are felt to come at too great a cost will continue to be inadequately safeguarded, particularly if there are any signs that the European Court might offer the government any latitude in such areas.

What the Act should bring is a more consistent and coherent system of human rights protection, leading to the development of human rights previously unrecognised in domestic law and a reasonably consistent application of human rights law to human rights disputes.[187] For this to happen, however, it is not sufficient merely to free the judges from their existing constitutional and legal chains, and to equip them with the tools of European and international human rights law. For the Act to succeed in practice all departments of government, including the judges, have to fully

---

[185] One notable example is in the law of trespassory assemblies, where the domestic courts have been prepared to interfere in the exercise of police powers in controlling demonstrations which the European Commission refused to find in violation of Arts 10 and 11 of the Convention: contrast *DPP* v *Jones* [1999] 2 All ER 257, with *Pendragon* v *United Kingdom* (Application No 31416/96). The recent case of *DPP* v *Redmond-Bate (The Times,* July 28, 1999) also appears to go further than both the judgment of the European Court in *Steel* v *United Kingdom* (1999) 28 EHRR 603 and the cautious approach of the Convention machinery in the general area of demonstrations and the law.

[186] The Court of Appeal has held that a company could claim for breach of privacy, despite accepting the argument that Art 8 of the European Convention on Human Rights did not extend protection to such bodies: *R* v *British Standards Commission, Ex parte British Broadcasting Corporation (Liberty intervening)* [2000] 3 All ER 989.

[187] For a critical analysis as to the extent that this has been achieved in the post-Act era, see R Clayton, "Developing Principles for Human Rights" [2002] *EHRLR* 175.

understand and appreciate those 'European' principles and the general principles of human rights protection.[188] In this respect an analysis of the case law of the European Court of Human Rights, particularly in those cases involving the United Kingdom, will be essential if the purpose of the Act is to be achieved in domestic law.

---

[188] See Clements and Young, "Human Rights: Changing the Culture; Campbell, Human Rights: A Culture of Controversy"; M Hunt, "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession; and Young, The Politics of the Human Rights Act", all in (1999) 26 *JLS*. See also Adjei, "Human Rights Theory and the Human Rights Debate" (1995) 58 *MLR*, and J Jowell and J Cooper (eds), *Understanding Human Rights Principles* (2001).

"SUBTERRANEAN LAND LAW":RIGHTS BELOW THE SURFACE OF LAND

Dr Jean Howell, Senior Lecturer in Law, University of Manchester

INTRODUCTION

An owner of land, if asked to define the physical extent of his ownership would probably do so in two-dimensional terms: he would point to the boundaries, typically marked by some physical feature-fence or wall or river. He would, if prompted, also include sufficient space above the surface to accommodate the height of any buildings on his land. He will rarely include in his conception of ownership land below the surface. Yet it is a clear principle that the owner of the surface owns also the land below the surface. According to Blackstone 'land hath also, in it's legal signification, an indefinite extent, upwards as well as downwards. . . downwards, whatever is in a direct line between the surface of the land and the center of the earth belongs to the owner of the surface'.[1] The principle is expressed in the statement c*uius est solum eius est usque ad coelum et ad inferos:* 'he who owns the land owns everything reaching up to the very heavens and down to the depth of the earth.'

This is often followed by an immediate disclaimer as to its value as anything other than a 'colourful phrase.'[2] The principle is however utilised in America. *Marengo Cave Co v Ross* concerned a claim for adverse possession of a cave, which lay under the land of both A and B. The opening of the cave was on the land of A who opened the whole of the cave to the public. Although B knew of the business, he was not aware until many years later that the cave ran under his land. When A claimed adverse possession of the whole cave, it was held that his possession was not open and notorious: it was implicit that both A and B as land owners had a claim to the caves under their respective pieces of surface land, a decision explained by reference to the *ad inferos* doctrine.[3] In *Commissioner for the Railways* v *Valuer-General*, a Privy Council case from Australia, Lord Wilberforce, speaking of a number of nineteenth century cases which had considered its use in connection with mineral rights, commented that reference to the 'doctrine' were 'imprecise and mainly serviceable as dispensing with analysis' but in none of the cases was there an authoritative pronouncement that 'land' meant the whole of the space from the centre of the earth to the heavens: 'so sweeping, unscientific and unpractical a doctrine is unlikely to appeal to the

---

[1] Blackstone, Commmentaries, Book 11 (1966 ed.) p118. See also *Pountney* v *Clayton* (1883) 11 QBD 820, 838: '*Prima facie* the owner of that land has everything under the sky down to the centre of the earth', and *Egremont Burial Board* v *Egremont Iron Ore Company* (1880) 14 Ch D 158,160: 'The plaintiffs are entitled to the land down to the centre of the earth and none is entitled *prima facie* to interfere with their rights'.

[2] *Bernstein of Leigh (Baron)* v *Skyviews & General Ltd* [1978] QB 479, 485.

[3] 212 Ind 624, 10 N E 2d 917. See J. Dukeminier and J. E. Krier, Property (3rd ed, Little Brown, Boston, 1993) p 138.

common law mind'.[4] On the other hand there is no 'authoritative pronouncement' as to what 'land' in these circumstances may in fact mean. The 'colourful phrase remains useful as a starting point: in so far as his rights are not expressly restricted by contract, common law or statute, the surface owner's rights are without physical limits – he has full dominion of the soil to any depth. The problem for the surface owner of this aspect of his ownership is one of 'out of sight, out of mind'. He will rarely give thought to what is happening under his feet: unlike a trespass on the land which is usually easily detectable and which he will be alert to suppress, a trespass under the surface can continue for many years without his knowledge.

Yet exactly what constitutes the surface is itself not clearly defined. In *Pountney* v *Clayton*5 a grant of the surface meant, *prima facie*, not merely the plane surface, but all the land except the mines. However, land can be cut horizontally into very thin slices and what appears to be the surface, can itself be subject to conflicting rights. In *Cox* v *Glue*[6] it was held that different strata of the soil could be the subject of separate and distinct rights. There, A was seized in fee of a piece of land upon which the burgesses of B had a right to depasture cattle during part of the year. Although during that period A could maintain an action in trespass against a person for digging in the subsoil, he could not do so against a person who merely rode over the land, since during that time the burgesses had exclusive possession of the surface.

In terms of general property law principles, the rights and obligations the owner has below the surface, whatever that is, are in essence the same as those he has on the surface and the space above it. The surface owner may bring an action for the intrusion of tree roots below the surface[7] or may himself be responsible for damage caused by actions under his land.[8] He may be entitled to compensation for compulsory purchase of his subjacent land.[9] He may himself exploit the subsoil by building in it[10] and can exercise the usual rights of ownership: he may sell it outright[11] or grant a lease [12] or an easement[13] or

---

4 [1974] AC 328, 315 [PC].
5 (1883) 11 QBD 820, 839.
6 (1848) 5 CB 533.
7 *Delaware Mansions* v *Westminster City Council* [2002] 1 AC 321.
8 The doctrine of *Rylands* v *Fletcher* (1868) LR 3HL 330 starts from the presumption that a land owner is in control of the land below the surface.
9 Under the provisions of the Acquisition of Land Act 1981 and the Land Compensation Act 1961.
10 Although planning permission may be required: Town and Country Planning Act 1990, s 55(1) and s 57(1), and he must not remove support from adjacent land, below.
11 In *Grigsby* v *Melville* [1974] 1 WLR 80 it was accepted that a cellar could be conveyed separately from the surface building. Such an interest will presumably be categorised as a 'subterranean' flying freehold.
12 *R* v *Westminster City Council and the London Electricity Board Ex p Leicester Square Coventry Street Association Ltd* (1989) 59 P & CR 51 (lease of subsoil by Westminster City Council, the owners of Leicester Square for 999 years to the London Electricity Board to build a substation).
13 *Attorney-General of Southern Nigeria* v *John Holt & Co (Liverpool) Ltd* [1915] AC 599; *Celsteel Ltd* v *Alton Holdings Ltd* [1985] 1 WLR 204.

impose covenants on sale.[14] He may convey mines and minerals apart from the surface and then may have a right to have his land supported. He may extract water percolating through his land, although he has no right to water flowing in defined channels under his land.[15] Others may gain a right to adverse possession under the surface[16] and his land may be subject to the rights of statutory undertakers.[17]

Although these principles are straightforward to state, the exact extent, either physical or legal, of a particular right may be more difficult to define. There is relatively little authority on the extent of a land owner's rights below the surface.[18] This is unsurprising. Until the advent of the mechanical digger, the greatest extent of exploitation of the area below the surface was what could done by a man with a spade. For practical purposes, the question still only has significance for land relatively near the plane surface. The nearer to the surface, the easier it is to recognise that someone, whether the owner of the surface or a third party, may have identifiable and practically useable rights in that land. The further down, the less likely it is that ownership rights can be utilised. In *Bernstein of Leigh (Baron)* v *Skyviews & General Ltd*[19] it was held the land owner's rights above his land were restricted to 'such height was necessary for the ordinary use and enjoyment of the land.' It might be argued that the same test should be used for land below the surface. But in *Bernstein* it is implicit that even above the notional height at which the land owner's useable rights stop, there is not a 'free for all' in the airspace above. The use to which it can be put is limited to that of passage and the land owner may maintain an action for nuisance to restrain greater use. Also, although technology is always advancing and the depth at which land can be exploited will increase, to characterise the surface owner's rights as 'following' technological advances would offend against all notions of 'property' whose defining quality in land is certainty.

Why does any of this matter? Firstly to the property lawyer, it is unsatisfactory to have an area of such uncertainty. Secondly, and more importantly, the exact nature of a land owner's right may have at some time to be determined: matters which are seen as of 'academic interest only'[20]

---

[14] *R* v *Westminster City Council and the London Electricity Board Ex.p Leicester Square Coventry Street Association Ltd* (1989) 59 P & CR 51.

[15] *Bradford Corporation* v *Pickles* [1895] AC 587. Rights over flowing water are now covered by various statutes *e.g.*, Water Resources Act 1991.

[16] *Rains* v *Buxton* (1880)14 Ch D 537; *Marengo Cave Co* v *Ross* 212 Ind 624, 10 N E 2d 917 (1937).

[17] Providers of electric, gas, water and sewerage services are given power by various statutes to acquire rights under the surface.

[18] The courts and the legislature shy away if they can from any explicit definition of the surface owner's rights below the land. For example the Law Commission has suggested that leases entered into under Public-Private Partnership agreements under s 210 of the Greater London Authority Act 1999 to construct and run the London Underground should be overriding interests within s 70 of the Land Registration Act 1925. The Law Commission Report does not discuss directly the question of ownership but refers simply to the "difficulties and disputes" in mapping and in identifying the land subject to the lease. (*Land Registration for the Twenty-First Century* Law Comm No 271, (HC 114, 2001), p 150.)

[19] [1978] QB 479.

[20] See the comment in *Reed* v *Madon* [1989] 2 WLR 553, below.

have a habit of acquiring a very practical reality.[21] The possibility of this is now increased by the implementation of the Human Rights Act 1998. New challenges are being made in every area of law and any consideration of property rights must now look at the human rights dimension. This article will be concerned with three areas where there are particular difficulties for both surface and subsurface owner: mining rights, rights in highways and rights in graves.[22] Where mining rights are granted away from the surface both the mine owner and the surface owner will have an interest in having their respective rights accurately defined but in practice such precision is often impossible. For the surface owner of land under the highway there is uncertainty as to the depth at which his ownership ceases. The owner of a grave has no problems of definition of area; his problems are of the legal nature of his right.

2 MINES

The surface owner may lease the mines and minerals under his land, or convey them away entirely but unless specifically excluded,[23] mines and minerals are included in a conveyance of the surface. Whoever owns them may exploit them, subject only to statutory or common law restrictions.[24] Where they are dealt with separately from the surface a number of problems arise both for the owner of the mine and the surface owner. [25]

(a) The nature of the right granted.

---

[21] There has been a flurry of cases relating to burial rights generally, below. In a different context, the mediaeval law of escheat had been considered in *Scmlla Properties Ltd* v *Gesso Properties (BVI) Ltd* [1995] BCC 793.

[22] There are problems also where objects are found in or on the soil. Where objects are found on the soil, ownership remains with the original owner, or if he cannot be found may pass to the land owner or finder: *Parker* v *British Airways Board* [1982] QB 1004. Objects found in the soil will normally belong to the owner of the surface, whether they are treated as part of the land or remain chattels: *Elwes* v *Brigg Gas Company* (1886) 33 Ch D 562, or they may be classed as 'treasure' and thus be regulated either by the old law of treasure trove or by the Treasure Act 1996.

[23] Where land is acquired for public works, the undertaker is not obliged to purchase the mines and minerals under the land, (although this can be done by agreement). Where they are not acquired, rights are usually reserved to the owner of the mines to work them but the undertaker may prevent the working if it would cause harm to the surface enterprise.

[24] Originally property in all mines and minerals was vested in the Crown by prerogative, the Crown only gradually ceding its rights. See *Attorney-General* v *Morgan* [1891] 1 Ch 432. Both gold and silver and the mines in which the ores are found still belong to the Crown. Property in unworked coal is in a statutory body, the Coal Authority, which permits coal mining activities under licence: Coal Industry Act 1994, s 7.

[25] Although ownership of the surface may be severed in other circumstances than for the purpose of mining, as in *Grigsby* v *Melville* [1974] 1 WLR 80, problems have largely arisen where the severance has been of mines from the surface.

Both the mines themselves and the minerals within the mines are 'land' within the English statutory definition.[26] However, there is no definitive meaning attributed to either 'mines' or 'minerals.' The popular sense is of mines as a physical space out of which minerals, usually coal, are dug. However the legal meaning is far wider than that. In *Elwes* v *Brigg Gas Company*, 'minerals' was held to include every substance which can be got from the soil for profit although the term did not include anything that was not part of the natural soil. 'Unquestionably coal is deemed in law a part of the natural soil..in law the natural processes by which the trees of the forest have become coal is not investigated: the result only is considered.' Under this test, a prehistoric boat embedded in the subsoil which clearly retained its separate identity was held not to be a mineral.[27] The fluid nature of substances such as petroleum and gas has caused difficulties in the past. American authorities until recently classed these as acquired 'by capture': escaping gas from one piece of land to another was treated as a fugitive resource by analogy with wild animals.[28] The ownership of methane gas was considered in *Earl of Lonsdale* v *Attorney-General.*[29] It was held that a lease of 'mines and minerals' did not pass the rights in natural gas. At the time of the leases, in 1860 and 1888, not only did the general understanding of 'mines and minerals' exclude a substance which in its natural state was fluid, but gas was seen as a positive danger and not a substance which would ever be the subject of a grant. At the present day there is no difficulty in making these substances the subject of a grant .[30] On the other hand, where the substance is a liquid rather than a gas, it may be held not to be mineral and thus not the proper subject of a grant of minerals. It will depend on whether the substance can be defined as something other than pure water: as, for example, as water saturated with salt, (brine) in *Lotus Ltd* v *British Soda Co Ltd*[31] or running silt as wet sand (rather than dirty water) in *Jordeson* v *Sutton, Southcoates and Drypool Gas Co.*[32] Apart from this, it would seem that *any* substance which has a clear separate physical identity will be a 'mineral' and can be the subject of a separate grant from the surface.

(b)The physical extent of mines.

---

[26] "Mines and minerals" includes any strata or seam of minerals or substance in or under the land, and powers of working and getting the same: Law of Property Act 1925, s 205(1)(ix).

[27] (1886) 33 Ch D 562, 566.

[28] *Hammonds* v *Central Kentucky Natural Gas Co* 255 Ky 685, 75 S W 2d 204 (1934), overturned by *Texas American Energy Orp* v *Citizens Fidelity Bank & Trust Co* 736 S W 2d 25 (Ky 1987): J. Dukeminier and J. E. Krier, *Property*, p 39.

[29] [1982] 1 WLR 887.

[30] Property in petroleum (which includes mineral oil, natural gas and methane gas) existing in natural strata in Great Britain or in the territorial waters adjacent to the United Kingdom is vested in the Crown and these substances may be extracted only under licence: Petroleum Act (Production) Act 1934, s 1. Ownership of coal bed methane existing in its natural state in coal strata is vested in the Crown and not in the Coal Authority: Coal Industry Act 1994, s 9; Petroleum (Production) Act 1934, s 2; Continental Shelf Act 1964, s 1(3).

[31] [1972] Ch 123.

[32] [1899] 2 Ch 217.

The uncertain nature of the thing being dealt with is repeated in the uncertainty over the physical extent of a mine. According to Blackstone the owner of land owns 'whatever is in a direct line beneath the surface of any land and the center of the earth belongs to the owner of the surface; as is every day experience in the mining companies'.[33] However, the refusal of caves or mines to be contained neatly within imaginary subterranean boundaries corresponding with those on the surface[34] can lead to difficulties. With the increased ability to exploit land below the surface, the exact physical extent of the subterranean land leased or sold may be a matter of considerable importance.

In Earl of *Lonsdale* v *Attorney General*, it was held that the expression 'to the bottom of the coal measures' in the lease referred to the bottom of the lowest identifiable seam of coal that would or might be worth mining.[35] This suggests that the physical extent of the land leased is limited only by the existence of the particular mineral and the ability to extract it. It is a clear rule, however, that leased premises must be sufficiently defined in extent.[36] Where the surface is leased or sold, boundaries are defined by the plans and the conveyance; any difficulties which arise over boundaries rarely concern more than a matter of feet.[37] It has been suggested[38] that the territorial limit of the lease can be found by reference to the surface as it exists from time to time. This would suggest that a lease or conveyance of mines which did not specify territorial limits must be taken to be identical in extent to the upper parcel, which may put an obligation on the surface owner he did not intend.[39]

How far in practice mines keep strictly within the configuration of the upper parcel is uncertain but it would seem almost impossible for them to do so.[40] There must be many cases in which the owner of the surface will be unaware of workings under his subjacent land. In *Attorney-General* v *Morgan*,[41] the mine (or at least the minehead) was situated on a farm. Morgan had taken a lease from the owner of the farm of the 'mines beds veins and seams of ore' on the farm. According to the evidence, the principal

---

33 Blackstone *Commentaries*, vol 11 p 18.

34 One can ignore for this purpose the problem that since the earth is a sphere, subterranean land parcels should be wedgeshaped.

35 [1982] 1 WLR 887, 935.

36 R. E. Megarry and H. W. R. Wade, *Real Property* (5th ed Stevens, London, 1984) p 635 say that there can not be a lease if no defined premises are let, citing *Interoven Stove Co Ltd* v *Hibbard* [1936] 1 All ER 263. Also K. Gray, *Elements of Land Law* (3rd ed Butterworths, London, 2001) p 386.

37 See, for example, *Wibberley* v *Insley* [1998] 2 All ER 82. The common law demands that the temporal extent of an estate must be clear: for leases: *Prudential Assurance Co Ltd* v *London Residuary Body* [1992] 2 AC 386.

38 K. Gray, *Elements of Land Law op cit* n 36 p 386, citing the Australian case of *Goldsworthy Mining Ltd* v *Federal Commissioner of Taxation* (1972-73) 128 CLR 199.

39 Mines underneath land in single ownership may be leased to different people: see *Rylands* v *Fletcher* (1868) LR 3HL 330.

40 Where mining rights are granted under the seabed, the physical extent of the right is by reference to latitude and longitude. Whilst giving certainty to the rights on the surface (land under the sea being no different from dry land), the problem of the extent of the lease under the seabed would seem to remain, especially when the substance mined cannot easily be contained.

41 [1891] 1 Ch 432.

seam worked could be traced for miles though the countryside. It would seem highly unlikely that the farm itself followed the exact course of the vein and Morgan must have been mining under adjoining owners' land. Any working under the adjoining surface owner's land without his permission would be both a trespass and theft of the minerals. In practice the chance of the surface owner being aware of the encroachment is slight unless as in *Marengo Cave Co* v *Ross*[42] he decides to exploit the land himself but this does not affect the principle. Apart from statutory exceptions[43] and where the mines has been conveyed separately, the surface owner has full ownership of any minerals under his land. If he were to find viable quantities of a substance which became of economic value, he would have the right to exploit it.[44] The difficulty of knowing the exact extent of mines and the right in them is acknowledged in the English land registration scheme which treats an interest in coal or coal mines and any rights over them as overriding interests.[45]

c) Support for the surface

Quite apart from the difficulty of knowing exactly what control he has over exploitation under his land, the extent of the surface owner's right not to have his land let down by under ground workings is unclear. As a general principle, the surface owner of land has a natural right of support for the surface from both adjacent and subjacent land.[46] This natural right extends only to land in its natural state but a land owner may acquire an easement of support for buildings on land[47]. Once acquired the duty on the neighbouring land owner is the same whether the right arises by common law or is acquired as an easement.[48]

The extent of the duty owed by the 'supporting' landowner has been considered most recently in *Holbeck Hall Hotel Ltd* v *Scarborough Borough Council.*[49] The Court of Appeal, following the line taken *Leakey* v *National Trust* [50]held that where there is a right of support the landowner has to take positive steps to continue support for a neighbour's land. Nevertheless, where there is subsidence, the extent of the liability on the landowner will depend on whether

---

42 212 Ind 624, 10 N E 2d 917 (1937).

43 In *Morgan*, the mineral being mined was gold and belonged to the Crown wherever it was found.

44 How long he would retain the right would no doubt depend on the value of the mineral to the state. The Atomic Energy Act 1946 allows the Secretary of State to search for and compulsorily acquire substances which can be used in the production of atomic energy.

45 Land Registration Act 1925, s 70(1)(l) and (m). To be replaced by sch 1 paras 7, 8 and 9 and sch 3 paras 7, 8 and 9 of the Land Registration Act 2002. (The legislation has received the Royal Assent but is not yet in force.) For the reasoning see *Land Registration for the Twenty-First Century, Law Comm* No 271, (HC 114, 2001), p 150.

46 *Dalton* v *Angus & Co* (1881) 6 App Cas 740. See *Gale on Easements* (J. Gaunt and P. Morgan eds) (16th ed Sweet and Maxwell, London, 1997) ch 10, for a review of the law.

47 *Dalton* v *Angus & Co* (1881) 6 App Cas 740.

48 *Ibid*.

49 [2000] 2 All ER 704.

50 [1980] QB 485.

the damage is the result of an action on the part of the landowner or whether it arises through natural causes; whether the defect was patent or latent, whether he knew or ought to have known of it and the extent of the damage. In these cases the support claimed was from adjoining land. Any action (or inaction) by the owner was on his own land and had merely a 'knock-on' effect on the neighbouring land. It may be also that activity on neighbouring land directly removes the support under adjoining land. Whether the affected land owner in these circumstances has any remedy will depend, among other things, on the nature of the substance supporting his land. In *Popplewell* v *Hodkinson*[51] excavations on adjacent land had drained the land under the claimant's adjoining land so that the soil subsided and cottages on the land became cracked and damaged. Although the claimant had an undoubted right of support from the soil, this natural right did not extend to support from water in the soil so he had no cause of action.[52] It seems also that there can be no prescriptive right to support by water[53] although the terms of a grant may prevent the support being taken away[54].

In none of these cases did the adjacent owner physically intrude onto the neighbour's land: he simply removed his own land (whether or not deliberately) or took advantage of the 'fluid' nature of the adjoining land. The situation is different where there is a separation of ownership of surface and minerals. Until there is a separation the surface owner cannot strictly claim a 'right' of support. Provided that he does not remove his neighbour's right to support, an owner of the whole can let down his own land as much as he likes.[55] However, once the ownership of surface and subsoil is severed, this natural 'right' comes to look more like a true right of property which may be expressly or impliedly removed or reduced by agreement or statute. What the extent of the right will be, will differ depending on the circumstances of the severance. Where there is no evidence of the origin of the separation, the surface owner will *prima facie* have a full natural right of support.[56] Where the surface and the mines have been severed by deed or statute, the extent and existence of the right of support will depend on the interpretation of the agreement. In general, a conveyance of the surface separate from the mines will carry with it the right to support, in which case the owner of the mines will be prevented from mining close to the surface. In *Egremont Burial Board* v *Egremont Iron Ore Co*[57] the Company, in mining the ore, had let down the land below the cemetery, causing a coffin to fall into the mine shaft. The Company had been granted a right to work the minerals in the district by the surface owner, Lord Lonsdale, who had earlier conveyed the fee simple in the cemetery to the Burial Board. The liability of the Company to the Board depended on whether the conveyance to the plaintiff Board had reserved the mines to Lord

---

51 (1869) LR 4 Ex 248.

52 Similarly in *Langbrook Properties Ltd* v *Surrey County Council* [1970] 1 WLR 161.

53 *Brace* v *South East Regional Housing Association Ltd* [1984] 1 EGLR 144.

54 *Popplewell* v *Hodkinson* (1869) LR 4 Ex 248, under the principle of non-erogation from grant.

55 This is subject to any restrictions imposed by planning law on excavations. Until separation the landowner can be seen as having a quasi-right to support as in the rule in *Wheeldon* v *Burrows* (1879) 12 Ch D 31.

56 *Pountney* v *Clayton* (1883) 11 QBD 820.

57 (1880) 14 Ch D 158.

Lonsdale, or whether it had passed the fee simple without reservation. It was agreed that in the latter case, the Company had no right to mine under the land. However, if the minerals had not been reserved the Company claimed to be able under the terms of its agreement to mine the land, although in a manner which prevented further damage to the cemetery.

The extent of the right of support has been mainly considered where the surface has been acquired for a public undertaking. Where both parties are contracting freely, they may make whatever arrangement they wish: it is a question of construction in each case. Where the purchase is for a public enterprise, the undertakers are restrained by the terms of the statute authorising the activity. A series of cases in the nineteenth century considered the relative rights of companies constructing and operating railways, highways and canals on the one hand, and the owners of minerals on the other and the Land Clauses Consolidation Act 1845 and the Railways Clauses Consolidation Act 1845 replaced private acts with a 'mining code'. The modern code is contained in the Acquisition of Land Act 1981 which incorporates the relevant provisions of the Railways Clauses Consolidation Act 1845.[58] In fact, where the surface has been originally acquired for the purpose of an undertaking, a later purchaser of the surface may find that he has less support than he would have bargained for privately. In *Pountney* v *Clayton*,[59] where a railway company had purchased the land without the minerals, a purchaser from the railway company of its surplus land had no greater right than the railway had. The owner of the mines could work the mine without regard to whether the working let down the surface, providing the working was in the usual way in the district.

As can be seen the relative rights and obligations of surface and subsoil owners are surprisingly uncertain and ill-defined. Yet it would seem important that these are defined both as rights of property and as a practical matter. Both parties need to know the extent of any right of support: too much, and an underground enterprise may be made unworkable; too little and the surface may be severely damaged. Even where there is a express separation of surface and subsoil, although the immediate surface owner will be aware that there may be workings under the land which may affect its stability, the mining operations may well not be contained within the physical outlines of the surface and could extend under neighbouring land. Apart from the obvious infringement of the surface owner's property rights, there is a more practical implication. He will often not be aware that there is or has been working under his land. He may only discover this if his land collapses.[60] Many coal mines covering extensive areas have been closed over

---

[58] Acquisition of Land Act 1981, s 3 and sch 2, parts I, II and III. For example, the Channel Tunnel Act 1987, s 8 and s 36 give the Secretary of State powers to purchase land compulsorily or by agreement. S 4(1) of sch 5 provides that the mining code provisions of the Acquisition of Land Act 1981 are to have effect in relation to the land to be acquired.

[59] (1883) 11 QBD 820.

[60] Coal Industry Act 1994, s 38(1) permits support to be withdrawn from the surface in certain circumstances. Coal Mining (Subsidence) Act 1991, s 1 provides for compensation for subsidence caused by mining operations. The compensation may take the form of appropriate remedial action, (s 2(1)) or payment in lieu (s 13); *McAreavey* v *Coal Authority* (2000) P & C R D3.

the last three decades, particularly in Yorkshire and Durham. The consequent shrinkage of the land over the years may cause subsidence at a considerable distance from the scene of the operations. It is usual on a purchase of land to do a Coal Mines search[61] but this will tell little more than whether have been adjacent coal workings.

3 GRAVES[62]

Ownership of the soil carries with it the right to be buried- or to bury another- in one's own land. No new estate or right is being created, the landowner is simply using his land as owner. Burial in private land is becoming increasingly popular. There is, it seems, no need for planning permission: there would be neither a material change of use nor an engineering operation under the relevant legislation. There is no direct English authority but the possibility was accepted in *In re Christ Church, Harwood*[63] But it will always be a matter of fact and degree. In a Scottish case[64], it was intended that only the owners and his immediate family would be buried in the private ground. The position would be different if the ground were to be used for a substantial number of burials, even if it did not amount to a commercial enterprise. There may also be considerations of public health and private land use restrictions which might prevent use of the land for burial.

There will also be a difficulty if the land were subsequently sold.[65] Presumably the family would wish for continued access to the grave or at least to ensure its protection. In such a case, ownership in fee of the grave and a surrounding area could be retained with an associated easement of way. If the land were sold with no such reservations, the new owner would nevertheless be unable to utilise the land fully: human remains cannot be removed without permission.[66] In property law terms, however such 'home' burials present no real problems.

---

[61] A purchaser of land within a coal mining area should obtain a Coal Mining Report from the Coal Authority. This will tell the purchaser whether the property is within the "likely zone of influence from past mining and whether the ground movement should have ceased; whether it is within a present zone of likely physical influence or will be in the future". It will also tell the purchaser whether there is any record of any notice of the risk of land being affected by subsidence being given under s 46 of the Coal Mining Subsidence Act 1991.

[62] See also J. A. Dowling, "Exclusive Rights of Burial and the Law of Real Property" (1998) 18 LS 438; P. W. Young, "The Exclusive Right of Burial" (1969) 39 ALJ 50.

[63] [2002] 1 WLR 2055, 2065. The case was concerned with suitability of a memorial in a Church of England graveyard.

[64] [1994] JPL 305. Discussed in V. Moore, *A Practical Approach to Planning Law* (5th ed, Blackstone, London, 1995) p 102.

[65] In the Scottish case, the land was in rough grazing land among birch woods in remote and secluded rural surroundings. In the perhaps unlikely event that the land was consecrated, it could not be sold other than under an Act of Parliament or a Measure of the Church of England or General Synod. For the law on alienation of consecrated ground, see L. Leeder *Ecclesiastical Law Handbook* (Sweet and Maxwell, London, 1997) para 8.7 *et seq*.

[66] See below.

(a) Burial in a graveyard or cemetery.[67]

The position is different where burial is in a public burial ground. The extent and nature of the right can differ depending on whether the burial is in a church graveyard or a municipal or a privately owned cemetery.[68] There is a common law right to burial in the parish in which a person resides or in which he dies. The right exists only in an inchoate form until the person dies [69] and it is simply a right to be buried.[70] It also possible and more usual to acquire 'exclusive' rights of burial, that is, a right to be buried in a particular plot.[71] The death of a family member will often be the occasion on which a plot is acquired but it may be possible to reserve a plot at any time.[72] Exclusive burial rights can be acquired in Church of England graveyards[73] and in municipal or privately owned cemeteries. Whenever the plot is acquired, the grantee has an exclusive right to decide who will be buried in the plot.[74] The exact nature of the right acquired is problematic.[75]

(i) The nature of the right in the grantee

Despite the fact that the grantee has perhaps the most apparently permanent right in land it is possible to have, it is generally agreed that he has in fact only a licence, although apparently an irrevocable one. In *Re West Norwood*

---

[67] There seems to be no difference in law between a "graveyard" and a "cemetery." A graveyard is usually attached to a church whilst a cemetery is not, although it may contain consecrated ground and have chapels within its grounds.

[68] Burials in Church of England graveyards are governed by the canons of the Church of England. See generally, G. H. Newsom and G. L. Newsom, *Faculty Jurisdiction of the Church of England* (2nd ed Sweet and Maxwell, London, 1993). Other religious denominations have similar rules: see *Halsbury's Laws* vol 14 Ecclesiastical Law, p 788 *et seq*. Only regulations affecting Church of England graveyards will be considered here. Burials in Local Authority cemeteries are made under the Local Authorities' Cemeteries Order 1977, sch 26 of the Local Government Act 1972 and Local Authorities' Cemeteries Order 1977 S. I No 204. Private cemeteries are regulated by the Cemeteries Clauses Act 1847. The Act provides a statutory code to be applied in particular cases to special legislation authorising the making of cemeteries, and its provisions were widely incorporated into acts establishing both private and municipal cemeteries. The Act continues to apply to private cemeteries incorporated by statute.

[69] *Halsbury's Laws*, Ecclesiastical Law, para 1118. The right has been described as crystallising when a person dies: *Re West Pennard Churchyard* [1991] 4 All ER 124.

[70] *In re Christ Church, Harwood* [2002] 1 WLR 2055, where the nature of burial rights was considered generally.

[71] There is provision under the Local Government Act 1972, s272 and sch 30 for the establishment of common graves, in which there are no such rights.

[72] *In Re Blagdon Cemetery* [2002] 3 WLR 603.

[73] *Re Luke's, Holbeach Hurn* [1990] 2 All ER 749. Whether spaces can be reserved in Church of England graveyards before a death is a matter for the chancellor of the diocese. It is often the practice in "popular" graveyards not to allow reservation.

[74] There is no reason why only family members can be buried in a reserved plot although this will usually be the case.

[75] It is the rights of the grantee or his assignees with which we are here concerned. After burial, a body may be secure against removal but can have no rights as such.

Cemetery,[76] (a case of a cemetery incorporated by statute[77] as a private cemetery and to which the Cemeteries Clauses Act 1847 applied) the right was described as 'an exclusive licence, either in perpetuity or for a limited period, to bury in that plot and to leave that plot by will or by assignment to members of his family or others named. What the purchaser of a plot did not acquire was any interest at all in the land as real property. Any real property remained throughout vested in the company, subject to the statutory inalienability of any part of the cemetery which was consecrated.'

Although a grant in municipal cemeteries is expressed to be for a 'term of years',[78] the grant cannot be interpreted as giving the grantee a lease[79] and thus an estate in land. Section 44 of the Cemeteries Clauses Act 1847 specifically provides that the right is a personal one and does not confer any interest in the land and the effect is reproduced in the Local Authorities' Order 1977 which applies to municipal cemeteries.[80] A exclusive right to burial in a Church of England churchyard can only be acquired by faculty.[81] The right thus acquired[82] is simply a right to be buried in a particular plot and does not in any sense give an 'interest in land'.

In a municipal cemetery or a churchyard, the grant is for a limited period. The Local Authorities' Cemeteries Order 1977 prevents the grant of an exclusive right of burial in a municipal cemetery for more than 100 years. Where a grant was made before 1 April 1974, whether in perpetuity or for more than 100 years, if the right has not been exercised (in other words, no body has been buried in the grave) during a period of 75 years from the grant, it may be determined within 6 months unless the owner, (presumably after such a lapse of time, the original owner's assignee) signifies his intention to retain it.[83] The grant of a right in a churchyard is also now limited to 100 years,[84] although there is no provision for terminating pre-existing arrangements. In contrast, in private cemeteries governed by the Cemeteries Clauses Act 1847, section 40 permits the company to sell a right to burial either in perpetuity or for a limited time but there is no time limit imposed.

---

[76] [1995] 1 All ER 387,393.

[77] The Southern Metropolitan Cemetery Act 1836. The cemetery had been acquired by the local authority but it was agreed that the provisions of the 1847 Act still applied.

[78] Local Authorities' Cemeteries Order. The form of grant under the Cemeteries Clauses Act 1847 is "in perpetuity or for the period agreed upon".

[79] It is for a certain term, although it may be terminated before the end of the term, and the grantee has exclusive possession.

[80] A cemetery company may in any case not have the power to part with any estate or interest in the land: see *London Cemetery Co Ltd* v *Cundey* [1953] 2 All ER 257.

[81] It was stressed in *Re Luke's, Holbeach Hurn* [1990] 2 All ER 749 that the practice of informally reserving a grave space before death without a faculty gave no legal right of any sort.

[82] It was made clear in *Re West Pennard Churchyard* [1991] 4 All ER 126 that the sale of burial plots is and always has been impossible. This does not mean that a right of burial is free – fees are charged on reservation, and when the right to be buried is exercised.

[83] Art 10(1) and (8)(i) of the Local Authorities' Cemeteries Order 1974.

[84] Faculty Jurisdiction Measure 1964, s 8(1). A right can be extended by faculty.

Once a right has been exercised, however, rights of burial in a plot whether in a Church of England, municipal or private burial ground, can not be granted to anyone else, even if, as will often be the case, all the space has not been utilised.[85] If the decision is made to close the burial ground for burials, this may prevent the exercise of the right unless the closure order permits new burials.[86] In practice, a burial ground will only be closed when there are no or virtually no spaces left unreserved.

Since the grantee does not own the land he cannot invoke the principle of *cuius est solum eius est usque ad coelum et ad inferos.* He cannot prevent grants of the land under his plot[87], either for other graves- a vault may extend under his plot-, or for any other purpose, for example, mining. It is the owner of the freehold who must bring any action for subsidence caused by activity under the plot.[88] On the other hand, the benefit of the grant may be assigned or left by will, rights which give the licence some of the insignia of 'property'. Since 1925, it seems that succession to a exclusive right to burial will pass under the grantee's will or on intestacy:[89] In the majority of cases there will be no difficulty as to who succeeds[90]. Whatever its nature, the right to burial carries with it sufficient auxiliary rights to enable the purpose of the grant to be carried out. In *Reed* v *Madon*[91] it was held that the grantees, although only licensees, had a sufficient property right to maintain an action for trespass against the owner of an adjoining plot, whose memorial encroached on their plot. A grantee may be given an order for exhumation if the space has been used for another burial.[92]

(ii) The effect of the 'right to burial' on purchasers of the freehold.

It was made clear in *Re West Norwood Cemetery*[93] that the freehold estate remains vested in the grantor who can deal with in the normal way: by a local authority within the terms of statutory power,[94] or by private cemeteries under the Cemeteries Clauses Act 1847. (It is unlikely that a Church of

---

[85] It is very common for only one person to be buried in a multiple grave, the grantee's family having scattered or preferring to acquire a separate plot for its own more immediate family members.

[86] Burial Act 1853, s 1; Local Government Act 1972, s 272(1) and Church of England (Miscellaneous Provisions) Measure 1992, s 1.

[87] The *physical* extent of the plot granted may vary but only slightly. The usual depth of a plot is to permit a maximum of three burials. This is a practical matter: interments at a greater depth can cause problems of excavation.

[88] *Egremont Burial Board* v *Egremont Iron Ore Co* (1880) 14 Ch D 158.

[89] See Dowling, *op cit* n 62, p 450 for the difficulties of who is entitled.

[90] The position is not always straightforward. In a case in 1995, both a widow and a mistress claimed the right to the deeds to a double grave in which the man was buried. The mistress paid for the funeral and asked for a double grave. The widow argued that there was an agreement that the funeral would be paid for from the husband's estate and the deeds and the right to burial therefore belonged to the estate: The Times, January 17 1995.

[91] [1989] 2 WLR 553.

[92] *Re Luke's, Holbeach Hurn* [1990] 2 All ER 749.

[93] [1995] 1 All ER 387, 393.

[94] The sale by Westminster City Council in 1987 of three of its cemeteries for 15 pence each was subsequently declared unlawful and the Council was ordered to repurchase the cemeteries and pay associated costs, amounting to £240,000: The Times, June 30 1992.

England graveyard will be sold as a 'going concern' and there are restrictions on dealing with consecrated land.[95]) If, as is suggested, the grantee has an irrevocable licence[96], it will be enforceable against the grantor, and equity will intervene to prevent its revocation.[97] But a licence should, in strict property law terms, have no effect on a later purchaser of the land out of which the grant is given: it is accepted that a licence *per se* is not an interest in land which can affect third parties.[98] However it seems that in practice any person acquiring the freehold will be bound by the rights of burial, at least if the land is bought as a 'working' cemetery.[99]

The purchaser may be under a statutory duty or be bound by the terms of the conveyance. In *Reed* v *Madon*[100] a cemetery incorporated by statute and thus regulated by the Cemeteries Clauses Act 1847, was sold to a company. The plaintiffs had purchased exclusive rights of burial in three plots prior to the transfer. It was held that the company was bound by the statutory duty under section 48 of the 1847 Act.[101] The plaintiffs had rights which were 'equated' with a right of property, and were enforceable against anyone infringing them. The question of whether the plaintiffs has an interest in land was said to be 'of academic interest only.' In *Re West Norwood*[102], the local authority had acquired a private cemetery as a 'working' cemetery. Although it was emphasised that the plot holders were only licensees, the local authority was bound by the provisions of the act of 1836 under which the cemetery company was set up[103] and so by the rights of burial already granted by the former owners. In addition, the local authority was bound by the terms of the conveyance of the cemetery to it, under which it was subject to 'the obligations under Deeds of Grant in respect of exclusive rights of burial and in respect of Deeds for the maintenance in perpetuity and lesser periods of certain graves and memorials.'[104] This suggests a 'constructive trust' obligation under the principles laid down in *Ashburn Anstalt* v *Arnold* [105], a

---

95 G. H. Newsom and G. L. Newsom, *Faculty Jurisdiction of the Church of England* p 174–175 for the circumstances in which consecrated land can be sold.

96 *Re West Norwood Cemetery* [1995] 1 All ER 387, 393.

97 *Errington* v *Errington and Woods* [1952] 1 KB 290.

98 *Ashburn Anstalt* v *Arnold* [1989] Ch 1.

99 It is also possible for disused burial grounds to be sold: if they are acquired by the local authority under the Open Spaces Act 1906, they must be retained as an open space. The owner of burial rights affected by the acquisition is entitled to compensation: Open Spaces Act 1906, s 13.

100 [1989] 2 WLR 553.

101 [1989] 2 WLR 553, s 60. S 48 provides that "No body shall be buried in any place wherein the exclusive right of burial shall have been granted by the company, except with the consent of the owner for the time being of such exclusive right of burial".

102 [1995] 1 All ER 387.

103 "An Act for establishing a cemetery for the interment of the Dead southward of the Metropolis" 6 & 7 Will 4 cxxix. S 8 empowered the company to grant licences.

104 [1995] 1 All ER 387, 394.

105 [1989] Ch 1.

principle which could be used if a working cemetery were sold in circumstances where a statutory obligation could not be imposed.[106]

Nevertheless to classify such rights as 'licences' seems inappropriate. Few would argue that rights of this kind should be honoured. Perhaps like unincorporated associations, which also exist despite a difficulty in fitting them into existing categories, exclusive rights of burial are in that most malleable of classes, that of *sui generis*, and the law must bend to accommodate them[107].

(b) Resting in peace?

Where rights of burial have been exercised, the deceased rests more securely than the personal nature of the original grant would suggest. Since the scandals of the nineteenth century when bodies buried in graveyards would often be dug up within a very short time to permit new burials, the law has been meticulous in ensuring that bodies once committed to the earth, remain there.[108] In general, exhumation is allowed only for the most pressing reasons.[109] In *Re St Michael and All Angels, Tettenhall Regis,*[110] it was stressed that the disturbance of human remains in consecrated ground should be avoided if at all possible. It may be, however, that in future exhumation will be granted more readily. In R*e Durrington Cemetery*[111] a petition requesting exhumation from ground consecrated according to the rites of the Church of England for reinterment in a Jewish cemetery was granted both on its merits and because the Chancellor considered that refusal might amount to a denial of the right to freedom of religious practice and observance under Article 9 of the European Convention on Human Rights, since incorporated in the Human Rights Act 1998. [112]

In practice, in graveyards the ground is often 'buried over' several times before it will be closed for burials.[113] The often controversial practice

---

106 In the Westminster City Council case, above n 94, the cemeteries were sold to a private company.

107 There is no provision for their registration under the English land registration legislation scheme, nor are they included in the Law of Property Act 1925, s 1, which defines the classes of legal and equitable interests.

108 See the comments of Chancellor Gray in *Re West Norwood Cemetery* [1995] 1 All ER 387, 390.

109 Permission may be granted by the Coroner, the Home Office or the Diocesan registrar depending on the circumstances; see *Halsbury's Laws* (1994 ed) vol 10, Cremation and Burial pp 1196–1206. The most usual reasons for a request are to remove remains from the wrong grave to the correct one; to move remains from a common grave to an identified grave; to have a body cremated; to recover jewellery or documents; and to enable road schemes to take place.

110 [1996] 1 All ER 231. The principle applies equally to cremated remains: *Re Atkins* [1989] 1 All ER 14 where Chancellor Edwards warned in an age of increasing mobility against treating buried cremated remains as "portable". See also *in re Blagdon Cemetery* [2002] 3 WLR 603.

111 [2000] 3 WLR 1322.

112 For the general effect of the Human Rights Act 1998, see below.

113 Provision has to be made for the proper reburial of any remains: Newsom and Newsom, *Faculty Jurisdiction of the Church of England,* p 153. The lack of space in London cemeteries has led the Home Office to consider the possibility of reusing old graves. Those buried over a century ago would be exhumed, put in a

of 'lawning' graveyards attached to a church does not involve any removal of bodies. Any monuments are, it seems, personal property and permission must be obtained from the present owners to remove them.[114] It is possible in limited circumstances to build on a disused burial ground[115]. Generally consecrated ground cannot be built on[116] but a planning authority has wide powers under the Town and Country Planning Act 1990 to acquire burial grounds for any purpose.[117] The acquisition is subject to restrictions[118] but consecrated land can be acquired and ecclesiastical restrictions on use can be overridden.[119]

4 HIGHWAYS[120].

The owner of a house bordering a suburban street will think of his property as ending at his front gate but this will usually not be the case. There is a presumption that where there are properties on each side of a street, adjoining landowners own the land to the middle of the street. Thus the owner of Mon Repos will own the land up to the centre point on Acacia Avenue where the land of his opposite neighbour in Chez Nous will begin. The presumption gives way to any express provisions in a grant[121]. If the street is a highway (and whether it is will depend on whether it has been adopted as a highway), there is an overriding presumption that a surface owner retains his full fee simple ownership of the land[122], subject only to the right of passage.[123] If the land

---

new coffin and reburied at a deeper level: Sunday Telegraph, September 5 1999. In a letter to *The Times* in 1899, the then Duke of Westminster suggested that the purchasing of plots in perpetuity was undesirable. Graves should be reused once the remains become part of the earth. Reprinted in *The Times*, 9 December 1995.

114 See Dowling, *op cit* n 62, for a discussion of the ownership of gravestones and monuments.

115 Disused Burial Grounds Act 1884 and Disused Burial Grounds (Amendment) Act 1981.

116 *Re St Michael, Tettenhall Regis* [1996] 1 All ER 231.

117 Town and Country Planning Act 1990, s 226.

118 Disused burial grounds may be acquired if only a small area is needed or if the land is required for road widening or drainage: Acquisition of Land Act 1981, s 19 and Town and Country Planning Act 1990, s 228.

119 Town and Country Planning Act 1990, s 238.

120 A highway is a way over a defined route which the public at large are permitted to use, as of right, for the purposes of passage. There may be a highway over water: only the position where the right is over land is considered here. Railways are not highways, since the right to passage is a matter of contract. For the law generally on highways, see S J Sauvain, *Highway Law* (Sweet and Maxwell, London, 1989).

121 Any grant will have to be interpreted with care. Deeds often do not show precise boundaries, being concerned more to show the position of the land in relation to another piece. The English land registration legislation does not require accurate boundaries. It is in any case almost impossible to show a boundary on paper – any line, no matter how fine, is bound to be out of scale. Boundaries have to be defined by a physical inspection and the use of various presumptions. *Wibberley* v *Insley* [1998] 2 All ER 82, *Hale* v *Norfolk County Council* (2001) 82 P & CR 26.

122 Although there are suggestions that the presumption does not apply in the towns: *Beckett* v *Leeds Corporation* (1872) 7 Ch App 421, or in building schemes and estates: *Mappin Bros* v *Livery & Company Ltd* [1903] 1 Ch 118.

ceases in law to be a highway, the landowner will get back full dominion over the land. The most usual case in which the presumption of ownership is displaced is where the whole of the fee simple in the land is acquired by the body making the highway. Whether the whole fee simple has been acquired is a matter for interpretation of the particular legislation authorising the scheme.[124]

At the present day, the power to create highways and the responsibility for them are vested in the local highway authority.[125] Land for the construction of new highways may be acquired either by compulsory purchase or by agreement with the landowner.[126] Section 150 of the Highways Act 1980 permits the highway authority to acquire only a limited interest in the land,[127] although the landowner may require the authority to acquire the full interest. [128] Every highway maintainable at the public expense, as the majority are,[129] vests in the highway authority.[130] Where the highway authority acquires less than the full fee simple, as again will usually be the case, the exact nature of the interest it acquires is difficult to define. It has been described as an 'unusual property right' which will be interpreted restrictively since statute takes away without compensation part of the interest of the landowner.[131] The nature of the right was considered in *Tithe Redemption Commission* v *Runcorn UDC*[132] where it was described as a legal fee simple determinable,[133] the determining event being the road's ceasing to be a highway. As with exclusive rights of burial, any difficulties in definition are glossed over: a right exists by virtue of statute if nothing else.

A more difficult question is the physical extent of the interest acquired by the local authority and, as a necessary corollary, the extent of the surface owner's remaining rights. It is clear that apart from statutory[134] or contractual restraints, he has full rights in the subsoil. In *Tithe Redemption Commission* v *Runcorn UDC,*[135] Lord Denning said that the 'top two spits'- the depth of earth

---

123 The surface owner may not obstruct the way but he can maintain actions for trespass: *Goodtitle ex d Chester* v *Alker Elmes* (1757) 1 Burr 231.

124 *Marquis of Salisbury* v *Great Northern Railway Co* (1858) 5 CB (NS) 69.

125 Highways Act 1980, Part III.

126 Under Highways Act 1980, Part XII and the Acquisition of Land Act 1981.

127 For example, under the Channel Tunnel Act 1987, s 8(3) the highway authority, Kent County Council, is given power to acquire land for extending the A20. Under Part III of sch 5. It need acquire only so much of the land, whether the surface, the subsoil or the under the surface, as is required for its purposes, or to create and acquire easements, without being required to acquire a greater interest.

128 Highways Act 1980, s 252.

129 Highways Act 1980, s 36. Until the Highways Act 1835, the maintenance of highways fell in general on the parish. See *Gulliksen* v *Pembrokeshire County Council* [2002] 2 WLR 1124 for a case where the highway authority was not responsible for maintenance of a highway.

130 Highways Act 1980, s 236(3).

131 S J Sauvain, *Highway Law,* p 46.

132 [1954] 1 Ch 383.

133 It is a legal fee simple even though it is a conditional fee: Law of Property Act 1925, s 7(1).

134 Highways Act 1980, s176-279. Many statutory bodies have powers to put pipes or cables under the land.

135 [1954] 1 Ch 383.

cut by a spade- vests in the authority and in *Coverdale* v *Charlton*,[136] the surface of a street was held to mean a surface of such thickness as the local board required for the purpose of 'doing to the street that which is necessary for it as a street'. How much is needed will vary. In *Schweder* v *Worthington Gas Light and Coke Company (No 2)*,[137]eighteen inches was sufficient and *vis a vis* the highway authority, the plaintiff could prevent any use at a lower depth. This was agreed as being a reasonable amount given the fact that it was a country road. The opinion has been expressed[138] that as the highway authority's need changes with increases in user, the depth to which its interest extends may also change. It is doubtful if this is correct. Such a conclusion would be highly unsatisfactory for the landowner who may find his rights diminishing without his knowledge, and without compensation.[139] Whilst in the majority of cases, the landowner will have no requirement to use the land under the highway, this does not affect the principle.

5 **CONCLUSION.**

It has been shown that the extent of a landowner's rights below the surface is both more complex and less certain than may be supposed. The reason for the relatively small number of disputes on rights under land is not because such rights do not exist, but because their existence is often not appreciated. Any intrusion into land which is not sanctioned by some countervailing property right in the intruder, such as an easement, lease or licence, will be a trespass. It is true that the surface owner will not usually wish to or be able to utilise the ground below the surface, but he has rights in the land which could be valuable.[140]

Since the incorporation of the European Convention on Human Rights into English law under the Human Rights Act 1998 these issues have a new resonance: the public, and their advisors, are becoming more 'rights conscious' and old presumptions as to the legality of an action can no longer be taken for granted. In property law, the judges are feeling their way to a correct interpretation of the Act, some adopting an approach based on the perceived underlying principles of the legislation, rather than a robust property law approach.[141] Whatever balance is finally reached, the courts are very aware of the human rights factor and are seeking to reach decisions in a way which could not give rise to a challenge under legislation.[142] Whether this will lead to an undesirable uncertainty in the law of property cannot be considered here.[143]

---

[136] (1878) 4 QBD 104, 118.
[137] [1913] 1 Ch 118.
[138] S J Sauvain *Highway Law* p 47.
[139] In *Schweder* v *Worthington Gas Light and Coke Company (No 2)* [1913] 1 Ch 118, the plaintiff had (legally) constructed a tunnel under the road connecting his two pieces of land below the agreed eighteen inches. To later hold that the highway authority's rights extended further down would interfere with his rights.
[140] *Marengo Cave Co* v *Ross* 212 Ind 624, 10 N E 2d 917 (1937) shows that land under the surface can be exploited commercially.
[141] Compare the Court of Appeal approach in *Wallbank* v *Parochial Church Council of Aston Cantlow and Wilmcote* [2002] 1 P & CR 5 to the first instance judgment of Ferris, J, *The Times* 30 March 2000.
[142] See the approach in *Re Durrington* [2000] 3 WLR 1322 above.
[143] Much will depend on whether the legislation is held to apply only to public authorities however defined or whether it applies more generally. For a

A number of the provisions may have relevance to land and rights under it. In *Re Durrington Cemetery*[144] it was considered that a refusal of exhumation might be an denial of the freedom to religious practice and observance under Article 9. This was not the primary reason for the decision and the court was careful not to make too much of it but it is likely that this will be pleaded in future in all such cases.[145] The provision which has the most obvious application[146] is Article 1 of the First Protocol which states that 'every natural or legal person is entitled to the peaceful enjoyment of his possessions' and no one is to be deprived of his property 'except in the public interest and subject to the conditions provided for by the law and by the general principles of international law'. Moreover the State has the right to enforce such law as it deems necessary to control the use of property 'in the general interest or to secure the payment of taxes or other contributions or penalties.' The fact that the owner of the right may not have an 'interest in land', as that is commonly understood in land law terms, does not prevent his being protected by Article 1. A person is protected in peaceful enjoyment of his 'possessions' which seems to include rights which do not fall with the traditional category of interests in land[147]. Thus the licence held by the owner of an exclusive right of burial[148] will be within Article 1, as well as the more obviously 'proprietary' rights, that can exist below the surface.

A vital factor in deciding whether rights have been infringed under the legislation is whether compensation has been paid. Although a right to compensation is not set out in Article 1, in *James* v *UK,* [149] it was said that:

'The Court observes that under the legal systems of the Contracting States the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances. . . As far as Article 1 is concerned, the protection of the right

---

discussion of human rights and land more generally see Howell, "Land and Human Rights" [1999] *Conv 287*; "The Protection of Property Rights in Land under the Human Rights Act 1998" in L. Betten (ed.) *The Impact of the Incorporation of the ECHR into the British Domestic Order* (Kluwer Law International, 1998); "The Human Rights Act 1998: the "Horizontal effect" on Land Law" in Cooke (ed). *Modern Studies in Property Law Volume 1:Property 2000,* (Hart Publishing, Oxford 2001).

144 [2000] 3 WLR 1322.

145 The court will have to be persuaded that the exhumation should be ordered primarily on other grounds. In the case itself, despite a long delay and the fact that the reinterment would be in ground unconsecrated in the Christian rite, there were 'exceptional factors'. In a case without exceptional factors, the human rights point may not have sufficient weight. In *in Re Blagdon Cemetery* [2002] 3 WLR 603, exhumation was allowed but art 8 although raised was held to be irrelevant.

146 Art 6 (a right to a fair trial) and art 8 (the right to a home and family life), (as *in Re Blagdon Cemetery* [2002] 3 WLR 603, above) may have a marginal relevance, as may art 14 which prevents discrimination.

147 See D.J. Harris, M. O'Boyle and C.Warbrick, *Law of the European Convention* (Butterworths, London, 1995), p 517, for examples of rights held to be "possessions".

148 *Reed* v *Madon* [1989] 2 WLR 553.

149 (1986) 8 EHRR 123, 147.

of property it affords would be largely illusory and ineffective in the absence of any equivalent principle'.

Although there need not be full compensation, a failure to pay any at all may be a violation of the statute. Thus any taking of land under the surface by a public authority is an expropriation and in principle requires compensation. In most cases where there is some action by the State which takes away property rights, compensation will be provided for under the relevant legislation[150]. This is not however always the case[151]: the owner of the land over which a highway passes is deprived without compensation of his full dominion of the land during the continuance of the highway and apparently to an uncertain depth.

In any case where a public authority is interfering in some way with property rights, a challenge could be made under the relevant legislation.[152] It is true that in most cases the challenge could be met by the argument that the appropriation is in the public interest. Nevertheless it could be useful as an irritant factor: the onus would be on the public authority to prove that the surface owner had no interest in the land, which given the presumption of ownership to the centre of the earth, would need express statutory provision in each particular case.

It is unlikely that subterranean land will be exploited on a large scale in the near future, other than for minerals. Although England is crowded there are no plans to build housing estates underground. Nevertheless the principles that have been considered here are of a general importance. Unauthorised incursions on the surface can result in substantial awards for the owner: in *Amec Developments Ltd* v *Jury's Hotel Management (UK) Ltd* [153] £375,000 was awarded for an encroachment of 3.9m over a building line. The same principles should apply to incursions under the surface. There is no reason why, if someone else wishes to utilise ground below the surface he should equally not pay the full economic value, either in rent or compensation, to the surface owner.

---

150 The owners of coal mines were compensated at the time of nationalisation: Coal Industry Nationalisation Act 1946. There is no compensation for gold and silver found on land since the land owner has never had any interest in it..

151 The closure of a burial ground gives no right to compensation for rights which can no longer be exercised, Burial Act 1853, s 1; Local Government Act 1972, s 272(1) and Church of England (Miscellaneous Provisions) Measure 1992, s 3(I).

152 The Greater London Authority Act 1999 which provides for leases entered into under Public-Private Partnership agreements does not seem to contemplate the payment of compensation to the land owners under whose land the railways passes. Such a scheme would be complex to administer. Nevertheless a challenge to the legislation could be made on this ground.

153 (20001) EG 163.

NATIONALITY, CITIZENSHIP AND THE MEANING OF NATURALISATION: BRUBAKER, THE UNITED KINGDOM, EU CITIZENS, THIRD-COUNTRY NATIONALS AND THE EUROPEAN UNION

Robin M White, Department of Law, University of Dundee[1]

INTRODUCTION

The law on nationality or citizenship[2] (in the sense of "state membership") has produced a limited amount of theory.[3] Brubaker's *Citizenship and Nationhood in France and Germany*,[4] however, provides a rich and thought-provoking example. He argues that "nation-states" use nationality or (his preferred term, therefore used hereafter) citizenship[5], to exclude non-members and thereby legitimise themselves. Control over citizenship is "an essential attribute of sovereignty".[6] Indeed, given erosion of control of immigration through membership of the European Community, "[i]n the European setting, citizenship is the last bastion of sovereignty".[7]

Most people become citizens at birth, so central citizenship questions revolve around the *jus soli* and *jus sanguinis*.[8] However, the last fifty years have seen significant migration within Europe. This raises questions of acquisition after birth, that is, change of immigrants' citizenship by naturalisation. In the United Kingdom, important discussion has recently

---

[1] This article started life as a paper to the newly-formed Immigration & Refugee Law Group of the SPTL at the Annual Meeting in Glasgow in September 2001, and formed the subject of a Dundee Law Department staff seminar in January 2002: my thanks to those who commented. I am also grateful to Prof Emeritus HUJ d'Oliveira (Ministry of the Interior, Amsterdam), for his comments on a draft. I bear all responsibility for the final product.

[2] These two terms are equiparated here. Distinctions are sometimes drawn between them. However, the *European Convention on Nationality* (ETS 66 (1997)) does not: para 23 of the "Commentary on the Articles. . ." in the "Explanatory Report. . ." observes ". . . with regard to the effects of the Convention, the terms 'nationality' and 'citizenship' are synonymous". Nor do UK or Irish citizenship law: the half-dozen *British Nationality Acts* of the last half-century created a large number of statuses almost called "citizenships"; and the Irish Acts are called *Irish Nationality and Citizenship Acts*.

[3] The earlier work of Parry, more recently of Anderson, Bauböck, Cohen, Closa, Rubio-Marín and now Hansen, are well-known, and the lesser-known Favell, *Philosophies of Integration* Macmillan (1998) which addressed issues raised by Brubaker, deserves mention.

[4] Harvard UP (1992) (hereafter "*Brubaker*").

[5] He also equiparates the two terms: see *eg* p 50 "In French and American English, *nationalité* and *citoyenneté*, 'nationality' and 'citizenship', are rough synonyms" and "are used interchangeably to designate the quality of state-membership". (It is not thought that the "American" before "English" is significant).

[6] *Brubaker* p 180.

[7] *Ibid*.

[8] That is, the principles that a child's citizenship at birth is wholly or largely determined by the territory of birth, or parents' citizenship, respectively.

been generated about naturalisation and nationhood, expressed in White Papers, legislation and elsewhere. In the European Community as a whole, the non-naturalisation of immigrants has also generated discussion, which recently produced a Draft Directive to give a special status to "long-term resident third-country nationals".

This article therefore outlines Brubaker's thesis; tests it against UK experience; and considers current UK naturalisation, EU citizenship and "third country national" issues within the framework provided by Brubaker.

Brubaker's thesis in general

Brubaker's general thesis can be simply sketched. Firstly, citizenship is a means of social closure of great significance. "There is a conceptually clear, legally consequential, and ideologically charged distinction between citizens and foreigners".[9] Thus "[o]nly citizens have a right to enter (and remain in) the territory of the state [and] suffrage and military service are normally restricted to citizens".[10] Further, it is not the "state" but the "nation-state" which is regarded as the primary political entity. Any state "claims to be the state of, and for, a particular, bounded citizenry [and further, it] claims legitimacy by claiming to express the will and further the interests of that citizenry",[11] and this citizenry is "usually conceived as a nation. . . ".[12] Thus "citizenship" reflects and defines "nationhood".

Secondly, however, "traditions of nationhood" differ. ("Tradition" is important, for Brubaker observes that "[t]radition is a constructed, not a purely objective property"[13] expressed in "cultural idioms", including "idioms of nationhood", which "*constitute* interests as much as they express them"[14]). He considers the "two core states of continental Europe",[15] France and Germany, which have markedly different traditions of nationhoods, the one "political", the other "ethnocultural".[16] These differences, he argues, flow from differences of political history. In brief, in France, state preceded nation and therefore "[i]n the French tradition, the nation has been conceived in relation to the institutional and territorial frame of the state. . . ".[17] Nationhood (and citizenship) are thus viewed as "unitarist, universalist and secular. . . [with] an essentially political understanding. . . centrally expressed in the striving for cultural unity".[18] This crystallised in the French Revolution, of which "[m]odern national citizenship was an invention".[19] On the other hand, in Germany, nation preceded state and therefore "the German

---

[9] *Brubaker* p 21.
[10] *Ibid* p 23.
[11] *Ibid* p 21.
[12] *Ibid.*
[13] *Ibid* p186, invoking Hobsbawm & Ranger *The Invention of Tradition* Cambridge U.P. (1983).
[14] *Ibid* pp 1, 16-17, 162-163 (emphasis in original).
[15] *Ibid.*
[16] This approach is not novel. It is closely pre-figured, for example, in Namier "Nationality and Liberty" *in* Namier *Vanished Supremacies* Hamish Hamilton (1958) (hereafter "*Namier*").
[17] *Brubaker* p1.
[18] *Ibid.*
[19] *Ibid* p 35.

understanding [of nationhood] has been *Volk*-centered and differentialist" and not "linked to the abstract idea of citizenship". It is "an organic cultural, linguistic or racial community" making "nationhood an ethnocultural, not a political fact".[20] Moreover, there was "no pivotal event...no moment of crystallisation remotely like the French Revolution".[21] Thus also, unlike in France, "formal state membership, participatory citizenship, and ethnocultural nation-membership are designated by distinct terms".[22]

Thirdly, these traditions of nationhood express themselves in French and German law on acquisition of citizenship, which are "assimilatory" or "exclusionary" respectively.[23] This is clear in attribution of citizenship at birth. France accepts a role for the *jus soli*[24] (thereby making "second-generation immigrants"[25] nationals). Germany traditionally cleaves to the *jus sanguinis* (and thus failed to make even "third generation immigrants"[26] nationals),[27] yet "[w]hile the citizenry is defined restrictively *vis-à-vis* non-German immigrants, it is defined expansively vis-à-vis ethnic Germans".[28] (Thus, East Germans were considered "Federal Germans" before reunification and those of German origin in Eastern Europe descended from settlers are similarly considered, at least if expelled.)[29]

Fourthly, these traditions express themselves equally in acquisition after birth. In principle, a more restrictive naturalisation law expresses itself as a

---

[20] *Ibid* p 1.

[21] *Ibid* p 50.

[22] *Ibid*: *i.e.*, "*Staatsangehörigkeit*", "*Staatsbürgerschaft*" and either "*Nationalität*" or "*Volkszugehörigkeit*" respectively. The first "exactly captures" the legal concept of "citizenship" as Brubaker uses it (p 51).

[23] Brubaker never quite fixes on two adjectives to express the manifestation in citizenship law of the two traditions of nationhood, but this pair seem to express his meaning accurately.

[24] Application of *jus soli* has changed somewhat since: see *Nascimbene* (ed) *Nationality Laws in the European Union* (1996) (hereafter "*Nascimbene*") p 315, and Council of Europe *European Bulletin on Nationality* September 2001 (DIR/JUR (2001) 2) (hereafter "*EBN*") p 82; but this change does not seem to affect Brubaker's general argument.

[25] There is, of course, no such thing as a "second generation immigrant": a *fortiori* with "third generation immigration".

[26] See previous note.

[27] Application of *jus sanguinis* has changed significantly since: see *EBN* p 89 discussing the "Act to Amend the Nationality Act" (Gesetz zur Reform des Staatsangehörigkeitsrechts) of 15 July 1999. This introduces from 01/01/2000 a form of *jus soli*, whereby a German-born child, either or both of whose parents has 8 years German residence and is settled, acquires German citizenship, but at 18 must elect between it and any other citizenship held. As Brubaker wrote "[i]f a *jus soli à la française* is unimaginable in Germany. . ." (p 177), it must be a matter of speculation how he would incorporate this change into his theory.

[28] *Brubaker* p 82: policy is "exclusionary" in relation to ethnocultural considerations, rather than generally.

[29] *Ibid* pp 83-84: see also Krajewski & Rittstieg in *Nascimbene*, pp 360, 365-366, and 371: *EBN* does not mention either issue expressly, but see the somewhat obscure opening sentence of para 3 (p 93), and the first three unnumbered paragraphs on p 94.

"purely discretionary decision", which "cannot be appealed", is seen as "anomalous and infrequent", with "procedure which is long and complex" and may have "a dissuasively high fee".[30] A less restrictive one is the reverse. In practice, assimilatory France would permit ready naturalisation, while exclusionary Germany would not.

Brubaker's thesis in relation to naturalisation

Recent changes in UK naturalisation law and impending EC law on "long-term resident third-country nationals" make Brubaker's conclusions on naturalisation especially interesting. His general thesis would suggest different propensities to naturalise in France and Germany. This appears to be true. He asserts on the basis of data for the 1980s that "Italians naturalize at rates five times higher, Spanish at rates ten times higher in France than in Germany. And Tunisians and Moroccans in France naturalize at rates nearly ten times higher than that of Turks in Germany".[31] He concludes that "[o]f the nearly three million foreign residents from the core immigrant groups in Germany, fewer than 5,000 acquire German citizenship each year, and nearly half of these are Yugoslavs. France, on the other hand, gains more than 53,000 new citizens each year from a slightly smaller core immigrant population".[32] (However, the status of ex-East Germans, and those of German origin returned from other parts of Eastern Europe, should not be forgotten).

But in both states "foreign workers were recruited in large numbers in the 1960s and early 1970s in response to labor shortages" while "[o]rganized recruitment was suspended in 1973-74" for reasons common to both.[33] Further, "[i]mmigrants in both countries have become dramatically more visible in everyday life during the last two decades"[34] and "[i]n both countries immigrants comprise a substantial fraction of the manual working class and are over-represented in [low grade] occupations".[35] Moreover, "[d]iscourse about immigration and immigrants follows similar patterns in both countries" and there are "striking similarities in immigration policies"[36] of both. Given these "similar migration processes, comparable immigrant populations, and converging immigration policies",[37] the difference in the rate of naturalisation becomes counter-intuitive. The traditions of nationhood are evidently strong.

How, then, are these traditions expressed in naturalisation to produce this counter-intuitive outcome? It is odd that, having mentioned discretion, appeals, procedure and fees as factors in restrictiveness, Brubaker actually examines renunciation of previous citizenship and minimum length of residence. (One could also consider criteria such as good character, the ability to speak the relevant language, and oath of allegiance, although

---

30 *Ibid* p 33.
31 *Ibid* p 78: see Tables 1 & 2 (pp 79-80).
32 *Ibid* p 82: see Table 3 (p 83).
33 *Ibid* p 75.
34 *Ibid.*
35 *Ibid* p 76.
36 *Ibid.*
37 *Ibid* p 77.

perhaps he regarded these as constants.)[38] In any event, French naturalisation law, Brubaker observes, required five years' residence and no renunciation of previous nationality,[39] while German law required 10 years residence and renunciation of any previous nationality.[40] Beyond simple ease of naturalisation, he considers general differences in attitudes to naturalisation are significant emanations of tradition. In France, he suggests, naturalisation is regarded as "a normal and desirable outcome of settlement" for it "alone in Continental Europe has a tradition of immigration. . . ",[41] while Germany "lacks a political culture supportive of naturalisation",[42] expressed particularly in the assertion that "the Federal Republic is not a country of immigration".[43] Yet further, immigrants' own attitudes towards naturalisation are important. Brubaker suggests that in France, many immigrants have "adopted a more instrumental 'desacralized' understanding of citizenship" and "divorced the legal question of citizenship from broader questions of political loyalty and cultural belonging".[44] Low German naturalisation rates, however, "may reflect different understandings of what naturalisation means", for there, naturalisation "is perceived as involving not only a change in legal status, but a change in nature, a change in political and cultural identity, a social transubstantiation. . . ".[45]

Yet detailed examination of differences may obscure an underlying fact. Naturalisation is linked to immigration. It is the way in which immigrants become citizens. This reveals "a circular quality to closure based on citizenship", for "[o]nly citizens enjoy free access to the territory, yet only residents have access to citizenship" which thus "permits nation-states to remain. . . relatively closed and self-perpetuating communities".[46] Brubaker is right to relate, but distinguish between, immigration policies and

---

38 In broad terms, both Lagarde (on France) and Krajewski & Rittstieg (on Germany) in *Nascimbene* (pp 317-318 and pp 368-369) and the EBN entries (pp 83-84 on France and pp 90-91 on Germany) might support such a conclusion, but none mentions an oath of allegiance (though in Germany the applicant must identify with the principles of freedom and democracy, a requirement rather running contrary to Brubaker's general thesis), and neither entry on Germany mentions a language requirement.

39 *Brubaker* p 77: see also Lagarde in *Nascimbene* pp 317-318, who shows that only two years are required where there are "liens familiaux avec un Français"; "mérites personnels"; and "liens particuliers avec la France": also EBN pp 83-84.

40 *Brubaker* p 77: see also Krajewski & Rittstieg in *Nascimbene* pp 368-370. However, *EBN* p 91 asserts that until 1999 the period of residence was 15 years, but that the legislation introducing elements of the *jus soli* also reduced the period to 8 years. Also, although requirement to relinquish previous nationality remains, there are exceptions, and "[w]ith the aim of European integration in mind Germany plans to create incentives for foreigners to acquire German nationality; to this end, the principle of avoiding multiple nationality is waived in the case of reciprocity [*scil.* within the EU]".

41 *Brubaker* p 77.

42 *Ibid.*

43 *Ibid* and p 174: translating and quoting *Einburgerüngrichtslinien* (administrative guidelines on naturalisation) no 2.3, printed in Groth *Einburgerüngsratgeber* Alfred Metzner (1984) p 88.

44 *Ibid* p 78.

45 *Ibid.*

46 *Ibid* p 34.

nationality policies. The former, he points out, are instrumental: "who we let in"; the latter symbolic: "who we are".[47] But he does not fully explicate this "circular quality". How does the non-citizen get "let in" and become resident? If immigration policies create the pool from which naturalisation applicants exclusively come, immigration decisions determine naturalisation ones. A residence requirement means "who we are" is influenced "who we let in", or rather (since many may enter only temporarily, whether as visitors, workers or otherwise), "who we let in permanently".[48] Incidentally, while no right attaching to citizenship is *a priori* more important than any other, and while the modern literature (and indeed, the *British Nationality Act 1981*) sometimes seem to reduce nationality law to a mere adjunct of immigration law,[49] Brubaker does note the significance in a world of territorially bounded states of the fact that "the state may not deny entry to its own citizens".[50]

Applying Brubaker's thesis to the UK

Brubaker's political-assimilatory/ethnocultural-exclusionary distinction cannot simply be an elegant device applying just to France and Germany, but must be a thesis about "citizenship and nationhood" generally.[51] How does it apply to the UK?

"social closure"

Clearly, citizenship acts as a form of social closure in the UK. There are rights and obligations which turn upon it, including "an unqualified right to enter. . . [and]. . . suffrage and military service",[52] though which form of UK citizenship must be discussed below. (An interesting avenue Brubaker does not explore, therefore largely ignored here, is whether the forms and extent of social closure differ as between France and Germany).

"traditions of nationhood"

Brubaker's prime criterion for determining whether the tradition of nationhood is political-assimilatory or ethnocultural-exclusionary is whether state preceded nation or *vice versa*. This is rather difficult to determine in the UK case: what state, what nation?

---

[47] *Ibid* pp 179-189 generally, especially p 182 "The central question is not 'who *gets* what?' but rather 'who *is* what?'" (emphasis in original).

[48] There were, for instance, 86.4m entrants to the UK in 1999, of whom 80% were visitors: see *Control of Immigration Statistics: United Kingdom, 1999* CM 4876.

[49] Parry *Nationality and Citizenship Laws of the Commonwealth and Ireland* (2 vols 1957 and 1960) (hereafter "*Parry*") barely mentions immigration in the whole 1285pp: it was not an issue then. It is now, and Fransman, *British Nationality Law* (2nd ed 1998) (hereafter "*Fransman*"), gives "right of abode" a whole column of references in the index. The "right of abode" is the only right attaching to citizenship mentioned in the *British Nationality Act 1981* (which is the whole point of the Act): see s 39.

[50] *Brubaker* p 25.

[51] *Namier*, though with different fish to fry, looked at Hungarian, Italian, Polish, Swiss and other examples.

[52] *Ibid* p 23: see *Immigration Act 1971* s 2, *Representation of the People Act 1983* s 1, *Act of Settlement 1700* s 3, and *Army Act 1955* s 21.

what state? - Anglo-Saxon attitudes[53]

The United Kingdom of Great Britain and Northern Ireland presumably came into existence in either 1922[54] or (if secession did not change its nature) 1801.[55] However, it is common to consider it did so in 1707 (presumably on the ground that Ireland was simply incorporated into an existing state),[56] or even earlier. This is the constitutional orthodoxy, teleologically eliding the differences between the UK, Great Britain, and England, and treating Ireland, Scotland and Wales as bolt-on modifications. Thus Bradley and Ewing's *Constitutional and Administrative Law* has a section entitled "The historic structure [of the UK]" with subsections on Wales, Scotland, Northern Ireland, the Channel Islands and the Isle of Man, but none on England.[57] The nearest there is to a pivotal event is probably the "Glorious Revolution" of 1688 which did not co-incide with any of the amalgamations producing the UK.

This is also the citizenship lawyers' orthodoxy. Parry mentions Scotland and Ireland, the 1603 Personal Union (and the Dutch and Hanoverian ones, despite which, 1688 and 1714 pass with no more mention than 1603), and the 1707 and 1801 Unions, but as complications in the steady flow of English law.[58] Thus, he traced twentieth century *jus soli* and *jus sanguinis* from a thirteenth century English case and a fourteenth century English statute respectively,[59] without wondering why the former should bind UK courts, or the latter have any force after the English Parliament ceased to exist in 1707.[60] Fransman is better, noting that in 1707 "English subject" became "British subject" and referring to the situation at common law of "[c]hildren

---

53 Carroll, *Through the Looking Glass* ch 7.

54 *Irish Free State (Agreement) Act 1922* (see also *Irish Free State (Constitution) Act 1922* and *Irish Free State (Consequential Provisions) Act 1922*), expressing the Anglo-Irish Treaty and 1922 Irish Constitution: Bradley & Ewing *Constitutional and Administrative Law* (12th ed 1997) (hereafter "*Bradley & Ewing*") p 43 "[the Treaty] recognised the emergence of the Irish Free State, on which Westminster conferred what was then described as the status of a self-governing dominion". Strictly speaking, however, the title was not changed until the *Royal and Parliamentary Titles Act 1927*.

55 *(GB) Union with Ireland Act 1800*, and corresponding legislation of the Irish Parliament (Casey *Constitutional Law in Ireland* (3rd ed 2000) pp 1-2 coyly but unspecifically observes that ". . . the necessary legislation was passed by [the Irish Parliament] by May 1800 . . ."). The tercentenary of the UK passed without any official jollification at all.

56 The precise status of Ireland *vis-à-vis* England, and later Great Britain is, of course, difficult to state in simple terms, given *Poyning's Law* of 1494, the *Declaratory Act* of 1720, etc.

57 Pp 38-48: admittedly it and other texts mention *McCormick* v *Lord Advocate* 1953 SC396 and McCormick "Does the United Kingdom have a Constitution?" (1978) 29 NILQ 1 in discussion on Parliamentary Sovereignty.

58 *Parry* pp 45-47, 57-60.

59 *Elyas de Rabayn* (1290) Bracton f 427b and *De Natis Ultra Mare* 1351 25 Edw 3 st 1 (pp 30-31).

60 Another example is listing the English Act of Union (6 Anne c 11), but not the Scots (1701 c 7) and (p 58), observing that the English Act "should have put an end to the tendency towards the preservation of a separate Scottish nationality. . ." without explaining why the converse was not equally true.

born outside the dominions to an English (or British) ambassador",[61] but repeats the same general analysis. It was also evident in the Parliamentary debates on the *British Nationality Act 1981*.[62]

what nation? - "the Norman Conquest was a Good Thing, as from this time onwards England stopped being conquered and was thus able to become Top Nation"[63]

Similar difficulties bedevil debate on nationhood. These islands plausibly contain English, Irish, Scots and Welsh nations, each with its idioms of nationhood. However, it is the nation which the putative nation-state reflects which counts for citizenship purposes. So which nation legitimises the UK? There is no adjectival form of "United Kingdom", and the ambiguous "British" is usually used instead.[64] Confusingly, especially in England, "British" and "English" are often seen as synonyms[65] (as indeed is "Anglo-Saxon")[66] and popular "British histories", even when written by professional historians, tend to ignore Ireland, Scotland and Wales unless they impinge upon England.[67]

But it is difficult to see how any British identity could precede 1707. *Calvin's Case*[68] neatly demonstrates the point. The issue was whether a Scottish subject of James VI, born after 1603, was also an English subject of James I. How could the question arise unless Scots and English subjects were separate beasts? Colley's influential book, *Britons – forging a nation 1707-1837*,[69] takes as its very title and theme the creation of a "British national identity" (her phrase) in the 18th and early 19th centuries, out of war and religion, intermingled with trade.

---

[61] *Fransman* p 154: see also the generous n 9 on p 4 and n 1 on p 153.

[62] *E.g,*. Mr Hattersley, Shadow Home Secretary, referred in Committee to the limitation of the jus soli as proposing "a change after 700 years of practice" (since *Elyas de Rabayn's Case*?), which takes one half a millennium before the creation of the UK: see *OR Standing Committee F* First Sitting, Tuesday 10 February 1981, col 9.

[63] Sellar & Yateman *1066 And All That* Methuen (1930) p 25.

[64] The individualised form "Britisher" is impossibly Rider Haggard, and "Brit", a recent coining, expresses embarrassed post-modern irony. Also, why are the international UK car licence plate initials "GB" and the £ sterling often rendered as "GBP"?

[65] Paxman *The English: a portrait* (revised edition 1999) p 58, observes that "One of the characteristics of the English which has most enraged the other races who occupy their [*sic*] island is their thoughtless readiness to muddle up 'England' with 'Britain'" (though that very sentence shows that he may not have taken his own lesson to heart).

[66] The Anglo-Saxons were, of course, the original immigrants who "swamped" British culture.

[67] See e.g., *Schama A History of Britain* (2000). A good analysis of this historiographical phenomenon by another professional historian is Davies, *The Isles: a history* (1999), Introduction.

[68] 7 Co Rep 1a, Jenk 306, Moore 790, 2 St Tr 559. For a comprehensible account of this case, see Galloway *The Union of England and Scotland* (1986) pp 148-152 who notes the *postnatus'* name was actually Colville (altered presumably on the ground that all Scots were Calvinists).

[69] Pimlico (1992) (hereafter "*Colley*").

state before nation? – "the British are coming!"[70]

If Colley is right, clearly state in fact preceded nation. However, Brubaker insists that, rather than historian's analysis, it is the tradition of nationhood, expressed in the idioms of nationhood, that counts. The orthodox idiom is probably that, whatever name it is currently trading under, the state is really "Greater England", continuously developing from millennium-old roots, to which the Celtic fringe has been safely gathered in (or not). The nation is similarly a primordial English, to which the Celtic cousins have been admitted.[71]

This does not fit readily into Brubaker's framework. However, it is not difficult to conclude that the UK tradition of nationhood is a "political" one, "conceived in relation to the institutional and territorial framework of the state", and not an "ethnocultural" and "*Volk*-centred" one of a people seeking fulfilment through creation of a state. It is closer to the French position, which would predict an assimilatory citizenship policy. However, the ambiguous "British" conceals two important perspectives, the Irish and the imperial.

the Irish dimension - John Bull's Other Island[72]

Does the Irish dimension alter these conclusions? Clearly, Brubaker offers no direct assistance,[73] but we can note that, as states, Ireland and the UK have had mutually defining effects, and no "British-Irish nation" ever properly evolved to legitimise the original UK.[74] Modern Brito-Irish history has been almost entirely expressed through competing assertions about mutually exclusive nationhoods.[75] So the island of Ireland of presents a prime example of "citizenships" expressing "nationhoods", and Partition encapsulates the issue of legitimacy, the issue of "who we are".

This seems to reinforce the conclusion that (despite 1922), in the UK, nation did not precede state (but indicates, interestingly, the reverse in the case of the state of Ireland) and has a political rather than ethnocultural tradition.[76]

---

[70] Longfellow "Paul Revere's Ride" in *Tales of a Wayside Inn* (1863)

[71] Admittedly *Colley*, who is part Welsh (see p 9) observes (p 6) ". . . nor is [Great Britain's] genesis to be and explained primarily in terms of an English 'core' imposing its cultural and political hegemony on a helpless defrauded Celtic periphery": see also p 373 and ch 3 *passim*. The present writer, who is English, has relations who think being Scottish is an eccentric pastime, rather like morris-dancing.

[72] GB Shaw (1904) (title of play): an incidental implication is that the First Island was John Bull's, not Jock's or Taffy's.

[73] Something might be made of comparison with Algeria, which Brubaker does consider (pp 139-142).

[74] *Namier* observes (p 48) "in the adjoining island a similar mixture of Celt, Anglo-Saxon, and Norman has failed to evolve an Irish territorial identity", and who can disagree?

[75] *Colley* ignores the creation of the United Kingdom: "British" relates only to Great Britain.

[76] *Namier* observed (p 47) that the British concept of nationality was "primarily territorial: it is the State which has created the nationality, and not vice versa", also "[t]he political life of the British island community centres in its Parliament at

It is worth noting that the British Irish Agreement of 1998 (*alias* the Good Friday Agreement, or Belfast Agreement)[77] expressed its basic conclusions in terms of nationhood and citizenship. In Article 1(vi), the two Governments "recognise the birthright of all the people of Northern Ireland to identify themselves and be accepted as British or Irish, or both, as they may so choose, and accordingly affirm that their right to hold both British and Irish citizenship is accepted by both Governments and would not be affected by any future change in the status of Northern Ireland".[78]

It is also worth noting that the social closures are less mutually exclusive than might be expected. In addition to the well-known territorial claim of the Irish Constitution, broadly speaking, Irish law regarded the inhabitants of the North as Irish Citizens.[79] The UK shows an interesting mirror-image. The *British Nationality Act 1948*, while excluding any "citizen of Eire" from British Subjecthood,[80] nevertheless specified that such a citizen was not an alien[81]; was in the same position as a British Subject for the purposes of extraterritorial jurisdiction;[82] and was entitled to retain British Subjecthood by giving notice "at any time" to the Secretary of State, provided s/he fulfilled a simple condition (and such a person *still is entitled*).[83] (Indeed, astonishingly, those who so retained are now almost the only people who are actually correctly titled "British Subjects".)[84] Further, s/he might also register as of right as a Citizen of the United Kingdom and Colonies (and *still may register* for the successor status of British Citizen).[85] The explanation for this enduring policy is probably a desire less to ignore Irish independence than to apply the general principle of the 1948 Act that everyone who was a British Subject before the Act should be so after.

Westminster, which represents men rooted in British soil. This is a territorial, and not a tribal, assembly. . .".

77 Available at www.nio.gov.uk and www.irlgov.ie.

78 See also Annex 2: note also the irredentist Articles 2 & 3 of the Irish Constitution (headed "The Nation"), have been amended, though remain drafted explicitly in terms of nationhood and citizenship.

79 See particularly *Irish Nationality and Citizenship Acts 1956 and 1986* s 7(1): summarised in *EBN*.

80 Section 1.

81 Section 32(1) *sub voc* "alien".

82 Section 3.

83 Crown service, or holding a UK passport, or "associations by way of descent, residence or otherwise with the United Kingdom, or with any [dependent territory]" (s 2, re-enacted without the second condition by s 31(2) of the *British Nationality Act 1981*).

84 1981 Act s 31: the term is no longer applied to British Citizens or citizens of other independent Commonwealth countries, being entirely replaced by "Commonwealth Citizen": see 1981 Act s 37.

85 S 6: replaced by 1981 Act s 4.

the imperial dimension - a fit of absent-mindedness[86]

Although both France and Germany had empires, Brubaker says little about them. England had colonies before 1707, inherited by Great Britain. In the 18th century, Great Britain saw enormous imperial expansion. During the Seven Years War, Colley notes that "the British. . . conquered Canada. They drove the French out of most of their Indian, West African and West Indian possessions. They tore Manila and Havana from the Spanish".[87] These acquisitions were, she considers, difficult intellectually and emotionally to absorb for reasons relating to "nationhood". She suggests that "[t]he spoils of unprecedented victory unsettled. . . in part because they challenged longstanding British mythologies: Britain as pre-eminently a Protestant nation; Britain as a polity built on commerce; Britain as the land of liberty..."[88] The "Thirteen Colonies" were lost shortly thereafter, and arguably because they did not perceive themselves as part of the state (which the mother country would not tolerate), and only ambivalently part of the nation.[89] However, Colley concludes, the outcome "refurbished [British] unity"[90] by uniting Scotland and England more closely; removing "scruples and uncertainties" as to the morality of empire and thus "clarify[ing] and strengthen[ing] London's control" over it; and creating "a far more consciously and officially constructed patriotism which stressed attachment to. . . [*int al*] . . . the importance of empire".[91]

In short, the state enlarged into empire, its inhabitants included into nation[92]. The primary link between UK and the other parts of the empire was simply that the UK had acquired them at various times, so it was the *British* Empire, and the state preceded this agglomeration of people, a position confirmed by *Donegani v Donegani*,[93] which decided that after the conquest of Canada, its inhabitants became British Subjects unless removing themselves. During the 19th Century, the UK acquired further massive territories in Asia, Australasia and Africa. While this may have been done in a fit of absent-mindedness, the mould was set, and conclusions on the priority of state over nation, and a political tradition of nationhood, not dislodged.

---

86 "We seem, as it were, to have conquered and peopled half the world in a fit of absence of mind" John Seeley (1833-1895) *The Expansion of England* [*sic*] (1883): quoted in Jay, *The Oxford Book of Political Quotations* (2nd ed 2001).

87 *Colley* p 101.

88 *Colley* p 103: the Empire had changed from something "small and homogeneous enough to seem reasonably compatible with the values that the British, and above all the English, believed they uniquely epitomised. . . predominantly Protestant and Anglophone" while the new acquisitions "included Quebec with its 70,000 French Catholic inhabitants, as well as large stretches of Asia which were manifestly neither Christian nor white" (p 101-2).

89 *Colley* (pp 132-145) suggests that, the colonies having been founded by the Crown, not Parliament (which had largely ignored them for a century), the colonists saw themselves as in a direct relationship with the Crown and not subject to Parliamentary taxation: thus, in brief, the American War of Independence.

90 *Colley* p 144

91 *Colley* p 145

92 Or did state part company with nation?

93 (1834, 1835) 3 Knapp. 63: see discussion in *Parry* pp 72-73 and 431-436. Contemporary discussion used the term "English Subject".

Empire also produced one fundamental fact of UK citizenship law, further confirming a political tradition of nationhood, but having its own significance. Until the *British Nationality Act 1948*, there was effectively only one British nationality status: British Subject ("BS"), a multi-racial, multi-cultural, multi-ethnic "common status"[94] for the entire Empire and Commonwealth, acquired according to UK law. As a compromise with the aspirations of independent Commonwealth countries who sought their own citizenships, the 1948 Act retained this common status, but permitted the alternative title of "Commonwealth Citizen" ("CC": thus "BS/CC") for the benefit of those countries not wishing to appear subject to Britain, and altered the method of acquisition. It was now acquired indirectly, by acquisition of a "gateway citizenship",[95] that is the citizenship of a Commonwealth state. Thus one became a BS/CC by acquiring Australian Citizenship if connected with Australia, Indian Citizenship if connected with India, "Citizenship of the UK and Colonies" ("CUKC") if connected with the UK, *etc*.[96]

The *British Nationality Act 1981* continued this structure, subject to two changes. Firstly, it restricted the name of the common status to "CC" only, on the ground that "BS" had a dated air. Secondly, it split the UK gateway citizenship of CUKC into three, namely "British Citizenship", "British Dependent Territories Citizenship" and "British Overseas Citizenship" ("BC/BDTC/BOC")[97] on the ground of immigration concerns, as explained below in relation to "preservation by manipulation" of the *jus soli*. Neither change affected the existence or effect of the "common status".

Three further post-imperial changes require mention.[98] Firstly, "British Dependent Territories" have become "British Overseas Territories", and "BDTCs" consequently "BOTCs".[99] Secondly, broadly, all present and future BOTCs become BCs as well.[100] Thirdly, it appears BOCs may be able to register as BCs as of right.[101] Again, these will be explained below in

---

[94] *Parry* pp 85, 92-4

[95] Cmd 7326, quoted in *Parry* p 92

[96] *British Nationality Act 1948* s 1: decolonisation in the 1960s did not upset this compromise. Indeed, it confirmed it, for each newly-independent ex-colony's citizenship became a new "gateway citizenship", its inhabitants acquiring that, and losing CUKC, status (subject to exceptions).

[97] See *British Nationality Act 1981* Pts I-III, and relevant references in *Fransman.*

[98] Others changes relate to the Falklands Islands and Hong Kong (on which see, *e.g.*, "The Relationship of Immigration and Nationality" (1996) 1 *Contemporary Issues in Law* 25-45 (hereafter "*White 1996*"), at 14-45, but note more recent legislation, and for a fuller account, see White, *Nationality and Hong Kong: a tragedy in five Acts?* (1998) 6 Asia Pacific Law Review 23-65 (hereafter "*White 1998*")), and most recently, to the ex-inhabitants of the British Indian Ocean Territory (for which, see *R (Bancoult)* v *Secretary of State for Foreign and Commonwealth Affairs* [2001] 2 WLR 1219 and *British Overseas Territories Act 2002* s 6).

[99] *British Overseas Territories Act 1992* ss 1, 2 (and see White Paper *Partnership for Progress and Prosperity* Cm 4264 (1999)): presumably the Government foresaw the possible confusion between "BOTC" and "BOC", which remain separate statuses.

[100] *Ibid*, ss 3, 4, 5 & Sch 1: there are presently irrelevant exceptions.

[101] *HC Deb WA col 527W* (4th July 2002) promising amendment to the *Nationality, Immigration and Asylum Bill 2002*.

relation to the "preservation by manipulation" of the *jus soli*. Again, none affect the existence or effect of the "common status".

But what, beyond confirming the political tradition of nationhood, is the significance of this fundamental fact of a "common status" (to which other citizenships are "gateways")? The answer is that, so far as the UK is concerned, it is to BS/CC (now just CC) status that "suffrage and military service", two of Brubaker's three prime criteria of "social closure", and other standard incidents of nationality such as the right to stand for public office, have always, and still do attach.[102] Only claims to diplomatic protection, entitlements to a passport and any right of entry attach to the "gateway citizenship" of BC (or, *mutatis mutandis* BOTC, as it now is, or BOC).[103] A warning is necessary. Firstly, the legal effect of BS status was a matter of local law, and not all colonies were as liberal as the UK was, so the common status meant little in some places.[104] Secondly, for all this period, the UK was a country of net emigration, which has a significance we reach later.

Acquisition at birth

If the UK tradition of nationhood is a political one, Brubaker's thesis requires that UK nationality law should be assimilatory, not exclusionary, and adhere to a *jus soli*.

allegiance and jus soli

At common law, British Subjecthood flowed from allegiance, and the first general statutory regime, the *British Nationality and Status of Aliens Act 1914*, declared that all persons "born within His Majesty's dominions and allegiance" were "deemed to be natural born British Subjects".[105] In practice, this simply meant the *jus soli* applied, subject to insignificant exceptions. The common status of BS required this, so under common law and the 1914 Act, anyone born in Perth, Scotland had the same status as anyone born in Perth, Western Australia.

The *British Nationality Act 1948* compromise caused the UK to put the *jus soli* into explicit legislative form, so "every person born within the United Kingdom and Colonies" became a CUKC.[106] Thus, while those born in the two Perths now had separate gateway citizenships (as Australia was independent), those born in Kingston-upon-Hull, England and Kingston, Jamaica (as Jamaica was still a colony) still had the same gateway

---

[102] *Representation of the People Act 1983* s 1, *Act of Settlement 1700* s 3, *Army Act 1955* s 21.

[103] BOTCs and BOCs claim diplomatic protection from the UK Government. BOTCs claim passports from the government of the territory through which they obtain the status, but BOCs claim them from the UK Government. BOTCs will normally have a right of entry to the territory through which they obtain the status, but notoriously BOCs have no right of entry at all (see "preservation by manipulation" below).

[104] See *e.g.*, Huttenback, *Racism and Empire: white settlers and colored immigrants in the British self-governing colonies 1830-1910* (c1976).

[105] S 1.

[106] S 4: it vainly hoped all other independent Commonwealth countries would follow suit.

citizenship, CUKC, but all would remain BS/CC.[107] Such a policy could hardly be more assimilatory, and was certainly more so than the French.

mixed jus soli and jus sanguinis

However, although the common status/gateway citizenship compromise was retained by the *British Nationality Act 1981*, this simple and assimilatory *jus soli* provision was substantially altered. The 1981 Act (as originally drafted) stipulated that "[a] person born in the United Kingdom. . . shall be a British Citizen if at the time of his birth his father or mother is: – (a) a British Citizen; or (b) settled in the United Kingdom. . ." [108]. Parental status is now an additional condition (although a "settled" alien parent can substitute for a national). This was a move away from assimilation, still no less generous than the French position, though begging the question of the position of BDTCs (now BOTCs) and BOCs.

preservation by manipulation

Subject to this last question, Brubaker seems vindicated. However, to regard the UK as simply assimilationist is counter-intuitive, and the tripartite BC/BDTC/BOC structure and changes to the status of BDTCs and BOCs both require interpretation, which comes by consideration of UK immigration legislation, which preserved the *jus soli* by manipulating it.

Firstly, the tripartite structure: the UK became a country of occasional net immigration and, though there were labour market considerations, UK immigration policy from the 1950s was primarily to limit "coloured immigration", that is, reduce the propensity of BS/CCs from the West Indies, Indian Sub-Continent and Hong Kong to use the right of entry to the UK which they had always had, but rarely used till then. This aim was clearly ethnoculturally exclusionary. It is difficult to see the desire in the 1950s and 1960s to exclude English-speaking, cricket-playing, monarchy-respecting West Indians (including numbers of demobbed ex-servicemen) as motivated by them failing to accept British cultural norms.

This policy was effected by the *Commonwealth Immigrants Acts 1962* and *1968*. The precise operation of these Acts is complicated and ill-understood. Very briefly, the two Acts removed the right of entry to the UK from BS/CC as such. Indeed, they removed it not only from non-CUKC BS/CCs (as might have been defensible), but also from many CUKCs BS/CCs too (as was in fact their purpose). Indeed, they subdivided CUKC status into three classes: CUKCs with a right of entry to the UK (who were generally white); CUKCs with no right of entry to the UK, though normally with a right of entry to a colony (who were generally West Indian or Chinese); and CUKCs with no right of entry to the UK, nor to a colony, nor indeed to anywhere else (who were the "East African Asians"):[109] a tripartite distinction embarrassing in ECHR terms,[110] and otherwise.

---

[107] By virtue of s 1.

[108] S 1(1) for BCs (but see now the changes wrought by the *British Overseas Territories Act 2002* ss 5 & Sch 1, and discussed below).

[109] Less briefly, the 1962 Act kept out "coloured immigrants" both from the independent Commonwealth countries such as India and Pakistan (as well as white ones from Australia and Canada) who would generally be Indian Citizens

This distinction was crystallised into the BC/BOTC/BOC structure, noted above in relation to the "imperial dimension", by the *British Nationality Act 1981*.[111] Under that Act, BCs acquired the status by the modified *jus soli* in the UK;[112] BDTCs acquired the status by the modified *jus soli* in a colony;[113] and BOCs did not acquire the status by *jus soli* at all, since it was designed to be acquired at commencement only. And the only right attaching to BC status is the "right of abode":[114] which was the purpose of the Act. This manipulation of statuses to limit the right of entry to the UK thus permitted preservation of the *jus soli* in heavily modified form.

Secondly, the changes to the status of BDTC and BOC: these were also noted above in relation to the "imperial dimension", and they amount to a significant reversal of the policy of the 1962 and 1968 Acts. Since BOTCs (as they now are) will generally also be BCs from now on, and BCs may be able to become so, they will regain the right of entry to the UK.[115] This is remarkable in itself, but of more immediate interest is that the modified *jus soli* undergoes a consequential further modification such that being "born in a qualifying territory" (that is, a British Overseas Territory[116]) is now as good as being "born in the United Kingdom" for the purpose of acquiring BC status at birth.[117] So, while the parental requirement remains, the territorial extent of the *jus soli* returns to something like its 1948 dimensions.

But why the reversal of policy? The answer in relation to BOTCs (as they now are) is straightforward. The White Paper preceding the *British Overseas*

---

or Pakistani Citizens (etc), and not CUKCs; and from the colonies such as the still-colonial West Indies and Hong Kong (as well as the Falkland Islands and Gibraltar) who generally would be CUKCs. It did so by restricting the right of entry to the UK to CUKCs who were either born in the UK, or held a passport issued by the UK Government (as opposed to a colonial government, such as Antigua or Hong Kong). Thus the first two classes of CUKC. The 1968 Act followed upon the independence in the East African colonies. CUKCs there of African origin became citizens of Kenya, Malawi or Uganda, but many CUKCs of Indian Sub-continent origin were effectively denied such citizenship, so remained CUKCs. There were no longer colonial governments there to issue them with passports, so their passports became ones issued by the UK Government, and they thereby regained the right of entry (by transferring them from the second class to the first). When they tried to use that right, the 1968 Act was passed to exclude them by requiring "UK passport holders" to have an ancestral connection with the UK as well to retain the right of entry. So not only had they no right of entry to Kenya, Malawi or Uganda, they lost their right of entry to the UK too. Thus the third class of CUKC. For a fuller explanation, see *White (1996)*, at 35-38.

110 See *East African Asians* v *UK* (1973) ECHR 76.

111 There was further manipulation by the *Immigration Act 1971* which created the additional concept of "patriality", which was abolished by the 1981 Act, and is too complicated to discuss here, though it supports the argument on manipulation.

112 *British Nationality Act 1981* s 1(1) (as originally enacted).

113 *Ibid* s 15(1).

114 *Immigration Act 1971* s 2(1)(a) (now as amended).

115 *Ibid*.

116 *British Nationality Act 1981* s 50 (1) (as amended by *British Overseas Territories Act 2002* s 5, Sch 1, para 5).

117 *Ibid* s 1(1) (as amended by *British Overseas Territories Act 2002* s 5, Sch 1, para 1(2): and see Sch 1 generally).

Territories Act 2002 referred to their "sense of grievance", "an irritant affecting the ease with which they can travel" and simply that they "feel British".[118] But these complaints date from 1962 and if taken seriously then would have prevented introduction of the *Commonwealth Immigrants Act 1962*. So what has changed? The answer is that the vast majority of BDTCs (more than 3,000,000 latterly)[119] were always in Hong Kong. After the handover of Hong Kong to China, in 1997, the total population of all remaining dependencies was small (probably about 186,000).[120] So the ethnocultural threat is tiny and it is safe to give them back the right of entry to the UK. In relation to BOCs, the distinction is a little less straightforward, though essentially similar.[121]

acquisition at birth - conclusions

Thus the *jus soli* remained (albeit modified by the parental requirement), but at the price of manipulation of statuses for distinctly ethnoculturally exclusionary reasons, and the state did in fact "deny entry to its own citizens". Indeed, this manipulation became a basis of the citizenship law, and the circumstances of the recent reversal of policy underline the point. Brubaker's thesis is not simply vindicated.

Acquisition after birth

If state preceded nation, Brubaker's thesis also requires that, irrespective of immigration experience (and the UK partook of "similar migration processes, comparable immigrant populations and converging immigration policies" to those of France and Germany), the UK naturalisation régime be relatively liberal; regarded as normal by natives; and widely used by immigrants. This is of immediate interest given impending changes in UK naturalisation, discussed below.

settlement - the pool of naturalisation applicants

The starting point is Brubaker's insight on the "circular quality of social closure", though it was suggested that he does not fully explicate the implication that "who we let in permanently" (that is, for "settlement"[122]) influences "who we are" because it provides the pool of naturalisation applicants. The immigration policy described above can be summed up as "Less!"[123] but was never "None!". The UK has never applied a *Gastarbeiter*

---

[118] *Partnership for Progress and Prosperity: Britain and the Overseas Territories* Cm 4264 (1999), para 3.6.

[119] See *Hong Kong: the nationality provisions of the Hong Kong Act 1985: a draft Order in Council* Cmnd 9637 (1986), para 10: and adjust for the lapse of a decade.

[120] See *Second Report from the Foreign Affairs Committee "Dependent Territories: Interim Report"* HC Paper (1997-98) No 347 para 16

[121] After the *East Africans Case* (see n 110 above). BOCs were not mentioned in *Partnership for Progress. . .* (see n 118 above).

[122] "Settlement" is a term of art for those with unrestricted rights to remain in the UK: see *Immigration Act 1971* s 3(1),(2A) and *Statement of Changes in Immigration Rules* ("*the Immigration Rules*") HC Paper (1993-94) No 395 para 6: also paras 134, 255 (as substituted by CM 4851 (2000) para 23), and 288, and *Immigration (European Economic Area) Regulations 2000* (SI 2000/2326) reg 8.

[123] Or rather, "Fewer".

policy. Once admitted, immigrants might always settle permanently ("primary immigration"), and indeed achieve family creation and reunification ("secondary immigration") with or without naturalisation.

The pool of settled immigrants is therefore substantial. In the two decades before 1998, acceptances for settlement (that is, grants of leave to enter, or to remain, indefinitely) ran at some 50,000 to 70,000 per annum.[124] It is also clearly very preponderantly "secondary". In 1998, almost 70,000 were accepted for settlement,[125] 75% (53,000) of whom were family members of people settled in the UK, whether BCs or not (including some 13,500 husbands, 22,000 wives, 12,300 children and 5,000 others).[126] Only 6% (4,200) were work permit holders or similar; 9% (6,500) were refugees; and 8% (5,500) others.[127]

Further, it also largely reflects the primary immigration of half a century ago. The biggest single source of the 70,000 was the Indian Sub-Continent (excluding Sri Lanka) at 24% (16,500), the rest of Asia providing another 20% (13,500).[128] The next biggest was Africa with 23% (16,000); followed by 15% (11,000) from the Americas, including the West Indies; 11% (7,500) from Europe (despite free movement of workers, only 0.4% – just 270 – from the European Economic Area[129]), and 5% (3,500) from Oceania.[130]

the naturalisation regime

Turning to the naturalisation régime, five principal Acts have operated a modern naturalisation procedure, that is, the *Naturalisation Acts 1844* and *1870*, and the *British Nationality Acts 1914*, *1948*, and *1981*.[131] (Procedure for married women has altered significantly but, as Brubaker does not consider that interesting topic, it is not pursued here). A sixth Act is about to be passed.[132]

Brubaker's criteria for restrictiveness of naturalisation were the number of years residence and the requirement (or otherwise) to renounce previous nationality. The 1844 Act imposed no specific length of residence at all. Only in 1870 did a specific requirement, of five years, appear, and this has

---

[124] Dudley & Harvey *Control of Immigration Statistics: UK, 2000* Home Office Statistical Bulletin 14/01 (hereafter "*HOSB 14/01*": available at www.homeoffice.gov.uk/rds/hospubs1.html) Fig 1 and paras 16 & 21.

[125] *HOSB 14/01* Table 3.1. Since 1998, the number of acceptances has almost doubled "mainly due to a rise in asylum-related settlement" (*ibid* p 1 "main points" first unnumbered paragraph) so to avoid the complexities this factor introduces, the 1998 figures are chiefly considered here.

[126] *Ibid* ("husbands & wives" includes fiancé(e)s, accepted for settlement after marriage).

[127] *Ibid*.

[128] *Ibid* Table 3.2.

[129] *Ibid*.

[130] *Ibid*.

[131] See also the *British Nationality Act 1943* s 4. Before 1844, it was normally only by private Act of Parliament.

[132] *I.e.*, the *Nationality, Immigration and Asylum Bill 2002* awaiting its Report and Third Reading stages in the House of Lords at the time of writing. It is not thought that there will be any relevant amendments at these stages.

applied ever since, with modifications,[133] with a continuing power to reduce this period in certain cases.[134] Renunciation has never been required, though the 1870 Act[135] divested a British Subject voluntarily naturalising elsewhere of British Subjecthood, a policy continued by the 1914 Act,[136] but repealed by the 1948 Act. The UK now expressly requires an applicant not be in breach of immigration laws and be settled[137]. Probably this requirement was informally applied before through the Secretary of State's discretion. It emphasises that the pool of applicants is "who we let in permanently". So far, UK naturalisation seems as unrestrictive as the French.

There are complications. Until the 1914 Act, "local naturalisation" was allowed in colonies,[138] but universal "imperial naturalisation" required UK residence. From 1914 to 1948 Acts (although "local naturalisation" continued), "imperial naturalisation" required just one year's residence in the UK, and the rest might otherwise be anywhere in the Empire or Commonwealth. From the 1948 to 1981 Acts, reflecting the UK's reduced colonial responsibilities (expressed in the "gateway citizenships"), naturalisation as a CUKC required residence anywhere in the UK or colonies (but not in independent Commonwealth countries, who had their own gateway naturalisation). From the 1981 Act, reflecting the creation of the UK's three new "gateway citizenships", residence must be in the UK for BCs, or a colony for BDTCs[139] (and independent Commonwealth countries continue to follow their own policies). This still seems unrestrictive.

Brubaker mentions, later to ignore, the criteria of restrictiveness as discretion, appeals, procedure and fees. Until now, suffice it to say that the UK standard naturalisation has been discretionary,[140] unappealable,[141] subject to no complicated procedure,[142] but with significant fees.[143] Also, there are criteria not mentioned by Brubaker. A future residence requirement has

---

133 1870 Act s 7; 1914 Act s 2(1)(a),(2); 1948 Act s 10 Sch 2 para 1(a)(b); 1981 Act ss 6(1)(2) & 18, Sch 1 paras 1(2)(a)(b), 3(1)(a)(b) and 5(1)(a)(b).

134 *E.g.*, now 1981 Act ss 6(1)(2) & 18, Sch 1 paras 2(a)(b), 4(a)(b) and 6(a)(b).

135 S 6 (implementing an agreement with the USA: see *Parry* p 183).

136 S 13.

137 1981 Act s 6(1),(2) Sch 2 paras 1(2)(c)(d) and 5(1)(c)(d).

138 This raises questions of terms of acquisition and territorial extent, too complicated to be pursued here: but see *Parry* pp 774-77 and each territory section.

139 On earlier periods, see *Parry*, also 1870 Act s 7; 1914 Act s 2(1)(a),(2); 1948 Act s 10 Sch 2 para 1(a)(b); 1981 Act s 6(1),(2), Sch 1 paras 1(2)(a)(b) and 5(1)(a)(b).

140 1844 Act s 7; 1870 Act s 7; 1914 Act s 2(1); 1948 Act ss 10, 26; 1981 Act ss 6(1), 44: *Fransman* para 14.2 suggests, however, that there is little sign that, once the conditions are fulfilled, any further discretion is applied, and see *R* v *Secretary of State for the Home Department ex parte Fayed* [1998] 1 WLR 763, [1997] 1 All ER 228. On 22 December 1997, the Home Secretary announced that he would in future give reasons for refusal

141 But see *ex parte Fayed* (previous note).

142 Currently, principally the *British Nationality (General) Regulations 1982* SI 1982/986: it is the law which is complicated, not the application procedure.

143 Currently, £150 for straight naturalisation: *British Nationality (Fees) Regulations 1996* SI 1996/444.

always existed.[144] So probably has one of an oath of allegiance, formally required since 1844 (when it was over 170 words, required to be administered by an English or Irish, but not, curiously, a Scottish, judge, and included adherence to the Protestant succession).[145] Language and good character requirements have also no doubt always informally been applied through the Secretary of State's discretion, although neither was formally imposed until the 1914 Act, and the former is not exiguously applied and can be waived.[146] Crown service, now extended to service with international organisations or even UK companies, has been an alternative to past residence since 1914, and is now also an alternative to future residence.[147] If these factors are taken into account, naturalisation seems somewhat more restrictive.

It seems more so in the light of current changes, which are most interesting given Brubaker's analysis. These relate to appeals, procedure, and the allegiance and language requirements, and constitute a major policy shift.[148] No appeal as such is introduced, but the provisions exempting the Secretary of State from giving reasons for grant or refusal of naturalisation are repealed, making judicial review a real possibility.[149] Also, "nationality functions" are removed from the exemption to the application of race relations legislation,[150] which might be seen as an incidental distancing of naturalisation from ethnocultural exclusion.

These changes are less important, however, than changes in procedure, and the allegiance and language requirements, which must be taken together. Firstly, there is now to be a "citizenship ceremony".[151] No form is laid down for such ceremony but the Secretary of State is empowered to make regulations for "the content and conduct of a citizenship ceremony" and related purposes.[152] The significance of this is that (subject to a dispensing

---

144 On pre-1844 private Acts, see *Parry*; 1844 Act s 6; 1870 Act s 7; 1914 Act s 2(1)(c); 1948 Act s 10, Sch 2 para 1(e)(i); 1981 Act ss 6 & 18, Sch 1 para 1(1)(d)(i).

145 1844 Act s 10; 1870 Act s 9; 1914 Act ss 2(4), 24, & Sch 2; 1948 Act ss 6, 10 & Sch 1; 1983 Act ss 6, 42(1) Sch 5.

146 Since the 1981 Act, it may be taken in Scottish Gaelic (but not Irish – why?) or Welsh.

147 1914 Act s 2(1)(a); 1948 Act s 10 Sch 2 para 1(2)(a); 1983 Act s 6 & 18, Sch 1 para 1(3), 5(3).

148 There are other amendments in the *Nationality, Immigration and Asylum Bill 2002* in relation to deprivation and resumption of citizenship, etc, which are not considered here.

149 *Nationality, Immigration and Asylum Bill 2002* cl 7(1): at the time of writing, the Bill awaits its Report and third Reading stages in the House of Lords, and no amendments to this provision are anticipated.

150 *Ibid* cl 6.

151 *Ibid* cl 3 & Sch 1 para 1 (substituting a new s 42 into the *British Nationality Act 1981*).

152 *British Nationality Act 1981* s 41(1)(db) (as substituted by *Nationality, Immigration and Asylum Bill 2002* cl 3 & Sch 1, para 4), and see s 41(1)(da),(dc) (as so substituted). S/he may also make regulations designating or authorising persons to exercise functions ("which may include a discretion"), and require local authorities to provide specified facilities, in connection with such ceremonies: *ibid* s 41(3A) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 3 & Sch 1, para 7, and see also Sch 1, para 9).

power in the Secretary of State) making the new oath and pledge (considered shortly) at such ceremony is to be a prerequisite of naturalisation.[153] Secondly, then, added to the oath of allegiance to the Sovereign (which remains unaltered) there is to be added a "pledge" expressing loyalty to the United Kingdom, its rights and freedoms, and its democratic values.[154] The significance of this is the clear change of focus of allegiance. Thirdly, the language requirement is to be tightened, by empowering the Secretary of State to make regulations "for determining whether a person has sufficient knowledge of a language for the purpose of an application for naturalisation" and related purposes.[155] The significance of this has to be looked at in connection with the next point. Fourthly, an entirely new formal requirement for naturalisation is created, that is "sufficient knowledge about life in the United Kingdom".[156] These changes clearly make naturalisation more restrictive, but equally clearly indicate an increasingly clear political, rather than ethnocultural tradition. They are returned to in relation to the "natives' attitude towards naturalisation" below.

"Registration" must be mentioned, a process which once made naturalisation less restrictive. The 1948 Act, as part of the common status/gateway citizenship compromise, allowed holders of another "gateway citizenship" to become CUKCs on the strength of twelve months ordinary residence, or Crown service, in the UK.[157] Thus it was an entitlement, and there was a single, unexiguous, condition of residence which was readily achievable through the right of entry to the UK until 1962. However, the *Commonwealth Immigrants Act 1962* not only removed the right of entry from BS/CCs, but also increased the residence requirement to five years.[158] Further, the use of registration was considerably altered by the 1981 Act and rendered enormously complex, in part by transitional provisions and

---

[153] *British Nationality Act 1981* s 42(2),(4),(6),(7) (as substituted by *Nationality, Immigration and Asylum Bill 2002* cl 3 & Sch 1). The words of the pledge are: "I will give my loyalty to the United Kingdom and respect its rights and freedoms. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen [or BOTC, or BOC]". There may be logical difficulties in simultaneously swearing loyalty to different entities in the oath and the pledge, as well as difficulties in pinning down precisely what the pledge means. Comparison may nevertheless be made with the requirements for naturalisation in Germany referred to in n38 above.

[154] *British Nationality Act 1981* Sch 5 (as substituted by *Nationality, Immigration and Asylum Bill 2002* Sch 1, para 2).

[155] *British Nationality Act 1981* s 41(1)(ba) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 1(2)). S/he may also make regulations concerning specified qualifications, courses, levels of achievement, *etc*: *ibid* s 41(1A) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 1(3)).

[156] *British Nationality Act 1981* Sch 1, para 1(1)(ca) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 1(1)). The Secretary of State is given powers in relation to such knowledge, parallel to those concerning language qualifications, courses etc: *ibid* s 41(1)(bb) (as inserted by *Nationality, Immigration and Asylum Bill 2002* cl 1(2), (3)). It will be fascinating to discover what aspects of life will be covered, and how sufficient knowledge demonstrated. It would be a cheap shot to wonder if there might be a question on whether the national dish is chicken tikka.

[157] 1948 Act 6(1).

[158] 1962 Act s12(2).

abandonment of the simple *jus soli*. This cannot be examined here, but in brief, the "intra-gateway" registration was not continued (save for transitional cases),[159] though a parallel form was enacted for BDTCs and BOCs to register as BCs.[160] The recent changes in relation to naturalisation discussed above apply, *mutatis mutandis* to the remaining forms of registration.

On balance, then, naturalisation (including registration) has been as unrestrictive as the French, though the criteria unexamined by Brubaker and the 1962 and 1981 Acts, and the recent changes, cast doubt. Brubaker's thesis is only equivocally supported.

natives' attitudes towards naturalisation

Brubaker's criterion of natives' attitudes towards naturalisation can be inferred from anecdotes and Government thinking. As to anecdotes, Zola Budd may be recalled.[161] She was a South African runner when, during the era of *apartheid*, South Africa was boycotted from the 1984 Olympic Games. The Home Office processed her application for citizenship in possibly unprecedented time, in order for her to compete for the UK. This was widely applauded. In a recent case with a different outcome, a 22-year-old Australian, settled in the UK with his family some nine years earlier, applied for naturalisation. He was a talented basketball player and under the relevant rules, could not play professionally in the UK unless a "UK citizen". However, he had spent approaching four of the preceding five years, including the whole of the preceding year, in the USA on a sports scholarship, so failed to fulfil the residence requirement, and it appears the Secretary of State declined to waive it. His father was reported as regarding the decision as "nothing but red tape" and as being supported by his MP, and the British Basketball League was quoted as considering it "ludicrous".[162]

As to Government thinking, a recent example is the Hinduja "Passports-for-Favours" Affair. Two millionaire businessman brothers sought naturalisation. Initially refused on residence requirement grounds (though good character was in issue), they were finally granted citizenship in 1998. The matter came to public attention because of suggestions that a senior Minister tried to facilitate their naturalisation in return for funds for the Millennium Dome. An enquiry, while finding he behaved properly, at least temporarily ended his ministerial career.[163] It also produced evidence of

---

159 1981 Act s 7.

160 1981 Act s 4: there is no parallel provision for registration as a BDTC.

161 See *e.g.*, *Times* of various dates in 1984, including 3, 9, 27 March; 10, 11, 14, 24, 27, 28 April; 8, 16 May; 1 June; 28 July, 27 September; 1, 2, 3 November.

162 *Dundee Courier* 3/11/01: it may be significant that both cases involve sport, and that the applicant in the second had a very Scottish name. A straw poll of 30 Honours law students of nationality and immigration law in November 2001 produced a third who thought the operation of the law appropriate, a third who thought sport demanded special rules, and a third who could not see what the fuss was about.

163 *Review of the Circumstances Surrounding an Application for Naturalisation by Mr SP Hinduja in 1998* by Sir Anthony Hammond KCB, QC HC Paper (2000-2001) No 287 (also *Review of the Conclusions of the 2001 Review. . .* HC Paper (2001-2002) No 652)

lobbying for the naturalisation by public figures, and shed light on the application process and Secretary of State's discretion. Not only was the waivable residence requirement waived, but so was "the unwaivable requirement" of presence in the UK.[164] Also, possible good character difficulties were overlooked;[165] and the application was considerably prioritised.[166] It is difficult to resist the conclusion that all this was because it was thought some of the applicants' wealth would rub off on the UK.[167]

Two Home Office reports published in December 2001 on racially-linked rioting in northern English towns[168] are further evidence. Their principal remedy, "social cohesion", relates to citizenship in a non-legal sense ("good citizenship"), but the argument is clearly part of the "politics of identity". Multiculturalism was seen as compatible with "nationhood" only so long as certain "inviolable rights and duties" were upheld.[169] What caught press attention[170] was the conclusion that there should be "a universal acceptance of the English language" and "a clearer statement of allegiance".[171]

This presaged the most important White Paper *Secure Borders, Safe Haven: integration with diversity in Modern Britain* (2002)[172] which contained a chapter on "Citizenship and Nationality"[173] indicating the considerable changes in Government thinking which emerged in the recent legislative changes proposed on naturalisation. It opened by indicating that "those who settle here [should] gain a fuller appreciation of the civic and political dimensions of British citizenship and . . . understand the rights and responsibilities that come with [its] acquisition" and rehearses the theme of "welcom[ing] the richness of cultural diversity which immigrants have brought to the UK", while recognising that it "will sometimes be necessary to confront some cultural practices which conflict with [British Citizenships'] basic values".[174] The significance of naturalisation was to be enhanced in the three broad ways[175] which we have met when dealing with the proposed legislative changes, that is: citizenship ceremonies "celebrating

---

[164] *Ibid* paras 5.153-5.155, 5.178-5.187
[165] *Ibid* paras 5.156-5.162, 5.192-5.196
[166] *Ibid* paras 5.166-5.177 and Annex D (note Para 3(1)(a), (2)(j), (l) thereof, also 3(2)(g) in relation to Zola Budd).
[167] *Ibid passim*
[168] *Building Cohesive Communities: a Report of the Ministerial Group on Public Order and Community Cohesion* (hereafter "*Ministerial Group*") and *Community Cohesion: a Report of the Independent Review Team Chaired by Ted Cantle* (hereafter "*Cantle*").
[169] *Ministerial Group* para 3.12
[170] *E.g., Scotsman* 12/12/01 p 8 "Oath stalls frank talk on racism in Britain"
[171] *Cantle* paras 5.1.7 and 5.1.15
[172] CM 5387 (hereafter "*SBSH*") which draws on and replaces *Fairer, Faster and Firmer: a modern approach to immigration and asylum* CM 4018 (1988), the first White Paper on the subject since 1964.
[173] *Ibid*: Annex A contains an interesting brief chart of naturalisation requirements in seven other states.
[174] *Ibid* paras 2.1, 2.2 and 2.3.
[175] The other legislative changes were also outlined: *ibid* paras 2.9-2.10, 2.24-2.25.

the acquisition of citizenship;[176] a reworded oath of allegiance referring to "citizenship obligations";[177] and formal language and "citizenship" tests.

The significance of all this is that the natives seem to view citizenship in a rather instrumental way, but certainly as "a normal and desirable outcome of settlement". Indeed, the proposed increased restrictiveness is specifically designed to enhance "an essentially political understanding" of citizenship "centrally expressed in the striving for cultural unity", running contrary to Brubaker's equation of political tradition with unrestrictiveness. His thesis is again only equivocally supported.

immigrants' attitude towards naturalisation

Immigrants' attitudes towards naturalisation are also difficult to gauge. Brubaker's primary evidence is simply propensity to naturalise. Although direct comparison with his figures for France and Germany is not possible, it is clear that in the UK, among the pool of the "settled", the propensity is high.

Some 82,000 people naturalised as British Citizens in 2000.[178] This was a considerable rise over the previous year, indeed over any year in the preceding decade, when the numbers fluctuated between about 40,000 and 60,000.[179] However, such fluctuations are in part an artefact of Home Office activity,[180] so the number of applications is a better index of demand. These show a steady rise from 1991 (less than 40,000) to 1998 (nearly 70,000) with a small drop thereafter (to about 65,000 in 2000).[181] Since, as noted above, some 50,000 to 70,000 people were accepted for settlement each year over the same period,[182] it is clear that the great majority of the pool of those settled seek, and achieve, naturalisation.[183]

To emphasise the point, their geographical origins show remarkable similarity to those for settlement, also noted above.[184] In 2000, 27% (22,000) of those naturalised were from the Indian Sub-Continent (excluding Sri Lanka), with a similar proportion from Africa, and the rest of Asia and non-

---

176 *Ibid* paras 2.19-2.20

177 *Ibid* para 2.21 and Annex B "I [swear by Almighty God] [do solemnly and sincerely affirm] that, from this time forward, I will give my loyalty and allegiance to Her Majesty Queen Elizabeth the Second Her Heirs and Successors and to the United Kingdom. I will respect the rights and freedoms of the United Kingdom. I will uphold its democratic values. I will observe its laws faithfully and fulfil my duties and obligations as a British citizen".

178 Dudley & Harvey *Persons Granted Citizenship, 2000* Home Office Statistical Bulletin 9/01 (hereafter "*HOSB 9/01*": available at www.homeoffice.gov.uk/rds/hospubs1.html): see also Fig 1 in *SBSH*.

179 HOSB Fig 1 & para 2

180 *Ibid* para 2

181 *Ibid* Fig 2 and para 1: see also Fig 1 in *SBSH*.

182 *HOSB 14/01* Fig 1 and paragraphs 16 & 21.

183 However, "there must be a large number of people who [are settled] who might be eligible for British Citizenship but who for one reason or another have not applied for it": quoted in House of Lords *Fifth Report of the European Union Committee 2001-02* "The Legal Status of Long Term Resident Third Country Nationals" HL Paper (2001-02) No 33 (hereafter "*HL33*") para 22.

184 *HOSB 14/01* Table 3.2.

EEA Europe providing 11% (9,000) each, and the Americas and the Middle East, 8% (7,000) each (while the EEA produced the tiny proportion of 2% (1,700)).[185]

Brubaker does suggest that the low German naturalisation rate flows in part from an immigrant desire not to lose original citizenship.[186] The UK does not require this, as noted, but the states of original citizenship may, so it is difficult to make general statements. He further suggests that the high French rate flows in part from "a more instrumental, 'desacralized' understanding of citizenship".[187] The legal advantages in the UK are in general actually rather limited, going little beyond "a right to enter. . . the territory of a state. . . suffrage and military service".[188] However, a reason for the planned changes in the naturalisation régime is the assertion that "many applicants do not appear to attach great importance to acquiring British citizenship, beyond the convenience of obtaining a passport".[189] In any event, Brubaker's thesis is here unequivocally supported.

acquisition after birth - conclusions

The characteristics which Brubaker's thesis predicts are generally fulfilled, subject to certain factors. The suggestions must be rehearsed that it underplays the role of immigration policy in the "circular quality of social closure", and the suggestion made that he too readily equates an unrestrictive naturalisation régime with a political tradition of nationhood. Within those, UK naturalisation policy seems political, not ethnocultural.

EU Citizens, Third Country Nationals and the European Union

It is interesting to apply Brubaker's thesis to the EU, and in relation to naturalisation, his analysis is especially interesting.

Fairly clearly "Citizenship of the European Union" is an attempt to bind the inhabitants to the EU by social closure. The rights attaching are usually seen as inclusive but, as Brubaker argues, inclusion only makes sense if there is exclusion. Free movement is about external borders. As to whether "state" precedes "nation", clearly the state-like structure of the EU precedes any nation of Europeans, and Citizenship of the EU is in a political rather than ethnocultural tradition. (Maastricht can be seen as a pivotal event).

Certainly, all Citizens of the EU now have a certain citizenship rights in every other Member State, including a certain "right to enter (and remain in) the territory of [the other Member States]" and certain "suffrage" there, if not "military service".[190]

---

185 *Ibid*
186 *Brubaker* p 78
187 *Ibid*
188 See eg *Bradley & Ewing* various pp under general rubric "ALIEN - disabilities and disqualifications".
189 *SBSH* para 2.12
190 Arts 17-22 TEC (ex art 8-8e).

EU Citizenship, national citizenship and naturalisation

This attempt to bind the inhabitants to the EU is, however, equivocal. It is to "complement and not replace national citizenship"[191] as a compromise wording to calm Danish fears of excessive EU power. "Non-replacement" is effected largely by the means of acquisition which, in an echo of the *British Nationality Acts 1948* and *1981*, is by gateway citizenships, one for each Member State. Thus questions of *jus soli* and *jus sanguinis* do not apply, and nor at first sight does naturalisation.

However, gateway citizenship acquisition indicates a fascinating conclusion. Citizenship of the EU is really mass reciprocal naturalisation without renunciation of previous citizenship or prior residence, let alone use of discretion, appeals, procedure or fees, or for that matter, oath of allegiance or ceremony. (In Brubaker's terms the regime is appropriately unrestrictive, as in the political tradition, the natives' attitude *ex hypothesi* somewhat equivocal, but the propensity to naturalise unavoidable).

"Third Country Nationals", naturalisation, nationality and Title IV

Were this not enough, relevant debate also occurs in relation to "Third Country Nationals", that is, those from non-Member States living and working within the EC or (briefly put), settled immigrants. This requires more extended discussion.

As is well-known (and Brubaker notes), the EC has relied heavily on external immigrant labour, but many such immigrants, while settled, have not been assimilated into the EC population. This is most obvious in Germany, where many Turks, Yugoslavs and others entered, but remained non-citizens because of the ethnocultural exclusionism of German naturalisation law,[192] as did their children because of reliance on the *jus sanguinis* (as Brubaker also notes). Their numbers are considerable,[193] their status not ambiguous, but arguably anomalous.[194]

A Community immigration policy is an inevitable consequence of an internal market in labour, and very obviously so post-Schengen.[195] Thus, Title IV,[196] establishing a Community competence on visas, asylum, immigration and other policies related to free movement of persons and to be implemented

---

191 See Denmark's Declaration appended to the TEC.

192 Greek law may be even more exiguous, requiring 15 years residence: see House of Lords *Thirteenth Report of the European Union Committee 2000-2001* "A Community Immigration Policy" HL Paper 2000-01 No 64 (hereafter "*HL64*") para 107. However, Grammataki-Alexiou in *Nascimbene* p 395 shows Greek naturalisation as rather complicated and appearing to require ten years residence for those not "ethnic Greeks", five for "ethnic Greeks".

193 Estimates vary from 10m to 30m, of whom perhaps half are long-term residents *HL33* paras 21, 48.

194 See Groenendijk, Guild & Barzilay *The Legal Status of Third Country Nationals who are Long Term Residents in a Member State of the European Union* Centre for Migration Law, University of Nijmegen (2000).

195 See *e.g., HL64*

196 Which does not bind the UK unless it opts in: see Protocol on the position of the United Kingdom and Ireland.

within five years, was inserted into the EC Treaty at Amsterdam. The issue was emphasised by the Tampere European Council.[197] "Fair Treatment of Third Country Nationals" was one of the four elements it specifically set out to achieve by, among other things, "an approximation of national legislations [*sic*] on the admission and residence of [TCNs]".[198] This would create a common "pool" of "who we let in".

the Draft Directive and a status for LTR-TCNs

Citizenship law "will remain the sole prerogative of Member States"[199] (Brubaker noting this "essential attribute of sovereignty"). Nevertheless, the Tampere Conclusions went on to declare that they sought "a uniform set of rights which are as near as possible to those enjoyed by EU citizens", including "the opportunity to obtain the nationality of the Member State in which they are resident".[200] (Confusingly, no doubt because Tampere was concerned with the "Charter of Fundamental Freedoms of the European Union" as well as an "area of freedom, security and justice", these are sometimes referred to as "core rights".)[201]

In particular, as part of the crop of Tampere-generated legislation[202], there appeared a Draft Council Directive concerning the status of third-country nationals who are long-term residents[203] ("LTR-TCNs"), to fulfil these aims.[204] This has been discussed by the House of Commons European Scrutiny Select Committee which classified it as "legally and politically important",[205] and the House of Lords Select Committee on the European Union, which pointed out it goes some way beyond what Tampere Council decided.[206]

---

197 Conclusions of the Presidency 15 & 16 October 1999 (Bull EU 10-1999 pp 7-14) (hereafter "*Tampere Presidency Conclusions*") para 20 (See also Communication form the Commission to the Council and the European Parliament on a Community Immigration Policy COM (2000) 757 final, also printed as Appendix 4 to *HL64*).

198 *Ibid* para 20

199 *HL64* para 104

200 *Tampere Presidency Conclusions* para 21 (inaccurately quoted in House of Commons *First Report of the European Scrutiny Committee 2001-2002* HC Paper (2001-2002) No 152-i (hereafter "*HC152*") para 6.1 as "para 12").

201 This convenient phrase seems popular, possibly because it is not clear what it means. O'Leary *The Evolving Concept of Community Citizenship* Kluwer (1996) p 29 observes that in negotiations on union citizenship there were calls for "fundamental rights" to be attached to it. Such calls would seem perverse. If rights are fundamental, they should attach to everyone, not just citizens. "Human rights" and citizenship rights are not synonyms, but alternatives.

202 For a recent list of such legislation, see *Communication of 23 May 2001. . .* COM (2001) 278 final, or *HL64* Appendix 4, Annex 2

203 *Proposal for a Council Directive concerning the status of third-country nationals who are long-term residents* COM (01) 127 final (23.3.2001) made under art 63(3), (4) in Title IV (hereafter "*COM (01) 127*"). The Explanatory Memorandum details the history of the Draft Directive.

204 Explanatory Memorandum paras 1.1, 1.2.

205 *HC152* para 6 (Para 26 also deals with a Draft Directive on mutual recognition of decisions on the expulsion of third country nationals).

206 *HL33* paras 3, 4. (It also refers to interlocking Draft Directives).

long-term resident third-country nationals: a right to quasi-naturalisation?

The Draft Directive requires "Member States [to] grant long-term resident status to third-country nationals who have resided legally and continuously for five years in the territory of the Member State concerned".[207] Detailed rules define what constitutes the five years (and boil down to ignoring interruptions of less than six months, and some others, and excluding "temporary protection"), but grounds for original admission are irrelevant, and indeed, those born in the country who have not acquired citizenship are included.[208] The applicant must also have adequate "resources" (unless a refugee or born in the Member State).[209]

Numerous criticisms can be made of the drafting, and this Draft Directive does dovetail into others.[210] However, it clearly provides that an applicant fulfilling the requirements and giving the appropriate information,[211] must be granted the status as of right, subject only to a limited possibility of refusal on narrow "public policy and public security" (though not "public health") grounds.[212] Any refusals must be reasoned, and there must be legal redress.[213]

quasi-naturalisation: the consequential rights

The status has four important consequences.[214] Firstly, an LTR-TCN acquires a right to remain for life since s/he must be re-admitted even if the residence permit has expired,[215] and expulsion is only possible on narrow grounds of "public policy" or "domestic security" (and again, not "public health"); and with an appeal process and legal aid required and "emergency expulsions" prohibited.[216] (Withdrawal of the status is required, though only by a reasoned decision with legal redress[217], on grounds of two consecutive years absence, subject to limitations; fraud; acquisition of the status in another Member State; or expulsion.)[218]

Secondly, an LTR-TCN is entitled to equal treatment with nationals in relation to most occupational, educational and social security

---

[207] *COM (01) 127* art 5(1).
[208] *Ibid* art 5.2-5-4, read with art 3 and relevant parts of "Article-by-Article Commentary".
[209] *Ibid* art 6: essentially, at least subsistence income and sickness insurance for all risks.
[210] See *HL33* paras 8-10 and *passim.*
[211] *COM (01) 127* art 8.
[212] *Ibid* art 7: The "Article-by-Article Commentary" says refusal is "subject to criteria similar [not identical?] to some of those in Directive 64/221/EEC". Cf the provision in relation to expulsion.
[213] *Ibid* art 11.
[214] *Ibid* art 9.
[215] *Ibid* art 26.
[216] *Ibid* art 13: the "Article-by-Article Commentary" is much fuller than the parallel provision in relation to acquisition, declaring that Directive 64/221 defines the relevant terms, referring to the case law, to art 8 ECHR and to art 47 of the Charter of Fundamental Rights of the European Union.
[217] *Ibid* art 11.
[218] *Ibid* arts 10, 27(2).

opportunities.[219] These are widely drafted to include equality of working conditions generally and trade union membership; access to education and vocational training, "including study grants"; recognition of diplomas, etc; and "access to goods and services. . . including housing". Equal treatment can be extended to other matters.[220]

Thirdly, the LTR-TCN has a right of residence in any other Member State,[221] at least provided s/he fulfils one of, effectively, two conditions[222] (and refusal must be reasoned and legal redress available).[223] The first is employment (which includes periods of incapacity or unemployment, etc), the second, economic self-sufficiency (i.e., s/he both possesses "adequate resources to avoid becoming a burden on the Member State" and has "sickness insurance covering all risks in the second Member State").[224] Further, the status entitles to equality of treatment with nationals of this Member State, save for "social assistance and study grants" (provided the relevant residence permit is obtained).[225] (Five years such residence entitles to LTR-TCN status in this Member State instead.)[226]

Fourthly, the status entitles the LTR-TCN to bring in members of any existing family[227] (though a second Member State may require, *int al*, evidence of economic self-sufficiency)[228] subject only to "public policy and domestic security" and (in this case) "public health" provisos.[229]

LTR-TCNs, quasi-naturalisation and the last bastion

The draft Directive thus grants LTR-TCNs free movement as of right. This has been described as "revolutionary" and "by far the most radical part of the proposal"[230] (though it seems an inevitable outcome of Schengen).[231] The Explanatory Memorandum makes it plain that voting rights were excluded only because no legal basis could be found.[232] The status starts looking like "a right to enter (and remain in) the territory of a state [and] suffrage", albeit without reference to military service.

---

[219] *Ibid* art 12(1).
[220] *Ibid* art 12(2).
[221] *Ibid* art 15.
[222] *Ibid* art 17 (outlining the application process): see also art 21 and the transitional art 25.
[223] *Ibid* art 22.
[224] *Ibid* art 16: it is drafted as three conditions: employment; study; and economic self-sufficiency. However, students have to be economically self-sufficient.
[225] *Ibid* art 24, read with art 21.
[226] *Ibid* art 27.
[227] *Ibid* art 18(1): see also art 23(3). "Family members" is widely defined in art 2(e).
[228] *Ibid* art 18(2).
[229] *Ibid* arts 19 & 20.
[230] *HL33* paras 12 (Prof E Guild) and 26 (Committee) respectively.
[231] NB art 39 TEC (ex art 48) refers to free movement of "workers", only Reg 1612/68 limiting it to nationals of Member States, an ambiguity repeated in art 61(a).
[232] Para 5.5.

Unsurprisingly, the UK has determined not to opt in to the Draft Directive.[233] But more importantly, is the status a quasi-Citizenship of the EU, obtained by a form of simple registration without oath of allegiance, language requirement, or the like, and indeed, in a form of reverse subsidiarity, detached from that of any Member State, so by-passing their conditions, procedures and discretion? (In Brubaker's terms this would be appropriately unrestrictive, as in the political tradition, accepted as normal by the natives, and widely used. Certainly its aim is as assimilatory as Citizenship of the EU itself).

Also more importantly, is it a step beyond "who do we let in?" towards a purely EU test of "who we are"? Is the last bastion of sovereignty falling?

CONCLUSIONS

This article has sought to outline Brubaker's thesis on citizenship and nationhood; to test it against UK experience; and to consider current UK naturalisation and EU citizenship and "third country national" issues within Brubaker's framework.

It concludes that (although recent changes in German law throw some doubt upon its fundamentals) the UK experience fits Brubaker's general thesis to a considerable degree, but suggest problems for it. The continuity of the history of those nations now contained within the UK, and the asymmetry of their status, make it difficult to determine whether state preceded nation or *vice versa*. The imperial dimension of citizenship law is very important, but Brubaker largely ignores empire. Brubaker's lengthy but unexamined criteria of restrictiveness of naturalisation criteria make the UK seem relatively exclusionary, while the short but examined ones make it assimilatory. Most importantly, are two other criticisms. Firstly, preservation of the *jus soli*, principal evidence of an assimilatory tradition, can be shown to have been preserved by manipulation of citizenship categories which make its continued modified existence misleading. Secondly, concentration upon naturalisation criteria is also misleading as it ignores the significance of preceding immigration decisions.

The article also concludes that Brubaker's views on naturalisation provide a useful prism for illuminating current UK discussions, though again suggesting a problem, for the proposed increasing restrictiveness is justified in terms of increasing assimilation.

Finally, it concludes two things in relation to the EU. Firstly, Citizenship of the EU, illuminated by Brubaker's views, may usefully be seen as constituting mass reciprocal naturalisation on wholly unrestrictive terms with a view to assimilation. Secondly, the envisaged long-term resident third-country status constitutes an alternative form of quasi-naturalisation,

---

[233] *HL33* para 30 and Appendix 4. It is understood that the Directive was discussed during Spring 2002 under the Spanish Council Presidency, agreement being sought on amended Articles 1-5: Immigration Law Practitioners' Association European Update June 2002, Legislative Update para 3.3 referring to Council doc. 7193/02.

whereby a form of EU citizenship may be created, wholly unmediated by Member States.

MORTGAGEES: BANKRUPTCY OF *O'BRIEN* HUSBANDS

Andrew Harper, Barrister, De Montfort Chambers, Leicester*

Maitland, remarking of a mortgagee said, "He is not less a creditor because he is a secured creditor."[1] This article concerns abuse of process in an action by a mortgagee on the personal covenant following the refusal of a possession order. The particular circumstances which will be considered are those of the decision of the Court of Appeal in *Alliance & Leicester Plc* v *Slayford*[2] in which a mortgage by way of legal charge given by a husband was tainted with undue influence in favour of his wife. The Court of Appeal, allowing the company's appeal, held that proceedings by the lender with a view to the bankruptcy of the husband were not abusive.

A mortgage, since 1925 almost always by way of legal charge,[3] is a composite bundle of rights and obligations. Besides a charge of real property there is invariably a personal covenant by the borrower to repay the sum secured with interest. Often there are supplemental security mechanisms such as a declaration of trust and a power of attorney in the lender's favour. Consequently, if the borrower defaults, the remedies available to the lender are not simply the right to take possession of and sell the property, but also the right to appoint a receiver, the right to sue on the personal covenant for a monetary judgment and the right to foreclose,[4] albeit this latter remedy is falling into disuse.[5] Traditionally a mortgagee has been entitled to pursue any or all of his remedies concurrently or consecutively, an exception from the rule against multiple actions between the same parties arising from the same facts established in *Henderson* v *Henderson*.[6]

In residential lending possession with a view to sale is the principal remedy, it is only if possession is successfully contested that the alternatives are

---

* In the case under notice, led in the Court of Appeal by Mr Ali Malek Q.C., 3 Verulam Buildings, Gray's Inn. I am grateful to Professor A.R. Everton, Department of the Built Environment, University of Central Lancashire and to the Editors for their comments and criticisms made upon an earlier draft.

1 Maitland, *Equity: A course of lectures* (1936) Lecture XIII p 182.

2 [2001] 1 All E.R. (Comm.) 1; [2001] B.P.I.R. 555.

3 Law of Property Act 1925 ss 1(2) and 85-87. In Northern Ireland the relevant provision is the Conveyancing Act 1881 s 19(1).

4 Clark, *Fisher & Lightwood's Law of Mortgage* (2002) pp 401-402; Harpum, *Megarry & Wade The Law of Real Property* (2000) s 19-045 ff; Burn, *Cheshire & Burn's Modern Law of Real Property* (2000) p 756; Waldock, *The Law of Mortgages* (1950) ch 10; Ramsbotham, *Coote's treatise on the law of mortgages* (1927) ch 44.

5 *Per* Sir Donald Nicholls V-C in *Palk* v *Mortgage Services Funding Plc.* [1993] ch 330 at 336 E–F; Markson, "Foreclosure for closure?" (1979) 129 *N.L.J.* 33. In Northern Ireland foreclosure has not been granted for generations.

6 (1843) 3 Hare 100; 67 E.R. 313; Cousins, *The Law of Mortgages* (2001) pp 254–255; see also Clark *op cit* pp 404–405; Harpum *op cit* n 4 s 19-083; Burn *op cit* n 4; Waldock *op cit* n 4 pp 260–1; and see also Handley, "A closer look at *Henderson* v *Henderson*" [2002] 118 *L.Q.R.* 397.

considered.[7] Since a Law of Property Act receiver is the agent of the mortgagor and therefore bound by equities affecting him,[8] and a court appointed receiver takes subject to prior encumbrancers who are in possession,[9] neither will be in any better position to obtain possession than the lender. In the absence of subrogation to an untainted prior charge[10] an action on the personal covenant will generally be the only way of making some recovery.[11]

ABUSE

In the context under discussion there appear to be two aspects of possible abuse. First procedural abuse in seeking a money judgment after possession has been refused, i.e. the relationship between mortgagee proceedings and the *Henderson* rule and, secondly, substantive abuse, most probably in the context of the enforcement procedure, once a monetary judgment has been obtained. There are, of course, various methods of enforcing a money judgment – execution against the debtor's goods, the making of an instalment order under section 71 of the County Court Act 1984, seeking a charging order and attachment of earnings are all techniques commonly employed.[12] However, once an account is in default, lenders frequently seek to finalise the relationship with the borrower by way of a capital sum recovery. This is because it is generally inconvenient for them to monitor lengthy *ad hoc* arrangements for payments of the sort produced by instalment orders or attachment of earnings, which will not correspond in amount or frequency with the sums ordinarily due.

Procedural abuse

The exception from the *Henderson* rule enjoyed by a mortgagee has been confirmed in two recent cases *Securum Finance Ltd* v *Ashton*[13] and, more definitively, in *U.C.B. Bank Plc* v *Chandler*.[14] Securum had advanced money to a Turks and Caicos Islands company with the benefit of a contractual guarantee from Mr. Ashton, the company's UK representative, signed on 28th January 1987. The guarantee was secured by a legal charge over Mr. Ashton's home granted some two months later containing a personal covenant by Mr. Ashton to pay the sums secured. The Court of Appeal (Chadwick LJ and Rattee J) held that Securum were entitled to bring a second action against Mr. Ashton, for the sum owing, based on the personal covenant in the legal charge, despite having had an earlier action for the same sum, founded on the contractual guarantee, struck out for want of

---

[7] Particularly, it is not appropriate to make a possession order against one only of two joint proprietors in possession, *Albany Home Loans Ltd.* v *Massey* [1997] 2 All. E.R. 609 (CA).

[8] Law of Property Act 1925 s 109(2).

[9] *Evelyn* v *Lewis* (1844) 3 Hare. 472; 67 E.R. 467.

[10] Millett LJ was prepared to give leave to appeal on such a basis in *Guardian Assurance Plc.* v *Burbridge* (unreported, CA 31st July 1995).

[11] Bennett, "Bankruptcy and matrimonial property" (1982) 132 *N.L.J.* 991, at 991–2.

[12] In Northern Ireland similar enforcement methods are all available under the Judgments (Enforcement) (Northern Ireland) Order 1981.

[13] [2000] 3 W.L.R. 1400.

[14] (2000) 79 P. & C.R. 270.

prosecution. In *U.C.B.* the bank commenced proceedings for possession of factory premises in the Brentwood County Court in June 1994, including a claim to a monetary judgment. The hearing proceeded by consent, only a possession order being made. In 1996 U.C.B. commenced a fresh High Court action to recover the sums outstanding on the personal covenant. The Court of Appeal had no hesitation in rejecting an argument based on *Henderson*.[15]

Substantive abuse

The premise here is that held in *Downsview Nominees Ltd* v *First City Corporation* that: –

> ". . . powers conferred on a mortgagee must be exercised in good faith and for the purpose of obtaining repayment. . . "[16]

It is apprehended that the requirement of good faith, although constraining the mortgagee, must accommodate the inherent conflict between his interests and those of the mortgagor and that this appears to negate any *general* duty of care. Highlighting the intrinsic tensions of the situation, Lord Lindley, in the Court of Appeal in *Kennedy* v *De Trafford*, explained that while the mortgagee:

> ". . . is not at liberty to look after his own interests alone, and it is not right, proper, or legal for him, either fraudulently, or wilfully, or recklessly, to sacrifice the property of the mortgagor: *that is all*."[17] (author's emphasis)

So far as concerns the selection of any particular power to exercise, it is submitted that, quite apart from seeking to obtain payment, in the good faith context, the lender's motive must be to pursue the direct objective of the power and not some ulterior purpose. In *Alliance & Leicester plc* v *Slayford* it was contended that abuse arose from the clearly foreseeable, if not inevitable prospect (whether desired or not) that possession of the property would be sought by a future trustee in bankruptcy.

ALLIANCE & LEICESTER PLC v *SLAYFORD*

In June 1991 the former Alliance & Leicester Building Society commenced possession proceedings in the Colchester County Court to recover a residential property, legal title to which was held by a husband who occupied jointly with his wife. In July 1996 the trial judge, His Honour Judge Brandt, found that Mrs. Slayford had a beneficial interest of perhaps 5% in the property, by virtue of contributing £2,113, in the judge's words a "pitiful piece of capital",[18] towards the payment for improvements. He also found that she had signed a professionally prepared *Boland*[19] consent form by

---

[15] *Ibid*, p 274.

[16] [1993] A.C. 295 *per* Lord Templeman at 312 F–G. See Grantham, "The purpose of a company receiver's powers" (1993) 57 *Conv.* (N.S.) 40; Ramsbotham *op cit* n 4 p 900.

[17] [1896] 1 ch 762 at 772, affirmed by the House of Lords [1897] A.C. 180 at 185 *per* Lord Herschell.

[18] Unreported, Colchester County Court, 15th July, 1996.

[19] *Williams and Glynn's Bank Ltd.* v *Boland* [1981] A.C. 487.

reason of her husband's presumed undue influence, the common solicitor having entrusted it to Mr. Slayford for execution.[20] In consequence possession was not granted. In 1998 the company obtained leave from District Judge Gypps to amend the original pleadings to seek a money judgment, a decision which was challenged on appeal, once again to His Honour Judge Brandt. The judge directed Alliance & Leicester, by now a plc, to file an affidavit setting out its intentions for the enforcement of any judgment obtained. In doing so the company was "ruthlessly frank" that the only course likely to realise a payment was the bankruptcy of Mr. Slayford. The judge held that:

> "The most serious criticism that can be made of the amendment is that it seeks to enforce or to achieve by the back door that which could not be achieved by the front door. It seeks, in effect to flout what I clearly had in mind back in July 1996. It seems to me to be a quite flagrant abuse of the process of the court to look for ways round a judgment with which the Claimant is unhappy."[21]

There are, of course, authorities such as *Quennell* v *Maltby*[22] in which it has been held to be abusive for a mortgagee to utilise a third party as a puppet to procure possession which he cannot take himself. Most pertinent is the decision in *Re Ng (A bankrupt).*[23] Here, the Bradford and Bingley Building Society, in what the judge could only assume to have been an attempt to avoid adverse publicity, made an agreement with the husband's trustee in bankruptcy, for the latter to exercise his powers to secure a sale. More generally it has been held in *Trustee in Bankruptcy of Syed Bukhari* v *Bukhari*[24] that a trustee should not simply act under the instructions of the major creditor.[25] A creditor who is dissatisfied with the conduct of a trustee can, of course, seek directions from the court.[26]

In *Slayford* the Court of Appeal (Peter Gibson, Mummery and Latham LJJ) endorsed and followed *U.C.B.* It was made clear that in the absence of *res judicata*, procedural abuse based "re-litigation" required some additional element, such as a collateral attack on an earlier decision, dishonesty or

---

[20] Then known as *O'Brien* class 2B following *Barclays Bank Plc.* v *O'Brien* [1994] 1 A.C. 180 at 189–90, a classification method now discredited, see *Royal Bank of Scotland plc* v *Etridge* (No 2) [2001] 3 W.L.R. 1021 *per* Lord Clyde at 1050 C–D, Lord Hobhouse at 1056 E-F and Lord Scott at 1077 B–C.

[21] Unreported 2nd December, 1999. The judge did not have the benefit of either *U.C.B. Bank Plc* v *Chandler op cit* n 14 (unreported at the time) or *Zandfarid* v *B.C.C.I.* (unreported, 12th July 1996, CA) but he was referred to the Privy Council's decision in *China & South Sea Bank* v *Tan Soon Gin* [1990] 1 A.C. 536 at 545 C–D.

[22] [1979] 1 W.L.R. 318, regarded at the time as a novelty. See Wilkinson, "Mortgages, a new equity" (1979) 129 *N.L.J.* 624; Pearce, "Keeping a mortgagee out of possession" (1979) 38 *C.L.J.* 257.

[23] [1998] 2 F.L.R. 386.

[24] [1999] B.P.I.R. 157.

[25] See also *Judd* v *Brown* [1997] B.P.I.R. 470 *per* Harman J. at 479 C–G.

[26] Insolvency Act 1986 s 303; Insolvency (Northern Ireland) Order 1989, art 276.

unjust harassment.[27] Further, assuming (but without deciding) that Article 6 of European Convention on Human Rights was horizontally effective,[28] the right to a fair trial in a reasonable time was not breached by successive actions, since one did not look at the totality of the time taken by the litigation between the parties as a whole, but at the time taken in respect of the particular breach of civil obligation in question. Under the common form of mortgage in use by high street lenders, fresh arrears, and, in the absence of payment, a fresh default on an obligation, arose each month. Indeed, during argument, Latham LJ reminded the court that the very right to payment was itself a right to property enjoyed by the lender within Article 1 of Protocol 1 to the Convention which could not simply be ignored.

The Court of Appeal went on to hold that it was not abusive for a secured lender to seek to bankrupt one co-owner where the other could resist the lender seeking possession by virtue of the security being tainted with undue influence. This was qualified only by the requirement that the lender surrender its security under Rule 6.109(2) of the Insolvency Rules 1986,[29] as the company's affidavit filed in the County Court made clear that it would do. The court thereby confirmed its previous refusal to give leave to appeal on the very point in *Zandfarid* v *B.C.C.I.*[30]

INSOLVENCY LAW, PROPERTY LAW AND EQUITY

The wife and the lender

It is important to appreciate that a wife who succeeds in establishing priority for her interest in a property against the lender by reason of undue influence, does not thereby acquire an inviolable right to remain in that property, good against the world, or indeed any enhanced right, but merely preserves intact her beneficial interest from the *lender's* charge. It is simply the case that, absent collusion between lender and trustee, the wife is then placed in no worse position in the bankruptcy than if the lender had always been unsecured, moreover having once surrendered his security, a lender is not to be further prejudiced.[31] The trustee has a statutory duty to perform and the criteria in section 335A of the Insolvency Act 1986 will protect the wife, or not, as the case may be.[32]

---

[27] *Per* Auld L.J. in *Bradford & Bingley Building Society* v *Seddon* [1999] 1 W.L.R. 1482 at 1493 B.

[28] As incorporated into domestic law by the Human Rights Act 1998.

[29] S.I. 1986 No. 1925; Insolvency Rules (Northern Ireland) 1991 (S.R. 1991 No. 364).

[30] *Op cit* n 21; the decision at first instance is at [1996] 1 W.L.R. 1420. A decision as to leave is not authoritative before a full court hearing a final appeal, *Boys* v *Chaplin* [1968] 2 Q.B. 1 *per* Lord Denning at 23F–24B.

[31] *Cheltenham & Gloucester Building Society* v *Grattidge* (1993) 25 H.L.R. 454 *per* Hoffmann LJ at 457.

[32] Inserted by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1) and sch 3 para 23; see *The Mortgage Corporation* v *Shaire* (2000) 80 P. & C.R. 280, noted Pascoe, "Section 15 of the Trusts of Land and Appointment of Trustees Act 1996 – A change in the law?" 2000) 64 *Conv.* (N.S.) 315; *Harrington* v *Bennett* (unreported, Mr Lawrence Collins Q.C. ch D, 16th March 2000; Miller, "Applications by a trustee in bankruptcy for sale of the family home" (1999) *Ins. L. & P.* 176-182. The nearest equivalent Northern Ireland provision is in the

It is submitted that the lender suffers no further consequences of the undue influence. The Insolvency Act 1986 constitutes "public interest" legislation for which reason it may not be possible for a creditor, even by express representation, to estop himself from recourse to the remedies it provides.[33] Indeed, one might ask whether there is not a public duty to proceed? In any event Rose and Millett LJJ, who refused leave to appeal in *Zandfarid*, clearly thought that a lender bound by constructive notice of undue influence is not so estopped.

It is important to understand precisely the nature of the wife's rights where she is a victim of undue influence and how they evolve to bind third parties. The foundation is not any right of action against the lender, but that *against her husband*. This is, of course, the wife's "equity to set aside" propounded in *Barclays Bank Plc* v *O'Brien.*[34] The equity is founded on "misrepresentation, undue influence or other . . . actionable wrong" committed by husband against wife.[35] The equity is to have the agreement *between husband and wife*, to grant the security to the lender, rescinded.[36] The so called "taint" is properly the consequence of the fact that, in circumstances in which the lender has actual or constructive knowledge of this equity, the House of Lords have held in *O'Brien* that it binds him also – thus enabling the wife to set aside the security which she has *prima facie* granted.[37] That this was an inappropriate application of the notice rules has been widely debated.[38] However, in spite of the way notice was applied, it is not generally suggested that in a case of undue influence the equity to set aside has been elevated by *O'Brien* to anything above its established status as a mere equity,[39] not of itself an interest but a personal right of action.[40]

Insolvency (Northern Ireland) Order 1989, art 309, as amended by the Family Homes and Domestic Violence (Northern Ireland) Order 1998, art 41(1) and sch 3.

33 *In re a bankruptcy notice* [1924] 2 ch 76; *Huddersfield Fine Worsteds Ltd.* v *Todd* (1926) 134 L.T. 82. As to contractual exclusion see *National Westminster Bank Ltd* v *Halesowen Presswork* [1972] 2 W.L.R. 455 *per* Viscount Dilhorne at 463 H, Lord Simon of Glaisdale at 466-7 and Lord Kilbrandon at 481 C to D. On the "pubic interest" aspects of insolvency law see Keay, "Insolvency Law: a matter of public interest?" (2000) 51 *NILQ* 509.

34 *Op cit* n 20 at p 195 E to F. This aspect of *O'Brien* is unchanged after *Royal Bank of Scotland plc* v *Etridge* (No. 2).

35 *Ibid*, p 197 E to F; *First National Bank Plc* v *Walker* [2001] 1 F.L.R. 505 at 515 (CA). By way of aside, this may have important consequences for limitation of the wife's rights, see Limitation Act 1980 section 36 and, by analogy, *Molloy* v *Mutual Reserve Life Insurance Co* (1906) 94 L.T. 756 (rescission for misrepresentation).

36 Although Waters regards this as artificial, Waters *et al*, *Wurtzburg & Mills Building Society Law* (looseleaf) s 6.97 p 6/74 n 5; and see *Re Brocklehust deceased* [1978] ch 14 at p 43 A–D.

37 *Op cit* n 20 at pp 195–196.

38 See Martin, *Hanbury and Martin Modern Equity* (1997) p 834 where the references are collected; also essays by O'Sullivan, Virgo and Barker, chs 3–5 in Rose, *Restitution and Banking Law* (1998) and *Royal Bank of Scotland plc* v *Etridge (No 2) op cit n* 20 *per* Lord Nicholls at 1036–7.

39 *E.g.* Lord Scott in *Royal Bank of Scotland plc* v *Etridge (No 2) op cit n* 20 at p 1072 F–G; McGhee, *Snell's Equity* (2000) s 2-05 pp 23–24; Hayton, *Underhill and Hayton Law of Trusts and Trustees* (1995) p 39.

The trustee in bankruptcy

It is necessary to begin by considering the effect of a mortgagee surrendering his security. By that is meant whether it continues to subsist in the hands of the trustee. A distinction appears between the situation in which the surrendered charge is followed by one or more subsequent charges and that in which the surrendering mortgagee is the only secured creditor. Where there are subsequent chargees the surrendered charge passes to the trustee, retaining its priority for the benefit of the general body of creditors.[41] Where however there are no subsequent chargees, it is arguable that the trustee takes nothing as a consequence of the surrender. This argument proceeds from the perceived rationale of the decision in *Cracknall* v *Jackson*[42] which was simply to prevent the second chargees from obtaining a windfall benefit at the other creditors' expense.[43] It may also be the case that rule 6.109 does not necessarily require any property rights to be transferred to the trustee.[44] However, if one accepts that the surrendered charge is extinguished it is to assume that the mere fact of increasing the available equity in the property is of sufficient benefit to the general body of creditors as to satisfy the requirement of the rule. It might also be thought to involve a philosophical difficulty in as much as the continued subsistence of a proprietary right is made dependent upon circumstance.

When there is a second charge, it seems, in keeping with the rationale in *Cracknall*, that the trustee has a duty to try and enforce it.[45] In doing so he may be faced with either one of two alternative factual scenarios. First, at the time of bankruptcy, possession proceedings may have been concluded in the wife's favour. Secondly, the surrendering lender may have bankrupted the husband before judgment in the possession proceedings, or even without taking any such proceedings at all. Where the first scenario pertains, the wife's mere equity merges in the judgment granted at the conclusion of the possession claim. Should she have succeeded, that judgment is a declaratory judgment *in personam* setting aside the lender's charge as against all her legal and equitable interests in the property and accordingly, on surrender the trustee will take the security so relegated. What, however, of the second scenario, i.e. if the husband is bankrupted by the lender before judgment or even without possession proceedings at all? Is the trustee then bound by the wife's mere equity if he decides (or is obliged) to rely on the surrendered charge? A trustee in bankruptcy takes his bankrupt's title, subject to equities affecting the bankrupt,[46] but where a security is surrendered is he similarly bound by those affecting the creditor? There is some authority, albeit in a slightly different context, that at least a personal equitable *defence* does not

---

[40] See generally Martin, *Hanbury & Maudsley Modern Equity* (13th ed, 1989) ch 28 (omitted from subsequent editions) and Everton, "Equitable interests and equities – in search of a pattern" (1976) 40 *Con*v (N.S.) 209–221.

[41] Insolvency Act 1986 section 269 (1) (a), Insolvency Rules 1986 r 6.109(2) and *Cracknall* v *Jackson* (1876) 6 Ch. D. 735 *per* Hall V. – C. at 739; *cf Moor* v *Anglo Italian Bank* (1879) 10 Ch. D. 681 *per* Jessel M.R. at 690.

[42] *Ibid*.

[43] I am grateful to the Editor for drawing this interesting approach to my attention.

[44] *Cf* Bankruptcy Act 1914 sch 2, r 11.

[45] Fletcher, *Law of Insolvency* (2002) pp 115–6.

[46] *Ex parte Hanson* (1806) 12 Ves 346 at p 349; 33 E.R. 131 at p 132.

pass with the land,[47] yet following *O'Brien*, the mere equity appears to be more than just a *defence*, as it is founded on an "actionable wrong" and constitutes a claim.

Where, because of the argument advanced earlier, no charge passes to the trustee and equally, where it does, but he forms the view that he cannot successfully rely upon it, he will rely instead on his statutory powers under the Insolvency Act 1986 to get in the bankrupt husband's estate. Here, it is submitted, the wife's equity being a personal equity, has no proprietary impact on the husband's estate. The husband's trustee takes subject only to the wife's proprietary interests, legal and equitable, and to such personal claim to damages, as (subject to limitation and proof of loss), arises by reason of the "actionable wrong" of her husband. In terms of the wider considerations there is, of course, the all embracing section 335A (2) (c) of the Insolvency Act 1986,[48] which in bankruptcy now replaces the former section 30 of the Law of Property Act 1925. Under section 30 the taint occasioned by undue influence enjoyed little weight in an application for sale.[49] It is true that in *Chhokar* v *Chhokar* Cumming-Bruce LJ spoke of the trustee representing "innocent" creditors[50] but it is submitted that (even if this be a proper consideration) the innocence of the creditor may be lost only by the existence of *actual* knowledge.[51] In as much as the lender's knowledge is *constructive* (as, moreover, would be the position with most cases in this genre) it should follow that the relevance of creditor culpability will, in the vast majority of cases, be no greater under section 335A.[52] One cannot but remark that the wife's equity is thus made a Chameleonic concept, at one and the same time a claim against her husband, a ground for priority over the lender and yet no more than a personal equity of no definitive impact upon the estate in bankruptcy. However, any tension that this might involve is dispelled when one remembers that as long ago as 1965 it was recognised by the Australian High Court in *Latec Investments Ltd* v *Hotel Terrigal Pty Ltd*[53] that the enforceability of an equity can vary both with the *locus* of the party seeking to rely upon or deny it and his purpose in so seeking.[54]

CONCLUSION

The latter part of this case note is necessarily discursive as the appeal in *Alliance & Leicester Plc* v *Slayford* was essentially procedural and the parties subsequently having settled, the substantive ramifications await

---

47 *Nwakobi* v *Nzekwu* [1964] 1 W.L.R. 1019 (concerning *laches*), and see Spry, *The Principles of Equitable Remedies* (1997) pp 87–8.

48 *Op cit* n 31.

49 *Zandfarid* at first instance *op cit* n 30 p 1429 H; *Bank of Baroda* v *Dhillon* [1998] 1 F.L.R. 524 at p 528 A to D, noted by Pascoe, "The further decline of overriding interests" [1998] *Conv.* 415.

50 [1984] F.L.R. 313 at 327 G–H.

51 Spencer-Bower & Turner, *The Law Relating to Estoppel by Representation* (1977) p 126 and in the context of the former s 30 Martin, "Section 70(1) (g) and the vendor's spouse" (1980) 44 *Conv.* (N.S) 361 at 378.

52 *Cf* Bright, "The third party's conscience in land law" (2000) 64 *Conv.* (N.S.) 398, esp pp 412–413.

53 (1965) 113 C.L.R. 265 *per* Menzies J. at 290–1.

54 Meagher, Gummow & Lehane *Equity Doctrines & Remedies* (1992) ss[430] – [435].

judicial consideration. The following remarks about the Court of Appeal's decision may, however, be made by way of useful summary. First the mortgagee's traditional exemption from the *Henderson* rule is unimpaired. Secondly, *assuming* Article 6 of the European Convention on Human Rights is horizontally effective, it is not breached by a successive action on the personal covenant. Thirdly, and most importantly, bankruptcy proceedings by the holder of a tainted charge against one of two co-owners, the other of whom enjoys an interest in priority to the lender, are not abusive. The decision to bankrupt will, however, require careful thought to be given to the existence and claims of all other creditors, and thereby the likely dividend, due to the necessity to surrender the security. Fourthly, it is not possible for the major creditor to exert any sort of direct influence on the trustee in bankruptcy. Finally, the considerations required by section 335A of the Insolvency Act 1986 will govern the making of any order for possession and sale in proceedings which the trustee might bring, but the undue influence would, it is believed carry little weight. The decision in *Alliance & Leicester plc* v *Slayford* is a further helpful amelioration of the *O'Brien* defence for which judicial jealousy is clear.

POLITICAL ADJUDICATION OR STATUTORY INTERPRETATION: *ROBINSON* v *SECRETARY OF STATE FOR NORTHERN IRELAND*

Marie Lynch, Research Assistant, School of Law, Queen's University Belfast*

Just before the House of Lords rose for its summer recess this year it delivered its judgment in the *Robinson* case.[1] This eleventh hour delivery was widely anticipated not only by the parties but also by those working in the Northern Ireland Assembly where the case originated.[2]

Primarily *Robinson* concerns two major issues, statutory interpretation and statutory perception. Arising from the case are questions such as how the Northern Ireland Act 1998 is to be viewed; is it another statute produced by Westminster to be ranked alongside other primary legislation? Or should we see it as a unique enactment with the status equal or commensurate to that of a constitutional document? If the latter is the case, what will be the consequences for the future perception and interpretation of the Northern Ireland Act 1998? Will it discourage other potential challenges to the status of the Act? On a national level will the other devolution acts for Scotland or Wales be viewed in the same light?

Also stemming from the query as to the status of the Act is the wider issue of the judicial approach to statutory interpretation. Do judges interpret a statute like the Northern Ireland Act strictly legalistically, or is a more purposive, broader reading with reference to the preceding Belfast Agreement more appropriate? The use of *Hansard* further brings into question the propriety of reference to parliamentary debates as an aid to interpretation.

Robinson, where the judiciary were brought into the "campaign against the Agreement", also raises the issue of the appropriateness of involving the judicial body in these 'highly politicised' cases. As a reputedly apolitical institution, whose their independence from executive and partisan politics is highly valued, is there a danger that these values may be compromised when a court adjudicates on contentious political issues?

Outside the legal arena the effects of the Lords' judgment could have had immense practical ramifications. A finding in favour of the applicant would have meant the Assembly being dissolved and the call of immediate elections instead of the scheduled date in May 2003.[3] In this paper the background to

---

* Currently working on a project entitled, *The Role of Law and Litigation in Articulating Northern Ireland's Emerging Constitutional Framework,* Funded by the Economic Social and Research Council (E.S.R.C. L219252114).

1 *Robinson* v *Secretary of State for Northern Ireland and Others* [2002] UKHL 32 (25 July 2002).

2 After the judgment was delivered Peter Robinson was quoted as saying that this phase of the campaign against the Belfast Agreement had come to an end. *Irish News* Friday 26 July 2002 p 11.

3 1 May 2003.

the case will be outlined first and then the two main issues above will be discussed.

General Background

The case in question stems from a challenge taken by the deputy leader of the Democratic Unionist Party, Peter Robinson MP MLA, who claimed that the election of David Trimble and Mark Durkan as First Minister and Deputy First Minister (FM and DFM) on the 6 November 2001 was invalid.

David Trimble had resigned from the office of First Minister in protest at the conduct of Sinn Fein. Under section 16(7)(a) of the Northern Ireland Act 1998 (NIA), this action had the effect of leaving both offices (FM and DFM) vacant. As the sub-section provides:

> "If either the First Minister or the deputy First Minister ceases to hold office at any time, whether by resignation or otherwise, the other - shall also cease to hold office at that time".

When the offices of FM and DFM become vacant, section 16(8) of the NIA stipulates that from that time:

> "an election shall be held under this section to fill the vacancies within a period of six weeks beginning with that time."

If after this period has elapsed and the positions are not filled, section 32(3) directs the Secretary of State to propose a date for a poll for the election of the next Assembly.

On Friday 2 November 2001 the Assembly held an election to fill the offices of FM and DFM, as required by section 16(8) (this was two days before the six-week deadline that was set to run out on Sunday 4 November). However the candidates, Mr Trimble and Mr Durkan, failed to garner the support required to get elected. What followed was some circuitous and creative political manoeuvring whereby members of the Alliance Party and the Women's Coalition,[4] re-designated themselves as either nationalists or unionist. This gave the two candidates the requisite support required to be elected on the second poll held Tuesday 6 November 2002. Later that day the Secretary of State proposed 1 May 2003 as the date for the poll for the election of the next Assembly.[5]

Peter Robinson's challenge centred on two issues. Firstly he argued that section 16(8) required the election of the FM and DFM to take place within six weeks. As the Assembly was a creature of statute it has only the powers conferred on it by statute, therefore the Assembly had no power to elect the

---

[4] Under Strand One, section 6 of the Belfast Agreement (Cm 3883), all members of the Assembly at their first meeting, must register a designation of identity – nationalist, unionist or other. The criteria for electing the FM and DFM is also set out in Stand One, in s 15 and s 5(d)(i). These provisions only allow those designated as either unionist or nationalist to take part in the elections for FM and DFM. NIA section 16(3) implements these provisions.

[5] On 11 December 2001, the Northern Ireland (Date of Next Assembly Poll) Order 2001 was passed, directing that the date for the next poll should be the date proposed, 1 May 2003.

ministers after that period. Any election after the expiry of that date was invalid. Secondly he contended that if the offices were not filled within the six-week period, section 32(3) imposed a duty on the Secretary of State to propose a prompt and early date for the poll for the election of the next Assembly so that the political impasse could be resolved democratically by an appeal to the people. He considered that it was the duty of the courts to interpret and apply the NIA and not to take into account extraneous factors such as a disagreeable political outcome.

This argument was rejected in the High Court by Kerr J and in the Court of Appeal by Nicholson LJ and McCollum LJ, with the Lord Chief Justice, Sir Robert Carswell notably dissenting. Leave was granted to appeal to the House of Lords where a majority of the House (Lords Bingham, Hoffmann and Millett) also dismissed the case.

The majority in the House of Lords favoured the respondent Ministers and the Secretary of State's argument, which maintained that the provisions of the NIA should be interpreted so as to uphold the cross-community, devolved government where possible. This contention, based on the purpose of the Belfast Agreement, considered that if the Assembly failed to elect a FM and DFM within the six-week period, the Secretary of State was under no duty to fix an immediate date for a poll. Instead he was entitled to delay fixing a date and to wait for a reasonable period in order to establish whether the Assembly would succeed in electing a FM and DFM.

In accepting the respondents' argument the Lords rejected the purely declaratory approach to statutory interpretation advocated by the applicant, whereby they would pronounce the law as it is written in the NIA by providing a literal translation of the text and applying it to the facts at the centre of the dispute. The approach undertaken by Lords Bingham, Hoffmann and Millett was less traditional and favoured a more creative technique whereby the judge looks to the purpose of the statute. Here the aim is to determine the underlying principle or motivation behind the law, and use this rationale as an aid and guide to interpretation. This approach accommodates consideration of the background to the statute thereby enabling the judge to give a broader, more expansive interpretation of the law than what the alternative positivistic approach would provide.

That the latter approach was favoured is plainly evident in the majority's speeches. When examining the NIA, Lord Bingham addressed two questions; why the Act was enacted and in relation to this case, to what purpose? In answering these questions Lord Bingham, like Lord Hoffmann in his speech,[6] drew upon the long title of the Act. From this it was evident that the Act was enacted primarily to implement the Belfast Agreement, to further its purpose to "end decades of bloodshed and centuries of antagonism"[7], and to restore a devolved government to Northern Ireland in a manner which would be "significantly different" from previous attempts.[8]

One solution, considered by Lord Bingham to guarantee this difference was to ensure shared participation by unionists and nationalist communities in

---

[6] [2002] UKHL 32, para 33.
[7] *Ibid*, para 10.
[8] *Ibid*, para 3.

political institutions. Another was to be found in the establishment of the key offices of First Minister and Deputy First Minister (FM and DFM). In fact the vital roles of the FM and DFM in the functioning of the new democratic government in Northern Ireland is something that all the judges in *Robinson* have acknowledged. However those delivering the majority judgments focused in particular on the importance of the way these ministers were appointed. Certain stipulations contained in section 16 such as, the condition that they were to be filled by candidates elected jointly and on the basis that they obtain majority support from both designated nationalists and unionists members of the Assembly, were factors which Lord Bingham,[9] Lord Hoffmann,[10] and Lord Millett,[11] believed were in keeping with the purpose and the cross community ethos of the Agreement. Lord Hoffmann acknowledged how important yet fragile these positions were would likely be:-

> "It was obviously going to be a matter of delicate negotiation to secure, first, a joint ticket of two candidates willing to be yoked together and secondly, the three required majorities. But the positions occupied by the First and Deputy First Ministers made their election essential to enable devolved government to be carried on."[12]

Due to the potentially precarious nature of the Ministers' positions and the delicate nature of the devolved Assembly,[13] it was Lord Bingham's opinion that if the "shared institution were to deliver the benefits which their progenitors intended, they had to have time to operate and take root."[14]

In consideration of this and the purposes that Parliament was seeking to promote, Lord Bingham felt that it was unlikely that Westminster would have wished to constrain local politicians and the Secretary of State within "a tight straightjacket."[15] Accordingly, the duty contained in section 32(3) on the Secretary of State to propose a date for the poll for the next Assembly election should not be read so restrictively or rigidly as to require a prompt date as contended by the applicant. Rather a more generous and flexible interpretation of the NIA, which would allow scope for political discretion in order to deal with deadlocks and stalemates, would be more in keeping with the Act's purpose of creating a stable environment for cross-community government as set out in the Belfast Agreement.

In view of that, if an effective election of a FM and DFM did appear to be imminent then Lord Bingham would "expect" the Secretary of State to "pause" in order to take account of these developments. He should facilitate the political process and then propose a date in the future that would take account of the effective election.[16] However Lord Bingham was in no doubt that the Secretary of State's discretion in such circumstances was limited. If

---

[9] *Ibid*, para 5.
[10] *Ibid*, para 27.
[11] *Ibid*, para 89.
[12] *Ibid*, para 27.
[13] See in general Lord Bingham's speech, particularly paras 2 and 10.
[14] [2002] UKHL 32, para 10.
[15] *Ibid*, para 14
[16] *Ibid*, para 15.

there appeared to be no prospect of a pending election of the ministers or if the Assembly had resolved on an immediate dissolution,[17] then the Secretary of State would be expected to propose a very early date for the poll.[18]

Facilitating this broad purposive approach to statutory interpretation, that permitted the Secretary of State such discretion in setting a date for the Assembly election, is the judicial perception of the NIA. In the course of their speeches both Lord Bingham and Lord Hoffmann referred to the NIA as a constitutional document.[19] Lord Bingham was unambiguous when he stated that the NIA "is in effect a constitution." Such a categorisation is of great import, not only for the perceived status of the Act but also in that it permits greater latitude in interpretation.[20]

These statements, confirming that the NIA should be viewed on par with a constitutional document, may enhance the significance of the NIA. However the judges in this instance considered that so to categorise the Act required more, it behoved the courts to interpret the constitutional provisions in issue "generously and purposively, bearing in mind the values which the constitutional provisions are intended to embody."[21] And where constitutional arrangements retain scope for the exercise of political judgment, (as in the case of the discretion afforded to the Secretary of State under section 32(3)), "a more flexible response in light of unpredictable events is permitted."[22]

Thus there is a consequence to viewing the Act in an elevated level; it entitles the interpreter to pay regard to the Act's background to ascertain its purpose and to use this information when interpreting and applying its provisions. In applying these principles of construction to the present case Lord Hoffmann considered that the NIA must be interpreted against the political backdrop of the situation in Northern Ireland and documents such as the Belfast Agreement and the principles contained therein. The utilisation of this background material, including the long title of the NIA, was permitted as aid to construction, for in Lord Hoffmann's opinion they "form part of the admissible background for the construction of the Act just as much as the Revolution, the Convention and the Federalist Papers are the background to construing the Constitution of the United States."[23]

In this unequivocal statement concerning statutory interpretation and statutory perception, Lord Hoffmann firmly established the practice of using the Agreement and the political background of Northern Ireland as an aide to interpretation. However it is not just this emphatic affirmation of the

---

[17] NIA s. 32(1).
[18] [2002] UKHL 32, para 15.
[19] See Lord Bingham at para 11; Lord Hoffmann at para 25 – the "1998 Act is a constitution for Northern Ireland"; Lord Millett at para 93.
[20] See *Thoburn* v *Sunderland City Council* [2002] 3 WLR 247 at 280-281. In this case Lord Justice Laws categorised the European Communities Act 1972 as a constitutional statute and as such it could not be impliedly repealed. It is also of note that in this case Laws LJ considered the Scotland Act 1998 and the Government of Wales Act 1998 as constitutional statutes.
[21] Lord Bingham at para 11.
[22] *Ibid*, para 12.
[23] *Ibid*, para 33.

purposive approach to the judicial application of the NIA that makes this section of his speech worthy of note. Lord Hoffmann's correlation of the Belfast Agreement and its antecedents with the history and the employment of the historical legal text that precedes the United States Constitution say much for his actual perception of not only the NIA but the Agreement as well. By making this comparison he is affording to these documents a similar status to one of the oldest and most respected Constitutional documents in the modern Western world.

An Alternative View

Disagreeing with the majority's ruling that the provisions in the NIA should be construed in order to give effect to the objectives of the Belfast Agreement was Lord Hobhouse and the former Lord Chief Justice for Northern Ireland, Lord Hutton.[24] Taking a literal approach to the interpretation of the NIA, both were of the opinion that the Northern Ireland Assembly was a body created by a Westminster statute and that it had no powers other than those given to it by statute.[25]

In considering the extent to which the purpose of the NIA to implement the Agreement could affect the interpretation of sections 16 and 32, Lord Hutton did concede that it was necessary to keep in mind that the Belfast Agreement was drafted in the hope that the cross-community institutions of government would succeed. Nevertheless, although the Agreement made certain provisions allowing for review if difficulties arose across the range of institutions, he pointed out that the Agreement contained no express provision stating what would happen if the Assembly failed or did not continue. However Parliament had laid down the procedure to be followed if a scenario such as the failed election in the present case should happen. As such, while these provisions were in place, "the objective of the Belfast Agreement cannot operate to alter the meaning of their words." [26]

This contention, that where Westminster has made legislative provision for certain developments, no extraneous factors may be taken into judicial consideration to alter their original intent is an argument that does bear merit. After all it is a basic constitutional tenet that Parliament is the supreme legislative entity in the United Kingdom. A political agreement, whilst clearly significant, does not have the legal status to alter the meaning or to overrule an Act of Parliament. Therefore, regardless of how influential agreements were in the creation of a piece of legislation, where Parliament has made provisions for a set of circumstances then these are the requirements which must be followed. Politically expedient considerations, even in the interests of stability, cannot be taken into account when such requirements exist.

Moreover Lord Hobhouse regarded the Secretary of State's refusal to call for a new election as required by section 32 as being contrary to the Agreement.

---

[24] Appointed to the Law Lords in 1997.

[25] Paraphrasing Lord Hutton at para 54. This statement was echoed almost word for word by Lord Hobhouse at para 66 – the Assembly is "entirely a creature of the Westminster statute."

[26] *Ibid*, para 61.

In Lord Hobhouse's view, the Secretary of State's decision over the election was political in character "as it is bound to favour one political party over the other", [27] thereby failing to reflect the "inclusive aspirations of the Belfast Agreement."

This divergent opinion, in which Lord Hobhouse also regarded the Secretary of State's refusal to call an immediate election as undemocratic in that it denied the electorate the right to elect a new Assembly which was granted to them by the Act, is an argument of considerable force. The query as to democratic legitimacy and the allegation of political expediency in the majority's approach will remain one of the most controversial aspects of this case.

In *Robinson* and in the recent House of Lords' decision in the *Northern Ireland Human Rights Commission (NIHRC)* case,[28] Lord Hobhouse drew upon the Belfast Agreement as an aid to interpretation.[29] However in contrast to the majority's approach in *Robinson*, he considered that a strict construction of the Agreement was more appropriate. He appears to have viewed it as a contractual document, setting the limits of what the parties had agreed to, and not a loose set of principles to be applied quite flexibly.

The Judicial Role and the Political Domain

Those familiar with Lord Hobhouse's work in the House of Lords may not be surprised that he took such a literal approach to judicial interpretation in *Robinson*.[30] In the *NIHRC* case, he alone delivered a dissenting speech. Finding against the appellants, Lord Hobhouse, like Lord Chief Justice Carswell in the High Court, was unable to read in the specific provisions of the NIA, an implied power as sought by the applicants. "Where the draftsman of the Act has wished to include incidental powers he has done so expressly."[31] Here the answer was unambiguous, unless the legislator had

---

[27] *Ibid*, para 74.

[28] *Re Northern Ireland Human Rights Commission* [2002] UKHL 25 (20 June 2002). The appellants in this case, the Human Rights Commission (NIHRC), sought the power of intervention in order to make submissions on human rights law and practice to courts, tribunals and inquests. The majority had ruled that this power had not been explicitly laid out in s 69 of the NIA. Nevertheless after collective reading of the subsections contained within s 69 and a consideration of both the role of the NIHRC and the overall purpose of the NIA, the Lords ruled that the Commission did have a capacity to make submissions, if permitted by the court hearing the case.

[29] *Ibid*, para 63. It is of note, in contrast to his approach in *Robinson*, that in the *NIHRC* case Lord Hutton was willing to give a liberal approach to interpreting the NIA in determining the extent of the powers of the NIHRC. However this was because in this case he was of the view that the powers sought were "fairly incidental" to what was expressly authorised by s 69. See paras 58 – 59.

[30] See for example, *Fitzpatrick* v *Sterling Housing Association Ltd* [2001] AC 27, at 67: "It is an improper usurpation of the legislative function, for a court to adopt social policies which have not been incorporated into the relevant legislation. . . it is a matter for parliament to consider, not for the courts to ask themselves: 'What would Parliament do now?"

[31] *Re Northern Ireland Human Rights Commission* (2002) UKHL 25, para 70.

expressly provided for the power claimed, Lord Hobhouse was not going to view it as implicitly given.

From his speeches in the *NIHRC* and *Robinson* cases Lord Hobhouse would appear to be something of a black letter traditionalist. However there is another aspect to his favoured approach. In *NIHRC* he showed an appreciable reluctance to interfere with the provisions Parliament deemed necessary to give effect to the Belfast Agreement. He stressed that the Agreement was an "intensely political act",[32] and considered the decision concerning how proactive and interventionist the NIHRC would be, to have been a political decision. In view of that, Lord Hobhouse considered any augmentation of the Commission's powers beyond those that were expressly granted matters for the executive and legislative branches, and not the judiciary who are not privy to the political rationale behind certain clauses.[33]

In *Robinson* and in *NIHRC* we have seen the courts operating in the areas of statutory interpretation and judicial review, which are traditional roles of a court in a constitutional democracy. However, devolution has added an extra dimension to these roles and invariably the courts are now being asked to become involved, whether they want to or not, in the difficult and contentious arena of Northern Ireland politics. Such involvement raises the problems which were acknowledged by Lord Chief Justice Carswell when delivering his Court of Appeal judgment in *Robinson*: "It is a difficult and invidious task for judges sitting in a court of law to adjudicate upon matters which have a highly charged political content, where the exercise of political judgment is at the centre of decision-making."[34]

The Lord Chief Justice clearly recognised the complexities which arise when the judiciary are required to move out from their traditional arena, as such involvement leaves them open to allegations that they take irrelevant and legalistically inappropriate factors such as the political consequences into consideration and leads to questions concerning their much prized neutrality.[35]

Addressing specifically the accusation that a finding in favour of the respondents in *Robinson* would be a politically expedient approach undertaken to provide the most convenient solution, Lord Hoffmann affirmed the principle that a judicial decision must "transcend any immediate result that is involved" and claimed that his construction of the Act satisfied these requirements.[36] As indicated earlier,[37] Lord Hoffmann was of the view

---

[32] *Ibid.* para 66.

[33] *Ibid*, para 68.

[34] [2002] NI 206 at 219. See also his decision in the *Re Williamson's Application* [2000] NI 294.

[35] After the ruling on his case was delivered, Peter Robinson was quoted as saying that the majority of the Law Lords preferred a "dangerously elastic and politically expedient approach." *Irish News*, Friday 26 July 2002.

[36] [2002] UKHL 32, para 33. However both Lord Hoffmann and Lord Bingham in their reasoning did consider the effects of having an immediate Assembly election, a consequence of the literal interpretation of s 32(3). Both were of the opinion that such a development would be undesirable. By an analogy to the costly effects of "premature elections" called by Prime Ministers in the UK, Lord Hoffmann considered that this was an option that was not to be taken lightly (para 29). Lord

that he was entitled to take into consideration the background facts and documents in the case. The perception of the NIA as a constitutional document permits judicial consideration of certain factors that otherwise would be considered inappropriate.

Considering the controversy surrounding this issue, the question remains whether or not Lord Hobhouse's approach is more preferable? Is his disinclination and unwillingness to lapse into issues that arise in the political domain more appropriate?

Providing an answer to this depends much upon the essential genre of a statute like the NIA. Is it to be viewed like the Law of Property Act 1925 or the Sale of Goods Act 1979 and given an essentially literal construction? With enactments like these natural persons and businesses sometimes invest significant sums on legal advice to ensure that business transactions are legally safe. Arguably they have a legitimate expectation that their advisers can assume a technical literal construction of the statute. By contrast a constitutional enactment like the NIA is designed to facilitate the political process. Arguably the approach of the majority allowed the political process to continue. It enabled a maximisation of political decisions to be taken by elected representatives and minimised the number of decisions taken by courts. Paradoxically, this approach may have contributed more to keeping courts out of the political arena.

Whether the judiciary in the future will be required to sit in judgment on potentially contentious issues will of course depend on whether applicants see the courts as a favourable forum in which to address their grievances. How the courts will react if and when they are required to sit in judgment on such cases will remain a source of much interest. What is clear however is the enhanced significance of the judicial role since Devolution.

Reliance on Hansard as a Guide to Statutory Interpretation

One striking feature of *Robinson* (perhaps unusual for a split judgment) was that there was one issue upon which all the Lords agreed. As part of counsel's argument for the appellant he had asked the court to consider statements made by Lord Dubs in the House of Lords during the passage of the Northern Ireland Bill.[38] Lord Cope of Berkeley had asked whether there was any sanction in place if a failure to elect the ministers occurred within the six-week period. Lord Dubs had replied: "If the Assembly fails to make

---

Bingham considered that "elections held with undue frequency are not necessarily productive", and though they "may produce solutions" they can also "deepen divisions" (para 11).

[37] See n 23 and text.

[38] In *Pepper* v *Hart* [1993] AC 593, the House of Lords relaxed the self-imposed rule which precluded reference to statements made in Parliament as an external aid to construction of statutes. Such reference is now permissible only where: (a) legislation is ambiguous or obscure, or a literal construction would lead to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill, together if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear.

such an election within six weeks, it will be dissolved and the Secretary of State then sets the date for an extraordinary election."[39]

These remarks were relied upon by the appellant to show that Parliament intended that the expiry of the time limit should trigger an immediate election.[40] Lord Bingham acknowledged that this statement did appear to give the appellant's argument some support.[41] However he advised that it must be read in context. He pointed out that Lord Dubs was not considering what the position would be if at the end of the six-week period there had been no effective election but such an election was expected within a matter of days, because this was not the question that had been asked. Lord Hoffmann took a similar position. He was of the opinion that Lord Dubs had not given any thought to the question of whether the Assembly would retain power to elect after the expiry of the period and the answer that he did provide was a "perfectly adequate" explanation of the effect of the clause.[42]

Although Carswell LCJ had "attached some considerable weight"[43] to the statement made by Lord Dubs, all those delivering the judgment in the House of Lords disagreed with his reliance on parliamentary debates in this case. As Lord Bingham pointed out: "It is not surprising that a minister, called upon at very short notice to answer a number of unexpected points, failed to speak with the precision expected of a parliamentary draftsman." [44] The Law Lords were of the opinion that the task of interpreting legislation was not assisted by the "too ready" reference to what had been said during debates in the House of Lords.[45]

They further took the opportunity to criticise, not just in this case but in general, the utility of referring to debates in parliament, emphasising that the occasions will be very rare when statements made by members of Parliament will be of use in statutory construction. Lord Hoffmann even went as far as to say that Lord Mackay, who dissented in *Pepper* v *Hart* and warned of the disadvantages of the use of references to Hansard, may have turned out to be the "better prophet".[46] Lord Mackay's objection centred on his belief that in almost all cases involving statutory interpretation, the parties' legal advisors would have to study Hansard to see whether or not any assistance could be derived from it. The expense of searching for useful material and the consequent increase in court time were other objections. On the whole Lord Mackay thought that access to Hansard would increase the cost of litigation without making an appreciable contribution to the quality of decision-making.

Robinson illustrates the force of Lord Mackay's objections. Little regard appears to have been given to the strict limits laid down in *Pepper* v *Hart* on the use of this material. The statement relied on was made during a lengthy

---

39 19 October 1998. HL Deb col 1229.
40 This argument was rejected by Kerr J in the High Court and by Nicholson LJ in the Court of Appeal.
41 [2002] UKHL 32, para 17.
42 *Ibid*, para 38.
43 *Ibid*, para 17 (Lord Bingham).
44 *Ibid*.
45 Lord Hobhouse, para 65.
46 Para 39.

and complex debate,[47] where understandably little time was permitted for proper consideration of the question and its context. Perhaps the greatest objection to over-reliance on ministerial statements is that they are just statements, and cannot be said necessarily to reflect the intention of Parliament as a whole.

Despite various attempts by the House of Lords to curtail use of Hansard,[48] reference to it is still fairly frequent.[49] *Robinson* may now be cited as a cautionary example of liberal reliance on it. The unequivocal rejection of its use in that case is certainly an endorsement of the minimalist approach to *Pepper* v *Hart* and a tacit approval of Lord Mackay's dissent.

CONCLUSION

Following the extensive devolution programme a substantial body of legislation was introduced to accommodate the fundamental constitutional developments. The interpretation and application of legislation such as the NIA and the Scotland Act was left to the courts to determine. How these legislative enactments should be construed was a matter of academic debate. Would they be perceived in a manner similar to other primary legislation or would they be treated differently because of their constitutional importance? One of the most important aspects of the *Robinson* judgment was that it provided an authoritative ruling on the significance of an Act of Parliament such as the NIA. The judicial interpreter in NIA related cases is now entitled to have regard to the Act's background in the Belfast Agreement to consider its purpose and to apply this knowledge when interpreting its provisions. It would now seem that the approach adopted by Kerr J in the recently decided case of *Re Parsons* is the one that is favoured by the House of Lords.[50] The one other major issue dealt with in *Robinson* was the use of Hansard in the interpretation of legislation. It would seem that another cautionary note has been sounded in this debate.

---

[47] It should also be pointed out that Parliamentary debates often take place late at night in nearly empty chambers.

[48] See *Ex p Spath Holme Ltd* [2001] 2 AC 349; *R* v *A (No 2)* [2002] 1 AC 45.

[49] [2002] UKHL 32, at para 40 (Lord Hoffmann).

[50] Unreported (QBD). Here Kerr J, in interpreting the Police (Northern Ireland) Act 2000, cited the Agreement as an endorsement of the new recruitment policy which requires the new intake to comprise of 50% Catholic and 50% Protestant recruits.

BOOK REVIEWS

UNDERSTANDING CORRUPTION IN IRISH POLITICS. By Neil Collins and Mary O'Shea [Cork University Press, Cork 2000, 98pp, Paperback £6.95]

This is an odd book. Readers who expect sensational revelations dishing the dirt on nefarious goings-on in the Irish Republic will be disappointed. Despite the subject matter and its brevity, the book is surprisingly laboured. The authors are more intent on educating than on entertaining their readers. Defining terms looms larger in their priorities than the sordid details of dishonest deals. The book's point of departure is an acknowledgement by the authors of the central importance to the Irish public of the issue of corruption in politics and business. Collins and O'Shea argue: "To understand political corruption in Ireland, it is necessary to examine the concept within an analytical framework that allows both historical and international comparison" (page 1). They suggest that the impression given to the public by the media makes corruption appear a more serious and more widespread problem than it actually is. This is such a recurrent theme through the book that readers might be forgiven for supposing that one of the purposes of the book is to defuse public concern about the issue. However, to be fair, the authors put forward a number of suggestions for tackling corruption in a chapter entitled "Anti-Corruption Strategies". Further, despite the relatively low-key and matter of fact manner in which they discuss actual episodes or areas of corruption, they do in the end categorise Ireland as "institutionally corrupt". That is to say, they conclude that "there is reason to suspect that in certain areas corruption is routine and pervasive" (page 88).

But while the authors argue that corruption in Ireland is of a more serious nature than the incidental corruption that is to be found in all countries, they reject any suggestion that corruption in Ireland is systemic. They identify three areas of especial concern. One is where "politicians have a direct role in deciding specific, individual policy decisions of high value to wealthy business interests such as planning at local government level". The outstanding example in this area is the issue of land rezoning. The country's economic expansion demands that more and more land is rezoned to enable new homes to be built. The fact that such decisions result in huge increases in the value of the land that is rezoned puts temptation in the way of both the beneficiaries and the local councillors with the power to make changes to the use to which land can legally be put. Another is where "civil servants routinely exercise discretion over commercially valuable decisions in the context of lax systems of accountability and ambiguous policy objectives". The third is where "ministerial decisions are both commercially charged and the policy criteria are insufficiently explicit" (page 89).

The opening chapter of the book discusses the international, academic literature on corruption and it is in this chapter that the authors introduce the distinction among different levels of corruption ranging from the incidental to the systemic. They also examine the issue of clientelism as being at the

boundary between corruption and legitimate assistance to constituents. They then look at the case of Italy to provide a reference point for corruption in an established liberal-democracy. It is scarcely incidental that Ireland looks clean by comparison. The second chapter provides a chronicle of corruption in Irish politics, going back to the Locke's Distillery scandal in 1947. The case concerned the attempt of a group of charlatans to pass themselves off as a foreign consortium capable of taking over the operation. By today's standards it seems a very trivial episode. However, the main focus of the chapter is on the scandals of the 1990s epitomised by the Beef, McCracken, Moriarty and Flood Tribunals and the DIRT Inquiry. DIRT stands for deposit interest retention tax, which was introduced by the 1986 Finance Act. The inquiry was prompted by the widespread use of bogus non-resident accounts to evade payment of the tax. The Beef Tribunal was prompted by allegations aired on British television about irregularities over the operation of export credit guarantees. The Flood Tribunal was concerned with allegations surrounding the rezoning of land in the environs of Dublin, while the central issue of the McCracken and Moriarty Tribunals was payments by big business to two leading politicians, Charles Haughey and Michael Lowry.

Next the authors tackle the issue of the causes of corruption in Ireland. They discuss these under six headings: historical developments, longevity in power, increased state activity, ethical leadership, financing of political parties, and political career patterns. They stress particularly that corruption in Ireland is not new and that the forms which corruption takes in Ireland are similar to what goes on in other countries. Chapter 4 is on the consequences of corruption and they divide these into economic, political and administrative consequences. Once again, the basic thrust of their analysis is designed to provide reassurance. For example, they suggest that the impact of the scandals of the 1990s on international perceptions of the level and extent of corruption in Ireland has been limited. They quote Ireland's ranking by Transparency International to underline the point.

In the chapter on anti-corruption strategies, they argue that of most relevance in the Irish case is the reduction of opportunities for the exercise of discretion in public policies that affords individuals significant benefits. They also argue the case for increasing parliamentary oversight, especially in the light of the role that the Public Accounts Committee played in the exposure of the DIRT scandal. They are more equivocal about the value of making an example of a few high profile individuals, arguing that such prosecutions can distract attention away from the underlying causes of corruption. Finally, they stress the need for a realistic assessment of the problem, noting that "domestic opinion in most countries overestimates the extent of corruption" (page 85). It is also entirely in keeping with the spirit of this puzzling book that where definitive proof was not forthcoming that money donated to politicians gave rise to the grant of favours, they underline the fact.

ADRIAN GUELKE ***School of Politics, Queen's University of Belfast***

THE LEGAL SYSTEM OF NORTHERN IRELAND By Brice Dickson [SLS Legal Publications (NI), 2001, Fourth Edition, xxxii and (with appendices and index) 423 pp, £25].

The author describes the aim of this book as being "the supply of basic information about the institutions and procedures of Northern Ireland's legal system, not about the actual content of the law." The book is now in its fourth edition, with previous editions quickly becoming established authorities on this subject. In writing this edition the author notes that, although the framework of the legal system has not radically altered, a great deal of detail has changed since the previous edition. Only a cursory glance through the current edition is required to confirm this fact. Almost every chapter of the book outlines important developments that have occurred within the Northern Ireland legal system since the previous edition was published in 1993. These changes do not merely stem from the re-establishment of devolved government or the implementation of the Belfast Agreement. Additionally the book highlights a large number of other developments that have occurred within the legal system during this period. Even in areas that have not been subject to reform, the author has augmented the text by reference to a substantial number of judicial decisions, research reports and academic literature that has been published in recent years.

The book retains the chapter format adopted in the previous edition. There are eight chapters in total. Chapter one provides an analysis of the historical development of the legal system in Northern Ireland. In doing so the chapter brings the reader entirely up to date by setting out the current court structure and by explaining the relationship between central government, the departments of the Northern Ireland executive and local authorities in the governance of Northern Ireland. Additionally the chapter examines the role of various individuals within the legal system, stretching from the Lord Chancellor to justices of the peace, and of the police, probation and prison services. Chapter two builds upon the previous chapter by explaining the division between criminal law and civil law and between statute law and common law. To anyone not familiar with Northern Ireland legislation the explanation of the many types of primary and secondary legislation that can arise in Northern Ireland will be particularly helpful. Indeed this is also augmented by examples of particular pieces of legislation, reproduced in appendix one of the book. The chapter also explains the influence that both the European Community and the European Convention of Human Rights have had upon the legal system. Chapter three provides comprehensive information on the sources of legal advice that are available and on the legal aid system. Subsequent chapters provide the reader with information on the operation of Northern Ireland's court structure. Chapters four and five respectively provide an analysis of the operation of Northern Ireland's criminal and civil courts. Chapter six, entitled 'Special Courts', deals with the operation of courts which exist outside the framework provided by the preceeding chapters and examines the role of both relatively well known courts such as youth courts and coroner's courts and of less well known courts such as election courts. Chapter seven then examines the function of the various tribunals that have been created by statute to adjudicate on particular aspects of the law. Finally, in chapter eight, the author provides an

analysis of the various oversight bodies that oversee the administration of the law in Northern Ireland. The bodies examined in this chapter include those that operate throughout the United Kingdom, such as the Criminal Cases Review Commission, and those that are particular to Northern Ireland, such as the Northern Ireland Human Rights Commission. The book then concludes with two appendices. Appendix one provides an example of a case report together with examples of different types of legislation. Appendix two is a useful reference point, providing contact details for both advice agencies throughout the province and for a wide variety of other bodies that have a role within the legal system.

Ultimately this is a book which surpasses the objectives that have been set for it by its author. The book can only be described as providing 'basic' information about the Northern Ireland legal system in the sense that it is written in an easily accessible style that assumes no prior legal knowledge. In all other respects the author has produced a book which is obviously the product of in-depth research and which will provide the reader with a very sound knowledge of the way in which the Northern Ireland legal system operates. Given the book's breadth of coverage there are limits to the depth of discussion that can be undertaken in respect of particular topics. However, the introduction of footnotes in this edition has enabled the author to deal with this by providing footnote references to alert the reader to other sources from which further information may be gleamed. One criticism, however, which might be made is that the author's discussion of the influence of European Community law within Northern Ireland does not fully reflect some of the recent developments that have occurred within the Community legal system.

So, who should read this book? The author anticipates that the book's main readership will be first year law students. Undoubtedly, the book will be of immense value to these students in Northern Ireland. However, the book is also a valuable resource for a much wider readership. Anyone who comes into contact with the legal system in Northern Ireland will benefit from the insights provided by the book. Additionally, whilst legal advisors in Northern Ireland will be fully conversant with the legal system, they are also likely to find the wealth of statistical information provided by the author particularly useful.

Finally, however, a cautionary note should be sounded. This is a book that aims to demystify the operation of the legal system in Northern Ireland. It does not deal with the substantive law. Consequently, as the author himself highlights, the book will not displace the need to obtain legal advice on any legal problems that might arise.

DR BRIAN JACK
School of Law, Queen's University Belfast

THE JUDICIAL ROLE IN CRIMINAL PROCEEDINGS. By S Doran and J Jackson. [Hart Publishing, Oxford, 2000, hardback, 352 pp, £50]

This collection of essays originated as a conference held in Belfast which set out to critically examine the judicial role or function in criminal proceedings, as indicated by its title. The topic has received increasing attention over the years and a book which draws together a body of scholarship which has so far been predominantly scattered amongst various journals, is long overdue. It is unsurprising that this task was undertaken by Doran and Jackson who have researched and written extensively in this area.

The collection is diverse, offering various perspectives on the judicial role from a feminist analysis, as offered for example by Fox ("Judicial Discretion and Gender Issues in Sentencing"), to comparative approaches such as that of Nijboer ("Comparative Perspectives on the Judicial Role"). It covers many aspects of criminal proceedings, including the role of victims and media coverage of trials. Thus, the concentration on the judicial role is used as a way in to a wider analysis of the criminal process. Indeed, the book specifically sets out to examine the judicial role in its historical and cultural context. Through this contextual approach the book seeks to understand differences in the role of the judiciary across jurisdictions and to understand changes which have occurred within jurisdictions.

The collection provides an up-to-date analysis which addresses the diverse and ever changing pressures on the criminal justice system. For example, the impact of the Human Rights Act and the growing strength of the victims movement and its effect are explored by Jackson and Shapland respectively. Both chapters examine how the role of the judiciary has expanded and may continue to do so. Jackson discusses how the need to interpret legislation in line with the Human Rights Act will inevitably result in judges becoming more involved in the trial than ever before as they will increasingly be called on to protect the rights of not only the defendant, but also the rights of all of those involved in the criminal justice process. As part of her extensive work on victims and witnesses in the criminal justice system Shapland cites the recent changes embodied in the Youth Justice and Criminal Evidence Act 1999 and argues that judicial concern for witnesses should be expanded beyond the courtroom door. She argues that judges should oversee the functions now performed by other courtroom personnel and agencies. Whilst this proposed scheme may have the potential to improve the experience of witnesses, it fails to address the tension created by charging one party with overseeing the welfare of both the accused and accuser. Furthermore, it does not take on board the more general arguments against expanding the role of the judiciary beyond one which has traditionally been perceived as umpireal.

Whilst the diversity of this collection makes it both interesting and broad-ranging, that is perhaps also its weakness. By seeking to cover so much does the book fail to fit the contributions together within a coherent framework? The collection is structured thematically to try to overcome the inevitable problems associated with collecting together a diverse body of work such as this. The book is arranged in five parts: Judging Law and Fact (covering general issues), Protection Of Rights and Prevention of Unfairness (covering specific demands on judges), Case Management, Judging and Judges at Times of Crisis, and Sentencing. This approach is partially successful. It works in so far as the nature of each contribution is indicated by the section in which it appears, yet there is still as much difference between some of the chapters as there are similarities. This is due to the very specific nature of

some of the contributions, many of which are directed at one jurisdiction or issue.

The diversity offered by this collection provides another potential problem. This is a substantial volume of twenty chapters. Whilst each of these chapters are good, informative, critical pieces, it is unlikely that there are many academics who would have an interest in all or perhaps even the majority. This problem is perhaps exacerbated by the multi-jurisdictional nature of the book. Chapters cover the judicial role in, for example, the USA, South Africa, Israel, the Netherlands, and Canada. This broad sweep is crucial in delivering the promise that the collection as a whole will help to explain the differing roles of judges according to geographical and cultural context. However, this breadth also means that one of the book's greatest strengths, bringing together in one volume a body of work which looks specifically at the judicial role in the UK, is diluted.

Many of the chapters will be excellent for evidence, criminal justice, sentencing and victimology courses, but this text is unlikely to be used as core reading material for students. Further, many readers will already be familiar with some of the chapters which are available in similar form elsewhere, either in journals, other edited collections or on the internet. Again this may have the effect of narrowing the potential market for such a hefty and expensive volume. At fifty pounds it is therefore unlikely that many individuals would buy this text, although I would recommend it for any library in its law, criminology or social sciences collections.

JO WINTER
School of Law, University of Manchester

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION: A COMPARATIVE ANALYSIS. By Hilary Delany [Round Hall Sweet and Maxwell, Dublin, 2001 hardback, xl and (with index) 281pp, €80]

In the opening paragraph of *Judicial Review of Administrative Action: A Comparative Analysis*, Hilary Delany writes that the book's aims are "to provide a comprehensive analysis of the grounds for judicial review of administrative action as they exist today in common law jurisdictions and to assess the future of judicial review generally". These objectives are undoubtedly as worthy as they are ambitious; yet they are also rather open-ended, and it is self-evident that a comparative project of this nature must somehow be limited in order to allow any meaningful conclusions to be drawn.

To this end Delany identifies, in chapter one, a number of key themes in contemporary administrative law which form a prism through which jurisdictional differences – and similarities – may be observed and appreciated. These include the extent to which judicially-authored principles of review have been overlaid with legislative and constitutional frameworks (such as the Administrative Procedure Act 1946 in the United States and

Australia's Administrative Decisions (Judicial Review) Act 1977); changing attitudes to the scope of judicial review and, specifically, the modern tendency to eschew rigid functional distinctions in setting the limits of review (see, classically, *Ridge* v *Baldwin* [1964] AC 640); the debate concerning the intensity of judicial review, particularly in relation to substantive principles such as reasonableness and, now, proportionality; and the trend towards "greater openness and transparency" (page 13) in administration. These matters certainly rank as important issues in modern judicial review – although others, perhaps most obviously the extent to which administrative law is becoming rights-oriented under the influence of constitutional and international human rights instruments, are equally significant – and they are capable of supplying a useful framework for comparative analysis.

The remainder of the book, however, relies upon a doctrinal rather than thematic organisation of the material; the four substantive chapters therefore focus on particular principles of judicial review, specifically jurisdictional error, abuse and retention of discretion, legitimate expectation and procedural fairness. Thus, although the author presents a wealth of material from various common law systems – in particular the Republic of Ireland, which forms the book's jurisdictional focus, England, Australia, New Zealand and Canada – there are times at which concentration on doctrinal detail tends to obscure the wider, and arguably more interesting, points which the thematic approach of the opening chapter appears to presage.

Delany argues that the most pronounced differences between the various common law systems considered in the book are to be found in their approaches to jurisdictional error. This issue is important because it impacts fundamentally upon the debate about the intrusiveness of judicial review which Delany refers to in her opening chapter: whereas courts are often willing to defer to decision-makers *vis-à-vis* the exercise of their discretion (hence the hands-off approach to matters of substance famously articulated by Lord Greene MR in *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223), jurisdictional questions are hard-edged, and must be answered correctly by the decision-making agency before its discretion arises in the first place. Consequently, the more widely the category comprising jurisdictional issues is constructed, the closer the judiciary's control of the administration becomes. Delany contrasts the more expansive approaches adopted in England, Ireland and New Zealand, in which it has been concluded (with varying degrees of certainty) that all errors of law are jurisdictional, with the Australian position, which continues to recognise a concept of error of law within jurisdiction (at least in relation to lower courts), and the Canadian approach, which regards some errors of law as inherently jurisdictional but allows judicial intervention in relation to other such errors only if the decision-maker has adopted a patently unreasonable construction of the relevant legislation. The author cautions the Irish courts – which, although sympathetic to the expansive English approach, have not yet firmly committed themselves on this point – that to regard all errors of law as jurisdictional implies inadequate sensitivity to the distinction between the judicial and administrative roles, although she omits to spell out her own preferred solution to this difficult question.

The chapter on legitimate expectation draws out further differences between the jurisdictions under consideration. The doctrine of legitimate expectation

has traditionally fulfilled a procedural role, ensuring that individuals' reasonable expectations that decision-makers will act towards them in a particular way are not dashed; in this way it supplements the established principles of procedural fairness by helping to determine their precise meaning within specific factual matrices. In recent years, however, this purely procedural conception of legitimate expectation theory has increasingly been questioned, and it has been argued that individuals ought to be able to enforce reasonable expectations not just of good procedural behaviour, but also of positive substantive outcomes. This issue – like the doctrine of jurisdictional error – goes to the heart of the debate about how judicial intervention and administrative autonomy ought to be balanced against one another since, if the courts insist that decision-makers confer expected benefits upon individuals, administrative discretion is potentially severely curtailed. As with jurisdictional error, Delany concludes that the position of English law is significantly more interventionist than that which is occupied by the other common law systems she considers, largely on the strength of the recent decision of the Court of Appeal in *R* v *North and East Devon Health Authority*, *ex parte* Coughlan [2001] QB 213 in which it was held that English law does indeed recognise substantive legitimate expectations, and that decision-makers may be required to fulfil such expectations unless the court is satisfied that there exists a countervailing and overriding argument of public policy.

Locating the English courts' interventionism in relation to substantive expectation and jurisdictional error within a broader common law setting helpfully contextualises their approach; but it might have been interesting to go further, for example by considering whether this activist stance of the English courts can be rationalised by reference to constitutional or institutional factors which are peculiar to the jurisdiction. This, in turn, would enhance our ability to evaluate the different approaches which are taken to these problematic issues across the common law world, and to determine the extent to which solutions adopted in one jurisdiction may usefully be borrowed by another. There are a number of points in Delany's book where the reader is left to speculate about these wider issues. Perhaps that is inevitable, given the very broad ambit of the inquiry which the book seeks to undertake. At the very least, however, Delany has provided public lawyers with an accessible and highly readable account of how other common law systems approach judicial review. If this stimulates – as it should – a greater willingness to look at the solutions adopted elsewhere to difficult questions of administrative law, then the book will have served a valuable purpose.

MARK ELLIOT
Faculty of Law, University of Cambridge

LIBEL LAW – A JOURNALIST'S HANDBOOK. By Damien McHugh. [Four Courts Press, Dublin, 2001, 96 pp, €15.95/£11.95/$19.95]

The second edition of this already popular handbook on the law of the Republic of Ireland has by reports been welcomed. Rightly so. It is a limpid work: clear, accessible and no nonsense. It runs to 96 pages only, yet includes the 1961 Act, index, glossary, and text of the National Union of Journalists (NUJ) guidelines.

What it does not address is the overall context within which libel law has become a vital legal issue. The recent past has seen Irish libel law used as a tool for silencing media scrutiny by corrupt politicians such as Mrs Cooper-Flynn, Mr Haughey *et al*. This is partly connected to the exalted position of privacy and good reputation in Irish law. Privacy features in the 1937 Irish Constitution (see article 40). It remains a "fundamental right" within the Republic, it was said by the Chief Justice in 1987. The preservation of "good name" is also based in the Constitution (again, in article 40). Article 40 (6) of the Constitution guarantees the freedom of the press, yet privacy and good name take precedence in a conflict between the press and an individual. Part of the reason why those such as Haughey could live lavishly on quite modest state salaries without anyone publicly forcing the explanation was because of the law. In addition the jury culture of libel trials in the Republic followed the bad example of the English High Court, where George Carman elicited excessive damages awards from juries for litigious celebrities like Lord Archer in the 1980s and 90s. The Irish Court Act of 1988 abolished juries for injury claim cases, and this probably stabilized libel damages in the Republic. The calls for reform were fruitful in that a Law Reform Commission of the early 1990s did recommend some changes, yet the active statute is still the Defamation Act of 1961. Change must occur – either juries go, or the burden of proof must in some manner be altered.

Of course full exposition of the evident case for reform is not the brief of Mr. McHugh. Both a barrister and ex-journalist, he keeps to his brief and his copy is pithy. The book runs through the law in simple language, and refers to journalistic practice. This shall be its success. It does in fact allude to reform and lacunas within the Irish law, and this, cleverly, remains understated. The handbook covers the basics of libel; the procedure for libel actions (including cyber libel); court reporting (including restrictions on reporting); contempt of court; privacy.

A published matter being found by a jury to be potentially defamatory, the onus is on the defence. McHugh rejects the golden rule of libel, "when in doubt, leave out". He notes though that "the Irish are an extremely litigious race" (page 20) and he advises real caution, as he provides tactical insights, i.e. when to give or omit an apology in the face of an action. "If an apology is published in the first instance, guilt is being admitted at a very early stage (. . .) if the apology is not published or is delayed, the legislation is there to be used against the publisher at the hearing" (pages 25-6). So McHugh, having illustrated the pitfalls, recommends specifics for either road – published apologies, for example, should then be early, self-penned and non-admissive of fault.

The advice on retention of dated notebooks is entirely justifiable, as is the recommendation (page 43) that court reporters never "pick up" an account of events from another party to proceedings at which they were not present. Much of this goes to plain sense, but having a little book of plain sense on every journalist's desk would probably prevent many libel actions coming

into being. Interestingly, McHugh declares that more problems arise with little thought of "social-type" items than big stories. A checklist of basic rules is given (page 33) in first person terms for the journalist:

1. Don't be economical with the truth.

2. Do not trivialise potentially serious stories.

3. Exercise greater control over copy.

4. Maintain hard copies of original draft article material.

5. Avoid using rumour and hearsay.

6. Facts are sacred.

Perhaps then the most controversial yet charming aspect of this book is that it presents journalism as a serious profession. Balance is stressed as a must, and incaution presented as self-harm, even with the trifles of "headers" on court reportage. McHugh writes that the writer of such headers carries a "heavy responsibility" (page 45). The principle is general. The Irish Times reported case of 10 February 2000 is cited (page 55) to illustrate how comment on a defendant's appearance and demeanour pre-trial was found to have breached her right to a fair trial. The press have a right under article 34(1) of the 1961 Act to report on legal proceedings in normal conditions, yet pressmen must tread carefully around the court-house.

McHugh treads carefully around the more complex issues and picks out the bare bones. A discussion of journalistic privilege forms the last section of the book. Whilst the press may be the "third estate" there is no such thing as a right to refuse to reveal sources etc. McHugh mentions the clash with the ECHR, and the reform of UK law to respect privilege in 1981. Libel Law: A Journalist's Handbook is an excellent resource, which should earn its space on the desk of any journalist or student of media law. Its concision is flawless.

BRIAN CIAN O'NEILL ***School of Law, Queens University Belfast***

CHARITY LAW IN NORTHERN IRELAND. By Kerry O'Halloran and Ronan Cormacain. [RoundHall Sweet & Maxwell, 2001, hardback, lxii and (with appendices and index) 618pp; €150]

This book provides a very useful account of a broad range of issues relating to charity law in Northern Ireland. The material covered includes not only charity law in the "black-letter" sense, but also issues relating to the historical context of charity law, the legal framework, including a brief history of the courts with charitable jurisdiction, the practical administration of charitable trusts, the management of this branch of the voluntary sector, and some useful procedural information. Although the title limits the content of the book to the law in Northern Ireland, the authors discuss the law in

Northern Ireland in the context of current law and practice in England and Wales and in the Republic of Ireland.[1]

The book is in two main parts. The first, and by far the larger part, is entitled "The Law and Practice", and addresses the substantive and administrative aspects of charity law. The second part, "The Procedures" goes on to provide a brief summary of common procedures, useful addresses and a selected bibliography.

The twenty-two chapters on charity law and practice in Part 1 make up the bulk of the book. This section is sub-divided into four further parts, which deal with "The Principles, the Law and the Courts", "Administration", "Charitable Purposes", and "Charities". The first section introduces the governing principles of charity law, the legal framework and processes, as well as some of the issues and implications arising from the Human Rights Act 1998, and other legislation. The opening chapters are thought-provoking, and, in a theme which echoes throughout the text, make a number of arguments in support of root and branch reform of charity law in Northern Ireland. These chapters include an account of the history and development of charity law, as well as exhaustive descriptions of various *dicta* on questions such as the relationship between the Preamble to the English Charitable Uses Act 1601, and the Irish Statute of Pious Uses 1634. In a volume which attempts to cover all bases, however, these chapters are arguably of primarily academic interest.

The second section of Part 1 deals with the administration of charitable trusts. Chapter Five considers in particular the responsibilities of the considerable range of agencies associated with charities in Northern Ireland. Chapter Six, on trusts and charitable trusts, provides a useful basic introduction to equity and trusts, and to the concept of charitable trusts, including a useful discussion of both the Irish and Northern Irish case law, as well as the more commonly cited English authorities. Chapter Seven introduces the concept and role of trustees, including the powers and duties of charitable trustees. This section forms useful introduction to the legal dimension of charity law for non-legal specialists.

The third section of Part 1 addresses the central substantive issue of the definition of charitable purposes under Lord Pemsil's "four heads of charity". The authors go beyond the traditional categories of "Relief of Poverty", "Advancement of Education", "Advancement of Religion" and "Other Charitable Purposes", to consider issues surrounding the charitable status of health and welfare services, political purposes, and recreation. This section includes a wealth of local case law, as well as providing interesting reflections on Northern Ireland policy in relation to charitable purposes. Potential human rights implications are considered at relevant points, for example, in relation to trusts for the advancement of religion.

The fourth section describes the management responsibilities of charities, including the formation of charities, charitable activities, the various tax and rates exemptions, and the procedures for dissolution of charitable organisations. This section, which again provides background information

---

[1] See also O'Halloran, *Charity Law*, (Round Hall Sweet & Maxwell, Dublin, 2000).

for the non-legal specialist on matters such as legal personality, sets out subjects such as the alternative legal forms for the constitution of charities, and the management responsibilities attendant on officers of charitable organisations, in a clear and helpful format. The law and practice relating to the principle of *cy-pres* can also be found in this section. Finally in Part 1, the current law relating to tax and rates exemptions applicable to charities in Northern Ireland is discussed, followed by a brief section on the procedures for dissolving a charitable body. Part 2, "The Procedures", forms a short coda to the main text, and describes both Inland Revenue Procedures and Charities Branch Procedures, as set out in their respective leaflets and documents.

On the whole, this book provides a thorough account of 'how to' in relation to charities in Northern Ireland. Underlying the fundamental purpose of the book, which explains the law, practice, administration and procedure of charities in layman-accessible terms, there is also an argument in support of the reform of charity law. The authors argue for the review of a number of fundamental aspects of charity law in Northern Ireland, including: the basis of charitable status; the relationship between charitable purposes and public services, state and social provision; whether charities for socially excluded purposes ought to be allowed to campaign for political change; whether trade restrictions on charities ought to be lifted; and whether the promotion of religion ought to be regarded as charitable, or sectarian in a secular society. On the whole, the book argues in support of a more thoroughly modern approach to charity law. The authors also review reform initiatives in other jurisdictions, with reference to a number of consultation papers, including the DHSS Consultation Document on Charity Law,[2] and describe the need for reform as "unquestionable".[3]

The structure of this book is particularly suitable either for non-legal specialists, seeking a thorough account of the legal regulation of charities, combined with a general introduction to the legal system and to "Equity and Trusts", or as a work of reference for practitioners. In places, however, the authors' attention to detail and determination to address every possible aspect of the charitable sector, have a tendency to interrupt the flow of the text, and to make parts of the book appear laboured and slightly difficult to read. Extensive reference is made to case law and statutory authorities, although little use is made of academic materials. These characteristics, along with some repetition of material across chapters suggests that the book is not intended to be read sequentially but as a work of reference. Although a shorter, more selective and discursive text might be more engaging for the reader, the book provides a very thorough description of all aspects of charity law and practice in Northern Ireland. These features will further secure its place as a valuable work of reference.

Unfortunately, and unusually in this otherwise comprehensive text, reference to the Trustee Act (Northern Ireland) 2001, under consideration in the Assembly at the time of writing, is omitted. Reference is made to the Trustee Act 2000, which effected major changes to trustee investment

---

[2] 1995, Northern Ireland.
[3] At p 45.

powers in England and Wales.[4] These changes, which were extended to Northern Ireland in the 2001 Act, are not set out in any detail, nor is their impact evaluated. The authors focus instead on the investment powers conferred under the Trustee Investment Act 1961, which was amended by the 2001 Act. Nevertheless, this omission aside, "Charity Law in Northern Ireland" packs a broad range of material into a single text. As a "one-stop shop" on not only charity law, but charities in general in Northern Ireland, this book will not only be valuable in guiding lay-persons attempting to navigate the legal, and other, issues associated with charitable organisations, but would also make a useful addition to the practitioner's reference library.

DR LORNA FOX ***School of Law,***
Queens University Belfast

---

[4] At p 155.