NORTHERN IRELAND

LEGAL QUARTERLY

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Vol. 54 No. 1 **Spring 2003**

NORTHERN IRELAND LEGAL QUARTERLY

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

ISSN 0029-3105

"LITTLE BETTER THAN CANNIBALS": SIR JOHN DAVIES AND EDMUND BURKE ON PROPERTY AND PROGRESS

Seán Patrick Donlan, Junior Lecturer, School of Law, University of Limerick

Their lives separated by a century, any tie joining Sir John Davies (1569-1626), the most important jurist in early seventeenth-century Ireland, and Edmund Burke (1729-1797) is less than obvious. At the core of the discussion here is a curious historical irony. Elements of Brehon law deemed by Davies, with many other English commentators, to be prohibitive of social and economic progress in Ireland were to reappear less than a century later in the penal laws. This is, of course, entirely consistent. If native custom was seen to effectively obstruct "improvement", it is not surprising that similar formulae would reappear in a legal order designed to inhibit development or to erode the position of propertied catholics. While, in general, Davies and Burke appear to adopt broadly similar schemes of property and progress, in which law and commerce were important influences on manners (broadly understood to include social practices and mores), there were also critical differences. These relate primarily to Burke's substantially different interpretation of Irish history both before and after Davies' time in Ireland. Living as he did on the march-lands of Irish/British, catholic/protestant, even perhaps ancient/modern, identities, Burke provides an especially interesting subject for the student of Irish history. This essay is a first, tentative step in understanding his complex relationship to Ireland and its past.[1]

Little Better Than Cannibals

The defeat and subsequent submission of Hugh O'Neill, the earl of Tyrone, in the Nine Years War (1594-1603), marked the end of the last major resistance of Gaelic Ireland. Coupled with the "flight of the earls" (1607) and the unsuccessful revolt of Sir Cahir O'Doherty (1608), it made manageable an extensive programme of plantation and colonisation in Ulster.[2] With the elimination of a Scottish threat by the accession of James I (VIth of Scotland) to the English crown, England gained effective political

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[1] This article was originally presented as a paper at Louis Cullen's Trinity College seminar series. I remain grateful to Professor Cullen for the invitation. I am indebted, too, to the Irish Legal History Society for a bursary enabling me to visit the Burke archives, from which I have drawn, and to Niall Osborough and Bernadette Cunningham who read drafts of this article.

[2] See generally Aiden Clarke with R. Dudley Edwards, "Pacification, plantation, and the catholic question, 1603-23" in TW Mood, FX Martin, FJ Byrne, *A new history of Ireland* (1976), iii.187-232. On the flight, see especially John McCavitt, "The flight of the earls, 1607", *Irish Historical Studies* 29 (1994) 159. See also FW Harris, "The rebellion of Sir Cahir O'Doherty and its legal aftermath", *Irish Jurist* (n s) 15 (1980) 298 and "Matters relating to the indictments of "the fugitive earls" and their principal adherents", *Irish Jurist* (n s) 18 (1983) 344.

control it had never previously enjoyed, or at least long maintained.[3] This practical control also permitted, and was secured by, subsequent legal changes that saw the virtual elimination of native Brehon laws throughout Ireland in favour of the application of English common law. Sir John Davies was to play an especially important role in promoting this change.[4]

An Englishman of Welsh parentage, Davies combined significant talents in both poetry and politics.[5] His political successes, in England as a member of parliament and later in Ireland, were, in fact, aided by poems dedicated to influential patrons and royals. Through this combination of flattery and ability, he was eventually knighted (1603) and obtained, in turn, the posts of Irish solicitor-general (1603-6) and Irish attorney-general (1606-19). Davies was also the first MP for Fermanagh (1613) and leader of the protestant, official group in the Irish parliament, installed as its speaker in a comical scene in which he was physically placed on the lap of an opposition candidate. During this time, Davies was also an English serjeant-at-law and later prime serjeant. Once back in England, he returned to the Westminister parliament, but died the night before he was to become chief justice of king's bench.

Unlike many critics of Irish policy and polity, Davies effected real change in Ireland. His fortuitous arrival at the close of the Nine Years' War permitted him the opportunity to put English law into practical effect in much of the country for the first time. He did so through active manipulation of legal doctrine and management of the courts.[6] His writings, which perhaps exaggerate his role, were written after nearly a decade in Ireland and document and defend those changes. Dedicated to the king, the *Discovery of the true causes why Ireland was never entirely subdued [and] brought under obedience of the crown of England until the beginning of his Majesty's happy reign* (1612) explains how, after centuries of mismanagement and diversion, James had finally made an *effective* conquest.[7] Relying heavily on the work of Sir Patrick Finglass and William Camden, his fellows in the Society of Antiquities, Davies also dealt at length with the tendency of the "Old English" to adopt Irish manners. A second work, the *Report of cases*

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[3] See C Litton Falkner, "Sir John Davis" in *Essays relating to Ireland: biographical, historical and topographical* (1909), 39-46. The success, too, of protestantism in Scotland had the effect of dividing the Irish and Scots Gaelic cultures. See Stephen G Ellis, "The collapse of the Gaelic world, 1450-1650", *Irish Historical Studies* 31 (1998-9) 449.

[4] *Cf* John McCavitt, "'Good planets in their several spheres'-the establishment of the assize circuits in early seventeenth-century Ireland", *Irish Jurist* (n s) 24 (1989) 248.

[5] See "John Davies" in Leslie Stephen and Sidney Lee (eds), *The dictionary of national biography* (Oxford, 1917) and Geoffrey Hand, "Sir John Davies", *Gazette of the Incorporated Law Society of Ireland* 64 (1971) 174.

[6] See Ciarán Brady, "The road to the *View*: on the decline of reform thought in Tudor Ireland" in Patricia Coughlan (ed), *Spenser and Ireland: an interdisciplinary perspective* (Cork, 1983), 43-4.

[7] For a recent reprint see, Davies, *A discovery of the true causes why Ireland was never entirely subdued [and] brought under obedience of the crown of England until the beginning of his Majesty's happy reign* (Washington, 1969), James P Myers, Jr (ed). See also Myers' interesting "Early English colonial experiences in Ireland: Captain Thomas Lee and Sir John Davies", *Éire-Ireland* 23 (1988) 8.

and matters in law (1615), was a collection of legal-political opinions, documenting the changes effected in the jurisprudence of the Irish courts.[8] By emphasising the "perfect conquest" following the Nine Years' War, Davies underscored the practical control of the country and concomitant imposition of the common law. He expresses this as a positive development, maintaining that native traditions were prejudicial to the native Irish in a way that English common law was not.[9] Irish law, like its manners, kept Ireland a nation of "cannibals".[10]

Davies' arguments are interesting for a number of reasons. First, the *Reports* is frequently cited for his statement that *English* law was "nothing else but the *Common Custome* of the Realm".[11] Even within England this is problematic, reflecting legal legend more than practice. The common law had long since ceased to be a *popular*, rather than *judicial*, custom.[12] Popular custom could, of course, become part of the law, for:

> "When a reasonable act once done is found to be good and beneficiall to the people, and agreeable to their nature and disposition, then do they use it and practice it again and again, and so by often iteratiton and multiplication of the act it becometh a *Custome;* and being continued without interruption time out of mind, it obtaineth the force of a *Law*."[13]

But the determination of reasonableness remained with the court.[14] In this way, common law mythology held that the law was "so formed and fitted to

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[8] Dedicated to Lord Ellesmere, Lord Chancellor of England, the work was originally written in the archaic law French that still dominated common law courts. *La primer discours des cases et matters in ley* (1615). I have cited from the anonymous translation, *A report of cases and matters in law* (Dublin, 1762). It is possible, as my law French remains imperfect, that this eighteenth-century translation, a decade after Montesquieu, may have modernised the text.

[9] See notes on Charles O'Conor and Hume as well as O'Conor and the penal laws in Thomas Bartlett, *The fall and rise of the Irish nation: the catholic question 1690-1830* (Dublin, 1992), 51-3.

[10] Attributed to Davies, the "Lawes of Irelande" is a short, economical sketch of the later *Discovery*. Drawn from the Ellesmere collection of the Huntington Library, San Marino, California, it is reprinted by Hiriam Morgan as "'Lawes of Irelande': a tract by Sir John Davies", *Irish Jurist* (n s) 28-30 (1993-5) 307.

[11] "[Continues] . . . consisting in use and practice . . . recorded and registered no-where but in the memory of the people" – "Preface" to *Reports*, 3.

[12] On the "redaction" of custom into customary law, see Donald R. Kelley, "'Second nature': the idea of custom in European law, society, and culture", in Anthony Grafton and Ann Blair (eds), *The transmission of culture in early modern Europe* (Philadelphia, 1990) and James Q. Whitman, "Why did the revolutionary lawyers confuse custom and reason?", *University of Chicago Law Review* 58 (1991) 1321, 1331.

[13] "Preface" to *Reports*, 3.

[14] The distinction between "custom" and "law" remains a subject more appropriate to "law and anthropology" than to "historical jurisprudence". If, however, there is no easy metric by which to distinguish manners and laws, as norms are institutionalised and the province of legal experts, they become the antithesis of social *practice*. This is especially true where, as in Ireland, the experts and the people were so often of different traditions. See Stanley Diamond, "The rule of law versus the order of custom", *Social Research* 38 (1971) 42 and Peter Karsten, *Between law and custom: "high" and "low" legal cultures in the lands of the*

the nature and disposition of this people, as we may properly say it is connatural to the Nation".[15] Whatever the truth of *English* law being the common or 'connatural' custom of the realm *within* England, it was quite simply untrue, as Davies knew, for Ireland. That was the problem he set out to solve.

Invariably, Irish jurists and historians quoting from the *Discovery* select Davies' statement that there was:

> "no nation of people under the sun that doth love equal and indifferent justice better than the Irish, or will rest better satisfied with the execution thereof, although it be against themselves, so as they may have the protection and benefit of the law when upon just cause they do desire it."[16]

Coming at the end of his work, in which he repeatedly criticised the backwardness of Irish culture, this is more rhetorical than real. No less than his contemporaries and predecessors, Davies believed English intervention required civilising the "wilde Irish".[17] In most respects, his comments followed lost-established criticisms. The reliance of the Brehon laws, with many other pre-modern legal systems, on "ericks" or financial penalties for criminal offences shocked many English commentators.[18] He criticised, too, customs like the "fostering" of children and "gossipred", the creation, by oath, of allegiances inimical to crown loyalties.[19] In general, he noted, that:

> "if we consider the nature of the Irish customs, we shall find that the people which doth use them must of necessity be rebels to all good government, destroy the commonwealth wherein they live, and bring barbarism and desolation upon the richest and most fruitful land of the world."[20]

This barbarism extended to their law, in which:

> "the weaker had never any remedy against the stronger . . . no man could enjoy his life, his wife, his lands or goods in safety if a mightier man than himself had an appetite to take the same from him. Wherein *they were little better than cannibals*, who

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British diaspora—The United States, Canada, Australia, and New Zealand, 1600-1900 (Cambridge, 2002).

15 "Preface" to *Reports*, 6. "Long experience, and many trials of what was best for the common good, did make the *Common Law*". *Id*.

16 *Discovery*, 224.

17 See generally Joseph Th. Leerssen, *Mere Irish & Fíor-ghael: studies in the idea of Irish nationality, its development and literary expression prior to the nineteenth century* (Cork, 1996).

18 Given the frequency of capital punishment in the common law, this presumably owed more to a perceived failure to exact justice than to English sensibilities. In addition, as Harold J Berman has noted such fines were arguably more effective than capital punishment. *Law and revolution: the formation of the Western legal tradition* (Cambridge, MA, 1983), 55. See *Discovery*, 131 and 163.

19 See *Discovery*, 170-1. See Fiona Fitzsimons, "Fosterage and gossipred in late medieval Ireland: some new evidence" in Patrick J. Duffy, David Edwards, and Elizabeth FitzPatrick (eds), *Gaelic Ireland c1250-c1650: land, lordship and settlement* (Dublin, 2001).

20 *Discovery*, 163.

> do hunt one another, and he that hath most strength and swiftness doth eat and devour all his fellows."[21]

Following Davies, I will "omit" discussion of "their common repudiation of their wives; their promiscuous generation of children; their neglect of lawful matrimony; their uncleanness in apparel, diet, and lodging; and their contempt and scorn of all things necessary for the civil life of man".[22] If his writings were distinguished by an "optimism and proud consciousness", Davies' humanist gloss ought not obscure the deep hostility he felt towards Gaelic culture.[23]

Chief among the failures of Irish law was "tanistry" and what English jurists referred to as "gavelkind".[24] Brehon traditions were, in fact, far less uniform than Davies suggests and he frequently misinterpreted Irish law in attempting to fit it into common law categories. In essence, tanistry was an elective system of kingship, whereby a "tanist" or heir-apparent was chosen by the tribe (*túath*) to succeed. This system, adapted to ensure 'worthy' kings, could result in violent competition as rivals sought to ensure their selection.[25] In addition, a portion of the land in each tribe—and its lesser kin-groups (*fine*)—was attached to the office.[26] In contrast, common contemporary practice of Europe's hereditary monarchies transferred kingship to the eldest male child or, if no male heir exists, to the eldest female. "Gavelkind", a legal term borrowed from an analogous legal practice in Kent, was more strictly related to real and personal property, involving paritable inheritance, the equal division between—as Davies saw it—all male children, within marriage and without.[27] Again, this stood in sharp contrast with English primogeniture and the process of assigning shares could be complex.[28]

Both the hereditary monarchy and primogeniture were seen as serving as important stabilising forces by reducing the 'legitimate' challenges open to kingships and successions. In the *Discovery*, Davies wrote:

> "In England and all well-ordered commonweals men have certain estates in their lands and possessions, and their inheritances descend from father to son, which doth give them encouragement to build and to plant and to improve their

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[21] *Discovery*, 163 (italics added). See Pawlisch 60-1. Spenser claimed that in the Munster famine, "they did eat the dead Carrions, happie wheare they Coulde finde them" cited in Andrew Hadfield, *Edmund Spencer's Irish experience: wilde fruit and savage soil* (Oxford, 1997), 66.

[22] *Discovery*, 171. Note, too, the discussion of Irish craftiness and inquisitiveness at 168.

[23] "Introduction" to *Discovery*, Myers (ed), 48.

[24] *Cf* Pawlisch, 61.

[25] But "until election . . . the freehold of the land is in suspense" – "The case of tanistry" in *Report*, 94.

[26] See Fergus Kelly, *A guide to early Irish law* (Dublin, 1988), 101. Defined at *Discovery*, n 18. See definition at 136 n 198. This appears less communal than feudal.

[27] *Discovery*, 164. In fact, kin-land (*fintiu*) was divided equally among all male children acknowledged by the group. Kelly, 102-3.

[28] In one local variant, for example, the shares of the inheritance (*orbae*) were established by the youngest male (*comarbae*), who had then to wait as choice of the shares were made in order of age. See Kelly, 102.

> lands, and to make them better for their posterities. But by the Irish custom of tanistry, the chieftains of every country and the chief of every sept had no longer estate than for life in their chieferies, the inheritance whereof did rest in no man."[29]

This is accurate to a degree. Unlike the common law, the central unit of the Brehon laws was the corporate kin-group.[30] This suggested, for example, the joint responsibility of the group for the acts of its members, the principle of "Kincogish" (*cin comhfhocuis*). While this was frequently convenient for English authorities, as the individual's lack of authority to bind the group or kin-land also accounted for the putative failure of the natives to maintain existing agreements.[31] In this way, tanistry "makes all their possessions uncertain and brings confusion, barbarism, and incivility".[32] Instead, as Davies suggested, the Irish must be "permitted to purchase estates of freeholds or inheritance which might descend to their children according to the course of our common law".[33] In the "Case of tanistry", in which Davies was (as attorney-general) counsel, the court eventually adopted his arguments about the role of the Brehon traditions in Ireland's "barbarism and desolation".[34]

Gavelkind applied more strictly to property than did tanistry, though the two are easily and understandably confused and property, especially that of land, continued to play an important political role as well.[35] With gavelkind, as Davies saw it, the problem was not violence, but the instability involved in the fragmentation and reassessment of property holdings. In the *Reports*, "The resolution of the judges, touching the Irish custom of Gavelkind" notes that:

> "By reason of these frequent partitions and removals or translations of the tenants from one portion to another, all the possessions were uncertain; and . . . was the very cause that no civil habituations were erected, no enclosure or improvement was made of the lands in the *Irish* countries where this custom . . . was in use, especially in *Ulster*, which seemed to be all one wilderness, before the new plantation made by the *English* undertakers there . . . ."[36]

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[29] *Discovery*, 164. See "The case of tanistry" in *Reports*, 92.

[30] Individuals could, however, acquire a measure of control over land obtained through surpluses in farming or in a profession. Kelly, 101.

[31] See "The case of tanistry" in *Report*, 92. Even lesser chiefs did not (typically) own their estates outright, but held only legal use (in a kind of usufruct or common law trust) for the period of the kingship.

[32] *Discovery*, 136.

[33] *Id.*

[34] "The case of tanistry" in *Reports*, 92. The case is usefully summarised in F.W. Newark, "The case of tanistry", *NILQ* 9 (1950-2) 215.

[35] See Kenneth Nicholls, *Gaelic and Gaelicised Ireland in the middle ages* (London, 1972), 63-4.

[36] "The resolution of the judges, touching the Irish custom of Gavelkind" in *Reports*, 135-6.

This "was the fruit of this *Irish gavelkind*".[37] Together, tanistry and gavelkind:

> "Made all their possessions uncertain, being shuffled and changed and removed so often from one to another by new elections and partitions; which uncertainty of estates hath been the true cause of such desolation and barbarism in this land, as the like was never seen in any country that professed the bane of Christ."[38]

Indeed, Davies "boldly" claimed:

> "that never any particular person, either before or since, did build any stone or brick house for his private habitation, but such as have lately obtained estates according to the course of the law of England. Neither did any of them in all this time plant any gardens or orchards, enclose or improve their lands, live together in settled villages or towns, nor made any provision for posterity; which being against all common sense and reason, must needs be imputed to those unreasonable customs which made their estates so uncertain and transitory in their possessions. For who would plant or improve or build upon that land which a stranger whom he knew not should possess after his death?"[39]

Adopting such a worldview, it is not difficult to see merit in his criticisms. In general, neither Irish laws nor manners favoured economic improvement.[40] But the possibility that "provision for posterity" might, in the more communitarian Gaelic culture, be in the maintenance of the kin-group, seems not to have occured to Davies.[41]

With this view, the "great defect" of English policy in Ireland was that "English laws were not communicated to the Irish, nor the benefit and protection thereof allowed unto them".[42] Over several centuries, the people were "governed . . . by the Brehon law; they made their own magistrates and officers; they pardoned and punished within their several countries; they made war and peace one with another without controlment . . .".[43] As a

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[37] "The resolution of the judges, touching the Irish custom of Gavelkind" in *Reports*, 136. *Cf Discovery*, 143 on Welsh "gavelkind".

[38] *Discovery*, 164.

[39] *Discovery*, 165. "[T]he Irish, after a thousand conquests and attainders by our law, would in those days pretend title still because by the Irish law no man could forfeit his land." – *Discovery*, 192.

[40] Ireland lacked towns since "all held themselves to be gentlemen. . . [and] scorn to descend to husbandry or merchandise, or to learn any mechanical art or science." - *Discovery*, 165-6. *Cf* Hiram Morgan, "The end of Gaelic Ulster: a thematic interpretation of events between 1534 and 1610", *Irish Historical Studies* 26 (1988) 8.

[41] Nichols notes that when Davies "lays the blame for the under-development of rural Ireland on [Gavelkind, he was . . .] confounding cause and effect; . . . such practices were the consequences of a low intensity of land use rather than its cause." – *Land, law and society in sixteenth-century Ireland* (Cork, 1978), 10.

[42] *Discovery*, 135. "[T]hough", he wrote, "they earnestly desired and sought the same." – *Discovery*, 135.

[43] *Discovery*, 76.

result of being outside areas of effective Crown control, the "king's writ cannot run" and English law enforced.[44] Given his role in the confiscation that would soon follow, it is interesting that Davies criticises past settlement patterns for excluding natives from good land, thereby promoting rebellion.[45] More critically perhaps, the amount of discretionary authority awarded setters, especially through the creation of county palatines often obstructed London's attempts to maintain uniform political and legal control.[46] Worse still, were the practical and theoretical problems associated with the Old English adoption of Irish manners and laws.[47] This made "them slaves to that nation which they did intend to conquer".[48] The failure of measures like the Statutes of Kilkenny (1366) to prevent the assimilation of settlers meant that "the Irish gave laws to them".[49] He repeatedly refers, too, as had earlier critics, to a variety of unjust and irregular Irish taxes or appropriations.[50] But again, while it is not difficult to see some merit here, the continuing use, for example, of feudal fees against recalcitrant Irish, both native and Old English Catholics, in the years *after* Davies, makes this charge somewhat specious.[51]

This is not simply bad faith and Davies' actions show the necessity and efficacy of claims of legal justification in English policy. Among these elements was the use of conquest theory in the aftermath of the Nine Years' War. The "principal mark and effect of a perfect conquest" was, in the age of Bodin, "to give laws to a conquered people".[52] When Davies noted that "to give laws unto a people; to institute magistrates and officers over them; to punish and pardon malefactors; to have the sole authority of making war and peace, and the like, are the true marks of sovereignty", he was doing little more than articulating an increasingly common assumption of European legal-political theory.[53] The medieval problem was not the centralised state—or church—but its absence. The modern theory was contradicted not only by continuing Irish practices, but the overlapping authorities and

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[44] "The case of tanistry" in *Reports*, 102. In much of Ireland, England had neither formal nor practical sovereign authority. See *Discovery*, 199-200.

[45] See *Discovery*, 160.

[46] See *Discovery*, 147-61.

[47] See Brady, "Spenser's Irish crisis: humanism and experience in the 1590s", *Past & Present* 3 (1986) 17 and his "Reply", *Past & Present* 120 (1988) 210, 213 (responding to Nicholas Canny's comments in "Debate", *Past & Present* 120 (1988) 201).

[48] *Discovery*, 154.

[49] *Discovery*, 162. The statutes also left the natives "at large, to be ruled by their barbarous customs as they were before." – "The case of tanistry" in *Report*, 106. *Discovery*, 187-8. See Poynings at 197-8.

[50] See *Discovery*, 83 (cess), 83-4 and 166-7 (coyne and livery), 94 (bonaught), 169 (cosherings, cessings, cuttings).

[51] See H.F. Kearney, "The court of wards and liveries in Ireland, 1622-1641", *Proceedings of the Royal Irish Academy* 57 (1955-6) 29 and Victor Treadwell, "The Irish court of wards under James I", *Irish Historical Studies* 12 (1960) 1.

[52] *Discovery*, 124. The French jurist Jean Bodin, whom Davies cites, would have been the best-known advocate of the modern theory of sovereignty in his *Six books of the commonwealth* (1576). A similar view had been solidifying throughout Britain and Europe, especially since the Reformation.

[53] Discovery, 76. Such a "perfect conquest doth reduce all the people thereof to the condition of subjects . . . governed by the ordinary laws and magistrates of the sovereign". – Discovery, 71.

decentralisation of pre-Reformation Europe. Indeed, while an effective state apparatus was an ever more important part of English governance, the Brehon laws were decidedly pre-modern. Ireland had never had a national state or legal system. The Brehons themselves were more accurately arbiters to whose decision the parties agreed to abide rather than magistrates. The force of their 'judgments' was more moral than political, owing as much to manners as to law or sanctions enforced by political institutions. This decentralisation of judicial authority may have initially slowed the encroachment of a common law, but it also made the native tradition more difficult to defend.

In a number of extraordinary actions, Davies sought to make this concept of sovereignty practically effective in Ireland through a process of judicial conquest.[54] The English government's general pardon following the Nine Years War had largely restored rebels to their estates. Effectively reinterpreting the settlement of 1603, Davies used a controversial theory of "alieanage" whereby the Irish were treated under English law as aliens, rather than subjects, without formally submitting to English law.[55] Existing legal relationships were remoulded into analogous, though often inappropriate, English law formulas. Ulster's under-chiefs could thus be seen as having "freeholds", against the claims, and claimed infringement, of Hugh O'Neill. Court-stacking by "New", rather than "Old", English magistrates, and the issuance of extra-judicial resolutions, by a majority of these judges acting in conclave outside of live legal controversies in the central courts, voiding Gaelic tenures (1606) further strengthened the options available to other courts.[56] The courts could also determine that Brehon 'customs', being *inherently* unreasonable, failed to meet judicial requirements for incorporation into the common law. This again resulted, in part, by the determination that a 'good' custom could not be contrary to a conception of the common good defined according to English standards.[57] In addition, by applying the modern theory of sovereignty, and assuming tanistry and gavelkind to be common and uniform throughout Ireland, they effectively claimed to have replaced Brehon law in its entirety, for "it must of necessity be abolished by the establishment of another general law in the same point".[58]

With the flight of the earls, arising partly through the political and the legal pressure of men like Davies, whose personal animosity towards O'Neill was

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[54] Hans S Pawlisch, *Sir John Davies and the conquest of Ireland* (Cambridge, 1985), 14.

[55] The Irish could not make claims without making formal submission by "charters of denization".

[56] These were followed, most notably in the "Case of tanistry", in a manner surprisingly akin to modern theories of precedent. See *Discovery*, 218. On precedent, see Berman, "The origins of historical jurisprudence: Coke, Selden, Hale", *Yale Law Journal* 103 (1994) 1651.

[57] Davies quoted a statute of Kilkenny (c 4, enacted in 40 King Edward III) stating that "the brehon law. . . ought not to be named a law, but an evil custom". *Discovery*, 139.

[58] "The case of tanistry" in *Report*, 101. See Pawlisch, 45.

well-known, the opportunity arose for seizing at once vast tracts of Ulster.[59] To do this, Davies changed tactics and, reinterpreting the Ulster lands again into Brehon terms, or his interpretation of them, he argued that no freeholders existed. This essentially credited O'Neill's claims, but in the Earl's absence, Davies maintained that the lands passed instead to King James in a residual claim (under conquest theory) as lord paramount. This ignored the fact that the kin-centred Brehon law, just as in English corporation theory the death of a natural person did not terminate the legal life of the "corporation", would have reallocated "shares" to the remaining members of the corporate group. More surprisingly, Davies portrayed the remaining Irish as beneficiaries of the King's 'civilising' of Ireland, though this involved both confiscation of the lands they occupied and their transportation from those lands. Davies claimed, indeed, that the native Irish *embraced* English law. In conditions little short of martial law, it is unsurprising that they would flock to the common law courts and commissions in order to find *any* security they might.[60] They would be largely disappointed.

As a result of these actions, Davies could quickly point to a number of successes.[61] The judiciary could claim that "the common law hath been communicated to all persons, and executed through all this kingdom" and the country was finally "well settled".[62] There was, he wrote, "one king, one allegiance, and one law".[63] As a result, there was "such comfort and security in the hearts of all men as thereupon ensued the calmest and most universal peace that ever was seen in Ireland."[64] The Irish were "encourage[d] to build, to plant, to give better education to their children, and to improve the commodities of their lands".[65] Crime, he claimed, was immediately lessened.[66] The English laws also had an immediate effect on manners, for:

> "These civil assemblies at assizes and sessions have reclaimed the Irish from their wildness; caused them to cut off their glibs [bangs] and long hair, to convert their mantles into cloaks, to conform themselves to the manner of England in all their behavior and outward forms."[67]

Here the mere necessity of having to submit to English courts meant:

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[59] See Harris, "The commission of 1609: legal aspects", *Studia Hibernica* 20 (1980) 31 and GA Hayes-McCoy, "Sir John Davies in Cavan in 1606 and 1610", *Breifne* 1 (1960) 188-91.

[60] See Harris, "The state of the realm: English military, political and diplomatic responses to the Flight of the Earls, autumn 1607 to spring 1608", *Irish Sword* 14 (1980) 47, 61.

[61] "The case of tanistry" in *A report of cases and matters in law*, 86. See Coke at Pawlisch, 63.

[62] "The case of tanistry" in *Reports*, 108, 115. *Cf Discovery*, 135.

[63] *Discovery*, 138.

[64] *Discovery*, 213.

[65] *Discovery*, 221. "Briefly, the clock of the civil government is now well set, and all the wheels thereof do move in order". *Discovery*, 223. See 223.

[66] See 216 on the reduction of crime and note that "the truth is that in time of peace the Irish are more fearful to offend the law than the English or any other nation whatsoever" – *Discovery*, 216.

[67] *Discovery*, 217.

> "because they find a great inconvenience in moving their suits by an interpreter, they do for the most part send their children to schools, especially to learn the English language: so as, we may conceive an hope that the next generation will in tongue and heart, and every way else, become English, so as there will be no difference or distinction but the Irish Sea betwixt us."[68]

In sum, "execution of the law doth make the Irish grow civil and become English".[69]

Given the overlap in Irish tradition of lawyers and poets, it is unfortunate the jurist-poet had so little sympathy with native culture. The judicial colonisation and conquest he oversaw, kinder and gentler perhaps than that envisioned by men like Edmund Spenser, no less effectively undermined Gaelic society.[70] This is not to suggest, as Davies sometimes does, that law-givers could introduce manners at will, but his actions and writings set important legal and historiographical precedents.[71] In practical terms, they "established a paradigm for British expansion elsewhere".[72] The focus on law rather than confessional differences also suggested a seemingly neutral scheme of social development, conducive to its acceptance by later 'enlightened' authors. Perhaps most important to eighteenth-century British and Irish historiography was David Hume, who believed Davies to be Ireland's only "philosophical historian" and adopted many of his arguments.[73]

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[68] *Id*. "And thus we see a good conversion, and the Irish game turned again." – *Id*. The Irish game was a variation of backgammon was characterised by rapid changes in fortune. See "Introduction" to *Discovery*, 54-5. This metaphor, Myers writes, "conceals several morally objectionable realities and misrepresents certain equally dubious cultural developments". "Introduction" to *Discovery*, 56. See also *Discovery*, 59.

[69] *Discovery*, 217.

[70] It may be of interest to note that Davies was a poet of the Spenserian school. Best known as the author of the *Faerie Queen* (1590-6), Spenser had served as an administrator in Ireland. While drawing on common Elizabethan-Jacobean perceptions of Ireland, his approach was especially severe in its recommendation of military terror and famine. See Spenser, *A view of the present state of Ireland* (Oxford, 1970 [1598]), WL Renwick (ed). Perhaps because of its harsh prescriptions, the work remained unpublished in his lifetime. It was, however, entered into the register of the Company of Stationers in 1598 and was available in circulation. Burke would have familiar with the edited and muted version published in Sir James Ware (ed), *Ancient Irish histories* (1633), the unabridged text not being in print until the nineteenth century.

[71] *Cf* Davies' preface to *Reports*, 15-6, esp. his comments on commercial improvement and "luxurie". "[I]f we all lived according to the Law of Nature, we should need few laws, and fewer lawyers. . . . And again, if we were a poor and a naked people, as many Nations in *America* be, we should easily agree to be judged by the next man we meet . . ." – *Reports*, 16.

[72] Pawlisch, 14. On Davies' work as "political propaganda", see Myers' "Introduction" to *Discovery*, Myers (ed), 53.

[73] Hume's *History of England* (1754-62) followed Davies closely, viewing the native Irish as savages civilised by English conquest (and some Scottish arms). See esp. *History of England* (1762), vi.58-61.

A Rude And Barbarous People

All of this will seem very remote from Edmund Burke, born a century after Davies' death, a period in which many see a shift in Ireland from colony to *ancien régime*.[74] In that time, Ireland saw the rebellion of 1641, Cromwell, Restoration and the Irish Act of Settlement, the Williamite wars, and the enactment of the penal statutes. Burke's family was no less affected than were others in Ireland.[75] His father, a Dublin attorney, appears to have been a *converso*, perhaps simply to avoid restrictions on the legal profession. As Burke's mother remained a catholic, Richard Burke only narrowly avoided a later statute (1733) barring those marrying catholics thereafter from practice.[76] Not only did "Ned" have numerous catholic relations, not least his sister, but his earliest education appears to have been in a hedge-school in the Blackwater valley of county Cork, perhaps even in Irish.[77] After Trinity College (Dublin) and legal studies in England, Burke began a literary career with *A philosophical enquiry into the origins of our ideas of the sublime and the beautiful* (1757), collaboration on the ethnographic *Account of the European settlements in America* (1757), and the post of editor for the *Annual Register*. These were insufficient income, however, for his young family and Burke found his first political employment not in England, but in Ireland. He was personal secretary to the Irish chief secretary, William Hamilton, when the "Whiteboy" disturbances of Munster erupted in the 1760s. While these occurred as the result of general agricultural changes from tillage to pasturage, the response of the Dublin government was harsh and sectarian, and members of Burke's extended family were implicated. The episode indicated that the defence of the catholic majority was often best accomplished in appeals to London, rather than to Dublin. Burke's parliamentary career, and his virtual silence at the time of Irish legislative independence (1782), grew in part from such experiences.[78]

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[74] See, *e.g.*, SJ Connolly, "Eighteenth-century Ireland: colony or *ancien regime?*" in D George Bryce and Alan O'Day (eds), *The making of modern Irish history: revisionism and the revisionist controversy* (London, 1996).

[75] There are recurrent efforts to remind the public of the "Irish" Burke. Conor Cruise O'Brien's *The great melody: a thematic biography and comment anthology of Edmund Burke* (London, 1992) is a good recent example, but he somewhat overstates the case. *Cf* Michael Fuchs, *Edmund Burke, Ireland, and the fashioning of self* (Oxford, 1996).

[76] 7 Geo. II, c 5 (*Stat. Ire.*). See Colm Kenny, "The exclusion of catholics from the legal profession in Ireland, 1537-1829", *Irish Historical Studies* 25 (1987) 337, esp. 354.

[77] See LM Cullen, "The Blackwater Catholics and County Cork society and politics in the eighteenth century", in Patrick O'Flanagan and Cornelius G Burrimer (eds), *Cork History and society: interdisciplinary essays in the history of an Irish county* (Dublin, 1993). Burke's library included an Irish-English dictionary, an Irish catechism, and a copy of Thomas á Kempis in Irish. Evidence that he spoke Irish later in life is not entirely convincing. An early Scottish biographer claimed that Burke spoke, by way of Irish, with an elderly Scot about the Ossian stories. Robert Bisset, *Life of Edmund Burke* ((2nd edn) London, 1800), ii.447-8. There is also a note by the less than trustworthy Charles Vallancey. See Walter D Love, "Edmund Burke, Charles Vallancey and the Sebright manuscripts", *Hermathena* 95 (1961) 21, 34.

[78] See "A candid enquiry into the causes and motives of the late riots in the province of Munster, together with a brief narrative of the proceedings against the rioters,

In Ireland in the 1760s, Burke befriended several members of the Irish Catholic Committee, including Charles O'Conor of Belanagare and Dr John Curry. He began, too, his best-known 'Irish' work, the *Tracts on the popery laws* (c 1759-65).[79] Never published, several versions of the *Tracts* circulated in the following decades among members of the English and Irish administrations. They continue to be seen as a foundational text in Irish historiography of the eighteenth-century, not least in the interpretation of the penal laws.[80] While modern scholarship has tended to emphasise that the statutes passed effectively into desuetude, they were never entirely a dead letter.[81] In 1778, for example, Curry wrote to Burke noting:

> "It will . . . be no small addition to your dislike of our Popery laws, that your old & worthy acquaintance Charles O'Connor, now at the Eve of life, is actually smarting under the lash of them, from the hand of [Hugh,] his younger brother, lately reconciled to the established religion, for the pious purpose of robbing him of the poor remains of his very ancient, & once ample, inheritance."[82]

In general, the *Tracts* underscored the continuing indignity of the laws, the perversion of the sentiments of the "little platoons" of family and community, of protestant discoverers or informers, and the corrupting effect of such laws on both islands.[83]

The perversion, too, of the legal and social orders was no small concern. When he later refused £300 from the Catholic Committee, Burke claimed his "uniform principle" was:

> "an utter abhorrence of all kinds of public injustice and oppression, the worst species of which are those which being converted into maxims of state, and blending themselves with law and jurisprudence corrupt the very fountains of all equity, and subvert all the purposes of Government."[84]

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anno 1766" in the Burke Papers of the Wentworth Woodhouse *Muniments* (hereinafter "WWM Bk P") at the Sheffield Archives, 8/1. It is also included in the *Correspondence of the Right Honourable Edmund Burke* (London, 1844), i. 41-5.

79 Included in *The writings and speeches of Edmund Burke* (Oxford, 1997 (10 vols)), Paul Langford (general ed), i.434-82 (hereinafter "WS"). See also WWM Bk P 27/205, listing the penal laws in outline (and quoting Blackstone's criticism).

80 See Cullen, "Catholics under the penal laws", *Eighteenth-Century Ireland/Iris an dá chultúr* 1 (1986) 23 and Eamon O'Flaherty, "Burke and the catholic question", *Eighteenth-Century Ireland/Iris an dá chultúr* 12 (1997) 7.

81 See SJ Connolly, *Religion, law and power: the making of protestant Ireland* (1992), CDA Leighton, *Catholicism in a protestant kingdom: a study of the Irish ancien régime* (1996), and Niall Osborough, "Catholics, land and the Popery Acts of Anne" in *Studies in Irish legal history* (Dublin, 1999).

82 Curry to Burke (7 June 1778) in WWM Bk P 1/1062. For a time, O'Conor was under house arrest.

83 See WS i. 481-2.

84 Burke to Curry (14 August 1779) in *The correspondence of Edmund Burke* (Cambridge, 1981 (10 vols)), Thomas W. Copeland (general ed), iv.118 (hereinafter "C").

It is essential in reading the Burke's later reflections on European revolution and the British constitution, to remember that he was aware of its significant limitations in Ireland.[85] While he brought to his analysis in the *Tracts* remarkable intellectual, legal, and rhetorical abilities, his arguments were not entirely novel, but closely reflected the thought of the Catholic Committee.[86] Like them, Burke—in appeals to reason, natural law, and history—paid particular attention to the fragmentation and insecurity of catholic property-holding and sought to show how the laws in action undermined the *national* interest of Ireland. The laws, Burke wrote, "entirely change the course of *Descent* by the common Law. They abrogate the right of *primogeniture*; and . . . substitute a new Species of Statute Gavelkind".[87] This penal gavelkind, as in the case of O'Conor, played on family division by encouraging, though far from successfully, conversion and confiscation.[88] Burke saw their purpose as:

> "that, probably in the first generation, but certainly after a few descents, the Landed property of Roman Catholicks should be wholly dissipated; and. . . their families. . . reduced to obscurity and indigence, without a possibility that they should be restored by any exertion of industry or ability, being disabled. . . from every species of permanent acquisition. . ."[89]

Restrictions existed, too, on:

> "the acquisition of landed property, which is the foundation and support of all the other kinds, [but] the Laws have disabled three-fourths of the inhabitants of Ireland from acquiring any estate of inheritance for life or years, or any chance whatsoever on which two-thirds of the improved yearly value is not reserved for 30 years.

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[85] See the notes on the "State of Ireland" in the 1770s at WWM Bk P 8/192-3.

[86] Thomas McLoughlin notes, "In Burke's 'Plan', Chapter Four, headed, 'The Impolicy of those Laws as they Affect the National Security,' looks like the climax, even though we do not have the final chapter . . . entitled 'Reasons by which the Laws are supported and Answers to them'." – "Burke's dualistic vision in the *Tracts on the popery laws*", *Études Anglaises* 34 (1981) 180, 187.

[87] WS ix. 436 (to "proceed *ad infinitum*"). See WS ix. 444. Gavelkind was, in the sixteenth century, "probably" the established method of inheritance among "the Burkes of Counties Tipperary and Limerick", from which Burke was descended. K.W. Nicholls, "Some documents on Irish law and custom in the sixteenth century", *Analecta Hibernica* 26 (1970) 105.

[88] The promise of gain through conformity was a threat that children held over their parents, wives above their husbands, and siblings against one another. In this way, "Hope and fear, love and gratitude, despondence and protection, should be entirely extinguished in all such families, so that with regard to the important points of donation, testament, settlement, and Descent, the whole Order of the common Law is changed and subverted . . . [and this] is still a more sensible departure from the Spirit of the common Law . . . (WS ix. 437)". See WS ix.438.

[89] WS ix. 437. See WS i. 442 and *cf* WS ix. 444. See also "Hints on circulation" contrasting, without reference to confessional differences, the aggregation of wealth in the gentry from 1685-1762. F(M) xxiv. 24 of the Fitzwilliam (Milton) Burke Collection at the Northampton Record Office. See WS ix. 615 and discussion below.

> This confinement of landed property to one set of hands, and preventing its free circulation through the community, is a most leading article of ill policy; because it is one of the most capital discouragements to all that industry which may be employed on the lasting improvement of the soil, or is any way conversant about land. A tenure of 30 years is evidently no tenure upon which to build; to plant; to raise enclosures; to change the nature of the ground; to make any new experiment which might improve agriculture; or to do anything more than what may answer the immediate and momentary calls of rent to the landlord and leave subsistence to the tenant and his family."[90]

It is at least ironic that a form of Gavelkind criticised as undermining social improvement, should become the means of maintaining, or fostering, decline. It was, he wrote, "as if the Law had said in express terms, 'Thou shall not improve'".[91]

These views on property and progress, insofar as it is possible to compare such vastly different contexts as the early seventeenth and mid-to-late eighteenth centuries, were broadly similar to those of Davies. In the period in which he wrote the *Tracts*, Burke also began, though never entirely completed, an *Abridgement of the English history* (c 1757-62).[92] In discussing Irish history there, he was not uncritical. "[T]he people of Ireland", he wrote, "lay claim to a very extravagant antiquity, through a vanity common to all nations".[93] More surprising may be his belief that the Irish had often clung too closely to the past. Among outdated Irish customs was tanisty, which "prevailed in Ireland some hundreds of years after the rest of Europe".[94] These were, Burke agreed, "attended with very great and pernicious inconveniences".[95] Such observations were, however, part of a wider analysis. Without contradicting Davies, Burke believed tanistry to have been nearly universal in European systems of property and successions. He made use of it to critique both whig and tory accounts of *English* constitutional history.[96] As tanistry was "made up of inheritance and election", he wrote in the *Abridgement*, the "controversy, which has been managed with such heat, whether in the Saxon times the crown was hereditary or elective, must be determined, in some degree, favourably for the litigants on either side; for it was certainly both . . . within the bounds, which we have mentioned".[97] This developed slowly over time, so that the

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[90] WS ix. 476-7.
[91] WS ix. 477. See WS ix. 445.
[92] See the *Abridgement towards an abridgement of the English history* at WS i.332-552. See also the "Fragment: An essay towards a history of the laws of England (c 1757)" in WS i.321-31.
[93] WS i. 509. See WS i.511.
[94] WS i. 433. "[U]ntil the beginning of the last century (WS i. 433)".
[95] WS i. 511. "[I]t was obviously an affair of difficulty to determine who should be called the worthiest of the blood; and a door being always left open for ambition, this order introduced a greater mischief than it was intended to remedy (WS i. 511)".
[96] WS.i. 433.
[97] *Id*, *Id*.

"leader neither knew the extent of the power he received, nor the people of that, which they bestowed".[98] Burke's analysis throughout the work – admittedly extending only to the Magna Charta – is remarkably free of Hume's hostility towards either the clergy or the Irish. It remains, with the related "Fragment" on law, an invaluable document, though often over-looked source for understanding Burke's views on law, manners, and history.[99]

The relationship between law and manners in history had long been important to European legal humanists.[100] Before the more advanced analyses of Vico and Montesquieu, even Davies had noted such connections among both the Amerindians and English.[101] Burke, in his collaboration with Middle Temple fellow William Burke on the *Account of the European settlements in America*, observed that the "infant settlements" even of the *colonists* "surely demanded a more simple, clear, and determinate legisllation" as laws must be "suited to the time, to their country, and the nature of their . . . way of life".[102] Of more interest, in discussing the Amerindians, the Burkes wrote how they were "[g]overned . . . by manners, not by laws".[103] Indeed, in such societies, these "customs operate amongst them better than laws . . . they become sort of nature to the governours and the governed".[104] This distinction between laws and manners, between social mores and formal institutions recurs throughout Burke. With the dichotomy, at least formally, between nature and art, it is at the centre of his thought on both culture and jurisprudence. Indeed:

> "Manners are of more importance than laws. Upon them, in a great measure, the laws depend. The law touches us but here and there, and now and then. Manners are what vex or soothe, corrupt or purify, exalt or debase, barbarize or refine us, by a constant, steady, uniform, insensible operation, like that of the air we breathe in. They give their whole form and colour to

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98 WS i. 434. The Saxon government "was never supported by any fixed or uniform principle", he wrote, and it was "no wonder, that the advocates for the several parties among us find something to favour their several notions (WS i. 435)".

99 See Donlan, "Beneficence acting by a rule: Edmund Burke on law, history, and manners", *Irish Jurist* (n s) 36 (2001) 227.

100 As the history of historiography attests, legal humanists were among the forefathers of modern history and hermeneutics. See esp. Donald R Kelley, *Foundations of modern historical scholarship: language, law, and history in the French Renaissance* (New York, 1970) and *The human measure: social thought in the Western legal tradition* (Cambridge (MA), 1990).

101 See the preface to *Reports*, 16 (on the "poor" and "naked" of America) and 15 (on contemporary European wealth and contract).

102 *An account of the European settlements in America* (hereinafter "AES"), ii.304. Citations to volume one are made from the 1766 printing (London, 1766), those to volume two to that of 1758 ((2nd ed) London, 1758).

103 AES i. 168.

104 WS i. 430. See AES i.167-9 and *cf An essay towards an abridgement of the English history*, WS i. 430 (on the Germans), 447 (on the Saxon polity).

> our lives. According to their quality, they aid morals, they supply them, or they totally destroy them."[105]

Given the fact that, in Ireland, Irish catholics – and indeed dissenters – often fell outside of the protection of the law, such a focus is not surprising. Burke would not always have agreed with O'Conor's defence of Irish institutions, which in many ways transposed English models to the Irish past. But he would have found little fault in the wider point that Irish institutions like tanistry, ericks, etc., could be entirely appropriate for the times.[106]

O'Conor sometimes portrayed the ancient Irish as commercial, and even united. Burke would have been suspicious of such a projection, which seems again to make the Irish more anglicised than the English themselves. But his experiences in Ireland and his knowledge of its history may have influenced his unique understanding of the relationship between culture and commerce. Whatever the truth about ancient Ireland, Burke was far more suspicious than were his Scottish associates – Adam Smith, William Robertson, and John Millar – of discrete stages of progress from rudeness to refinement. He was just as sceptical about the prioritisation of commerce over manners that many of the Scottish enlightenment appeared to suggest. He consequently remained far more supportive of the virtues of primogeniture, landed property, and the "moral economy".[107] From the *Tracts* on, Burke underscored the "happy alliance" of commercial and agricultural interests and very real, if legally "imperfect" obligations.[108] Indeed, even the penal laws left surprisingly little restriction on trade and movable wealth. In one of his last comments on the laws, Burke noted that:

> "The system of laws which, by a perversion of all legal principles, and by various contrivances of vexation, had screwed the Roman Catholics out of their landed property, and in the same process broken the spirit of their gentry, [they had] forced a commercial interest to grow up in its place."[109]

That a "monied interest" was not an unalloyed good, was a point of some importance in Burke's *Reflections on the Revolution in France and on the proceedings in certain societies in London relative to that event* (1790).[110] In

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[105] Letter one (1796) of *Letters on a regicide peace* (Indianapolis, 1999 [1975-7]), 126. For if "*laws* are corrupted. Whilst *manners* remain entire, they will correct the vices of law, and soften it at length to their own temper (WS iii. 299)".

[106] See O'Conor, "Of the laws of tanistry and eric, & c" in *Dissertations on the history of Ireland* ((3rd ed) Dublin, 1812).

[107] See EP Thompson, "The moral economy of the English crowd in the eighteenth century", *Past & Present* 50 (1971) 76.

[108] WS ix. 478.

[109] "On the state of Ireland" (c 1792) in *Correspondence of the Right Honourable Edmund Burke*, iv. 85. See Cullen, "Catholics under the penal laws", esp 29, Maureen Wall, "The rise of a catholic middle class in eighteenth-century Ireland" in George O'Brien (ed), *Catholic Ireland in the eighteenth century: collected essays of Maureen Wall* (Dublin, 1989), and Kevin Whelan, "An underground gentry?: catholic middlemen in eighteenth-century Ireland", *Eighteenth-Century Ireland/Iris an dá chultúr* 10 (1995) 7. See WS i. 478.

[110] See JGA Pocock, "The political economy of Burke's analysis of the French Revolution" in *Virtue, commerce, and history: essays in political thought and history, chiefly in the eighteenth century* (Cambridge, 1985) and "Edmund Burke

his general defence of the modern civil – or *civilised* – society, manners were not merely "of more importance than laws", but than commerce as well.

If there is a real sense, practically and philosophically, in which Burke lived in an anglicised world that Davies helped to create, he presents a very different account of the English settlements in Ireland.[111] He approached the eclipse of the Brehon laws, for example, and the slow decline of the Irish language regretting:

> "the narrow notions of our lawyers, who abolished the authority of the Brehon law, and at the same time kept no monuments of it; which if they had done, there is no doubt but many things of great value towards determining many questions relative to the laws, antiquities and manners of this and other countries had been preserved."[112]

Burke himself collected numerous "monuments" of the Irish past and helped others – Thomas Leland, Dr Sylvester O'Halloran, Charles Vallancey, and Thomas Campbell – to ensure that such materials were preserved.[113] Most notably, O'Conor followed Burke's suggestion that ancient Irish materials, including legal tracts, be translated before they were completely lost to future generations. Unfortunately, the man best able to achieve this, Francis Stoughton Sullivan (1719-66), Trinity College's first professor of feudal and common law, died before completing much of the translation of the *Annals of the four masters*.[114]

Burke's complex response, too, to the primitivism of 'Ossian', the partly found, partly constructed poetry of Scottish writer James Macpherson, is

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and the Redefinition of Enthusiasm: the context as counter-revolution" in François Furet and Mona Ozouf, (eds), *The French revolution and the creation of modern political culture: vol 3, the transformation of political culture 1789-1848* (Oxford, 1990).

111 Burke seems to have contemplated writing an Irish history. On Burke and Irish history, see John C Weston, Jr, "Edmund Burke's Irish history: a hypothesis", *PMLA* 77 (1962) 397 and Love, "Edmund Burke, Charles Vallancey and the Sebright manuscripts"; Idem, "Charles O'Conor of Belanagare and Thomas Leland's 'philosophical' history of Ireland", *Irish Historical Studies* 13 (1962) 1; and Idem, "Edmund Burke and an Irish historiographical controversy", *History and Theory* 2 (1962-3) 180.

112 WS i. 433. In his review of Ferdinando Warner's *The history of Ireland* (1763), Burke noted that "we could wish . . . the doctor had been a little fuller in his account of Tanistry and the Brehon law". *Annual Register* (1763) 258 (second pagination).

113 O'Halloran, whose *History of Ireland* (1772) Burke owned, wrote him with information on the Burkes of Limerick and sent him several Irish artefacts. See J.B. Lyons, "The letters of Sylvester O'Halloran (second part)", *North Munster Antiquarian Journal* 9 (1962-3) 25. See also the numerous Irish titles in Burke's published library catalogues. See Seamus Deane (ed), *Sale catalogues of libraries of eminent persons: Volume 8 – Politicians* (London, 1973) and the *Catalogue of the library of the late Right Hon Edmund Burke* in Oxford's Bodleian Library (Ms Eng Misc d 722).

114 There remains no satisfactory account of the life of Sullivan or analysis of his *Lectures on the constitution and laws of England* (1770; 2nd edn 1776). See Leslie Stephens and Sidney Lee (eds), *The dictionary of national biography* (London, 1885-1901), xx. 162.

instructive. Its arguably Irish sources and the concomitant attempt by Burke's intellectual allies to stress the civility of Irish manners *before* English conquest and commerce created numerous dilemmas.[115] While he expressed doubt immediately, Burke wrote that the works gave "a striking picture of the manners, the customs, the superstitions of the times . . . [and] seem utterly beyond the reach of any modern invention".[116] He went so far as to claim that the writing was "really Irish in an English dress" and, even in translation, it preserved "the majestic air, and native simplicity of a sublime original".[117] Interestingly, Hume wrote to the Reverend Hugh Blair, who introduced the work, of Burke's comment:

> "that on the first publication of Macpherson's book, all the Irish cried out, *we know all these poems, we have heard them from our infancy*. But when he asked more particular questions, he could never learn, that any one had ever heard, or could repeat the original of any one paragraph of the pretended translation."[118]

Under the criticism of his friends, Dr. Samuel Johnson and O'Conor, it became increasingly clear to Burke that the work was at least partially forged. But they remained, even with Hume and other Scots, attractive fictions.

It is Burke's comments on Irish history which best illustrate differences not only with Davies, but with many of his protestant Irish friends and English colleagues. In a letter of 1792, Burke stressed that the native Irish were held in contempt by the "civilising" English long before the eighteenth-century. The "statutes of Kilkenny" indicated "that the spirit of the popery laws, and some of their actual provisions, as applied between Englishry and Irishry, had existed in that harassed country before the words Protestant and Papist were heard of in the world".[119] Burke singled out Davies, with Spenser and Finglass, as examples of the "true genius and policy of the English

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[115] On the different Irish and Scottish responses, see Clare O'Halloran, "Irish re-creations of the Gaelic past: the challenge of Macpherson's Ossian", *Past and Present* 124 (1989) 69; *Idem*, "Golden ages and barbarous nations: antiquarian debate on the Celtic past in Ireland and Scotland in the eighteenth century" (unpublished PhD, University of Cambridge 1991); Colin Kidd, "Gaelic antiquity and national identity in enlightenment Ireland and Scotland", 1994 *English Historical Review* 1197, 1198. See also Kidd, *British identities before nationalism: ethnicity and nationhood in the Atlantic World, 1600-1800* (Cambridge, 1999).

[116] *Annual Register* (1761) 278 (second pagination). See *Annual Register* (1760) 253-4 (second pagination) and (1761) 282 (second pagination)).

[117] *Annual Register* (1761) 279, 276 (second pagination). Macpherson may, in fact, have drawn from Burke's *Enquiry*. See LL Stewart, "Ossian, Burke and the 'Joy of Grief'", *English Language Notes* 15 (1977) 1.

[118] (19 Sept 1763) in JYT Grieg (ed), *The letters of David Hume* (1969), i.400.

[119] WS ix. 615. See generally Burke's *Letter to Sir Hercules Langriche* (1792) (WS ix. 594-639) and "Letter to Richard Burke (*post* 19 February 1792)" (WS ix. 640-58). See also RE Burns, "The Irish penal code and some of its historians", *Review of Politics* 21 (1959) 276.

government".[120] Davies, he says, "boasts the benefits received by the natives, by extending to them the English law. . . [while] the appearance of things alone changed".[121] The promised improvement never came, but instead there were "unheard of confiscations" and "under pretence of tenures, and then of titles in the crown, for the purpose of the total extirpation of the interests of the natives in their own soil".[122] These actions:

> "kindled at length the flames of that rebellion which broke out in 1641. By the issue of that war, by the turn by which the Earl of Clarendon gave to things at the restoration, and by the total reduction of the kingdom of Ireland in 1691; the ruin of the native Irish, and in a great measure too, of the first races of the English, was completely accomplished."[123]

Again, all of these events *precede* the penal statutes. For all the rhetoric of the *Tracts*, Burke knew that the penal laws were not the cause of English and Irish protestant hegemony, but an attempt at securing the protestant – more accurately *Anglican* – interest.

As a good whig, Burke believed, the Glorious Revolution to have been a watershed for English liberty and public virtue, and he hoped Ireland would, in future, benefit from its connection with England. But the revolution "operated differently" in the two.[124] "In Ireland," he wrote:

> "it was the establishment of the power of the smaller number, at the expense of the political liberties and properties of the far greater part; and at the expense of the political liberties of the whole. It was, to say the truth, not a revolution, but a *conquest*."[125]

This distinguished the Irish situation from similar restrictions across the continent on protestant and catholic alike.[126] Ireland's long seventeenth century began with the elimination of the Brehon tradition in hopes of improving the mores and material goods of the native Irish through equal treatment under law. Whatever the reality of this ideal, the century ended with the legislative attempt, admittedly piecemeal and often ineffective, at eroding or containing Irish catholicism and commerce. Burke implies what O'Conor made explicit in unfavourably contrasting Hume's "declamation against the Tanistry Laws . . . with the Popery Laws since King William's

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[120] WS ix. 615. Finglass' *Breviat of the getting of Ireland and of the decaie of the same*, written in the sixteenth century, was published in *Hibernica: or some ancient pieces relating to Ireland* (1747).

[121] WS ix. 615.

[122] *Id*, WS ix. 616.

[123] *Id*.

[124] WS ix. 614.

[125] *Id* (italics added). "All the penal laws of that unparalleled code of oppression, which were made after the last event, were manifestly the effects of a national hatred and scorn towards a conquered people . . . (WS ix. 616)".

[126] Burke did *not* claim, as the nineteenth-century Irish historian WEH Lecky suggested, that the penal laws were *inspired* by the laws of Louis XIV against the Hugenots. See WS ix. 459-60.

demise".[127] In his own arguments with Hume, Burke "considered himself . . . as referred to on the subject".[128] Against what he believed to be the insulting and dehumanising contemporary histories of Ireland, Burke hoped for:

> "an interior history of Ireland, the genuine voice of its records and monuments, which speaks a very different language. . . : these restore Nature to its just rights, and policy to its proper order. For they even now show to those who have been at the pains to examine them, and they may show one day to all the world, that these rebellions were not produced by toleration, but by persecution – that they arose not from just and mild government, but from unparalleled oppression."[129]

Without claiming, then, that the Irish saved civilisation, Burke granted its native and catholic cultures a status denied them by many British and Irish protestant historians.

A final comment is worth noting, given the relatively clear conquest of Ireland, military and subsequently legal, that occurred in Davies' time. Dominating Irish debate throughout the eighteenth century, was the argument, following the lead of William Molyneux's *The case of Ireland's being bound by Acts of Parliament in England stated* (1698), that no conquest had ever taken place.[130] To varying degrees, it was instead suggested that the native Irish had acquiesced or, more surprisingly, been almost wholly replaced by settler stock.[131] The problems with patriot polemics are legion, perhaps none so much as the catholic character of much of the pre-1692 constitutional history claimed by protestant apologists. In the *Abridgement*, Burke argued that a conquest had occurred, though "it was indeed long before they were able entirely to subdue the island to the laws of England, the continual efforts of the Irish, for more than four hundred years, proved insufficient to dislodge them".[132] He was, at the same time, critical of

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[127] Robert E Ward, John F Wrynn, SJ and Catherine Coogan Ward (eds), *Letters of Charles O'Conor of Belanagare: a catholic voice in eighteenth-century Ireland* (Washington, 1988), 131. See O'Conor's "A letter to David Hume, Esq, on some misrepresentations in his *History of England*", *The Gentleman's Museum* (April/May 1763) and David Berman, "David Hume on the 1641 Rebellion in Ireland", *Studies* 65 (1976) 101, esp 107-8.

[128] Bisset, ii. 425-6.

[129] WS i.479. See WS i.478-9.

[130] See TO McLoughlin, *Contesting Ireland: Irish voices against England in the eighteenth century* (Dublin, 1999) and Anthony Carty, *Was Ireland conquered?: international law and the Irish question* (London, 1996).

[131] See Andrew Carpenter (ed), *The case of Ireland stated by William Molyneux* (Dublin, 1977), 30-1.

[132] WS i. 514. See generally WS i. 508-14. English involvement came about from native "faction and discontent" with Dermot McMurrough's call for English aid in a domestic dispute. Henry already had designs on Ireland and invaded, in part, as political penance for the murder of Thomas Beckett, in hopes of recovering the good graces of the English pope (Hadrian IV). Burke notes the irony that in "the submission of the Irish Chiefs to Richard IId mention by Sir John Davis", whatever its precise character, the Irish "bind themselves. . . to the Kings of England. . . supposing the Pope as the superior power. . . (WS ix. 470)". *Cf* "On the right of settlements or conquered countries to be bound by the laws of the

those, like Voltaire, who suggested that conquests were the preserve of civilised nations.[133] More importantly, he was aware, as his writings on Ireland, America, and India make clear, of the negative effects and positive obligations of conquest and colonialism, on the "metropolitan" and conquered or settled country alike.[134] But with its conquest a *fait accompli*, benefits could yet accrue to both Ireland and Britain. Burke sought, as Davies had claimed to, a union of manners, a deepening social commerce, and a more civil society between the two.

What is perhaps most remarkable about such a view is that the benefits of conquest are most evident in Burke's comments, not on Ireland, but on *England*. As with Irish patriotism, it remained an essential element of much English legal-political mythology that no Norman conquest had occurred.[135] At the same time, the Normans were seen to corrupt the ancient laws of England, which even as late as Blackstone remained a rhetorical ideal.[136] In Burke's English history and his fragment on the common law, he both acknowledged a Norman conquest and its civilising effect on the "rude and barbarous" Saxons, through the increased "communication" with the continent.[137] If they were not cannibals, the early English were a "people without learning, without arts, without industry, solely pleased and occupied with war, neglecting agriculture, abhorring cities, and seeking their livelihood only from pasturage and hunting".[138] They were among the "most backward in Europe in all improvements, whether in military or in civil life".[139] Indeed, in his only clear criticism of the Norman William, it is easy to hear an Irish, rather than an 'English' voice, noting:

> "To force against nature a new language upon a conquered people; to make them strangers in . . . courts of justice . . . ; to be reminded every time they had recourse to Government for

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metropolitan or dominant country", WWM Bk P 27/46 (cites Davies) and see William Burke's "Notes on Ireland" in WWM Bk P 40.

133 See *A note-book of Edmund Burke: poems, characters, essays and other sketches in the hands of Edmund and William Burke now printed for the first time in their entirety*, HVF Somerset (ed) (Cambridge, 1957) 119.

134 He noted in his critiques of British policy in India that "[t]ime has, by degrees, in other places and periods. . . blended and collated the conquered and the conquerors (WS ix. 614)". Cf. WS iii. 139-40 and see WS ix. 636-7 (on Quebec).

135 See Matthew Hale, "How the common law of England stood at and for some time after the coming of King William I" in *A history of the common law* ((2nd edn) London, 1716 [originally published posthumously in 1713]), esp. 107-8. *Cf* WS i. 322-3 (on Hale).

136 See the discussion in John Cairns, "Blackstone, an English institutist: legal literature and the rise of the nation state", (1984) *Oxford J of Legal Studies* 318, esp 354-60. See also JGA Pocock, *The ancient constitution and the feudal law: a study of English historical thought in the seventeenth century* (Cambridge, 1986 [A reissue with a retrospect]).

137 WS i. 430. *Cf* WS i. 330-1, i. 399. The phrase "rude and barbarous" was a trope long in use about the Irish. John Gillingham has noted its use in the twelfth century by William of Malmesbury, as well as by Spenser about the English past. "The English invasion of Ireland" in Brendan Bradshaw, Andrew Hadfield, and Willy Maley, *Representing Ireland: literature and the origins of conflict, 1534-1660* (Cambridge, 1993). See Spenser, *View*, 67.

138 WS i. 429.

139 WS i. 428.

> protection of the slavery, in which it held them; this is one of those acts of superfluous tyranny, from which very few conquering nations or parties have forlorn, though no way necessary, but often prejudicial to their safety."[140]

In the recurring debates over English exceptionalism and insularity, Burke's vision of English history and his criticisms of its jurisprudence and legal pedagogy remain too often overlooked.[141] Davies' extensive use of civil and canon law in the *Reports* and elsewhere has led to a re-evaluation emphasising the breadth of his jurisprudential erudition.[142] A similar revision of Burke jurisprudence remains to be done.[143]

Reason, Principle, Sentiment And Interest

The events of the early seventeenth century altered fundamentally the character of both Irish laws and culture. English jurisprudence in Ireland introduced legal and commercial languages in many ways hostile to native manners. The subsequent erosion of Gaelic tradition illustrated the power of both. Among jurists, it was long a humanist commonplace, at once descriptive and prescriptive, that laws were to be suited to a people. Davies had said as much, though in practice he sought to fit the Irish to English laws. Almost two centuries later, in a letter (1792) to his son Richard Burke, then agent for the Catholic Committee, the senior Burke wrote:

> "Instead of prating about Protestant ascendancies, Protestant Parliaments ought, in my opinion, to think at last of becoming Patriot Parliaments.
>
> The Legislature of Ireland, like all Legislatures, ought to frame its Laws to suit the people and the circumstances of the Country, and not any longer to make it their business to force the nature, the temper, and the inveterate habits of a Nation to a conformity to speculative systems concerning any kind of Laws. Ireland has an established Government, and a Religion legally established, which are to be preserved. It has a people who are to be preserved too, and to be led by reason, principle, sentiment, and interest to acquiesce in that Government."[144]

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[140] WS i. 472. *Cf* Blackstone, *Commentaries on the laws of England* (1765-9), iii. 317. See Fuchs 235.

[141] On the general debate, see Kelley, "History, English law, and the renaissance", *Past & Present* 65 (1974) 24 (reprinted in Kelley, *History, law and the human sciences: medieval and renaissance perspectives* (London, 1984)); the answer by Christopher Brooks and Kevin Sharpe, "Debate: history, English law, and the renaissance", *Past & Present* 72 (1976) 133; and Kelley's rejoinder following at p 143.

[142] Pawlisch, "Sir John Davies, the ancient constitution, and civil law", *Historical Journal* 23 (1980) 689 and "Sir John Davies' *Law reports* and the case of proxies", *Irish Jurist* (n s) 17 (1982) 368.

[143] Both Davies and Burke have been portrayed as exemplars of the "common law mind". See esp Pocock, *The ancient constitution*, 32-41 (on the *Reports*), 59-63 (on the *Discovery*), and 243 (on Burke).

[144] "Letter to Richard Burke", WS ix. 650.

As he wrote this, the British administration, informed by the analyses of the Burkes, were slowly forcing changes on the protestant "ascendancy" and removing the few remaining elements of the penal laws. In seeking closer ties between Britain and Ireland, against his "patriot" associates, Burke sought to make Davies' rhetoric reality. But the union for which he hoped was neither assimilation nor, I suspect, the ultimately compromised product of 1800, three years after his death. It was finally, not a matter for the laws, and only partly of commerce, but essentially a question of manners. Burke sought not, as had Davies, to make the Irish "become English", but instead, by the contribution of all of Ireland, to enlarge the meaning of "British".

EMBRACING "CONSTITUTIONAL" LEGISLATION: TOWARDS FUNDAMENTAL LAW?

Mark Elliott, Faculty of Law, University of Cambridge*

It is traditionally held that, because the United Kingdom Parliament is sovereign, all of the legislation which it passes is, in formal terms, of equal status. As Dicey put it, "neither the Act of Union with Scotland nor the Dentists Act 1878 has more claim than the other to be considered a supreme law".[1] In fact this conclusion derives from a particular conception of parliamentary sovereignty. The notion that Parliament's legislative supremacy is ongoing or continuing implies that it is the courts' duty to give effect to the most recent expression of Parliament's will.[2] Consequently, if two pieces of legislation conflict with one another, the courts are obliged to give effect to the more recent expression of Parliament's intention; even if the later Act does not explicitly derogate from the earlier Act, it is capable of repealing it by implication.[3]

This established view of parliamentary sovereignty was, of course, seriously challenged by the accession of the United Kingdom to the European Community and, in particular, by the recognition of the House of Lords in *Factortame (No 2)* that directly effective Community law may prevail over inconsistent Acts of Parliament.[4] One of the most surprising features of the *Factortame* litigation is the paucity of discussion, in their Lordships' speeches, of the constitutional underpinnings and implications of their recognition of the primacy of EC law. For this reason *Factortame* prompted considerable debate as to whether – and, if so, how – the supremacy of Community law could be explained consistently with the principle of parliamentary sovereignty.

The Administrative Court, in *Thoburn* v *Sunderland City Council*,[5] has now provided a clear answer to this question. The reasoning of the court challenges many aspects of the received wisdom concerning parliamentary sovereignty. In particular, the Court concludes that the ability to repeal legislation by implication is not a necessary concomitant of legislative supremacy; that all legislation is not equal in its constitutional status, and that there exists a category of fundamental constitutional legislation. This paper aims to unpack the significance of *Thoburn* by considering what light it sheds on our understanding of how the primacy of EC law is accommodated; how it challenges established theoretical accounts of parliamentary

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* I am grateful to Trevor Allan and Amanda Perreau-Saussine for their helpful comments on a draft of this article. However, the views expressed, and any errors, are my own responsibility.

1 Dicey, *An Introduction to the Study of the Law of the Constitution* (1959), p 145.

2 See, *eg*, Wade in "The Basis of Legal Sovereignty" (1955) 13 *CLJ* 172.

3 See, *eg*, *Vauxhall Estates Ltd* v *Liverpool Corporation* [1932] 1 KB 733; *Ellen Street Estates* v *Minister of Health* [1934] 1 KB 590.

4 *R* v *Secretary of State for Transport, ex parte Factortame Ltd. (No 2)* [1991] 1 AC 603.

5 [2002] EWHC 195 (Admin) [2002] 3 WLR 247.

sovereignty, and the implications of its recognition of fundamental law within the UK constitution. First, however, it is necessary to explain the background to the case.

As originally enacted, section 1(1) of the Weights and Measures Act 1985 permitted the use of both metric and imperial units of weight, without preference for one system over the other. However, Council Directive 80/181/EEC requires that metric units should be used in all member states; in consequence, UK law was amended such that it has been unlawful, since 1 January 2000, to sell loose goods in amounts measured in imperial units (albeit that such units can, for the time being, be used alongside metric units in a supplementary capacity). UK law was amended by means of the Weights and Measures Act 1985 (Metrication) (Amendment) Order 1994 (made under a Henry VIII power conferred by section 8(6) of the 1985 Act) and the Units of Measurement Regulations 1994 (made under section 2(2) of the European Communities Act 1972). A number of the appellants – the so-called "metric martyrs" – had been convicted of selling loose goods (fruit, vegetables and fish) from bulk using imperial units, and all of the appellants sought to question the legality of the secondary legislation which had effected the amendments under which they were charged.

"Constitutional" Legislation and Implied Repeal

The appellants contended that section 2(2) of the 1972 Act did not provide any legal basis for the 1994 Regulations, so that they – and consequently the 1994 Order, which, the Court accepted,[6] could not rationally stand without the Regulations – were incapable of effecting the amendments under which the appellants had been convicted. They argued that section 1(1) of the 1985 Act, as originally enacted, impliedly repealed section 2(2) of the 1972 Act to the extent that the latter permitted the enactment of any subordinate legislation which would have the effect of derogating from section 1(1) of the 1985 Act. It was said that the policy of Parliament in 1985 was to permit the use of metric *and* imperial units; and, to the extent that an earlier Parliament had in 1972 created *vires* to enact measures which would be inconsistent with that policy, the enabling provisions adopted by Parliament in 1972 were impliedly repealed. This argument has potentially dramatic consequences for Henry VIII clauses, since it would render them operative in relation only to earlier legislation. However, Laws LJ[7] doubted the soundness of the argument, concluding that there is no inconsistency between a later specific provision and an earlier general provision conferring *vires* to amend legislation.[8] In the absence of any inconsistency, no question of implied repeal could arise and the amendment of the 1985 Act therefore rested on a sound legal basis.[9]

However, in case he was wrong on that point, Laws LJ went on to consider a broader question: is the European Communities Act 1972 amenable, in any

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6 [2002] 3 WLR 247 at [40].
7 Giving the only reasoned judgment, with which Crane J agreed.
8 [2002] 3 WLR 247 at [50]-[52].
9 And so the appellants' convictions stood. Leave to appeal to the House of Lords was denied by the House of Lords (*The Times*, 16 July 2002), although an application has now been lodged with the European Court of Human Rights.

event, to implied repeal by inconsistent provisions in later statutes? The orthodox answer to questions of this nature is well-known: all legislation is vulnerable to express *and* implied repeal. This follows from the traditional view – adopted in *Vauxhall Estates Ltd* v *Liverpool Corporation*[10] and *Ellen Street Estates* v *Minister of Health*[11] – that Parliament's sovereignty is continuing, such that in cases of conflict priority must be given to the most recent expression of legislative intention. Decisions concerning limitations upon subordinate legislatures[12] are sometimes advanced as evidence of the courts' willingness to recognise "manner and form" limitations upon the exercise of legislative power;[13] however, these cases were decided in relation to legislatures exercising powers conferred by the UK Parliament and it is therefore doubtful whether they provide any clear guidance as to the powers *of* the UK Parliament.[14]

The *Vauxhall* and *Ellen Street* cases are therefore usually taken as clearly establishing that the doctrine of implied repeal is a fixed part of domestic constitutional law. However, it is not necessarily appropriate to draw such a broad conclusion from those cases: to do so is (arguably) to dislocate the legal principle which they announced from the context within which they were decided.[15] The contrary approach was adopted by Laws LJ in *Thoburn*. In his view the operation of the doctrine of implied repeal is context-sensitive, so that its applicability ultimately depends upon the nature and constitutional role of the legislation in question. The key issue, therefore, is whether the legislation amounts to an "ordinary" or a "constitutional" statute.[16] The normal principles – including that of implied repeal – operate in relation to the former. However, constitutional statutes – which category comprises legislation that either "conditions the legal relationship between citizen and State in some general, overarching manner" or "enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights"[17] – are to be treated differently.[18] Thus, Laws LJ explained that, "A constitutional statute can only be repealed, or amended in a way which significantly affects its provisions touching fundamental rights or otherwise the relation between citizen and State, by unambiguous words on the face of the later statute."[19] The meaning of this formula is amplified in the following terms:

> "Ordinary statutes may be impliedly repealed. Constitutional statutes may not. For the repeal of a constitutional Act or the

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[10] [1932] 1 KB 733.
[11] [1934] 1 KB 590.
[12] See, *eg*, *Bribery Commissioner* v *Ranasinghe* [1965] AC 172; *Attorney-General for New South Wales* v *Trethowan* [1932] AC 526.
[13] See Jennings, *The Law and the Constitution* (1959), pp 151-156; Heuston, *Essays in Constitutional Law* (1964), pp 9-16.
[14] See Wade, "The Basis of Legal Sovereignty" (1955) 13 *CLJ* 172 at 182-183.
[15] See Turpin, *British Government and the Constitution: Text, Cases and Materials* (2002), pp 39-40.
[16] [2002] 3 WLR 247 at [62].
[17] *Ibid.*
[18] The following are all said to be constitutional statutes: Magna Carta; Bill of Rights 1689; Act of Union; the Reform Acts; European Communities Act 1972; Human Rights Act 1998; Scotland Act 1998; Government of Wales Act 1998.
[19] [2002] 3 WLR 247 at [63].

> abrogation of a fundamental right to be effected by statute, the court would apply this test: is it shown that the legislature's *actual* – not imputed, constructive or presumed – intention was to effect the repeal or abrogation? I think the test could only be met by express words in the later statute, or by words so specific that the inference of an actual determination to effect the result contended for was irresistible. The ordinary rule of implied repeal does not satisfy this test. Accordingly, it has no application to constitutional statutes."[20]

This recognition of a category of "constitutional statutes", and the associated modification of the doctrine of implied repeal, is in many senses novel and raises significant issues concerning the role of legislative supremacy within the UK's constitutional system. The remainder of this paper seeks to explore a number of those issues: the specific question (which supplied the context for the *Thoburn* decision itself) concerning the relationship between parliamentary sovereignty and EC law; the more general implications of embracing a hierarchy of constitutional laws, and, more broadly still, the relationship between existing theoretical accounts of parliamentary sovereignty and that which is presented in *Thoburn*.

Parliamentary Sovereignty and the Supremacy of EC Law: Reconciliation through Interpretation?

Ever since the United Kingdom became a member of the European Community in 1973, constitutionalists have had to confront the apparently irreconcilable principles of the sovereignty of Parliament and the supremacy of EC law. Just as the former is generally regarded as axiomatic as a matter of British constitutional law, so the latter is a fundamental tenet of Community law. European law thus assumes primacy over national law irrespective of whether it post-dates or pre-dates the domestic provision,[21] and the supremacy principle operates even in relation to municipal constitutional law.[22] Although British courts acknowledged that circumstances could arise in which EC law would have to take priority over an Act of Parliament,[23] it was not until almost 20 years after British accession that this actually occurred in *Factortame (No 2)*, in which the House of Lords directed the disapplication of part of the Merchant Shipping Act 1988 on account of its incompatibility with directly effective Community law.[24]

One of the most surprising features of that decision is that, in requiring the disapplication of primary legislation, with all the momentous implications such a step entailed for the sovereignty of Parliament, their Lordships said scarcely a word about how such a development might be accommodated in

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[20] *Ibid*, *loc cit*.
[21] Case 6/64, *Costa* v *ENEL* [1964] ECR 585.
[22] Case 11/70, *Internationale Handelsgesellschaft* [1970] ECR 1125.
[23] See, *eg*, *Macarthys Ltd* v *Smith* [1979] 3 All ER 325.
[24] *R* v *Secretary of State for Transport, ex parte Factortame Ltd (No2)* [1991] 1 AC 603. See also *R* v *Secretary of State for Employment, ex parte Equal Opportunities Commission* [1995] 1 AC 1.

terms of constitutional theory.[25] Only Lord Bridge went any way towards acknowledging the enormous constitutional significance of the *Factortame* decision, but even he confined himself to the observation that the supremacy of EC law "was certainly well established in the jurisprudence of the European Court of Justice long before the United Kingdom joined the Community. Thus, whatever limitation of its sovereignty Parliament accepted when it enacted the European Communities Act 1972 was entirely voluntary."[26] But this begs far more questions than it answers, given that the voluntary acceptance of limitations on legislative freedom forms no part of the traditional account of parliamentary sovereignty.

The willingness of the court in *Thoburn* to address these issues explicitly is therefore as welcome as it is overdue. In particular, the analysis adopted by the Administrative Court facilitates an understanding of the status of EC law within the UK legal system which reconciles it with (a particular version of) parliamentary sovereignty. According to *Thoburn*, the operation of Community law within the UK is (uncontroversially) to be traced to the European Communities Act 1972; that legislation is the gateway through which EC law passes so as to take effect domestically, and it is therefore that legislation to which we must look in seeking to comprehend how and why EC law operates within the municipal legal system. Thus the domestic position of Community law must depend upon the constitutional status of the 1972 Act, since that is the conduit through which EC provisions acquire force in municipal law. The court concludes in *Thoburn* that the 1972 Act enjoys constitutional status which, as we have seen, renders it exempt from implied repeal. From this it follows that the legal superiority over domestic law which is afforded to EC law by virtue of the 1972 Act must obtain unless the inconsistent domestic law in question specifically repeals or departs from the 1972 Act. In result, Community law is clothed with the same constitutional protection as the domestic legislation which, in the first place, accounts for its operation in this jurisdiction; it therefore necessarily prevails over all national law in the absence of specific derogation. This approach prompts two particular comments.

First, the Administrative Court's analysis is consistent with the theory of parliamentary sovereignty – or, at least, a specific version of that theory. The model presented in *Thoburn* does not ultimately contradict the ability of Parliament to derogate from EC law. Such law enjoys priority only because the 1972 Act so provides, and later Parliaments are free to qualify or repeal (partially or wholly) those parts of the 1972 Act which make provision for the effectiveness and status of Community law in the United Kingdom, albeit that they may not do so impliedly. On this view, in the *Factortame* litigation EC law prevailed over the Merchant Shipping Act 1988 because, first, the 1972 Act provided for Community law to take effect in national law notwithstanding inconsistent provisions in later legislation and, secondly, the legislation enacted in 1988 did not derogate from the position set out in the

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[25] Although there has, of course, been considerable academic debate. See, *inter alios*, Craig, "Sovereignty of the United Kingdom Parliament after *Factortame*" (1991) 11 *YEL* 221; Laws, "Law and Democracy" [1995] *PL* 72; Wade, "Sovereignty: Revolution or evolution?" (1996) 112 *LQR* 568; Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 *LQR* 443.

[26] [1991] 1 AC 603 at 658-659.

1972 Act in an effective manner given the constitutional status of the latter. Parliament in 1988 was therefore substantively sovereign – it could have legislated contrary to EC law – but it omitted to exercise its sovereignty in a manner appropriate to secure that outcome. It follows that recognition of the European Communities Act 1972 (or indeed any other legislation) as constitutional in the *Thoburn* sense places only formal, and not substantive, fetters on the legislative freedom of Parliament. Ultimately, therefore, the pragmatic form of primacy thus ascribed to EC law is to be traced to the intention of Parliament – albeit an intention which is constructed through the application of particular and novel rules of interpretation – and, in this manner, may be reconciled with the legislature's ongoing substantive sovereignty.[27]

Secondly, the ability of the framework elaborated in *Thoburn* to accommodate both parliamentary sovereignty and the pragmatic primacy of EC law may appear to be a considerable strength. Indeed such an approach finds its roots deep in British constitutional tradition, whereby long-held orthodoxies are left undisturbed by – yet increasing dislocated from – the realities of governance and political practice. This tendency is clearly illustrated, for example, by the disjunction between the theory and reality of the royal prerogative,[28] but is perhaps most pronounced in relation to parliamentary sovereignty.[29] For many, this is a permanent feature of our legal system which, even in the face of radical constitutional and political change, remains constant. The *Thoburn* judgment classically illustrates this ethos. One of the central messages which it communicates is that Parliament is manifestly sovereign: it is free to do as it pleases, even if this involves derogation from EC law, provided of course that it is sufficiently specific when manifesting its intention. This precisely reflects the typology of constitutionalism which is so familiar in this jurisdiction. Thus all of the benefits which attach to EU membership are purchased by ascribing the pragmatic supremacy to Community law which is an obligatory condition of that membership; and yet this position is secured in a manner which leaves undisturbed the hallowed principle of parliamentary sovereignty, at least at a theoretical level.

The difficulty with this position is that it divorces constitutional theory from political reality. The caveat that Parliament may derogate from EC law provided that it makes specific provision to that effect vouchsafes its theoretical supremacy; but that self-same caveat resonates with a lack of reality. Even if domestic courts recognised the validity of a specific derogation, there would be no question of the European Court of Justice recognising its legitimacy. Short of fundamental Treaty renegotiation on this

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[27] In fact this approach was foreshadowed by Sir John Laws in "Law and Democracy" [1995] *PL* 72 at 88-90.

[28] The monarch, in law, possesses substantial powers under the royal prerogative; yet, once the legal position is overlaid with constitutional convention, which significantly attenuates the monarch's ability to exercise prerogative powers, the picture changes radically. Thus the traditional legal position is left undisturbed, and expectations of constitutional behaviour are fulfilled through the medium of convention, not law.

[29] For discussion see Elliott, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention" (2002) 22 *LS* 340.

point or British withdrawal from the EU, the UK has no option but to accept the primacy of Community law. The putative ability of Parliament, postulated in *Thoburn*, to derogate specifically from EC law is therefore a largely – if not entirely – theoretical construct: it is, in reality, scarcely more than a device to facilitate adherence to a theory of parliamentary sovereignty which bears little relation to the reality of Westminster's legislative competence within the contemporary constitutional landscape. We will see below, however, that this criticism of *Thoburn* must be qualified, because the judgment also looks beyond this solution by anticipating the possibility that, in the longer term, the constitutional status of EC law may be reflected at a theoretical, not just a pragmatic, level.

Constitutional Legislation and Constitutional Rights: Towards a Hierarchy of Norms

The approach commended by Laws LJ in *Thoburn* is novel to the extent that it marks out certain legislation as being constitutional in nature and attaches specific legal consequences to that categorisation. To some extent, however, it echoes Laws J's earlier judgment in *R* v *Lord Chancellor, ex parte Witham* which was given in a distinct, yet closely analogous, context. The key question in that case was whether legislation could, through the use of general words, attenuate or displace citizens' access to the courts. Laws J opined that access to the courts was recognised by the common law as a "constitutional right"; but, recognising that in the face of parliamentary sovereignty no right could be absolute, Laws J concluded that such rights were to be protected by means of interpretation, such that they could be displaced or qualified only by express legislative provision to that effect.[30] The relationship between constitutional rights and constitutional legislation is of interest for two reasons.

First, the concepts sit comfortably together, since each rests on the same premises: that the constitutional value of particular norms and governmental arrangements ought to be reflected in law, thus eschewing the unhelpful dogma that our constitution knows no hierarchy of values, but that – at least at the current stage of the British constitution's evolution – the fundamentality of such norms may be acknowledged only by means of interpretation. In this manner, the interpretative machinery invoked by the doctrines of constitutional rights and constitutional legislation facilitates legal recognition of a hierarchy of constitutional norms without, for the time being, disturbing the orthodox principle of parliamentary sovereignty. It is, moreover, entirely appropriate that the same approach obtains in relation to both common law constitutional rights and constitutional legislation: in each case the judiciary is (of necessity, in the absence of any constitutional text) determining that particular constitutional weight is to be ascribed to the value or rule in question, and that legal consequences ought to attach to the constitutional importance of the provision. It would be unfortunately formalistic to draw a distinction between common law and legislative provisions in this regard; and, by extending to constitutional legislation the

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[30] [1998] QB 575. Although, at one point in his judgment, Laws J speaks of "specific provision" (p 581), he later makes it clear that this means express provision (pp 585-586).

interpretative approach first applied to common law rights, *Thoburn* represents an important and positive development.

Secondly, however, the interpretative approach adopted in relation to constitutional rights and statutes will inevitably raise difficulties of construction.[31] What, precisely, constitutes a provision sufficiently "specific" to override constitutional legislation? Laws J concluded in *Witham* that constitutional rights could be displaced only by express provision. However, in *R* v *Secretary of State for the Home Department, ex parte Pierson*, Lord Browne-Wilkinson doubted the correctness of this approach. Although he agreed that "basic rights are not to be overridden by the general words of a statute since the presumption is against the impairment of such basic rights", he apparently felt that such rights might be displaced by broader means than purely express provision.[32] In the analogous context of constitutional legislation, Laws LJ appears to have taken this point into account in his judgment in *Thoburn*. Thus he refers to "specific" rather than "express" derogation from constitutional legislation, and accepts that this includes both "express words in the later statute" and "words so specific that the inference of an actual determination to effect the result contended for was irresistible".[33]

This is surely the correct approach, since it avoids the formalism – and, ultimately, the artificiality – inherent in seeking to draw a bright-line distinction between express and non-express repeal.[34] Instead, it captures the underlying and crucial point that, in a mature legal system, fundamental values must be accorded a measure of constitutional security which protects them against casual or incidental erosion, and which requires the legislature to consider their displacement – and to express its conclusions on this matter – in the clearest possible terms. Thus the approach commended in *Thoburn* will inevitably raise problems of interpretation; but they are problems which necessarily and rightly arise once we abandon the dogma that our legal system lacks any hierarchy of constitutional values.

The Wider Picture: Legislative Power and the Common Law Constitution

Within the constitutional framework set out by the Administrative Court in *Thoburn* the process of statutory interpretation occupies centre-stage. The strength of this approach, as we have seen, is that it acknowledges a hierarchy of constitutional values while still adhering to the established orthodoxy of parliamentary sovereignty. However, as noted above, the

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31 As Marshall (2002) 118 LQR 493 at 495-496 observes.

32 [1998] AC 539 at 575.

33 [2002] 3 WLR 247 at [63].

34 But it is arguable that *Thoburn* still suffers from formalism in a different context. By drawing a distinction between constitutional and ordinary legislation, the decision implies a clear choice between two styles of interpretation. It seems more likely that, as the case law in this area develops, a more subtle approach will emerge according to which the strength of the rule of interpretation applied to a particular provision – and hence the degree of specificity required to secure its repeal – will vary according to the *degree* of constitutional importance attached to it.

reverse side of this coin is that legal theory tends to become dislocated from political reality. For instance, the idea that Parliament remains notionally competent to derogate from EC law misrepresents the reality of the contemporary political order within which the United Kingdom, as a member of the EU, is bound to adhere to Community law. This style of reasoning, according to which the appearance of orthodoxy is preserved at the expense of a legal theory which accurately describes political reality, typifies the pragmatic British approach to constitutionalism.

To an extent, *Thoburn* perpetuates that tradition; but the case also tentatively points away from this style of reasoning. Although the court concludes that Parliament is, for now, sovereign, that position is not represented as an immovable one because, crucially, the concept of legislative power is conceptualised by the court in dynamic, not static, terms. Consequently, while the immediate relevance of *Thoburn* is its articulation of a novel category of constitutional legislation which is protected through statutory construction, the more abstract – but, in the longer term, potentially much more significant – impact of the case lies on a broader canvas, since it anticipates a constitutional scheme within which Parliament's role is subtly – but significantly – different from that which it presently occupies. Laws LJ expresses the point in the following terms:

> "Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the [European Communities Act 1972]. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal … The British Parliament has not the authority to authorise any [limitations upon its own powers]. Being sovereign, it cannot abandon its sovereignty . . . This is, of course, the traditional doctrine of sovereignty. If it is to be modified, it certainly cannot be done by the incorporation of external texts [such as the European Community Treaty]. The conditions of Parliament's legislative supremacy in the United Kingdom necessarily remain in the UK's hands. But the traditional doctrine has in my judgment been modified. It has been done by the common law, wholly consistently with constitutional principle."[35]

Two points are pivotal within this view of the constitutional order, and of Parliament's place within it. The first concerns the source of legislative authority. In Laws LJ's view Parliament's power to enact law is derived from, and thus conferred by, the common law. This is necessarily implicit in his assertion that the conditions upon which legislative authority is held can be – and indeed have been – modified by the common law. Secondly, if it is accepted that legislative power derives from the common law, then it follows *a priori* that the scope of that legislative power is not fixed. Parliamentary sovereignty, on this view, is not an immovable feature of the constitutional system: rather, it expresses the conclusion which the common law has

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[35] [2002] 3 WLR 247 at [59], *per* Laws LJ.

reached, for the time being, as to the width of Parliament's legislative competence. Crucially, as the common law evolves in light of changing circumstances – both internal and external to the UK's political order – so the common law conditions upon which Parliament's legislative authority is held may change in turn. Indeed this possibility is explicitly countenanced by Laws LJ in his judgment, and he concludes that such change has, in fact, already occurred:

> "The common law has in recent years allowed, or rather created, exceptions to the doctrine of implied repeal: a doctrine which was always the common law's own creature. There are now classes or types of legislative provision which cannot be repealed by mere implication. These instances are given, and can only be given, by our own courts, to which the scope and nature of Parliamentary sovereignty are ultimately confided. The courts may say – have said[36] – that there are certain circumstances in which the legislature may only enact what it desires to enact if it does so by express, or at any rate specific, provision."[37]

Thus, precisely because parliamentary sovereignty's nature and scope are a function of the common law – and are hence "ultimately confided" to the courts – those phenomena are prone to change as the common law, and the constitutional and political environment within which it is located and to which it gives legal effect, evolve. To date, as Laws LJ recognises, the extent to which the common law has changed in this regard is relatively modest. Hence the fundamentality of certain rights and of certain legislative provisions is secured by the application of new principles of interpretation which reflect the common law's conclusion that it is no longer constitutionally appropriate to ascribe to Parliament a legislative competence to abrogate such rights and arrangements implicitly.

But just as the common law has evolved so to arrive at this position at the present time, so further evolution is possible within this model. Ultimately, therefore, if the view of parliamentary sovereignty presented in *Thoburn* is accepted, then it is necessarily possible that the common law may, at some future point, arrive at the conclusion that there are certain constitutional values or constitutional arrangements whose normative value is so great as to place them beyond any interference – specific or otherwise – by the legislature. Consequently, while such key features of the British constitution such as human rights, membership of the EU and the existence of devolved institutions of government are all currently thought to be ultimately vulnerable in the face of an exercise of sovereign legislative power, *Thoburn* presents a view of the constitutional order in which the present subordinate status of such norms and structures may, in the future, change.[38]

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[36] In relation to common law constitutional rights and EC law.

[37] [2002] 3 WLR 247 at [60].

[38] For discussion of the impact on parliamentary sovereignty of devolution and the incorporation of the European Convention on Human Rights, see Elliott, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention" (2002) 22 *LS* 340.

This possibility inevitably arises if it is acknowledged that parliamentary sovereignty is not abstract or given, and that legislative authority is a common law construct whose reach is to be evaluated and determined within the context of contemporary constitutionalism and by reference to the extent and nature of the fundamentality which that constitutionalism ascribes to its central norms, structures and arrangements. Indeed, this dynamic conception of legislative authority was made even more explicit by Laws LJ in his judgment in *International Transport Roth GmbH* v *Secretary of State for the Home Department*, in which he opined that, "In its *present state of evolution*, the British system may be said to stand at an intermediate stage between parliamentary supremacy and constitutional supremacy. . ."[39] In result, although the common law presently acknowledges only formal limitations upon parliamentary competence, it is logically implicit within the model of constitutionalism set out in *Thoburn*[40] that the common law conditions upon which Parliament's law-making powers are held may, in the future, come to constrain those powers substantively.[41]

Re-evaluating Sovereignty Theory

Whether the articulation and enforcement of such constraints represents a legitimate judicial task, in the absence of a written constitution conferring such power upon the judiciary, is a well-rehearsed debate. For some, such judicial activism would represent an illegitimate arrogation of power wholly at odds with the role of the courts under the received perception of the separation of powers as it applies in the UK.[42] But for others, a process whereby the judiciary, through its interpretation of the common law constitution, articulates and gives legal force to the constitution's most fundamental values is the hallmark of true democracy, in which it is acknowledged that there exist norms whose legitimacy precedes even the claims of the represented majority.[43] It is beyond the scope of this paper to participate directly in that debate; rather, it has attempted to demonstrate that the decision in *Thoburn*, by presenting a judicial vision of the constitutional order which raises the possibility of legal limitations upon Parliament's competence, breaks new ground and adds a new relevance to the debate about the legitimate extent, in this context, of judicial activism. It is appropriate, therefore, to examine by way of conclusion exactly how *Thoburn* challenges established accounts of parliamentary sovereignty.

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39 [2002] EWCA Civ 158 [2002] 3 WLR 344 at [71] (emphasis added).

40 And also in *International Transport Roth GmbH*.

41 Unsurprisingly, these conclusions about the potential implications of *Thoburn* are entirely of a piece with the views which Sir John Laws has expressed extra-curially in this area. See principally "Judicial Remedies and the Constitution" (1994) 57 *MLR* 213, "Law and Democracy" [1995] *PL* 72 and "The Constitution: Morals and Rights" [1996] *PL* 622.

42 See, for example, Griffith, "The Brave New World of Sir John Laws" (2000) 63 *MLR* 159.

43 Such views receive prominent support from Laws, "Law and Democracy" [1995] *PL* 72; Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism* (1993), ch 11 and *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001), ch 7; Cooke, "Fundamentals" [1988] *New Zealand Law Journal* 158.

The framework articulated in *Thoburn* shares similarities with both the "continuing" theory and the "new view", but also differs from each of them in important respects. As is well known, the new view – advanced by Jennings[44] and supported by Heuston[45] – holds that, while Parliament may not impose substantive limitations upon its successors, it may subject them to constraints of manner and form. The *outcome* of the reasoning applied in *Thoburn* appears to support this theory since the European Communities Act 1972 is regarded as beyond implied repeal; this seems to suggest that, in enacting that legislation, Parliament succeeded in imposing a formal limitation upon its successors, requiring them to use specific language should they wish to depart from the 1972 Act.[46] However, although the outcome of *Thoburn* appears compatible with the new view, the *reasoning* applied by the court is not. Although Parliament is now subject to a formal restriction *vis-à-vis* derogation from the 1972 Act, the conclusion reached in *Thoburn* is that the source of this restriction does *not* lie in any legislative intention manifested by Parliament in 1972. Indeed, the possibility of Parliament's imposing such restrictions upon its successors was explicitly rejected by the court:

> "Parliament cannot bind its successors by stipulating against repeal, wholly or partly, of the [European Communities Act 1972]. It cannot stipulate as to the manner and form of any subsequent legislation. It cannot stipulate against implied repeal any more than it can stipulate against express repeal."[47]

The true explanation, according to *Thoburn*, for the emergence of the formal requirement relating to the 1972 Act is that the *common law* recognises it as a constitutional statute and attaches a particular legal condition – immunity from implied repeal – to such legislation. The formal limitation upon legislative competence which has emerged in relation to the 1972 Act therefore owes its existence to the development of the common law rather than to any manifestation of legislative intention. Consequently, while the outcome of *Thoburn* is that Parliament is now subject to formal restrictions *vis-à-vis* constitutional legislation, this does not invoke or support the new view. Indeed it directly contradicts that view by denying Parliament the ability to entrench legislation itself and by concluding that, instead, questions of entrenchment are ultimately to be determined through judicial application and development of the common law conditions upon which Parliament's legislative authority is held.

This forms a considerable advance on the new view as postulated by Heuston and Jennings. Their approach calls for highly artificial distinctions to be drawn between, on the one hand, manner and form limits and, on the other hand, substantive limits.[48] And, even if the distinction between the two

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[44] Jennings, *The Law and the Constitution* (1959), pp 151-156.

[45] Heuston, *Essays in Constitutional Law* (1964), ch 1.

[46] Or from EC law whose effectiveness is, in the first place, provided for by the 1972 Act.

[47] [2002] 3 WLR 247 at [59].

[48] Wade gives the example of an Act rendered practically beyond repeal by a requirement that the support of ninety per cent of the electorate must first be secured. See "The Basis of Legal Sovereignty" (1955) 13 *CLJ* 172 at 181.

forms of entrenchment can be maintained, it still ascribes to the legislature an unfettered competence to entrench its enactments by means of potentially very powerful manner and form limits. In contrast the model presented in *Thoburn* provides for independent judicial scrutiny before any legislation is recognised as being entrenched to any extent. In this manner any legislative attempt to entrench legislation must be examined by the judiciary against a wider constitutional backdrop, in order to determine whether the entrenchment of the legislation in question would be constitutionally appropriate. *Thoburn* therefore reflects an approach to questions of entrenchment which is far more contextual than that which is postulated by the new view.

Criticising the new view (among others), Allan observes that, "Almost all modern discussions of sovereignty share the error of seeking to provide a single determinate solution which can be applied, in advance, to every question concerning the limits of the doctrine which may arise in the future."[49] He goes on to suggest that the correct approach to questions of entrenchment demands analysis of the context within which they arise. Thus, "The boundaries of sovereignty must be determined in the light of the prevailing moral and political climate when difficult questions of constitutional authority arise."[50] By denying the legislature any automatic right to entrench legislation, *Thoburn* commends an approach similar to that which Allan advocates since, if Parliament ultimately holds its legislative authority subject to common law conditions, then it is for the judiciary, by interpreting the common law constitution and determining the role played by the enactment in question within that constitution, to decide whether and how it may be repealed. This, it seems, marks a more mature and measured approach to matters of entrenchment than the rather formalistic new view. It necessarily engages the judiciary in difficult issues; but, given that such issues will inevitably arise, it is surely better that they are resolved in a manner suitable to the context rather than by the mechanical application of a rule which takes no account of the specific issues at stake.

The model set out in *Thoburn* also differs from the continuing theory which was classically set out by Wade.[51] That theory essentially treats parliamentary sovereignty as a political fact; the doctrine is taken to describe the relationship between Parliament and the courts, and its ongoing applicability is therefore dependent upon the courts' continued acquiescence in that relationship. Importantly, however, the courts have no choice but to acquiesce if they are to act with constitutional propriety: the relationship described by the doctrine of parliamentary sovereignty is, we are told, immovable so long as the present constitutional order subsists. It is for precisely this reason that Wade is forced to explain any changes in the conditions upon which legislative authority is held in terms of an extra-constitutional "revolution".[52] By shifting the basis of the relationship between the courts and the legislature, the judiciary acts unconstitutionally by failing to adhere to the relationship dictated by the sovereignty principle.

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[49] Allan, "The Limits of Parliamentary Sovereignty" [1985] *PL* 614 at 624.
[50] *Ibid*, p 627.
[51] "The Basis of Legal Sovereignty" (1955) 13 *CLJ* 172.
[52] *Ibid*, p 189.

Following such judicial action the new constitutional landscape must be understood as the product of discontinuity since, if the constitutionally impossible actually happens, it must occur extra-constitutionally: the old, immutable *grundnorm* must logically have been replaced by a new one. Wade pursues this line of analysis in addressing the decision in *Factortame (No 2)*, concluding that the House of Lords' refusal to recognise the effectiveness of an Act of Parliament evidences the removal of judicial support from the relationship between courts and Parliament which the doctrine of legislative supremacy embodied.[53]

In one important respect, the version of parliamentary sovereignty advanced in *Thoburn* is very similar to Wade's. On both views, the courts occupy a pivotal role. Thus Wade holds that Parliament's legislative powers lie "in the keeping of the courts"[54] while, to similar effect, the Administrative Court's analysis is premised upon the notion that legislative authority is subject to those conditions which are prescribed by the courts through the common law. At this point, however, the similarity between the two views ends. The characterisation (which is dictated by Wade's theory) of the House of Lords' behaviour in *Factortame* as revolutionary – and therefore in some way extra-constitutional – is highly artificial. More fundamentally, Wade's view of parliamentary sovereignty as a constitutional given – a "political fact"[55] – raises a whole series of difficulties. It fails to supply a satisfactory normative justification for the existence and width of Parliament's law-making powers, and it renders legislative authority a phenomenon which is separate from law. This, in turn, insulates the doctrine of parliamentary sovereignty from the usual processes whereby legal principles are evaluated, interpreted and, where necessary, reinvented in order that they are rendered appropriate in light of a whole matrix of other considerations, not least the prevailing fundamental values embraced by the political and constitutional order.

The model advanced in *Thoburn* differs subtly but importantly from Wade's. Although the courts still play a central role, the conceptual starting-point – according to which legislative authority is neither above nor separate from, but is rather subject to, law – fundamentally changes the way in which we understand the courts' function. No longer does parliamentary sovereignty describe a factual relationship which may be changed only by unconstitutional behaviour on the courts' part; nor is legislative supremacy an immovable constitutional fact which needs no justification and is invulnerable to constitutional change. Once legislative authority is acknowledged to be a legal phenomenon which is subject to the common law, the judicial role changes substantially. It is, under the *Thoburn* view, the courts' task to interpret the nature and extent of legislative authority by reference to, and in a manner appropriate to, the content and values of the contemporary constitution. Alterations in the nature and scope of legislative authority are thus no longer to be regarded as aberrations evidencing a discontinuity wrought by judicial disobedience to the established order; such

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53 Wade, "Sovereignty – Revolution or Evolution?" (1996) 112 *LQR* 568.
54 Wade, "The Basis of Legal Sovereignty" (1955) 13 *CLJ* 172 at 189.
55 *Ibid*, *loc cit.*

alterations, instead, are a legitimate consequence of the courts' discharging their constitutional role.

In purely pragmatic terms, the roles occupied by the judiciary under Wade's view and under *Thoburn* do not differ radically. In each case the judiciary may ultimately determine the limits of legislative authority. However, according to the continuing theory the judiciary holds this power *only* on a pragmatic level, such that its exercise involves extra-constitutionality or discontinuity: in other words, it involves the judges arrogating to themselves a role which is not *constitutionally* theirs. In contrast *Thoburn* envisages that it is the courts' constitutional function to interpret the contemporary constitution and thereby determine the proper scope of legislative authority. This difference is key. It affects how we think about the constitution and law-making power at the most fundamental level, since it determines whether legislative authority is ultimately subject to the unwritten constitution or to the merely pragmatic response of the judiciary. In result, the approach commended in *Thoburn* places the judiciary on much more secure ground in discharging its function of determining the limits of parliamentary sovereignty – a function whose existence Wade is forced to concede, albeit at a pragmatic level only. *Thoburn* renders this process legal in nature, and thus envisages a limited judicial role which is to be discharged by reference to the constitution. In this way the judiciary does not – in contrast to the position logically inherent in the continuing theory – exercise an ultimately unfettered discretion in determining what is to be recognised as law; rather, its duty is to apply those criteria which are implicit in the constitutional order.[56]

This point is well made by Allan who, in criticising Wade's analysis of *Factortame* as evidence of revolutionary change in the constitutional order, comments that:

> ". . . it is scarcely possible to argue [as Wade does] both that changes in the rule of recognition are made or acknowledged for 'good legal reasons' and that such a rule constitutes only a 'political fact', subject to alteration for reasons of 'political necessity'. Legal reasons are usually understood to ground a legitimate judicial decision by invoking settled doctrine or principle: they serve to justify it by explaining the sense in which it was required by the standards of the existing legal order. A revolution occurs, or is cemented, only when a new source of authority is acknowledged, or fundamental rule adopted, which is *not* justified by the existing order, from which the courts have for whatever reason withdrawn their allegiance."[57]

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[56] An important difficulty, of course, lies in determining precisely what the unwritten constitution requires in this regard. For discussion, see Elliott, "Parliamentary Sovereignty and the New Constitutional Order: Legislative Freedom, Political Reality and Convention" (2002) 22 *LS* 340.

[57] Allan, "Parliamentary Sovereignty: Law, Politics, and Revolution" (1997) 113 *LQR* 443 at 444 (original emphasis), quoting from Wade, "Sovereignty – Revolution or Evolution?" (1996) 112 *LQR* 568.

Allan's point is that one cannot have it both ways: either sovereignty is purely a question of political fact, untouched and ungoverned by legal reasoning, or it is a question of constitutional law. And, in turn, judicial decision-making in this area represents either a wholly pragmatic and ultimately unfettered response to political change, or it is a form of constitutional adjudication, reliant upon legal reasoning and constrained by the terms of the constitution with whose interpretation the judiciary is centrally concerned. *Factortame* demonstrates that judicial decision-making in this context is inevitable. Given that reality, surely it is vastly preferable that such decision-making is treated in the latter sense, in order that the judiciary's role is constrained by law and by the constitution, and in order that the legitimacy of such adjudication may be properly measured and evaluated.

CONCLUSION

The decision of the Administrative Court in *Thoburn* v *Sunderland City Council* is of constitutional significance in three principal respects. In the first place it provides an explanation of EC law's status within the UK legal system which is far more coherent than any earlier judicial offering in this context. It elegantly ascribes a pragmatic form of primacy to Community law without, for the time being, displacing the doctrine of parliamentary sovereignty. Although the mechanism used to achieve this objective – based on Parliament's notional ability to derogate specifically from EC law – has been criticised in this paper because it fails to intersect with the political reality of the contemporary constitutional landscape, we have seen that, because of the wider analysis of parliamentary sovereignty presented in *Thoburn*, this shortcoming is potentially only temporary, and a necessary staging-post in the evolutive development of the common law constitution as it begins to confront the possibility of substantive restrictions on Parliament's competence to enact and change UK law.

Secondly, *Thoburn* marks, in a sense, the UK constitution's coming of age. It acknowledges the existence of a hierarchy of values and provisions within the British constitution by announcing a new category of constitutional legislation and relating this to the already established notion of common law constitutional rights. In this manner *Thoburn* dispenses with the Diceyan dogma that, within our legal system, all laws are equal. The interlocking regime of constitutional legislation and constitutional rights for which the Administrative Court's judgment lays the foundation is to be welcomed, and marks an important stage in the development of constitutional adjudication in the absence of a written constitution; and the strong interpretative protection now extended to constitutional statutes and rights in turn confers a substantial measure of security upon constitutional governance in the face, for the time being, of a sovereign legislature.

The third aspect of the judgment in *Thoburn* is of least immediate relevance, but is potentially of most far-reaching significance. In *Thoburn* the Administrative Court presents a vision of the British constitutional order which is subtly but importantly different from received constitutional orthodoxy and, thus, from the views encapsulated in many leading theories of parliamentary sovereignty. The approach advocated in *Thoburn* renders legislative authority a legal phenomenon which is subject to law and thus to adjudication by the courts. Acceptance of such a framework does not,

however, give the judiciary a free hand in determining the limits of parliamentary sovereignty, and it does not permit the imposition, upon the elected branch of the constitution, of the judiciary's own policy preferences and concerns. The impact of EC law upon the British constitution vividly illustrates that adjudication upon matters of parliamentary sovereignty – and, ultimately, determining the limits of the legislature's authority – is a task which inevitably arises. Moreover, recent changes to the architecture of the British constitution – notably the incorporation, through the enactment of the Human Rights Act 1998, of the European Convention on Human Rights, and the introduction of systems of devolved government in Northern Ireland, Scotland and Wales[58] – illuminate with particular clarity the tension lying at the heart of a constitutional order which ascribes unlimited power to its legislature[59] while simultaneously seeking to acknowledge the normative importance of such matters as fundamental rights and regional autonomy. Notwithstanding that the human rights and devolution legislation – like the European Communities Act 1972, on one interpretation at least – are formally compatible with the ongoing supremacy of the Westminster Parliament, that concept sits at best uneasily alongside the notion of fundamental constitutional rights and the idea that, as Lord Bingham recently put it, the Northern Ireland Act 1998 – and, by extension, the other devolution legislation – "is in effect a constitution".[60]

In the face of such difficulties, the usual British response has tended to follow one of two approaches. Most commonly, it has been accepted implicitly that there exists a dislocation between constitutional theory, which allocates absolute law-making power to Parliament, and political reality, which recognises the fundamentality of certain values and structures. In this way, the appearance of orthodoxy is preserved at the expense of its relation with reality. The alternative response is to abandon – in more explicit terms – constitutional law and constitutional theory, and to rely upon pragmatic accounts founded on the ultimate dependence of legislative authority upon the acquiescence of the judiciary: it is, for instance, in this manner that Wade accounts for the emergence of limitations, based on EC law, on Parliament's legislative competence.[61] Both of these approaches are flawed. The former invokes a constitutional theory which fails to coincide with the reality of the contemporary political environment, while the latter relies upon a normatively barren account of legislative authority which implies that its foundations lie in nothing more convincing than raw judicial recognition of legislative power.

The approach put forward by the Administrative Court in *Thoburn* represents a considerable advance. It allows constitutional theory fully to reflect constitutional reality and, in particular, the true position of the legislature. Such an approach undeniably raises a great number of difficulties as the judiciary embarks upon the task of interpreting the unwritten constitutional order and moves towards a position in which the limits upon legislative authority are more clearly and boldly articulated than has hitherto been the

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[58] See respectively Northern Ireland Act 1998; Government of Wales Act 1998; Scotland Act 1998.

[59] Or, more accurately in this era of devolved government, its central legislature.

[60] *Robinson* v *Secretary of State for Northern Ireland* [2002] UKHL 32 at [11].

[61] See Wade, "Sovereignty: Revolution or evolution?" (1996) 112 *LQR* 568.

case. In particular, considerable attention will have to be paid to determining the constitutional criteria by reference to which the judiciary is to identify the limits of parliamentary sovereignty. But this, in itself, is a strength as well as a problem. In contrast to the traditional approach – under which such judicial decision-making is inevitable yet necessarily obscured by the veil of extra-constitutionality which is taken to characterise it – a model which renders questions of sovereignty subject to constitutional adjudication makes that process of adjudication open to scrutiny and evaluation. Ultimately, difficulties of this nature are the hallmark of mature constitutionalism; and the fact that the judiciary, in *Thoburn*, has tentatively pointed towards a constitutional environment in which such problems may eventually arise is a development to be welcomed, not feared.

PROBLEMS IN THE IDENTIFICATION OF A COMPANY DIRECTOR

Professor Stephen Griffin, University of Wolverhampton*

INTRODUCTION

Although a person may be described and held out by a company as acting in the capacity of a director, in law that person will not be recognised as such unless he/she is formally appointed to the company's board of directors,[1] or performs duties, responsibilities and exerts influence in the management of the company's affairs in a manner associated and expected of a *de facto* director.[2] Alternatively, a person may be identified as a "shadow director." A shadow director is defined by the companies legislation as a person in accordance with whose directions or instructions the directors of a company are accustomed to act.[3]

Traditionally, the ability to label a person as either a *de facto* director or a shadow director has been determined by examining the involvement, influence and control which that person exerted over corporate conduct and

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* The author wishes to express his thanks to Professor Jill Poole and David Capper for reading and commenting on an earlier draft of this article. The author also wishes to express his thanks to David Capper for his assistance with the Northern Ireland references. Any errors remain those of the author.

1 Ordinarily, a company director will be appointed to hold office by the general body of shareholders, or in a manner which otherwise complies with the terms of the company's Articles of Association, see Table A, art 78, Companies (Tables A to F) Regulations 1985 (hereafter referred to as Table A). (In Northern Ireland see Companies (Tables A to F) Regulations (NI) (1986). A director formally appointed in this fashion is referred to as a *de jure* director.

2 The Companies Act 1985 (hereafter referred to as the CA 1985), s 741 defines a director as any person occupying the position of director, by whatever name called. (In Northern Ireland see Companies (NI) Order 1986, art 9). While never formally appointed to hold office as a company director, a person may be identified as a *de facto* director in circumstances where he/she performs senior management responsibilities and duties at a level akin to a *de jure* director. The definition represented by CA 1985, s 741 is reproduced in the Company Directors Disqualification Act 1986, (hereafter referred to as the CDDA 1986) s 22(4), the Insolvency Act 1986, (hereafter referred to as the IA 1986) s 251, and the Financial Services Act 1986, (hereafter referred to as the FSA 1986) s 207 (1). (The Northern Ireland equivalents here are the Companies (NI) Order 1989, art 3(1) and the Insolvency (NI) Order 1989, art 5(1)).

3 See, CA 1985, s 741 (2), a definition duplicated in the IA 1986, s 251, CDDA 1986, s 22 (4) and FSA 1986, s 207. The definition further provides that a person will not be classed as a shadow director where advice is exclusively tendered in a professional capacity. The exemption is limited and will not apply where the advice of a person acting in a professional capacity exceeds that normally expected from a person occupying a similar professional status, see *e.g.*, *Re Tasbian Ltd (No.3)* [1992] BCC 358 and *Re a Company (No.005009 of 1987)* (1988) 4 BCC 424. In this latter case, Knox J refused to hold, on a preliminary point of law, that a bank was incapable of acting as a company's shadow director. See generally, Fidler, "Banks as Shadow Directors" (1992) 7 *JIBL* 97.

policy. Given that distinct statutory definitions exist to identify the activities of either a *de facto* director or a shadow director, it would be a natural expectation for the factors and characteristics which establish these positions to be distinguishable. However, in practice such a distinction is often muddled to the extent that the judicial interpretation of the identifying characteristics of both a *de facto* director and a shadow director are devoid of any substantial disparity. The purpose of this paper is to analyse and consider issues relevant to a finding that a person's managerial activities were those of a *de facto* director or a shadow director. As a result of such analysis this paper will seek to advance proposals for the reform of the statutory identification of a company director.

While the statutory definitions relating to the classification of a director may be vague, such elusiveness does at least permit a degree of flexibility in the identification process.[4] In so far as fiduciary, common law, equitable and statutory duties have evolved to police an abuse of the execution of a director's corporate powers, the significance of establishing a person's role as a director is instrumental in determining that person's responsibility in the management of the company's affairs and his/her potential culpability[5] in respect of acts of corporate mismanagement. Notwithstanding that the nature and extent to which duties are owed to the company by a *de jure* director are reasonably well represented in the case law,[6] the same cannot be said in the context of a de *facto* director or shadow director, although it is contended that both should be deemed to owe duties to the company in a manner akin to a *de jure* director. While both a *de facto* director and a shadow director possess no formal agency agreement with the company, it is suggested that their ability to wield influence and authority in the management of a company's affairs is such as to justify a finding of a "hidden" or "presumed"

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[4] Notwithstanding the absence of any exact statutory definition of a director's role in the management of a company, the constitutional framework of a company dictates that, at the very least, a director will be expected to have a capacity to expressly or impliedly participate in the senior management of the company. See *e.g.*, Table A, art 70.

[5] Conversely, the identification of a person's activities as being those of a company director as opposed to, for example, a management consultant, may enable that person to evade liability in respect of acts of a contractual or tortious nature, see *e.g.*, W*illiams* v *Natural Life Health Ltd* [1998] 1 WLR 830. Here, the House of Lords concluded that where a tort is committed in the name of a company, a director of that company will not be deemed liable for the wrongful act, save in a situation where the director expressly or impliedly assumed a personal as opposed to a corporate responsibility for the wrongful act.

[6] Although examples of the duties are well represented at common law, the classification of the specific types of duties has given rise to some uncertainty. In an attempt to clarify this situation the DTI have sought to codify directors' duties, see *Modern Company Law For a Competitive Economy – Final Report* (DTI, London, June 2001), Annex C. (The report is hereafter referred to as the *Final Report of the Steering Group*). The recently published White Paper *Modernising Company Law* (Cm 5553-I, July 2002), which is seen as a pre-requisite to the implementation of a new Companies Act, seeks to implement a majority of the recommendations contained in the *Final Report of the Steering Group.* The White Paper (see pp 26-32), mirrors the recommendations of the *Final Report of the Steering Group* in respect of the codification of directors' duties, with the exception of the suggested codification of directors' duties in respect of creditors.

agency relationship with the company, one which may be said to arise by operation of law.[7]

The identification of a person's activities as those of a company director may be especially crucial in a situation where a company falls into an insolvent state.[8] Here, although the separate legal identity of a limited liability company will ordinarily divorce the company's interests and responsibilities from those of its management team,[9] in exceptional circumstances, following the insolvency of a company, the companies legislation will sanction the imposition of personal liability against a company director.[10] While any personal liability imposed will take the form of a contribution to the company's assets as opposed to a contribution to an individual creditor, in some cases the contribution may at least allow an individual creditor to recover a portion of his/her losses.[11] The statutory provisions, which have the effect of imposing personal liability against a director of an insolvent company, are predominantly those concerned with misfeasance proceedings,[12] fraudulent trading,[13] wrongful trading[14] and phoenix

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[7] See further: Fridman, "Establishing Agency" (1968) 84 *LQR* 224. In the *Final Report of the Steering Group,* (at para 6.7) it was considered that liability for a breach of duty should extend to both a *de facto* director and a shadow director. However, no mention of this recommendation is contained in the recently published White Paper *Modernising Company Law* (Cm 5553-I, July 2002).

[8] A company may be viewed as insolvent where its liabilities exceed its assets (balance sheet insolvency), see IA 1986, s 123 (2). (In Northern Ireland see Insolvency (NI) Order 1989, art 103(2)). For the purposes of a winding up petition, a company may be viewed as insolvent where it is unable to pay its debts as they fall due (cash flow insolvency), see IA 1986, s 123 (1). (In Northern Ireland see Insolvency (NI) Order 1989, art 103(1)).

[9] See especially, *Salomon* v *A. Salomon Ltd* [1897] AC 22, *Adams* v *Cape Industries* [1990] Ch 433, *Ord* v *Belhaven Pubs* [1998] BCC 607 and *Trustor AB* v *Smallbone* [2001] 2 BCLC 436.

[10] Where a statutory provision seeks to disturb the separate legal identity of a company it will rarely have the effect of denying the distinct existence of the corporate entity. The statutory provision will, where applicable, penetrate the corporate entity to target company directors, penalising their delinquent conduct in the management of the company's affairs. See generally, Ottolenghi, "From Peeping Behind the Corporate Veil, to Ignoring it Completely" (1990) 53 *MLR* 338 and Mitchell, "Lifting the Corporate Veil in the English Courts: an empirical study." (1999) 3 *CfiLR* 15.

[11] At present (but note the future effect of the Enterprise Act 2002), following the liquidation of a company, creditors whose interests are secured by way of a fixed or floating charge, or creditors classed as preferential creditors, will take any realised corporate assets in priority to unsecured creditors. However, assets recovered pursuant to actions instigated after a company's liquidation which formed no part of the company's assets prior to liquidation, *e.g.*, monies recovered from fraudulent or wrongful trading actions, will be paid into the general assets of the company for the benefit of the company's unsecured creditors.

[12] See IA 1986 s 212. (In Northern Ireland see Insolvency (NI) Order 1989, art 176). The provision provides an expeditious means, by way of a summary remedy, whereby an officer of the company who, prior to the company's liquidation was involved in the management of the company, may be held accountable for any breach of duty, or other act of misfeasance. Accordingly, both a *de facto* director and a shadow director will fall within the ambit of s 212, although a mere employee of the company will not, see *e.g.*, *Re Clasper Group Services Ltd* (1988)

companies.[15] In addition, a person established as a director of an insolvent company may, in circumstances where corporate misconduct is adjudged to have been of an unfit nature, be subject to a further penalty in the guise of a disqualification order.[16] Disqualification proceedings serve to protect the public interest[17] in so far as during the period in which a director is disqualified, the director's capacity to repeat his past misconduct is removed in respect of the future management of other companies.

Identifying a De Facto Director

Historically, the courts have exhibited some inconsistency in determining the appropriate circumstances justifying the identification of a person as a *de facto* director.[18] In cases where a company's affairs have been conducted

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4 BCC 673. See further Oditah, "Misfeasance Proceedings Against Company Directors" [1992] *LMCLQ* 207.

[13] See IA 1986 s 213. (In Northern Ireland see Insolvency (NI) Order 1989, art 177). The provision is applicable in circumstances where a person knowingly participated in the carrying on of a company's business with an intent to defraud creditors of the company or creditors of any other person, or for any fraudulent purpose. In practice, liability will fall on a director of the company, see *e.g.*, *Re Maidstone Building Provisions Ltd* [1971] 1 WLR 1085. See further Griffin, *Personal Liability and Disqualification of Company Directors* (1999, Hart Publishing, Oxford) pp 39-55.

[14] See IA 1986 s 214. (In Northern Ireland see Insolvency (NI) Order 1989, art 178). Liability under the wrongful trading provision will arise in circumstances where a company is in insolvent liquidation and where a person who was acting or who had previously acted as a director of the company, knew, or ought to have concluded at some time before the commencement of the winding up of the company, that there was no reasonable prospect that the company would avoid going into insolvent liquidation, see *e.g.*, *Re Produce Marketing Consortium Ltd* [1989] 5 BCC 569. See further Oditah, "Wrongful Trading" [1990] *LMCLQ* 205.

[15] See IA 1986 ss 216 & 217. (In Northern Ireland see Insolvency (NI) Order 1989, arts 180 & 181). The "phoenix company" describes a situation in which the controllers of a company place the company into liquidation or receivership with the objective of seeking to continue its business activities under the banner of a newly constituted company (the successor company). As a prerequisite to establishing liability it is necessary to show that the defendant acted as a director or shadow director of the liquidated company within the twelve months prior to its liquidation. See further Griffin, "Extinguishing the Flames of the Phoenix Company" (2002) 55 *Current Legal Problems*, (Ed. M. Freeman) O.U.P.

[16] In accordance with the CDDA 1986, s 6 (in Northern Ireland see Companies (NI) Order 1989, art 9) the court is under a duty to impose a mandatory disqualification order for between 2 and 15 years 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. See further Griffin, "The Disqualification of Unfit Directors and the Protection of the Public Interest" (2002) 53 *NILQ* 207.

[17] For issues relevant to determining the public interest in relation to insolvency proceedings see Keay, "Insolvency Law: A Matter of Public Interest?" (2000) 51 *NILQ* 509.

[18] While the term "*de facto* director" is not expressly defined by the companies legislation, its usage is well established in the law reports, dating back to at least

without a formally appointed board of directors,[19] the assertion that a person or persons acted in the capacity of a *de facto* director may be patently obvious.[20] However, in cases where the affairs of a company are *prima facie* under the guardianship of a validly appointed and active board of directors, the evaluation of the control deemed necessary to equate a person's activities with those of a *de facto* director may be especially difficult. This difficulty is particularly prevalent in cases where a person is appointed in a professional capacity to advise on matters connected with the internal and/or external management of the company[21] or where, for example, a substantial shareholder is able to influence the company's board of directors to the point of directly interfering with the internal management structures of the company.[22] Further, in the context of a large corporation, an additional complication may arise. While in a large corporation there will be little difficulty in identifying the company's board of directors, the board may not necessarily manage the company in the sense of directing corporate affairs on a day to day basis. Such powers may, in reality, reside in the hands of senior managers who, whilst not formally appointed to act as company directors, may for all intents and purposes act in a manner more consistent with a status ordinarily associated with a company director.

Although in more recent times the courts have sought to formalise guidelines to assist in the identification of a *de facto* director, such guidelines have been marred by inconsistency. In effect, two distinct tests emerged in relation to the identification of a *de facto* director, namely, the "equal footing test" and "the holding out test." In its original guise the former test identified a *de facto* director as a person who, in directing the internal arrangements of a company, acted on an equal footing with the company's formally appointed directors."[23] By contrast, the holding out test identified a *de facto* director as

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the Victorian era, see *e.g.*, *Re Canadian Land Reclaiming and Colonizing Co* (1880) 14 Ch.D 660.

[19] A company's board of directors is comprised of the individually appointed *de jure* directors. The board is the ultimate decision-making body of the company and determines the delegation of powers throughout the company. The company's articles determine the scope of a board's management powers. Subject to limited powers confined to the general meeting, articles akin to the format of Table A, art 70, will confer the general management powers of a company to the company's board. However, in respect of small private companies, the division of powers between the company's board and its shareholders will often be illusory because here it is common for the composition of the board of directors to be made up of the company's majority shareholder(s). As a matter of interest, in Germany, the division of powers between the directors of a limited liability company (GmbH) and its shareholders is weighted in favour of the latter to the extent that the directors must act on the instructions of its shareholders. Accordingly, a GmbH may often be managed by a majority shareholder(s) acting in the capacity of a *de facto*/shadow director.

[20] See *e.g.*, *Morris* v *Kanssen* [1946] 1 All ER 586, *Re Lo Line Electric Motors Ltd* [1988] BCLC 698..

[21] See *e.g.*, *Re Tasbian Ltd No.3* [1993] BCLC 297, *Secretary of State* v *Tjolle* [1998] BCC 282.

[22] See *e.g.*, *Secretary of State for Trade and Industry* v *Jones & Ors* [1999] BCC 336.

[23] See *e.g.*, *Re Richborough Furniture* [1996] 1 BCLC 507, *Secretary of State* v *Laing* [1996] 2 BCLC 324 and *Secretary of State* v *Hickling* [1996] BCC 678.

a person who, having been held out by the company as one of its directors, assumed the role of a director and performed functions in that capacity.[24]

However, these tests were open to criticism. The equal footing test was unduly restrictive of a finding of a *de facto* director as its attention was solely focused on the internal workings of the company without specific reference to any external perception of a person's managerial activities. Further, literally translated "equal footing" suggested that a person could escape being classified as a *de facto* director in circumstances where, despite performing functions akin to those of a director and being held out as such, the person's managerial functions were at a less substantive level than those of the company's formally appointed directors. The application of the "holding out" test was also limited. Although encompassing considerations relevant to both internal and external matters, the test's reliance on the latter precluded a finding of a *de facto* director other than where the company had, in external dealings with a third party, held out a person to be a director. As Warner J noted in *Re Moorgate Metals Ltd*[25] the expression "held out" was misleading because it may have been taken to imply that a *de facto* director must be someone to whom the label "director" had been expressly attached.[26]

However, in *Secretary of State for Trade and Industry* v *Elms*[27] the inconsistency resulting from the application of such disparate tests was, to a large extent, resolved. Here, Judge Cooke, while favouring the terminology attached to the "equal footing" test, re-defined the test to remove the requirement of establishing an equal standing in terms of power or authority in relation to the management of a company's affairs. Judge Cooke clarified the term "equal footing" as one which portrayed an equal right and ability to participate in the management and decision making process of the company via, for example, the mechanisms of board meetings. Further, the learned judge recognised the relevance of the holding out test as an evidential consideration in ascertaining whether a person had actually acted on an equal footing with the company's other directors. This impliedly merged the "equal footing" test and the "holding out" test into one. Judge Cooke advanced the following three guidelines to determine whether a person's activities were those of a *de facto* director:

> "(1)(a) Has the company held X out to be a director, *i.e.* allowed X to be cloaked with the indicia of directorship, and (b) has X claimed and purported to be a director?
>
> (2) Did X undertake functions that could properly be discharged only by a director and not just a manager?

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[24] See *Re Hydrodam (Corby) Ltd* [1994] 2 BCCL 180. For a detailed discussion on the tests to determine a *de facto* director, see Griffin (2000) 4 CfiLR 126.

[25] [1995] 1 BCLC 503.

[26] Caution in this matter was obvious, although in all probability, misplaced, given that the consternation surrounding the interpretation of the term "holding out" over-looked the fact that a "holding out" may take place as a result of a company's acquiescence in the performance of a person's managerial functions, see *e.g.*, *Freeman & Lockyer Ltd* v *Buckhurst Properties* [1964] 2 QB 480.

[27] (16 January 1997, unreported).

> (3) Is there clear evidence (a) that X was the sole person directing the affairs of the company or (b) if acting with others validly appointed or not, acting on an equal footing with the others and directing the affairs of the company?"

The learned judge described the three tests as disjunctive rather than conjunctive and opined that if there was any doubt as to the capacity in which X had acted, such doubt should be resolved in X's favour.

This revision of the "equal footing" test, was accepted by Jacob J in Secretary *of State* v *Tjolle*.[28] However, the learned judge declined to apply a single decisive test which exhibited the characteristics of a prescribed formula. Instead, Jacob J considered that in all cases the court should consider a number of factors and that the determination of a person's status, as a *de facto* director, should be resolved as a question of fact. The learned judge described the relevant factors, thus:

> "Those factors include at least whether or not there was a holding out by the company of the individual as a director, whether the individual used the title, whether the individual had proper information (e.g. management accounts) on which to base decisions, and whether the individual has to make major decisions and so on. Taking all these factors into account, one asks 'was this individual part of the corporate governing structure?' answering it as a kind of jury question . . . There would be no justification for the law making a person liable to misfeasance or disqualification proceedings unless they were truly in a position to exercise the powers and discharge the functions of a director. Otherwise they would be made liable for events over which they had no real control, either in fact or law."[29]

In rejecting a single decisive test, the classification of a *de facto* director as one based upon a consideration of a number of factors, possesses the advantage of flexibility devoid of the constraints inherent in the application of a prescribed and rigid test. In *Re Kaytech International plc; Portier* v *Secretary of State for Trade and Industry*[30] the Court of Appeal endorsed the approach adopted in *Secretary of State* v *Tjolle.* Here the court emphasised that all relevant factors (which of course will in part vary from case to case) should be considered in calculating whether a person's activities were those of a *de facto* director.

Accordingly, following the Court of Appeal's acceptance of the approach advocated by Jacob J, the attributes of a *de facto* director will in future be ascertained as a question of fact. While matters relevant to both the equal footing test and the holding out test will naturally form an essential part of that question, the ability to determine the identification of a *de facto* director will be more elastic, free from the limitations of any specific, formally devised, test.

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[28] [1998] 1 BCLC 333.

[29] *Ibid* at p 344.

[30] [1999] BCC 390. This was the first case in which the Court of Appeal was called upon to consider matters relevant to the identification of a *de facto* director.

Identifying a Shadow Director

A shadow director is defined by the companies legislation as a person in accordance with whose directions or instructions the directors of a company are accustomed to act.[31] Therefore, a shadow director may be expected to exert influence over the company's board of directors to the extent that his/her directions and instructions will ordinarily be followed. Consequently it would, at first sight, appear a logical assumption to conclude that a shadow director will be identified as any person who exerts a dominant and controlling influence over the company's affairs and who is responsible for engineering and directing corporate activity through what may be described as a "puppet" board of directors. Further, the term "shadow" would appear to imply that a person acting as a shadow director will operate in a hidden capacity, directing and controlling the activities of a company through persons who are expressly or impliedly held out by the company as its *de jure* or *de facto* directors. The aforementioned characteristics expound a position of superiority and control over the company's affairs. Indeed, prior to 2000, the said characteristics dominated the courts' identification of a shadow director.[32]

However, following the decision of the Court of Appeal in *Secretary of State* v *Deverell*[33] a controlling and dominant, but hidden influence in the affairs of a company must now be viewed as an exaggeration of the level and degree of involvement deemed necessary to identify a shadow director. The *Deverell* case concerned an application by the Secretary of State to disqualify D and H in accordance with section 6 of the Company Directors Disqualification Act 1986. It was contended that both had acted as shadow directors of E Ltd. In

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[31] *Supra*, n 3. It should also be observed that a person will not be classed as a shadow director if that person gives directions or instructions as an agent of another person or body, *e.g.*, a person will not be classed as a shadow director of company X where he gives directions or instructions in his capacity as a director of company Y. However in the given scenario it would of course be possible for company Y to be classed as a shadow director of company X, see *Re Hydrodam (Corby) Ltd* [1994] 2 BCCL 180. However, in the case of a holding company/subsidiary relationship, specific provisions of the CA 1985 preclude a holding company from being classed as a shadow director of its subsidiary company(ies) by reason only that the directors of the subsidiary are accustomed to act in accordance with the parent company's directions or instructions, see CA 1985, ss 309, 319, 320 to 322 and 330 to 346. (In Northern Ireland see Companies (NI) Order 1986, arts 317, 327, 328 to 330 and 338 to 354).

[32] See *e.g. Re Lo-Line Electric Motors Ltd* [1988] 2 All ER 692, *Kuwait Asia Bank EC* v *National Mutual Life Nominees Ltd* [1991] AC 187, Re Unisoft Group Ltd (No 3) [1994] 1 BCLC 609, Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180, *Sec of State* v *Laing* [1996] 2 BCLC 324 and *Re Kaytech International plc* [1999] 2 BCLC 351. The said characteristics have also been employed by academics in describing the identity of a shadow director, see *e.g.*, Davies, Gower's Principles of Modern Company Law (6th ed, Sweet & Maxwell, 1997), at pp 182-183. Notwithstanding a general absence of case law identifying examples of a shadow director, it is suggested that typical examples of persons who could have been identified as such prior to 2000 would have included; a substantial shareholder with a capacity to influence and direct corporate policy through a nominee board of directors or banks, financial institutions, and other creditors upon which the company's financial survival depended.

[33] [2001] Ch 340.

defending the proceedings, D and H argued that their involvement in the affairs of E Ltd had been as management consultants and not as directors.[34]

In relation to D, although he had never been formally appointed as a director of E Ltd, he had been involved in the management of the company from the time of its incorporation. As one of the signatories to the company's bank account, D was an active player and influence in the accounting and financial structures of the company and was its principal negotiator in business dealings. D's involvement and attachment to the company was substantial to the extent that he personally guaranteed a loan entered into by and on behalf of the company. In contrast to D's transparent involvement in the internal management structures of E Ltd, H's involvement in the company's affairs was more illusive. Having been made subject to a bankruptcy order, H was precluded from any involvement in the company's formal management structures. Nevertheless, irrespective of H's inability to expressly involve himself in the affairs of the company, his informal participation and influence in management issues was considerable, especially in the context of advising the company on its future direction. For example, notwithstanding the company's insolvent position and the concerns expressed by the company's board of directors in respect of the company's financial state, H had instructed the company's *de jure* directors to continue to trade, an instruction which had been obeyed.

At first instance,[35] Judge Cooke, sitting as a judge of the High Court in the Chancery Division, held that neither D nor H could properly be construed as shadow directors. In respect of D, the learned judge opined that while he was a prominent and powerful member of the company's management team, his participation was on a near equal footing with the company's *de jure* directors. Therefore, this equal participation could not properly be described as having cast the board of directors in a subservient role. In relation to H, Judge Cooke opined that while H had been an influential character, the board had not been accustomed to act on his advice, although on occasions his advice had been followed. Further, the learned judge considered that the giving of mere advice would not fall within the statutory definition of a shadow director unless it had been accepted and acted upon in a manner consistent with a direction or instruction. Judge Cooke concluded that although H had advised the company's board of directors, the board retained an ability to act independently and reject such advice, to the extent that H could not be described as having acted as the company's shadow director.

The Court of Appeal was to overturn the decision of Judge Cooke and as such both D and H were classed as shadow directors. Morritt LJ, who delivered the leading judgment of the court, considered that Judge Cooke had erred in the construction of the statutory definition of a shadow director. First, Morritt LJ rejected Judge Cooke's interpretation of a shadow director as a person who would always be in a position to cast the board in a subservient role.[36] Although Morritt LJ agreed that D would have clearly been identified as a shadow director had the board of directors constantly

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[34] Interestingly, both H and D received fees for their services to the company in an amount in excess of the salaries paid to the company's *de jure* directors.

[35] (Unreported 11 May 1998).

[36] *Supra*, n 33 at pp 354-355.

obeyed his instructions, he considered that the ability to establish a subservient relationship between a shadow director and the board of directors was not a pre-requisite to a finding that D had acted as a shadow director. His Lordship reached this conclusion on the basis that the use of the term "accustomed to act" should not be interpreted to mean that the board must always be compelled to obey the guidance of a shadow director. Accordingly, a person was capable of acting as a shadow director even if the board had a capacity to exercise independent judgment.

In respect of the finding that H had acted in the capacity of a shadow director and more specifically the issue of whether the giving of advice could be equated with a direction or instruction, Morritt LJ opined that if advice was given on a regular and consistent basis it could be considered in the same light as a direction or instruction because a direction, instruction, or the giving of advice all shared the common characteristic of an act of guidance.[37] Therefore, according to his Lordship, once it was established that there was a sufficient degree of guidance the court would be in a position to objectively ascertain whether the direction, instruction or advice so relied and acted upon by the board of directors carried real influence in relation to the business activities of the company. In so deciding, it would be immaterial that there was any expectation that the guidance would be followed. Further, according to Morritt LJ, it was unnecessary to establish that the "real influence" extended over the whole of the company's business operations.[38]

Following the judgment of the Court of Appeal in *Deverell*, a shadow director may therefore be identified in the following manner, namely as a person who customarily tenders advice, instructions or directions to the company's board, of a type which, as an act of guidance, carries real influence in relation to a part or the whole of the company's business affairs. While the company's board will normally adhere to the guidance tendered by a shadow director, it is not essential that it is habitually followed or that there is any expectation that it will be followed. A shadow director may be independent from or form a part of the internal management structure of the company. This reformulated definition now casts a wide net into which a person may be caught and labelled as having acted as a shadow director. However, although the new definition may be applauded in the sense that it increases the pool of persons who, as shadow directors, may be held personally accountable following a company's demise, affording greater protection to the interests of creditors and the general public, the credibility of the reformulated definition may be doubted in the context of its interpretation of the companies legislation.

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[37] *Ibid*.

[38] *Ibid*. Morritt LJ agreed with the approach advocated by the Australian courts in the interpretation of the Australian Corporations Law, s 60. The said provision is drafted in similar terms to CA 1985, s 741 (2). More specifically his Lordship agreed with the statement of Finn J in *Australian Securities Commission v AS Nominees Ltd* (1995) ALR 1, at pp 52-53, where his Honour said: ". . . the reference in the section to a person in accordance with whose directions or instructions the directors are accustomed to act does not in my opinion require that there be directions or instructions embracing all matters involving the board. Rather, it only requires that, as and when the directors are directed or instructed, they are accustomed to act as the section requires."

First, can mere advice be equated with a direction or instruction? Unlike the terms "direction" and "instruction" the statutory definition of a shadow director makes no mention of "advice" or for that matter "an act of guidance". A direction or instruction is a positive command, whereas a communication imparting advice is devoid of any requirement on the part of its recipient to comply with the recommendation. While a direction, instruction or the giving of advice may all share the common characteristic of an act of guidance, a direction or instruction, as an act of guidance, implicitly carries an expectation of obedience. In contrast, "advice" is, as an act of guidance, couched more in the form of a suggested course of action and therefore is deficient of any expectation that it must ordinarily be followed. Although there may be occasions where advice is habitually followed to the extent that it merely masks what is in effect a direction or instruction, it is suggested that mere advice is indisputably distinguishable from a direction or instruction.

The second point of contention, closely related to the first, involves the statutory definition of a shadow director in its use of the term "accustomed to act." In *Deverell,* Morritt LJ interpreted the term "accustomed to act" in a passive sense by indicating that it was unnecessary to establish that a person identified as a shadow director dominated the company's *de jure* directors, thereby casting the board of directors in a subservient role. However, with respect, although the term "accustomed to act" may be interpreted in a manner whereby a company's board need not *always* act in accordance with a direction or instruction, the term nevertheless implies that it would be unusual for a direction or instruction to be ignored. Therefore, if a board of directors is accustomed to act in accordance with a person's directions or instructions, the board will indeed be placed in a subservient position, notwithstanding that it may be blessed with a minor degree of autonomy. Surely the question of whether a board of directors is "accustomed to act" will rest upon a case by case analysis of whether a person in directing or instructing the board of directors was obeyed on a regular basis, and more specifically, whether that person's directions or instructions were ordinarily obeyed in relation to decisions crucial to the governance, direction and pursuit of the company's internal, external and financial affairs.

The final point of contention arising from the *Deverell* case concerns the ability to label a person as a shadow director where that person's influence in the management of a company's affairs was as a participant in the internal management structures of the company. While the statutory definition of a shadow director fails to specifically distinguish between the giving of directions or instructions as either an internal or external contributor to a company's affairs, is it not tacit in the use of the expression "shadow" that a person so classified will exert influence over corporate affairs from outside formal management structures? In *Deverell,* although D exerted considerable influence in the management of the company's affairs and was identified as a shadow director, as a visible character exerting managerial influence from inside as opposed to outside formal management structures, should he not have been more aptly described as a *de facto* director or indeed a *de facto* managing director?

Distinguishing Between A De facto and Shadow Director

Although a *de facto* director and shadow director share common characteristics in having a capacity to exert real influence in the management of a company's affairs, there is, surprisingly, little judicial consideration of any distinction between the two types of directorship.[39] Moreover, on occasions, the distinction has been portrayed as unnecessary and irrelevant.[40] While in some cases such ambivalence may perhaps be excused, for example, where a shadow director steps from the shadow to resolve corporate issues, thereby identifying himself as active in the conduct of the company's internal affairs and in a position akin to that of a *de facto* director,[41] surely, a general inability to distinguish between a person's activities as that of a *de facto* director or shadow director is unsatisfactory. Indeed, in *Re Hydrodam (Corby) Ltd*,[42] a case in which the significance of the distinction was actually stressed, Millett J observed that:

> ". . . in my judgement an allegation that a defendant acted as a *de facto* or shadow director, without distinguishing between the two is embarrassing. It suggests . . . that the liquidator takes the view that *de facto* or shadow directors are very similar, that their roles overlap, and that it may not be possible to determine in any given case whether a particular person was a *de facto* or a shadow director. I do not accept that at all. The terms do not overlap. They are alternatives, and in most and perhaps all cases are mutually exclusive."[43]

However, notwithstanding the above statement, post *Deverell*, the hallmarks of a shadow director have been modified to such an extent that they are now readily identifiable with characteristics assumed in the identification of a *de facto* director. For example, prior to *Deverell*, evidence to justify a person being labelled as a shadow director[44] required the exertion of a dominant and controlling influence over the company's affairs, a more daunting evidential requirement than establishing a person's capacity as a *de facto* director.

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[39] See *e.g.*, the comments Robert Walker LJ in *Re Kaytech International plc* [1999] BCC 390, 402.

[40] *E.g.*, in *Re Tasbian Ltd No.3* [1993] BCLC 297 the Court of Appeal, in affirming the decision of Vinelott J at [1991] BCLC 792, made no attempt when analysing the facts of the case to distinguish between a person's involvement in the management of a company as a de-facto or shadow director. Instead, the court was quite satisfied to conclude that the evidence of the case was sufficient to establish that the person had acted as either a *de facto* director or a shadow director.

[41] *Ibid.*

[42] [1994] 2 BCLC 180.

[43] *Ibid*, at pp 182-3.

[44] As with establishing the characteristics of a *de facto* director, the difficulty in attempting to distinguish between the activities of a professional advisor and a shadow director may be especially troublesome. To establish that a professional advisor acted as a shadow director one must first prove that the advisor exerted an influence over the company's affairs in a manner which exceeded his advisory status. It would appear that the advice and actions tendered by an advisor should be viewed objectively; such actions should be compared with those of a person of the same professional status and occupying a similar advisory role, see *Re Tasbian Ltd No 3*, *supra* n 40.

Following *Deverell*, a person's classification as a shadow director may, in common with that of a *de facto* director, be established without proof of a controlling influence. Secondly, prior to *Deverell*, a shadow director would have been defined as a person detached from the company's internal management, operating in a hidden capacity, directing and controlling the activities of a company through persons expressly or impliedly held out by the company as its *de jure* or *de facto* directors. After *Deverell*, a person may now be classed as a shadow director where he wields influence over a company's affairs irrespective of whether such influence is as a part of the company's internal management structure; a finding which could also equate to identify a person's capacity as that of a *de facto* director. Finally, prior to *Deverell*, a shadow director would have been expected to be in a position to give directions or instructions which would ordinarily be obeyed by the company's board. Following *Deverell*, the giving of advice is now equated with directions or instructions. In this respect a shadow director may be viewed as on an "equal footing" with the company's *de jure* directors in a sense previously construed as relevant solely to the identification of a *de facto* director. In effect, post *Deverell*, the ability to distinguish between a shadow director and a *de facto* director is, in practical terms, marred by such a similarity in characteristics that the distinction is now largely irrelevant. The only exception to this is where a person exerts managerial influence from outside internal management structures; such activity is incapable of falling within the definition of a *de facto* director but is nevertheless appropriate to the definition of a shadow director.

Although, in a practical sense, the inability to distinguish between a person's activities as either a *de facto* director or shadow director is, at present, unlikely to be relevant in calculating the extent of a person's potential culpability in respect of acts of corporate wrongdoing, in a linguistical sense, such a failure makes a mockery of legislation which persists in the retention of distinct provisions purporting to identify and separate the two categories of directorship. As there is currently no differentiation in sanction for an abuse of either position then there would appear little, if any point, in maintaining the statutory distinction pertinant to the identification of a *de facto* or shadow director, a fact evidenced by cases *post Deverell*. In the said cases the courts, in concluding that a person's management activities were those of a company director, have failed to specifically distinguish between the activities of a *de facto* director and a shadow director, instead, they have been content to "sit on the fence" by finding that the management activities were those of either a *de facto* director or shadow director.[45] However, despite the practical irrelevance of the statutory distinction between a *de facto* director and a shadow director, it is most probable that the distinction will be maintained.[46]

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[45] See *e.g.*, *MCA Records Inc* v *Charly Records Ltd* [2002] EMCR 1 and *The Official Receiver* v *Zwirin* [2001] WL 825078. Indeed, it is pertinent to note that in *Deverell* Morritt LJ expressly declined to express any view on whether the categories of *de facto* director and shadow director were mutually exclusive.

[46] See, the Final Report of the Steering Group, para 6.7.

Suggested Reform

If, as is most probable, the courts observe the definition of a shadow director as advanced in *Deverell*, then the characteristics establishing a finding of a shadow director will also incorporate those which portray the identity of a *de facto* director. Accordingly, the necessity of maintaining the present statutory distinction between a shadow director and a *de facto* director will become unnecessary. To this end it is submitted that it would be logical to merge the current statutory definitions of a *de facto* and shadow director into one, all embracing, statutory provision, thereby abandoning the present classification of a director as either a *de facto* director or shadow director. It is suggested that the unified definition could be identified by the term "ordinary director". The definition of an ordinary director could take the following form:

> "An ordinary director is any person, by whatever name called, who performs managerial functions as part of the governing structure of a company and/or issues directions or instructions which are acted upon, from time to time, by the company's board of directors."

In eradicating the statutory distinction between a shadow director and a *de facto* director, the reforming definition would confirm the acceptance of the union between the characteristics of the two types of office as impliedly portrayed in *Deverell*. The aforementioned reform, in giving logic to the reality of the situation, would end the embarrassment of maintaining the distinct statutory categories of a *de facto* director and shadow director.

However, while the removal of the statutory distinction between a *de facto* director and a shadow director may be necessary to the reality of the present order, the removal of the distinction would eradicate any ability, in respect of the classification of a director, to differentiate between a person's level and degree of involvement in the management of a company. Nevertheless, given that the culpability attached to the delinquent conduct of both a *de facto* director and shadow director is dependent upon the consequences and extent of any delinquent conduct rather than the specific classification of the type of directorship held, it may be argued that the need to so distinguish the degree of influence and control exerted by a person in the management of a company's affairs is unnecessary. Yet, as a matter of justice, if not logic, where a person's involvement in the management of a company's affairs is of a dominant and commanding nature, should not that person potentially suffer a greater sanction for a corporate wrongdoing than a person who, in relation to a similar act of delinquent conduct, acted on an equal footing with the company's other directors? Should not the law specifically distinguish, in terms of potential culpability, between persons who are in a position of control and dominance as opposed to those who merely impart advice and/or exert a more limited influence in the affairs of a company?

In suggesting affirmative answers to the aforementioned questions it is submitted that a more substantive legislative reform should be introduced to differentiate between the different levels and degrees of involvement which may identify a person's activities as those of a company director. To this end, it is contended that a distinct classification of a director as a "dominant director" could be introduced. While the *Deverell* interpretation of a shadow

director could be maintained as forming the crux of a person's potential liability in respect of the suggested reformulated definition of an ordinary director, it is suggested that a dominant director could be defined in the following manner:

> "A dominant director is any person, by whatever name called, who directs or instructs a company in the management of its affairs and whose directions or instructions are habitually obeyed and acted upon by the company's board of directors."

In accordance with the above definition, a person would be classified as a dominant director in circumstances which would have previously justified a finding of a shadow director prior to *Deverell.* However, a person would also be defined as a dominant director in any situation where, as either an external or internal influence in the management of a company's affairs, that person exerted a dominant and controlling influence. Therefore, a person acting in the capacity of a *de jure* director, or as currently defined, a *de facto* director, could also be classified as a dominant director where that person's authority and control over a company's affairs was of a type whereby the company's other directors were subservient to the will of that person. As a consequence of a distinction being drawn between an ordinary director and a dominant director, it is contended that any potential liability which attached itself to the latter would be expected (in keeping with the influence and control that person exerted over the management of a company's affairs) to be greater than that which would have been applicable had the particular type and degree of delinquent conduct been attributable to a person acting in the capacity of an ordinary director.

CONCLUSION

As the law now stands, the ability to label managerial conduct as affirmative of a person's conduct as either a de *facto* director or shadow director will be determined by examining the nature of the person's involvement, influence and control over corporate conduct and policy. Although the companies legislation defines a shadow director in terms distinguishable from those of a *de facto* director, following the case of *Deverell,* the practical worth of this distinction is now without substance and as such its maintenance is both confusing and an unnecessary embarrassment. Following *Deverell,* a shadow director may be established, in common with a *de facto* director, without proof of a controlling influence, devoid of a need to establish the shadow director as a hidden influence in the affairs of a company and finally, without proof of any expectation that the shadow director's directions or instructions will be obeyed. Accordingly, in a manner akin to that of a *de facto* director, a shadow director's role in the management of a company may be viewed to be on an equal footing with the company's *de jure* directors.

As the characteristics which ascertain a person's managerial activities as those of a shadow director now incorporate the identifying attributes of a *de facto* director, a logical step would be to merge the two distinct definitions into one (so defined as the ordinary director). However, the need to differentiate between persons who exert a dominant controlling influence over a company's affairs, as opposed to persons who may impart partial influence on an equal footing with the company's *de jure* directors, is such that a reforming provision (the dominant director provision) should be

introduced to take account of any disparity in respect of the degree of control exerted over a company's affairs by the company's directors. It is submitted that a dominant director, in exerting a greater degree of control and influence over a company's affairs, should shoulder a greater level of responsibility than that expected of an ordinary director; a fact which should always be reflected in the calculation of a director's personal liability and/or period of disqualification.

To conclude, the statutory definitions of a company director are at present confusing and inept and as such are in need of reform. Further, given that a current trend of corporate law reform is directed at re-evaluating the governance of companies and the responsibilities and duties attached to company directors, it is surely, as a logical and imperative co-requisite to such reforms, necessary to modify and restructure the statutory definitions and classification of company directors. While the confusion and uncertainty concerning the distinction between a *de facto* director and shadow director prevails, the law, as it currently stands, resembles something of a tangled web.

GATEKEEPING THE CEO: THE ROLE OF LAW, SELF-REGULATION AND INTERNAL MECHANISMS

Professor James Kirkbride, Professor of International Business Law, Liverpool John Moores University and Professor Steve Letza, Professor of Corporate Governance, Leeds Law School

INTRODUCTION

> ". . . in the entrepreneurial organisation, power is usually centralised in the hands of a strong, frequently charismatic CEO. Such individuals usually dislike submitting to authority."[1]

The Chief Executive Officer (CEO) in a company has been identified as the chief co-ordinator, policy maker, and motivator.[2] Others have described the CEO as representing the "pinnacle of the management structure with personal responsibility for the success of the company's operations within the strategy determined by the Board".[3] Whatever the description, two things are clear. First, CEOs are often attributed with corporate success and they have a clear influence on the activities of the company and others through what has been described as a "clout" position[4] – a position that often allows CEOs to manipulate boards of directors in order to pursue their own personal goals. Second, although CEOs exist in practice, there is little legal recognition of the existence and power of a CEO beyond the recognition of CEOs as being part of the Board and thereby being subject to regular directors' duties. Inherent in those duties is occasional recognition that the power will be reflected in agency or attribution theory activities but with limited specific success in the recognition of the "clout" of the position.[5]

There has been a consistent confirmation in law that the CEO position does not exist independently from the general duties applicable to all directors. As early as 1955, Viscount Kilmuir confirmed that the position of managing director (the CEO) was not an appointment to a specific and recognised office. It was no more than the appointment to the position of a director who was either a director with additional functions attracting additional remuneration, or else a person holding two distinct positions, that of the director and that of a manager. The position of managing director did not

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[1] A. Dent and F. Neubauer, *The Corporate Board – Confronting the Paradoxes*, (1992, Oxford University Press), at 74.

[2] B.R. Cheffins, *Company Law – Theory, Structure and Operation* (1997, Oxford University Press), at 108.

[3] *Guidelines for Directors*, (1990, Institute of Directors, London), at para 77.

[4] Westphal, "Collaboration in the Boardroom: Behavioural and Performance Consequences of CEO/Board social ties" (1999) *Academy of Management Journal*, 42:7-24.

[5] J. Kirkbride and S. Letza, "The CEO in Law and in Practice – A Study of Categorisation and Control" (2002) 10(4) Corporate Governance – An International Review, 136-152.

exist independently from the allocation of specific duties rather than the generic duties of a recognised post.[6] This position remains today.[7]

The consequence of all this is a danger that the failure to recognise the clout of the CEO, together with the ability of CEO to pursue personal interests, may result in positional conflicts like those identified by Eisenberg.[8] It is precisely because of those conflicts and because of the power and influence of CEOs that it is important to consider the effectiveness of all systems of control, whether internal to the organisation or externally imposed by law or other regulatory bodies.

The problem is not to be exaggerated, nor underestimated. Positional conflicts recognise the different forms of personal and corporate interests. The "clout" of the position presents an opportunity to emphasise these conflicts. However the main concern of this article remains the difficulty of identifying and controlling poor performing CEOs and their effect on corporate performance generally; not just the rather narrower issue of protecting the company from unscrupulous chief executives.

In essence CEOs are treated like any other director of the company. The regulatory system involves control at one layer through equitable and common law duties, supplemented by statutory duties which have been subjected to review as part of the Modern Company Law review process.[9] The development of an inclusive statement of directors' duties is one output of that Review, albeit little has been brought forward in respect of specific developments on the role of the CEO.[10] This layer of control places heavy reliance upon internal enforcement through the willingness of shareholders, acting individually or collectively to monitor and enforce directors' duties.[11] It is clear that the effectiveness of this system of control depends a great deal upon information and willingness to enforce, together with the process of risk shifting through the existence of directors indemnity insurance. These common law and statutory duties may also facilitate enforcement through state bodies such as the Department of Trade and Industry, notably in the

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[6] *Harold Holdsworth & Co (Wakefield) Ltd* v *Caddies* (1955) 1 All ER 725, at 729.

[7] See *Halsbury's Laws of England*, Vol 7(1) for a description of the "accepted" position.

[8] M.A. Eisenberg, "The Structure of Corporation Law" (1989) 89 *Columbia Law Review* 1461.

[9] See DTI, *Modern Company Law for a Competitive Economy* (1998); DTI, *Modern Company Law for a Competitive Economy – The Strategic Framework* (1999); DTI, *Modern Company Law for a Competitive Economy – Developing the Framework* (2000); DTI, *Modern Company Law for a Competitive Economy – Final Report* (2001).

[10] Parkinson expresses the view that any explicit duty is unnecessary as it is already implicit in the directors' common law duties. See, J. Parkinson, "Evolution and Policy: The Non-Executive Director", in *The Political Economy of the Company* (2000, Hart Publishing, Oxford), at 261.

[11] These "duties" are those developed through the common law, such as duties of care and skill, supplemented by statutory duties in areas of self-dealing and disclosure of conflicts. *Foss* v *Harbottle* (1843) 67 ER 189 and exceptions emphasise the role of collective and individual shareholder action in ensuring "internal" enforcement of these "duties".

area of director disqualification.[12] This enforcement agency faces the obvious problems of access to information, resource availability, and the strict requirements of the statutory regimes.

The next layer of control involves reliance on codes of best practice.[13] The governance codes have been private sector initiatives, supported by the government and financial institutions. Their focus has been to rectify governance weaknesses. This is where specific recognition of the role of the CEO has been present. This can be seen in the Cadbury recommendation that the role of the Chairman and the CEO should be split but that where the same individual does hold the two posts there should be a strong complement of outside directors.[14]

It is these codes, together with the statutory and common law duties that provide the accepted framework for the control of directors, but with limited specific recognition or control on the CEO. It is the purpose of this paper to examine two aspects of this regulatory system. The first concerns upon the operation of internal controls on CEOs.[15] This provides a measure of the willingness and actions of the internal participators in a company to control CEOs, particularly in the situation of poorly performing companies. This enforcement activity, if it exists, is central to the actual control of CEOs.

The second part of this study focuses upon the code recommendation that CEOs should be subject to the control of a strong complement of outside directors. This will enable us to explore the Codes' response to the positional conflicts identified by Eisenberg[16] and also to explore a model of control that was not part of the recent Modern Company Law Review (hereafter MCLR).[17] This model considers the position of the outside director and the possible development of "gatekeeper" liability.

Through this analysis, the central focus remains the need to develop an efficient regulatory system to control poorly performing CEOs and assist in limiting the potential for positional conflicts. It is the need to control poorly

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[12] See Company Directors Disqualification Act 1986.

[13] In the UK context, the main codes are: Cadbury Committee *Report of the Committee on the Financial Aspects of Corporate Governance* (1992, London, Gee); Greenbury Committee, *Report of the Study Group on Directors' Remuneration* (1995, London, Gee); Hampel Committee, *Committee on Corporate Governance, Final Report* (1998, London, Gee); Turnbull Committee, *Internal Control: Guidance for Directors on the Combined Code* (1999, London, ICAEW); *The Combined Code: Principles of Good Governance and Code of Best Practice* appended to the Listing Rules; see now Financial Services Authority, Listing Rules (London, 2000), r 12.43A.

[14] Cadbury *ibid* at 58.

[15] *Supra* n 9 for a discussion of the internal controls.

[16] *Supra*, n 6.

[17] *Supra*, n 7. *The Final Report of the Modern Company Law Review* acknowledged that it had not considered this aspect, particularly the position of CEO's. The DTI sponsored review of the role of non-executive directors, chaired by Derek Higgs, has recently reported. Its recommendations about CEOs were mainly that the role of CEO and Chairman should be split between two individuals and that a CEO should not become Chairman of the same company on relinquishing the post of CEO.

performing CEOs rather than the narrow concept of protecting the company from unscrupulous chief executives, that remains the central focus of debate.

This is essentially a legal question – a question of designing an appropriate system of legal obligations and liability. Despite the existence of common law and fiduciary duties, there has been a need to supplement these controls on directors through both statutory rules and codes of best practice. The sufficiency of the Codes was questioned in the MCLR – accompanied with the threat of replacing codes with legislation where this might be deemed necessary. No instance of this threat being carried through can be found. It is the failure of this 'mix' of legal controls to recognise the clout of the CEO and to develop specific controls on CEOs that has prompted this study. Recent governance failures such as Enron and World Com highlight some of the inadequacies of the common law approaches to controlling boards and unscrupulous CEOs.

In 1998 Farrar[18] concluded that the law had not fully come to terms with the variety of management structures and practices in modern companies. Despite the MCLR, the CEOs clout appears to be able to avoid the modern "mix" of legal controls. This paper proposed a regulatory model to fill the "gap" in the existing legal framework of controls.

Internal Mechanisms For Monitoring And Controlling The CEO

Various internal mechanisms can be employed by companies to monitor and control the CEO. These range from shareholder involvement in the company or market controls through to "hierarchical" controls where non-executive directors are expected to take the role of controller and monitor of the CEO. As Bratton[19] notes, the corporate structure has been identified in two different ways: either a hierarchical governance structure or market contracting. Pound[20] divides corporate governance into market-based solutions and political-based solutions, the former of which refers mainly to takeovers or the market for corporate control and the latter simply to a broad "non-market" approach (not merely a governance role).[21] Current analyses on corporate governance are all based on the theory of the firm and the related transaction cost economics,[22] which asserts that economic transactions may be mediated through either market or hierarchical structures.

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[18] J.H. Farrar, *Farrar's Company Law* (1998, London, Butterworths), at 304.

[19] W.W. Bratton, "The "nexus of contracts" corporation: a critical appraisal" 74 (1989) *Cornell Law Review* 407.

[20] J. Pound, "Proxy contests and the efficiency of shareholder oversight" (1988) 20 *Journal of Financial Economics* 237.

[21] J.P. Hawley and A.T. Williams, *Corporate governance in the United States: the rise of fiduciary capitalism* (1996) available on-line at: http://www.lens-inc.com/info/ competition.html.

[22] R.H. Coase, "The nature of the firm" (1937) *Economica* 4: 386; O.E. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* (1975, New York, Free Press); "On the governance of the modern corporation" (1975) 8 *Hofstra Law Review* 63; *The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting* (1985, New York, The Free Press).

A historical review of Anglo-American corporate governance structures reveals a circular shift from hierarchy to market and from market to hierarchy again. From the seventieth century, when modern corporations were created, through to the early twentieth century, corporations were governed dominantly by the hierarchical structure of "checks and balances" designed by corporate law. The gradual separation of ownership and control in Anglo-American corporations, recognised in the early twentieth century, has led to a reduction in the effectiveness of shareholders' monitoring. The finance conception of control, with its associated market governance structure, emerged in the 1960s and was further developed by the takeover movement in the 1980s. However, with the collapse of the market for corporate control at the end of the 1980s, a "non-market" approach advocated by numerous alternative perspectives has risen to shift market governance back to hierarchical governance structure. Ironically, even the advocates of the market governance model began to change their ideas towards "corporate internal control" on account of "inefficient exit" in the 1990s.[23]

The problem with the claimed "optimal" governance structures in current corporate governance analysis is that there is no solid empirical evidence available in support of their presupposition. The validity of the competing analyses on corporate governance, as Keasey *et al.*[24] remind us, relies ultimately on the supporting empirical evidence. Market governance or hierarchical governance, if claimed to be optimal, must be tested and demonstrated in practices. However, both sides of the corporate governance debate have offered counter-evidence to reject the opposite arguments, and consequently Anglo-American corporate governance practices have experienced both "hierarchical failure" and "market failure". Whilst the hierarchical governance failure is in relation to reluctant shareholders and malfunctioning boards, the market governance failure is due primarily to unreliable market forces and short-termism. The following examination will show how the available evidence rejects both assumptions of hierarchical and market optimums.

The Case Against Hierarchical Optimum

This section examines the core corporate monitoring mechanisms like the board of directors, shareholders and institutional shareholders. Available evidence indicates the defectiveness of the hierarchical governance structure as it operates through these mechanisms.

Board Failure

Board failure refers to the existence of broken connections between CEO, boards and shareholders, particularly where CEOs have been totally in control of corporations. Self-regulation and internal monitoring mechanisms

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[23] M.C. Jensen, "The modern industrial revolution, exit, and the failure of internal control systems" (1993) 48 *Journal of Finance* 831.

[24] K. Keasey, S. Thompson and M. Wright, "Introduction: The corporate governance problem – competing diagnoses and solutions", in K. Keasey, S. Thompson and M. Wright (eds), *Corporate Governance: Economic and Financial Issues* (1997, Oxford, Oxford University Press).

do not work in practice and tend to operate in a contrary manner to the expectation of traditional theories.

In conventional corporate theory, the board of directors plays a key role in the monitoring mechanism of checks and balances within the corporation. Directors, as the trustees of shareholders, nominate and monitor the CEO or managing director on their behalf. However, as Latham[25] observes, corporate governance systems in all major countries are fundamentally flawed because the connection between shareholders and the board of directors is broken. Although there have been various different structures of corporate boards, ranging from two-tier supervisory and management boards, for example in Germany for example, to insider-dominated boards in Japan, to mixed boards in the United States,[26] the board's passivity and lack of independence are commonly two main signs of failure. According to Bishop,[27] in Britain, America and Japan, the functions of boards have been mostly ineffective. In America, corporate boards are in general captured by management.[28] This enables CEO's to choose their friends, who will not challenge their power and interests, to sit on the board. In 1991, a study found that over 80% of board candidates were filled by CEO recommendations.[29] It has also been observed that in 76% of the largest companies in the USA, the CEO and the chairman of the board is the same person.[30] Sometimes we can see that boards dominated by outside directors remove top managers after poor performance. However, this only tends to occur after a major performance disaster.[31] In Britain, board members, including a non-executive chairman, are often chosen by the CEO. In Japan, boards are usually honorific.[32] The evidence on Japan and Germany indicates that boards are quite passive except in extreme circumstances.[33]

The proponents of reforming the traditional board assume that outside directors (or non-executive directors) with little or no equity stake in the company could effectively monitor and discipline the CEO to reduce the

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[25] M. Latham, "The corporate monitoring firm" (1999) *Corporate Governance* 7(1) 12.

[26] J. Charkham, *Keeping Good Company: A Study of Corporate Governance in Five Countries* (1994, Oxford, Clarendon).

[27] M. Bishop, "Corporate governance" (1994) *The Economist* 29 January.

[28] And J. Kay, *Does Privatisation Work? Lessons from the UK* (1988, London, London Business School).

[29] M. Mace, *Directors, Myth, and Reality* (1971, Boston, Harvard Business School Press); M.C. Jensen, "The modern industrial revolution, exit, and the failure of internal control systems" (1993) 48 *Journal of Finance*: 831; J. McRitchie, "Ending the Wall Street walk: why corporate governance now?" (1997) on line, available at http://www.corpgov.net/forums/commentary/ending. html.

[30] R.A.G. Monks and N. Minow, *Power and Accountability* (1991, New York, HarperCollins).

[31] M. Weisbach, "Outside directors and CEO turnover", (1988) 20 *Journal of Financial Economics* 431; J. Warner, R. Watts and K. Wruck, "Stock prices and top management changes" (1988) 20 *Journal of Financial Economics* 461.

[32] M. Bishop, "Corporate governance", *supra* n 27.

[33] S. Kaplan, "Top executives, turnover, and firm performance in Germany" (1994) 10 *Journal of Law, Economics and Organisation* 142; "Top executive rewards and firm performance: a comparison of Japan and the United States" (1994) 102 *Journal of Political Economy* 510.

fundamental conflict of interest between management and shareholders. In America, outside directors have long been a majority on the board of most big firms.[34] In Britain, non-executive directors made up about 33% of the main board in 1990 and 45% by 1996.[35] However, "the idea of non-executives" role has proven hollow at best.[36] Empirical investigations on UK listed companies during the periods 1989-1993 and 1994-1999 suggest that non-executive directors perform very weak monitoring or disciplining functions and have little or no influence on either CEO or board turnover.[37] The reason is that first of all, non-executives are not independent of management as mentioned above. The shareholders' election is typically a rubber-stamp approval of the candidates chosen by the existing board. Secondly, there tends to be an interlocking relationship between directors.[38] Non-executives are in an ambiguous position. Legally they have the same duties as executives and all directors are equal in theory. But in practice, non-executives are asked to act both as team mates of the CEO and as his referee.[39] Directors are regarded, both by themselves and by those who choose them, as nothing more than senior managers. Thirdly, outside directors often lack both the personal qualities and the practical resources to perform their fiduciary duties. They may have to bear any expenses occurred in investigating company matters.[40] They are busy people and probably have little time to think about the company's affairs or to collect information about the company.[41]

The broken connection between shareholders and boards could be shown not only on the board side, but also on the shareholders side, because shareholders are reluctant to play a role in monitoring and controlling the CEO.

Reluctant Shareholders

It has been argued that what is wrong with Anglo-American corporate governance is that far too many shareholders do not behave like owners.[42] In theory, shareholders as principals have a variety of rights (voice, vote, proxy fight, etc.) to monitor both directors (trustees) and managers (agents). In practice, this mechanism is seriously undermined by many factors.

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[34] M. Bishop, "Corporate governance" *supra* n 27.

[35] K.V. Peasnell, P.F. Pope, and S. Young, "A new model board" (1998) *Accountancy* (July) 115.

[36] M.C. Jensen, "The eclipse of the public corporation" (1989) *Harvard Business Review* October 61.

[37] J. Franks and L. Renneboog, *Who disciplines management in poorly performing companies?* (1999, unpublished DTI report); S. Letza, P. Hardwick, and J. Ashton, "Who disciplines management in poorly performing companies? An updated study" (2000 Company Law Review Report, DTI).

[38] M. Bishop, "Corporate Governance" *supra* n 27; O. Hart, "Corporate governance: some theory and implications" (1995) 105 *The Economic Journal* 678.

[39] *Ibid*.

[40] E. Sternberg, *Corporate Governance: Accountability in the Marketplace* (1998, London, The Institute of Economic Affairs).

[41] O. Hart, *supra* n 38.

[42] "A survey of capitalism – punters or proprietors", *The Economist* (5 May 1990).

The obvious problem is that shareholders have less incentive to actively monitor management.[43] For instance, even if a reply-paid card or form is offered, the return for annual general meeting resolutions and most extraordinary general meeting resolutions is rarely more than 15%. If a form is provided but not reply-paid, the level of response decreases significantly. If no form is provided, few shareholders are willing to appoint a proxy. For most companies the potential votes in favour of resolutions submitted by proxy forms do not exceed 20% of total possible votes. One important reason for the low incentive is a free-rider problem. In theory, a proxy fight is a very powerful tool for shareholders to discipline directors in a company with dispersed shareholders; a dissident shareholder can put up a slate of candidates to stand against management's slate, and try to persuade other shareholders to vote for his/her candidates. However, as Hart[44] notes, whereas the benefits from improved management accrue to all shareholders, the dissident shareholder bears all the costs, time and effort in fighting against the current board members. Thus, it is quite reasonable for a shareholder to be reluctant to undertake a proxy fight. Another reason for shareholders' low incentive is that they have often found their proposals useless. According to Strickland *et al*,[45] from 1986 to 1993 there were 216 proxy proposals submitted in the USA, among which 53 were negotiated (less than 25%) and 163 were submitted to a shareholder vote (more than 75%). Whilst in a negotiated agreement shareholders might more or less affect the corporate governance structure of the company, most proposals did not see such an effect. A study of 866 shareholder-initiated proxy proposals on governance issues at 317 publicly traded companies in the US from March 1986 to October 1990[46] found little evidence that shareholders' proposals produced a significant change of corporate policy such as CEO turnover. The average wealth gain from shareholder-initiated corporate governance proposals was not significantly different from zero. The study concluded that even the most successful proposals did not significantly change the companies' policies or stock values.

Another problem with shareholders' monitoring is managers' interference and manipulation. First, shareholders lack sufficient and true information about corporate performance. The content and timing of information distributed to shareholders is determined by directors, whereas the flow of information to directors is determined by executives. Thus, the manipulation of information in favour of management is unavoidable.[47] Moreover, managers often interfere in the voting process in an attempt to jawbone shareholders into supporting them and conceal information from their

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[43] *Ibid.*

[44] See n 41 above.

[45] D. Strickland, K.W. Wiles, and M. Zenner, "A requiem for the USA: is small shareholder monitoring effective?" (1997) 40(2) *Journal of Financial Economics* 319.

[46] J.M. Karpoff, P.M. Malatesta, and R.A. Walkling, "Corporate governance and shareholder initiatives: empirical evidence" (1995) *mimeo*.

[47] E. Sternberg, *Corporate Governance: Accountability in the Marketplace* (1998, London Institute of Economic Affairs); J. Kay and A. Silberston, "Corporate governance" (1995) 84 *National Institute Economic Review* 84.

opponents.[48] The agenda of general meetings is set by the directors, rather than by shareholders, which significantly limits shareholders' powers.[49] How to count shareholders' votes is another way of manipulation. Management can find out how shareholders vote proxies in advance of the annual general meeting. Un-voted proxies are often counted in favour of management.[50] In the process of electing directors, there are no genuine alternative candidates and thus CEOs are re-elected with overwhelming majorities. Also management is allowed by company law to use company funds to promote management's slate of directors. This further facilitates management to act against the dissident shareholder.[51] Due to the ability of the CEO to manipulate voting the shareholders' annual meeting is actually a meaningless election,[52] "an expensive waste of time and money" (DTI, 1996). The worse thing is that CEOs can use their corporate power to impose commercial sanctions against those who vote against them, for example, not awarding pension fund management or insurance or banking business to their opponents.[53] Note the manipulation by the CEO of Enron in this regard.

In addition, shareholders' ability of monitoring is restricted by legislation and jurisdiction:-

It is difficult or even impossible for shareholders to bring forward their own resolutions to the annual general meeting agenda.[54] According to US securities regulations, to require consideration of their resolutions shareholders must own a minimum of 1 per cent of the securities entitled to vote on the proposition, and must have held these shares for at least one year. In the UK, there is no standard procedure for getting a resolution on to an executive general meeting agenda.

The subject matter for shareholders' resolutions is also severely restricted. In the US, the subject matter is exclusive to the conduct of the ordinary business operations of the company or about company elections.

Shareholders are reluctant and find it difficult to communicate with each other because the procedures for conducting corporate voting are restricted by law or other authorities. In the US, communications amongst shareholders are subject to complex regulatory requirements. Expensive and time-consuming pre-clearance from the Securities and Exchange Commission (SEC) has been required for all communications to shareholders. Proxy contests are severely restricted. Although the SEC revised its proxy rules in 1992, serious obstacles to communication remain.

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[48] J. Pound, "Proxy contests and the efficiency of shareholder oversight" (1988) 20 *Journal of Financial Economics* 237; J.A. Grundfest, 'Subordination of American capital' (1990) *Journal of Financial Economist.*

[49] See n 47 above.

[50] J. McRitchie, "Ending the Wall Street walk: why corporate governance now?" (1997) available on line available at: http://www.corpgov.net/forums/commentary/ending.

[51] O. Hart, *Firms, Contracts and Financial Structure*, (1995, Oxford, Clarendon).

[52] J. Kay and A. Silberston, "Corporate governance" (1995) 84 *National Institute Economic Review* 84.

[53] See n 47 above.

[54] *Ibid.*

Filing procedure is still required whenever a voting group owning 5% or more in total agree to vote together.[55] In the UK, although shareholders are not legally barred from communicating with each other, it is still not easy for them to organise co-operative actions.[56] For example, shareholders lack sufficient money and information to take action against CEOs.[57]

In many countries, shareholders cannot vote by mail and have to show up at the general meeting to vote. This simply encourages nonvoting by small shareholders.[58]

The incentive problem also exists for large shareholders, particularly institutional shareholders.

The Conflicting Role of Institutional Shareholders

Institutional shareholders are mainly financial institutions such as pension funds, mutual funds, and insurance funds which tend to hold relatively large blocks of shares in publicly quoted corporations. Since the middle of the twentieth century there has been an increasing concentration of ownership into the hands of institutional shareholders. In Britain, financial institutions held approximately 62% of ordinary shares in 1993, more than double that of 1963.[59] In America, institutional ownership of the top 1000 firms was 57% in 1994, up from 46.6% in 1987, while institutional ownership of the second 50 largest firms was 64.3%. The top five institutional holders held fully 10.8% of all shares in the top 25 largest firms, while the top 25 institutional holders held 24.5% of the shares.[60] Thus, after the collapse of the market for corporate control in the US at the end of the 1980s, the role of institutional shareholders in the corporate monitoring system has been emphasised as an alternative monitoring mechanism. Institutional shareholders, as large shareholders, are expected by the new advocates of hierarchical governance to play a significant role in the monitoring process. In practice, the activism of institutional shareholders has produced some positive effects on the CEO's performance. Nevertheless, the role of institutional shareholders remains problematic because of their conflicting roles both as shareholders and as investors, the compound agency problem existing between beneficiaries and institutions and between institutions and corporate management, the dilemma of collective choice, and the higher agency costs, all of which raise questions about the effective monitoring of the monitors.

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55 J. McRitchie, "Ending the Wall Street walk: why corporate governance now?" *supra* n 50.

56 See n 47 above.

57 M.M. Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-first Century* (1995, Washington DC, Brookings Institution).

58 A. Shleifer and R.W. Vishny, "A survey of corporate governance" (1997) *The Journal of Finance* LII (2) 727.

59 Central Statistical Office (UK), *Share Register Survey Report End 1993* (1994, London, HMSO).

60 J.P. Hawley, and A.T. Williams, "Corporate governance in the United States: the rise of fiduciary capitalism" (1996) available on-line at: http://www.lens-inc.com/info/ competition.html.

The conflicting position of institutional shareholders has been clearly observed by Short and Keasey,[61] who indicate that institutional shareholders have two roles: one is the role of large shareholders who are expected to monitor company management on behalf of smaller shareholders, and the other is the role of investors whose duty is to maximise the return for the beneficiaries of the funds. As shareholders, institutions should take a long-term view of their shareholding positions and incur expense in intervening in management underperformance. As investors, institutions need to be free to exit and incur the least expense intervening in management in order to find the best return for their beneficiaries. Both roles cannot be easily reconciled with each other.

One major problem with institutional shareholders is that as agencies to own and invest the funds on behalf of their beneficiaries, they may not be accountable.[62] Some scholars find that large pension funds lack the expertise and ability to serve as effective monitors.[63] There are several reasons for the belief that agency costs will be higher at the institutional investor level than at the corporate management level. First, the free-rider problem is more severe in institutions than in companies. On the one hand, the beneficiaries of a pension fund are dispersed and do not find it possible or are not willing to undertake monitoring of institutions.[64] On the other hand, there is no generally accepted mechanism for cost sharing among institutions that undertake collective action like intervening in company management, the result of which is that they prefer to simply do nothing with their fiduciary duties[65] or report lower returns to their beneficiaries if they have to take costly action.[66] Second, there is an absence of disciplinary mechanisms to monitor the performance of institutional shareholders. Trustees are typically evaluated on procedural criteria rather than on their investment performance. The usual mechanisms of corporate accountability, such as the disciplinary threat of hostile takeovers, proxy fights, and other corporate control transactions, are neither available nor largely compromised at the institutional level.[67] Thirdly, institutional shareholders have less incentive and motivation for monitoring because they are merely intermediaries, not the ultimate owners of the shares, and get no direct benefits from attempting to improve corporate governance. The incentive systems of executive compensation used in corporations, such as stock options, are less used and

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[61] H. Short, and K. Keasey, "Institutional shareholders and corporate governance" in K. Keasey and M. Wright (eds), *Corporate Governance: Responsibilities, Risks and Remuneration* (1997, Chichester, J Wiley & Sons).

[62] J.C. Coffee, "Liquidity versus control: the institutional investor as corporate monitor" (1991) 91 *Columbia Law Review* 1277; W. Hutton, *The State We're In* (1995, London, Jonathan Cape).

[63] D. Cordtz, "Corporate hangman: hanging some CEOs may encourage others, but should pension funds wield the rope?" (1993) 162 *Financial World* 24; C. Wohlstetter, "Pension fund socialism: can bureaucrats run the blue chip?" (1993) *Harvard Business Review* January-February 71.

[64] J.C. Coffee, "Liquidity versus control: the institutional investor as corporate monitor", *supra* n 62.

[65] B.S. Black and J.C. Coffee, "Hail Britannia? Institutional investor behaviour under limited regulation" (1994) 92 *Michigan Law Review* 1997.

[66] W. Hutton, *The State We're In*, *supra* n 62.

[67] R.A.G. Monks and N. Minow, *Power and Accountability*, *supra n* 30.

more difficult to design for institutional investors.[68] This motivational issue has been evidenced by a low level of voting by institutional shareholders. In the top 250 UK companies, only 35% of shares have been voted. In 90% of the companies, the voting level is at 52% or less.[69] Fourthly, a large shareholder may use its power to improve its own position at the expense of other shareholders. There are two major possibilities: one is that a large shareholder might persuade management to divert profit to itself, for example, by selling goods to a company the shareholder owns at a low price or by buying goods from a company the shareholder owns at a high price. Another possibility is that the shareholder may agree to leave management alone in exchange for having its shares repurchased at a premium[70] (termed 'greenmail' in the US). One lesson from Germany and Japan is that although getting close to managers can enhance contestability by providing a monitor, it also can reduce contestability if the shareholder become too loyal to the CEO.[71] Finally, institutional shareholders have no clear obligations as owners under company law.[72] Governments' acquiescence on the conflict of interests in performing the institutional fiduciary duties further worsens the agency costs.[73]

Hawley and Williams[74] remind us of a compound agency problem existing between the ultimate beneficiaries of institutional funds and the institution, and between the institution and the fund managers responsible for the investment of those funds. The first-layer agency problem is how to monitor the monitors. This problem arises from the inability of beneficiaries to monitor institutional shareholders since the beneficiaries are extremely diverse. Currently there are approximately 100 million beneficiaries in the US.[75] The beneficiaries, as a very diverse group, may have quite different interests themselves. To determine what is the "best interest" of beneficiaries for which the institutions are charged to act may be a difficult or even impossible question.[76] Furthermore, the beneficiaries have little power to hold the trustees accountable. They lack almost all information.[77] Worse still, the beneficiaries cannot sell their stakes in the pension fund if the fund is under-performing, so they bear all the agency costs.[78] The second-layer agency problem exists between the institution and the fund

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[68] J.C. Coffee, "Liquidity versus control: the institutional investor as corporate monitor", *supra* n 62.
[69] C.A. Mallin, "Investors' voting rights" in K. Keasey and M. Wright (eds), *Corporate Governance: Responsibilities, Risks and Remuneration*, (1997, Chichester, J. Wiley & Sons).
[70] O. Hart, "Corporate governance: some theory and implications" (1995) 105 *The Economic Journal* 678.
[71] *Supra* n 32.
[72] *Supra* n 66.
[73] R.A.G. Monks, "The American corporation at the end of the twentieth century" (a speech at Cambridge University in July 1996), available on-line at: http://www.lens-inc.com/info/cambridge.html.
[74] J.P. Hawley, and A.T. Williams, "Corporate governance in the United States: the rise of fiduciary capitalism", *supra* n 60.
[75] *Supra* n 73.
[76] *Supra* n 74.
[77] R.A.G. Monks, and N. Minow, *supra* n. 30.
[78] *Supra* n 68.

manager. It lacks appropriate mechanisms to monitor fund managers' performance and prevent them from pursuing their own interests at the expense of institutions. Monks and Minnow[79] observe that fund managers are seldom accountable for the performance of institutional investments. Long-term rolling contracts can make it difficult for an institutional investor to replace a fund manager.

Monks[80] remarks that when a large and broadly diversified institutional shareholder such as a pension fund or mutual fund, which owns a cross section of the largest and medium-sized publicly traded companies, and hence owns a small proportion of the entire economy, it gives rise to a universal ownership problem. There are two issues here. The first issue is the problem of competition. If an institution owns majority stakes in all of the major companies in a single industry, what responsibility does the institution have to co-ordinate competition? This is at least an anti-trust issue. The second issue is a collective choice problem. What is good for the group as a whole may not be good for the individuals. There is a dilemma with the fiduciaries and beneficiaries of large institutions. For fiduciaries, institutions would like the companies they invest in to maximise profit aggressively. This could lead to externality problems such as environmental pollution. However, for the beneficiaries of those fiduciaries, as a large proportion of population, they may prefer a cleaner environment. The universal owners find it difficult to deal with the dilemma.

The Case Against Market Optimum

Market optimum is an assumption prevalent in economics. In the field of corporate governance, market governance usually refers to various mechanisms such as capital markets, managerial markets, and markets for corporate control. It is arguable that, although those market disciplinary tools might work under certain circumstances, the market optimum assumption is rarely sustainable in practice and market failure is often evident across time and space.

As explained above, the corporate internal monitoring mechanisms, typically the board and shareholders, are dysfunctional in performing their monitoring duties. It seems to be logical that when internal monitoring mechanisms are seriously defective, the external mechanisms are expected to play a significant role in corporate governance.

Control Of The CEO Through Independent Outside Directors – The Creation Of An "External Mechanism"

It is clear that the Cadbury recommendation for the inclusion of a complement of outside directors, particularly where the CEO occupies the role of Chairman as well, was influenced by the need to recognise and control the clout position and to avoid the apparent positional conflicts that might develop. The background to Cadbury, discussed later, included more extreme measures, including legislative proposals.

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[79] *Supra* n 67.
[80] *Supra* n 73.

Although there has been doubt cast on the effectiveness of the Codes,[81] the basic premise upon which a separation of CEO and Chairman positions and/or the inclusion of a complement of outside directors is an uncontroversial recommendation in respect of the recognition and control of CEOs.

However, there are some concerns as to whether the recommendation goes far enough in achieving the effective independent monitoring and control of the operation and actions of CEOs. The analysis above[82] suggests that there is some justification for greater monitoring and control of CEOs and it is the purpose of this section to focus on how this might be developed. This includes the need to explore the role of independent directors and the possibility of developing gatekeeper liability.[83]

The development of gatekeeper liability and CEO monitoring reflects the fact that it is precisely among top corporate decision makers that legal policies function most effectively to deflect personal and legal risks. It also reflects the concern that monitoring and evaluating the performance of top managers is simply too difficult to permit anything like total convergence of interest between managers and shareholders hence the partial failings of the internal monitoring and control expectations of common law duties.[84] Eisenberg's positional conflicts[85] may be an inevitable consequence of the difficulties in this area. The function of gatekeeper liability is identified in Kraakman's model of Corporate Liability Strategies.[86]

STRATEGIES OF MANAGERIAL LIABILITY

Type of Enterprise Liability	Asset Insufficiency	Sanction Insufficiency	Enforcement Insufficiency
Type of Managerial Liability	Shiftable Liability	Central Liability	Gatekeeper Liability

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81 See M.A. Ezzamel and R. Watson, "Organisational Form, Ownership, Structure and Corporate Performance : A Contextual Empirical analysis of UK Companies" (1993) 4 *British Journal of Management*.

82 *Ibid*.

83 "Gatekeeper Liability" is explored further in the paper, but it represented an attempt to force a portion of the enforcement burden onto firms' participants (in this case the non-executive director) who are not themselves the initiators of corporate or individual wrongs.

84 See Jensen & Meckling, "Theory of the Firm : Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305.

85 *Supra* n 6.

86 R.H. Kraakman, "Corporate Liability and the Costs of Legal Controls" (1984) 93 *Yale Law Journal* 857, at 868.

Using Kraakman's model enforcement insufficiency exists where the legal system cannot detect or prosecute a significant proportion of offences or wrongdoing. In the context of the control of CEOs that would reflect the failure of the system of internal controls provided through common law, equity and statutory duties to effectively monitor, detect and enforce those duties. One response to this "insufficiency" is to delegate enforcement to private actors (or gatekeepers) supported by a position of absolute liability. This is the preferred system of "gatekeeper liability" advocated by Kraakman. Potential targets of gatekeeper liability include outside directors and lawyers, accountants and underwriters.[87] The suggestion is that these outsiders can simultaneously serve as internal monitors of CEO behaviour because they possess privileged information about firm operations which is inaccessible to public enforcement officials or other internal players. It is significant that independent outside directors were identified as potential "gatekeepers", although the main focus of Kraakman's work was on the development of absolute liability on lawyers and accountants as "professionals". Enforcement insufficiency occurs when both enterprise and individual penalties fail to elicit sufficient compliance at an acceptable cost. Much of the recent debate over directors duties and enforcement in the Modern Company Law Review raised questions over the cost effectiveness of enforcement and alternatives. Kraakman's focus on enforcement insufficiency was centred on the firm's top participants. The findings in this area inspired Kraakman to conclude[88] that only one alternative remained, namely the possibility that civil or criminal liability could induce firm participants outside the circle of controlling managers to discover and prevent offences or wrongdoing. The scope of these participants' gatekeeper liability would depend on the reach of their duties to monitor for and respond to corporate wrongdoing. Gatekeeper liability joins the risk of absolute liability with an active duty to monitor for wrongdoing. It imposes liability on an entirely new class of innocent gatekeepers to reduce enforcement costs, the frequency of wrongdoing, or both. True gatekeeper liability is designed to enlist the support of outside participants in a firm when controlling managers (CEOs) commit wrongdoing or grossly underperform.

The first requisite for gatekeeper liability is identification of an outsider who can influence CEOs to forgo wrongdoing or improve performance. Reflecting on developments in the securities industry, Kraakman concluded that it was easy to see why outside directors, accountants, lawyers and underwriters were likely targets for a gatekeeper liability strategy. Each has, or might have, low cost access to information about a firm's wrongdoings and CEO behaviour. Contractually or informally, each already performed a private monitoring service on behalf of the capital market. But, and perhaps more significantly, each was an outsider with an independent career and assets beyond the firm. It is believed that an outsider with both a career and assets beyond the firm will be influenced by the reputational effects of any failure of their monitoring and enforcement activity. They have larger interests to consider, particularly lawyers and accountants who have both individual and firm reputations to protect. It is also suggested that if these gatekeepers can detect wrongdoing it would be extremely difficult to entice

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[87] *Ibid* at 892.
[88] *Ibid* at 897-898.

them into a conspiracy or to condone that wrongdoing. On that basis many offences will fail either because the outsiders cannot be corrupted or because the price of corruption exceeds its potential benefits. Thus it is perceived that gatekeeper liability will thwart a class of offences and wrongdoing that are unreachable through enterprise level or managerial sanctions. However, the imposition and development of gatekeeper liability is not without its problems. Clearly there is a cost element and if gatekeepers cannot shift their liability risks they will charge higher premiums. (Although one suspects that if the reputational influences are so great, then the operation of indemnity insurance for outside independent directors will enable the risk shifting required without adversely affecting the incentives to enforce and monitor). There is also concern whether the development of gatekeeper liability through independent non-executive directors might result in a more interventionist approach in the operation of board matters and corporate affairs. This might not enhance efficiency. Finally, there exists the possibility that it may be difficult to identify and persuade individuals to operate as non-executive directors. It is clear that the enforcement potential of a system of gatekeeper liability entirely depends upon the wrongdoing and level of culpability that triggers personal liability and on the choice of gatekeepers and the design of their duties. The problem of the market for gatekeeper services depends upon the sensitivity of potential gatekeepers to risk of personal liability, even though that liability can be shifted through indemnity insurance. It is reputation that is more important. A further issue is the extent to which CEOs dominate the selection of the non-executive director and that selection and relationship may result in the outsider being a captive outsider, only too willing to assume personal liability deferred through indemnity insurance for an appropriate price.

It is in the design of the duties of gatekeepers that we find the greatest difficulties. Do we require them simply to monitor and report to the Board on the potential commission of crimes and the failure to comply with statutory requirements. Or should a broad concept of failure to disclose key information affecting the management and performance of the company be preferred. All of these would require access to information and some of these would require strong technical skills possessed only by lawyers and accountants.

We also have to consider the position of the courts in determining the failure of the duties of gatekeepers and the imposition of absolute liability. Will the courts measure that failure against a broad concept of failure to report poor management, or will they require some more defined and generally acceptable measure, such as the failure to report breach of statutory duties or the provision of selective information to the board to assist in its decision making. One suspects that the courts would be reluctant to consider any broad concept of poor management and would be more comfortable with a more defined concept of duty. However, the greatest contribution would be to assist the board in both its decision making and its assessment of the role and the thoughts of the CEO through the provision of information to the board. In other words a model could be developed which would impose gatekeeper liability on a gatekeeper's clearly defined role of monitoring the provision of information from the CEO on the CEO's activities and other agreed financial and market information to assist the board in its decision making. Thus, the focus for enforcement would utilise the non-executives

and their interests in their reputation in order to control the CEO and ensure that information and decisions were provided to the full board for both the effective control of the CEO and the more effective performance of the broader role of the board in its contribution to the development of the company. On that basis we could respond to Kraakman's concerns of enforcement inefficiency while expanding the Cadbury recommendations to produce a more effective duty to perform imposed upon the non-executive outside director.

An initial assumption to be made in this area is that the independent director role includes a monitoring and reporting and then an individual or collective enforcement role. The assumption behind the Code recommendations on the inclusion of independent directors is the assumption of a role of monitoring the activities of the CEO. This follows earlier recommendations from a number of bodies including the British Institute of Management, that non-executives should have a legally defined role supporting complete independence.[89] Similarly, a private members Bill was introduced in the early 1970s requiring that non executive directors should be compulsorily part of the Board with a duty to report annually to shareholders on their assessment of the quality of the company's management and of the use of its assets.[90] Similarly, the Watkinson Committee was set up around the same time to look at the problem of how to improve the accountability of management.[91] The 1977 White Paper on the Conduct of Company Directors similarly concluded that non executive directors should provide independent supervision of the company's management and, to enable them to do so, they should have free access to management information. That report concluded that "the time may come when it would be appropriate to legislate in this field."[92] There then followed a series of reports and surveys which all saw the value of independent monitoring of management performance.[93] These were the forerunners to the Cadbury recommendations. They included a set of guidelines which were published by the Association of British Insurers in 1990, including a statement on the best practice of the role and duties of directors.[94] These guidelines emphasised the importance of non executive directors being independent and recommended that they be "in sufficient number and calibre for their views

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89 British Institute of Management, "The Board of Directors : A Survey of Its Structure, Composition and Role" *Management Survey Report No.10* (1992, London).

90 Introduced by Sir Brandon Rhys Williams, a Conservative Backbencher, Hansard, House of Commons (1971-1972) Vol 834, Col. 1661.

91 Reported in 1993 as *The CBI, The Responsibilities of the British Public Company.*

92 Department of Trade, *The Conduct of Company Directors* (Cmnd 7037, London, 1977) para 21.

93 These included the "Bullock" Report, Department of Trade, *Report of the Committee of Inquiry on Industrial Democracy* (Cmnd 6706, London, 1977); The Institute of Directors, *A Code of Practice for the Non-Executive Director* (London, 1982); and *Composition of Company Boards* [1988] *Bank of England Quarterly Bulletin*, 242.

94 ABI, *The Roles and Duties of Directors* (1990). These were re-issued in 1991, *Institutional Shareholder Committees: The Role and Duties of Directors – A Statement of Best Practice* (1991).

to carry sufficient weight on the board."[95] The ABI report went further than Cadbury in recommending that non-executives should "acknowledge a particular duty to monitor the performance of the board as a whole."[96] It is clear that the Cadbury Code did not extend to the introduction of a duty. Nevertheless we are in a post-Cadbury position and a duty might now be accepted as appropriate. Other commentators accept the monitoring role of independent directors. Cheffins suggests that outside directors fulfil two key functions.[97] One relates to support and assistance in managerial tasks, the other is monitoring executive decision making. According to Cheffins this will involve reviewing the performance of management to ensure that those in charge are running the company in the shareholders interests and are complying with legal duties, regulatory requirements, and ethical imperatives associated with the operation of a public company.[98] In situations where corporate performance is markedly substandard there are examples of outside directors orchestrating the removal and replacement of key executives.[99] Some have suggested that monitoring by non executives involves subjecting senior managers performance to ex post review and if necessary taking steps to remove them.[100] Such monitoring offers a way of overcoming management entrenchment. It may also play a part in controlling improper self dealing and other hygiene issues and in combating the adoption of growth and diversification strategies that benefit managers but which may be sub-optimal from the point of view of shareholders and the economy as a whole. Others accept that monitoring by non-executives is a potentially viable governance control but that the operation of the market has not been sufficient to induce satisfactory monitoring compliance.[101]

If we accept that the outside independent director performs a monitoring role, and if we accept the enforcement insufficiency that currently exists, then a number of issues remain in the development of gatekeeper liability. Kraakman suggests that the issues fall under two headings, first the market for gatekeeper services and second the scope of gatekeeper duties.[102] To these we may add a third, namely the regulatory structure. We will consider these heads in turn.

The Market for Gatekeepers Services

The market for independent directors per se exists. Pro Ned[103] were active in developing this and studies by PIRC[104] confirm the extensive use of

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95 *Ibid* at n 3.
96 *Ibid*.
97 *Supra* n 2, at 95-108.
98 *Ibid* at 96.
99 Examples include the resignation of the CEO of British Petroleum Plc in 1992; the resignation of Mr Maurice Saatchi from Saatchi & Saatchi Plc in 1995, and the resignation of Mr Perot from General Motors in 1992. See D. Clutterbuck and P Waine, *The Independent Board Director: Selecting and Using the Best Non-Executive Directors to Benefit your Business* (1993).
100 See Parkinson, *supra* n 10, at 235.
101 See J.B. Parkinson, *Corporate Power and Responsibility : Issues in the Theory of Company Law* (1993, Oxford University Press), at 181-188.
102 *Supra* n 83, at 892-893.
103 PRO NED was set up in 1981 with the active support of the Bank of England. One of the functions of PRO NED was to increase the number and quality of non-

independent directors, many of these being lawyers and accountants. Kraakman saw this issue as one of a concern over the sensitivity of potential gatekeepers to risk of personal liability. This influenced the level of incentive to become involved as gatekeepers although one suspects that the sensitivity over personal liability might be overcome through the extension of directors indemnity insurance cover to such outsiders. It has been widely suggested that the main incentive to act effectively in monitoring the CEO and board performance is reputational.[105] Professionals and their firms have much to lose through an association with poorly performing companies (see Enron). Evidence from the United States confirms the adverse effects upon professionals if the market perceives a failure to monitor effectively in situations of poorly performing companies.[106] Kraakman also perceived a problem in terms of reputational implications and suggested that liability could be extended from the individual to the firm.[107] We suggest that liability should remain with the individual, thereby accommodating the wide range of individuals who might undertake non-executive roles and also avoid any issues in respect of conflicts of insurance.

A related issue in the market for gatekeeper services is one of selection. We don't have nomination committees for non-executive directors. Nor, despite the efforts of Pro Ned, do we have a defined class of skilled non-executives. However there is some suggestion that Pro Ned is widely consulted and nominating committees are sometimes used to promote and appoint to the role of non-executive director.[108] A major concern in the absence of any nomination committee or independent selection process is the influence of the CEO in nominating and recommending non-executive directors. The influence of the CEO is one that without doubt exists, not only in selection but also in the removal of non-executive directors.[109]

We have noted that non-executive directors in companies that perform poorly will be penalised in the market for their services. It is clear that there is value in appointing non executive directors who have an interest in developing and protecting a reputation as diligent and skilled monitors and there is value more broadly in attempting to create a distinct profession of non executive directors in order to promote these qualities.[110] While the theoretical case for independent monitoring appears fairly strong, the

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executives and to act as a clearing house, bringing together companies and suitably qualified candidates.

104 See PIRC, *A Guide to the Guidelines : A Survey of Institutional Shareholder Corporate Governance Policies* (London, 1997).

105 See S. Kaplan, and D. Reishers, "Outside Directors and Corporate Performance" (1990) 27 *Journal of Financial Economics* 389.

106 See M.S. Weisbach, "Outside Directors and CEO Turnover" (1988) 20 *Journal of Financial Economics* 631; and S. Kaplan, and D. Reishers, "Outside Directors and Corporate Performance" (1990) 27 *Journal of Financial Economics*.

107 *Supra* n 21, at 893.

108 Cheffins, *supra* n 2, at 98.

109 See D. Clutterbuck, and P. Waine, *The Independent Board Director: Selecting and Using the Best Non-Executive Directors to Benefit Your Business* (London, McGraw Hill), at 191.

110 See R.J. Gibson, and R. Kraakman, "Reinventing the Outside Director : An Agenda for Institutional Investors" (1991) 43 *Stanford Law Review* 863.

empirical evidence, most of it American,[111] on the positive contribution of outside directors to economic performance is more equivocal. Apart from the vagaries of career development and exposure, one of the most obvious incentives to consider is that of payment and reward. The non-executive director will normally receive a fee for attending meetings and carrying out related duties. Some may also be in receipt of an annual retainer and may through the company agree that they can claim reasonable expenses such as travel and accommodation. In some cases the non-executive director is not the individual in receipt of any fee. The outside director might permanently work for another company or institution and the fees be paid directly to that primary employer as reimbursement for allowing the individual to spend time acting as a non-executive. In all cases it has been suggested that the fee is not particularly large.[112] It is reasonable to assume that exposure to gatekeeper liability might have an effect upon fees, although the reputational effects of a failure to monitor poor performance has not had the expected effect upon fee levels in America. There is rarely any direct correlation between corporate performance and the financial return an outside director receives. In fact, calls for the alignment of non executive directors' interests with those of shareholders, remunerating them with share options, has met with disapproval, notably in Cadbury and Hampel with the suggestion that it tends to undermine independence.[113] There also exists a view that tying director remuneration to corporate performance may simply duplicate the incentives which already exist. For example, it has been reported that non executive directors are keen to serve and carry out their duties because board appointments are prestigious, often an intellectual challenge, and can yield potentially viable business connections.[114] There is also the motivational effect which replicates the independence concerns of Cadbury and Hampel, namely, if a company's excellent performance results in a non executive being rewarded richly, that non executive may be more reluctant to speak out freely on crucial and controversial issues for fear of jeopardising a lucrative appointment. Remuneration schemes that induce directors to become deeply involved in corporate affairs affect the directors' independence.[115] It is expected that the introduction of gatekeeper liability would enhance the standing and reputation of the role as well as increasing the dangers of

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[111] For the UK position see M. Ezzanel and R. Watson, "Organisational Form, Ownership, Structure and Corporate Performance: A Contextual Empirical Analysis of UK companies" (1993) 4 *British Journal of Management* 161; S. Letza, P. Hardwick and J. Ashton, *Who Disciplines Management in Poorly Performing Companies? – An Updated Study* (a study prepared for the Company Law Review Steering Group) at www.dti.gov.uk.

[112] Clutterbuck and Waine, *supra* n 48, at 147, report that for a non-executive director who works approximately 15 days per year, the amount he will be paid annually will vary from about £7,000 for smaller limited companies to something over £20,000 for larger business enterprises. It has been suggested that the fees for non-executive directors appear to be increasing, "Non Executive Fees Rise Along with Extra Responsibility" *The Times*, 13 May 1996 (Survey indicating that fees paid by the largest UK companies rose from an average of £29,000 per year in 1995 to £37,000 in 1996).

[113] See Gibson and Kraakman, *supra* n 110.

[114] See Cheffins, *supra* n 2, at 101.

[115] C. Villers, "Executive Pay: Beyond Control?" (1995) 15 *Journal of Legal Studies* 260.

liability. The enhanced reputation of the role should bring with it other benefits in terms of business connections and intellectual challenge. This might present a sufficient balance in respect of the level of fees currently payable, or the reasonableness of fees to be paid in the future. If the call continues to relate fees to corporate performance, despite the concerns of independents, then one suggests that the agency funded response of Gilson and Kraakman might be one to consider in the future.[116]

Gatekeepers' Duties

Kraakman[117] suggests that the success of gatekeeper liability hinges on the development of legal duties that encourage the detection and interdiction of offences without overburdening the private relationships that serve as a vehicle. This requires a crafting of circumscribed duties to monitor and respond, that above all, do not ask too much from their target. The design and duties must not compromise the non-executive role as adviser, facilitator and monitor. It becomes a complex issue in terms of should the non executive gatekeeper be responsible for the failure to act to prevent mismanagement by CEOs, should their duties extend only to a duty to monitor and report poor performance, or one that clearly relates only to the so called hygiene issues of compliance with statutorily defined duties? If the duties are those of monitoring and reporting as opposed to monitoring and prosecuting or enforcing, then they are likely to be more manageable. It would also lessen concerns over developing sufficient incentives to act. A duty to monitor and report corresponds with the accepted position of independent directors. The position is one that non-executive directors today enjoy unlimited access to company information.[118] The development of a duty to monitor and report should codify this practice. Non-executive directors should have a statutory right to certain information at declared points at or before company board meetings and audit reports. They would need the skills to analyse and present the information to the board, with a right to report and question the CEO. The development of what might be regarded as such a low monitoring and reporting requirement is one that can accommodate concerns over incentives and concerns over skills deficiencies. The latter relates to the ability of the gatekeeper to identify and exercise a monitoring function. One would expect a lawyer or accountant to be proficient, but equally skilled would be a wider class of experienced non-executive directors. The duty to monitor and present information is one that is also sufficient in respect of making a contribution to enhancing corporate governance.

The Regulatory Structure

This invites consideration of a number of matters. First, there is Kraakman's insuffiency of enforcement category.[119] Insufficiency of enforcement can be

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[116] Gibson and Kraakman, *supra* n 49, at 884-892, where it is suggested that an agency funded by institutional investors be established to act as a clearing house for professional outside directors and to monitor their performance.

[117] *Supra* n 83 at 893.

[118] See Parkinson, *supra* n 10, at 241 and also KPMG, *The Role and Responsibilities of Non-Executive Directors : A Survey* (1999).

[119] *Supra* n 83 at 888.

measured against the efficiency of regulation presented through the gatekeeper approach. The efficiency can be measured at the level of enhancement of performance that one would assume to flow from using the independent directors as gatekeepers. It is clear that the independent directors are the ones who have information advantages over other possible nominee gatekeepers, such as shareholders. Efficiency is also present in the sense that board monitoring is free from the other problems that are liable to frustrate shareholder interventions, and avoid the very considerable costs associated with takeovers (bid premiums and transaction costs) that significantly blunt their disciplinary effects. Efficiency is also present in that there are some studies that support the proposition that monitoring by independent directors will have a positive effect upon corporate performance and CEO performance.[120]

The second point to note is that the development of a regulatory regime must be a legislative regime rather than one reliant upon codes or the development of controls based upon market practice. This brings forward the Labour Party suggestions[121] that legislation in this area might be required and also supports the ABI proposals[122] on the development of a statutory duty. The UK approach in this area has so far been one of developing best practice and voluntary codes and the main cause of concern, certainly for Cadbury, has been the difficulty of removing poor quality managers and the effect of this on corporate performance generally,[123] and not just the rather narrow issue of seeking to protect a company from unscrupulous Chief Executives. The introduction of the Codes themselves suggest that, over an extensive period, competitive forces in the market alone were failing to bring about the necessary strengthening of internal control. In this aspect of enhancing corporate performance and the effective monitoring of poor performance by CEOs, the Codes do not appear to be sufficient.

We noted earlier that the Cadbury recommendation did not go as far as the ABI best practice code that preceded it. Even in the MCLR it was noted that the government had an intention to replace the Codes where they were not effective.[124] The MCLR noted that the broad picture of the operation of codes in this area required a fresh look.[125] We are not alone in thinking that the codes of practice that we have relied upon to stimulate and shape board reform may need to be further refined or even replaced with a more prescriptive approach. The prescriptive approach we recommend should not

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120 See the studies by IM Millstein and PW MacAvoy, "The Active Board of Directors and Performance of the Large Publicly Traded Corporation" (1998) 98 *Columbia Law Review* 1282, that suggested that outside directors in the United States play an important role in replacing Chief Executives and in improving the performance of the company.

121 Department of Trade, *The Conduct of Company Directors* (Cmnd 7037, London 1977), para 20: "the time may come when it will be appropriate to legislate in this field."

122 See Association of British Insurers, *The Roles and Duties of Directors* (London, 1990).

123 For an account of the UK position, see Letza, Hardwick and Ashton "Who Disciplines Management? An Updated Study" *supra* n 111.

124 DTI (1998) *supra* n 7, at para 3.7.

125 DTI (1999) *supra* n 7, at s 5.5, "Regulation and Boundaries of the Law."

be viewed as replacing the codes. It is not an all or nothing approach. The monitoring obligations of the gatekeeper should be those prescribed in statute through an explicit statutory duty to that effect, but the details of board composition and other responsibilities around governance such as remuneration and nominations committees and procedures, should still be subject to the flexibilities of codes. No doubt such an approach will result in a fresh look at other aspects of the Codes in the future. Nevertheless the model suggested might enjoy the flexible benefits of codes through the enhanced position of regulatory conversations which would be a reasonably foreseeable consequence of the monitoring relationship between the CEO and the non-executive director.[126]

Finally, a mention must be made of the concerns that have been expressed in respect of the number of independent directors required on a board to ensure effective independent monitoring. Although it is increasingly common in the US for a substantial number of companies to have boards where non-executive directors constitute a majority, it is a rare occurrence in the UK.[127] None of the codes adopted in the UK impose such a requirement. The development of the proposed model of regulation and gatekeeper liability does not depend upon the board being comprised of a majority of independent directors. The position of multiple independent directors raises issues in terms of joint and several liability although this is where the code recommendation that a lead non-executive director is identified for the purposes of reporting is sufficient guidance.[128] That aspect of the Code should be one reflected in the prescriptive nature of the proposed gatekeeper liability control.

CONCLUSION

Thus we are faced with responding to the insufficiency of enforcement of the governance of poorly performing CEOs. The development of gatekeeper liability to be imposed upon the lead non executive director is consistent with empirical evidence of non executive influences on CEO and company performance in the US,[129] and is also consistent with the trends in the UK for developing an independent monitoring role for non-executive directors. It also overcomes the inefficiency of internal mechanisms of control as supported by the studies presented in this paper. The development of such a gatekeeper approach is not without its problems, notably those of incentives and scope of duties, but these problems are not insurmountable. One matter that may need further examination, albeit not an issue that has caused concern in the US, is the position of the inhibitive effect of interference that

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[126] For an account of the contributions of "regulatory conversations" to the system of control, see J. Black, "Talking about Regulation" (1998) *Public Law* 77. The concept appears to be similar to the political scientists category of "negotiated regulation".

[127] Although it has been reported that the boards of virtually all listed companies in the United Kingdom now have a significant proportion of non-executive members (PIRC, *Compliance with the Combined Code: A Study Prepared for the Company Law Review* (1999) see www.dti.gov.uk).

[128] This originated as a recommendation of the Hampel Committee, *supra* n 11, in an attempt to suggest changes to Cadbury in order to strengthen the monitoring role.

[129] See Millstein and MacAvoy, *supra* n 120.

monitoring might present in board decision making and corporate strategy development. This ought not to be a real concern when the advantages of regulatory conversations, supported by the powers and responsibilities of the gatekeeper approach, would present the benefits of accommodating interference outwith board meetings. On the face of it, this proposal might seem very radical and yet it is a natural evolution of both the codes of practice and the role of the non-executive director. It is also not an unusual situation in that state interference through legislation in respect of board operations and management performance is nothing new – in the post-Enron era it might well be expected.

COMMENTS AND NOTES

THE CONSIDERATION OF PUBLIC ORDER IN THE GRANT OF LIQUOR LICENCES

Graeme Watt, Barrister of the Inn of Court of Northern Ireland

Is the fact that proposed licensed premises are situated in a known trouble spot a relevant factor for a court to consider when deciding on the grant of a liquor licence? One might think that the answer is a very obvious "yes". However, a brief survey of our licensing laws and the attitudes of the various parties who participate in the licence-granting process, will show that the current received opinion is that the answer is, in fact, "no": public order is not a valid consideration. The contention of this note will be that the courts should permit themselves to take into account public order issues as raised by the Police Service. If this does not happen the issue of public order will be totally ignored in licensing law.

The Approach Of The Courts

The only statutory provision under which issues of public order could possibly be considered by a court considering the grant of a licence is art 7(4)(d) of the Licensing (Northern Ireland) Order 1996. This states that: "a court shall refuse an application for the grant of a licence unless it is satisfied (subject to paragraph (5)(b) which concerns conditional grants) that the premises are suitable to be licensed for the sale of intoxicating liquor by retail."

The dispute between the judges is over the meaning of "suitable". In short, the weight of authority is for interpreting suitability as concerning the mere fabric of the building; the adequate provision of fire escapes and the like. In *R (Marshall)* v *Justices of County Tyrone*,[1] the term "suitability of the premises" (as it appeared in s 9 of the Licensing Act (Ireland) 1874) was held in the High Court (where the action had come on a writ of mandamus and certiorari from a case originating at Strabane Petty Sessions) by Sir Peter O'Brien CJ to be:

> ". . . confined, in my judgment, to considerations affecting structure – structure in relation to proper accommodation for the public, in relation to the proper conduct of the business in the premises proposed to be licensed, and to considerations affecting site so far as it affects structural fitness upon the site, and access to the premises by the customers."

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[1] [1894] 2 IR 246 (QBD).

On appeal the Court of Appeal agreed with this view.[2] Palles CB said that suitability "excludes the fitness of the neighbourhood for a peaceable, orderly and well-supervised grocer's shop." In *Donnelly* v *Regency Hotel Limited*[3] Carswell J (as he then was) seemed to approve the *Marshall* doctrine.

What Carswell J said was that he "should be inclined to hold that the concept of suitability is limited to the matters considered in Marshall's case."[4] Although His Lordship went on to concede that he was, "bound to consider a somewhat wider range of factors," it seems that by this he meant a planning consideration, which at the time of *Donnelly* was not a statutory pre-condition to the grant of a licence but was considered as important at common law. However, as shall be seen, even planning considerations do not take account of public order issues.

Donnelly and its approval of *Marshall* is now viewed as definite law by the handful of senior members of the Bar who practice in the lucrative world of liquor licensing. The one case that goes against *Donnelly* is not held in high regard.

That case is *Re Philip Russell's Application*.[5] Kerr J suggested that a broader interpretation of suitability is required. His Lordship's interpretation would allow the court to consider the suitability of the premises in the social context of the building and accounting for the likelihood that public disturbances would be rendered more likely by the presence of a public house. The clearest way to convey the thoughts of His Lordship is to quote directly from the case:

> ". . . "suitability" is to be judged in the context of a general system of control of the sale of alcohol to the public. It would be surprising, indeed anomalous, if the application of such a general system of control did not include any opportunity to assess and evaluate the impact that the location of off licence premises would have on the neighbourhood . . . I believe that it is beyond plausible dispute that there *ought* to be an examination of whether off licence premises should be located in a particular area in terms of the effect that they are likely to have on the character of a locality." (Original emphasis).

This note is an argument in favour of the approach of Kerr J. It is submitted that *policy alone* requires the adoption of His Lordship's interpretation. The policy argument will be stated later. However, before leaving *Re Russel*, two points of case law analysis require to be made in order to show that it is a carefully considered case and not a mere policy statement.

Firstly, Kerr J was wary of following Palles CB because in the former's opinion the Lord Chief Baron placed too much weight on old Irish statutes when construing the 1874 Act. The Beerhouses (Ireland) Act 1864 required publicans to be of good character before they could be granted a licence. It

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[2] [1895] 2 IR 174.
[3] [1985] NI 144.
[4] *Ibid* at p 150.
[5] Unreported (Kerr J, 4th June 1993).

seems to have been the opinion of Palles CB in *Marshall* that this requirement covered the "public order" aspect of licensing thus avoiding the necessity of considering it when construing the suitability of the premises. Kerr J doubted if the two Acts had the connection that the Lord Chief Baron perceived. In any event, it is submitted here that the simple fact of a publican's good character does not diminish the chances of serious alcohol-related public disorder if his premises are situated in a trouble spot.

Secondly, Kerr J examined the text of the 1996 Order and noted that it requires that the premises be "suitable *to be licensed* for the sale of intoxicating liquor" (original emphasis) and not "suitable for the sale of intoxicating liquor". There is a subtle but significant distinction between saying (i) that a building is suitable for the sale of alcohol and saying (ii) that the premises are fit to be licensed for the same. Any given building in a local trouble spot may quite comfortably satisfy the first criterion while less obviously satisfying the second test. Can it seriously be argued that Parliament (presumably aware of the potential effects of alcohol consumption) intended to ignore the relationship between public disorder and the location of public houses when the 1996 Order was passed? Yet although it is the second test that has been laid down by Parliament, the cases apart from *Re Russel* apply the first test.

The Role Of The Planning Service

By article 7(4)(f) of the 1996 Order it is a necessary condition (save in special circumstances) for the grant of a liquor licence that there is in force planning permission to use the premises for the sale of alcohol. The important question when discussing the role of the planners is to ask how far they consider issues of public order when granting planning permission? While public order *per se* is not a material planning consideration within the meaning of the Planning (Northern Ireland) Order 1991, the impact of development upon the amenity of a neighbourhood is. Does this allow the planners to take account of public order issues? To answer this one must look at the Development Control Advice Note 7 entitled *Public Houses* prepared by the DoE[6] to give supplementary planning guidance.

The note is flawed in that it says that planning permission is not a necessary condition for the grant of a licence. This is wrong and the error arises from the fact that the note relies on the Licensing Act (Northern Ireland) 1971 now repealed. However, the note says that in practice the courts look for planning permission when considering applications for licences and consequently it is still helpful. In any event, the note makes no express reference to public order as a valid planning consideration. It does mention noise and disturbance. However, this seems to be the ordinary type of noise and disturbance associated with public houses. If the planners really considered that public order was a concern one would expect express reference to sectarian interfaces and the like.

It is not the contention of this note that the planners are avoiding responsibility. Quite the contrary, this note argues that the planners should not be fixed with the burden of taking decisions on the suitability of licensed

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[6] Available at www.doeni.gov.uk/planning.

premises from a public order perspective. That is the proper duty of the Police Service and the courts, who together have special expertise in dealing with this subject.

The Role Of The Police Service And Public Policy

So far it has been seen that there is no clear legal mechanism for the consideration of public order as a factor when deciding whether to grant a liquor licence. The weight of judicial authority is that the courts may not; and the Planning Service rightly considers it to be no part of its function.

By schedule 1, paragraph 4 of the 1996 Order, the Police Service may object to the grant of a licence. However, as the courts consider it a non-material consideration, they may not do so on the grounds of public order.

This situation should change. It is strange that in Northern Ireland, where alcohol probably plays a significant part in public disorder, that the relationship between the situation of public houses and incidences of serious public disorder (especially of a sectarian nature) is ignored. This is all the stranger when one considers just how often Crown Court judges (and High Court judges in bail hearings) remark on the link between alcohol and public order offences. Yet those self-same judges have for the most part decided, that public order considerations have no role to play in the grant of liquor licences. This note submits that *Re Russel* should be declared to represent the law at the next available opportunity. Previous cases to the contrary should no longer be followed because the current issue, being one of social importance, requires a fresh approach.

This should not be seen as an attempt to allow the long-dead temperance agenda to rule us from its grave. Indeed judges should always have the very highest regard for one of the most sacrosanct common law rights of the subject: that to trade freely without undue hindrance. However, the law should also allow judges to consider whether a wider public interest outweighs these rights in particular cases.

PAYING THE CONSEQUENCES

Michael McCord, Solicitor of the Supreme Court

Clients who are on the receiving end of a breach of contract claim invariably ask what damages they will be liable to pay if the breach is established. The answer is that a person who is in breach of contract is liable for whatever damage flows directly or obviously from the breach, and also for any further damage which was within the reasonable contemplation of that party when the contract was made. But what the courts have regarded as so called "direct loss" may surprise many ordinary business people.

Take the example of the tradesman who deals in spare parts for machinery in the manufacturing industry. He is contacted by a factory owner who tells him that a machine in the factory has broken down and that a spare part is required in order to get the machine working again. The tradesman delivers the spare part but it turns out to be defective, the machine will not work, and another spare part is required. The tradesman replaces the defective part with a good part free of charge. The price the factory owner paid for the defective part is clearly "direct loss" for which he has been compensated.

But what if the time taken between the supply of the defective part and supply of the replacement part is a day or so and in this time the factory owner's machine is forced to lie idle. Suppose the factory owner can show that the down time suffered in this period has resulted in a loss of production and consequently a loss of profit. Is he entitled to recover this loss of profit as damages from the tradesman for breach of contract? And is this loss of profit "direct loss" or "consequential loss"? The distinction, as we shall see later, can be crucial.

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed: *Robinson v Harman*.[1] In the example given above the factory owner would argue that had the tradesman not, in breach of contract, supplied him with a defective spare part, his machine would not have been lying idle for the day or so it took for a replacement to be found. Instead it would have been at full productivity and the factory owner would not have suffered the loss of profit.

Not all loss, however, which flows from a breach of contract, is recoverable. The victim of a breach of contract cannot recover loss which is too "remote". This rule was established in the seminal case of *Hadley* v *Baxendale* in which Alderson B formulated what has since been referred to as a two limb test:

> "the damages should be such as may fairly and reasonably be considered either arising naturally, that is, according to the usual course of things, from such breach of contract (limb 1) or such as may reasonably be supposed to have been in the

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[1] [1848] 1 Ex 850.

> contemplation of both parties at the time they made the contract as the probable result of the breach (limb 2)."[2]

Applying the test to the situation described earlier the factory owner would no doubt consider that if he has ordered a spare part for his machine, and the part is defective, then it is perfectly natural and obvious that the loss he will suffer is not just the money he has spent on the defective part but also any money he loses due to the machine being out of production until the defective spare part is replaced. Furthermore the tradesman knew, at the time the order was placed, that the part was required in order to make the machine work again.

In this scenario (hypothetical – but all too common in practice) the factory owner would, it is submitted, be entitled to recover his lost profit from the tradesman under either limb of the rule in *Hadley* v *Baxendale* (subject of course to the requirement that the factory owner must have taken all reasonable steps to mitigate his loss).

It is to avoid this liability for loss of profit that many tradesmen and suppliers prepare standard terms and conditions seeking to limit or exclude such liability. Such exclusion clauses come in all sorts of guises but one form of words which has caused some difficulty is where the supplier seeks to exclude or limit liability for "consequential loss". Many ordinary business people would think that if they include a term in their contract saying, for example:

> "The supplier agrees to supply a product of satisfactory quality which is fit for its purpose. If the supplier breaches this clause the supplier agrees to pay to the customer the price paid by the customer for the product however under no circumstances will the supplier be liable for consequential loss"

this means that the supplier is not liable for any loss of profit if the product he supplies turns out to be defective. Had the tradesman in the hypothetical scenario described earlier discovered such a clause in his contract he might well have felt encouraged toward the belief that he could defeat the factory owner's claim for damages for loss of profit.

A very similar question, however, was raised in the recent case of *British Sugar Plc* v *NEI Power Projects Limited*.[3]

In *British Sugar* the plaintiff (British Sugar) engaged the defendant (NEI Power) to design, supply, deliver, test and commission electrical equipment. The negotiations between the parties resulted in a contract which included a term which stated:

> "the Seller will be liable for any loss, damage, cost or expense incurred by the Purchaser arising from the supply by the Seller of any such faulty goods or materials or any goods or materials not being suitable for the purposes for which they are required save that the Seller's liability for consequential loss is limited to the value of the contract."

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[2] [1854] 9 Ex 341.
[3] [1997] 87 BLR 42.

The contract price was about £106,585.00. The plaintiff alleged that the equipment was poorly designed and badly installed, and that this resulted in breakdowns in the power supply. The plaintiff alleged that it had suffered damages of over £5million, consisting mainly of increased production costs and loss of profits due to the breakdown. A preliminary issue was tried by Alliot J, who held that words seeking to place a limitation on liability for damages in relation to "consequential loss", did not apply to the loss suffered by the plaintiff which he held was loss flowing directly and naturally from the breach. The defendant appealed to the Court of Appeal.

The defendant argued that any reasonable businessman would understand that loss of profits would be "consequential loss" and submitted that it was important, in the context of a commercial contract, to ascertain what reasonable businessmen would have intended when interpreting the meaning of a contractual term. In support of this argument the defendant relied on a passage in McGregor On Damages which states:

> ". . . in contract, where the pecuniary losses are nearly ubiquitous, another distinction is taken and built upon. This is the useful and important division between normal and consequential losses. The normal loss is that loss which every plaintiff in a like situation will suffer, the consequential loss is that loss which is special to the circumstances of the particular plaintiff. In contract the normal loss can generally be stated as the market value of the property, money or services that the plaintiff should have received under the contract less either the market value of what he does receive or the market value of what he would have transferred but for the breach. The consequential losses are anything beyond this normal measure, such as profits lost or expenses incurred through the breach, and are recoverable if not too remote."[4]

The plaintiff relied primarily on two Court of Appeal decisions: *Millars Machinery* v *David Way*[5] and *Croudace Construction Limited* v *Cawoods Concrete Products Limited*[6] and also on an intervening decision at first instance of *Saint Line Limited* v *Richardsons Westgarth & Co Limited*.[7] All three cases concerned interpretations of the word "consequential" in the context of contracts which contained clauses limiting liability for "consequential" loss or "consequential" damages. In all three cases the court held that consequential loss was something other than loss which flowed directly and naturally from the breach.

In the *Saint Line* case Atkinson J explained the position as follows:

> "What does one mean by 'direct damage'? Direct damage is that which flows naturally from the breach without other intervening causes and independently of special circumstances, while indirect damage does not so flow. The breach certainly has brought it about, but only because of some supervening

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4 McGregor on Damages (15th edn) paras 25-27.
5 [1935] 40 Com Cas 204.
6 [1978] 2 Lloyds Rep 55.
7 [1940] 2 KB 99, at 103-104.

> event or some special circumstances. . . In my judgment the words 'indirect or consequential' do not exclude liability for damages which are the direct and natural result of breaches complained of."

The Court of Appeal in *British Sugar* had no difficulty following this line of authority. Waller LJ said:

> "Both the *Millar* case and the *Croudace* case were construing the word 'consequential' in a very similar context to that which appears in this case. With Court of Appeal authority construing the phrase in a very similar context, and another Court of Appeal saying that the view previously expressed as binding in yet another similar context, it would take some radical difference in language or a radical difference in context to persuade yet a further Court of Appeal not to construe the phrase the same way."[8]

Tellingly Waller LJ also said:

> "Once a phrase has been authoritatively construed by a court in a very similar context to that which exists in the case in point, it seems to me that a reasonable businessman must more naturally be taken to be having the intention that the phrase should bear that same meaning as construed in the case in point. It would again take very clear words to allow a court to construe the phrase differently."[9]

The upshot was that on a true construction of the contract the court held the parties had simply agreed to limit the defendant's liability for loss and damage not directly and naturally resulting from the defendant's breach of contract to an amount equal to the value of the contract. This construction left the defendant to answer the claim for £5 million[10] as opposed to a claim limited to £106,585.

The case raises a number of interesting questions. If loss of profit is not "consequential loss" what is? It would seem that "consequential loss" must mean loss which is indirect or which, though caused by the breach of contract, is also the result of other supervening events unconnected with the breach. In *Saint Line* Atkinson J referred to loss brought about because of some special circumstances. If this is the case however such loss is surely not recoverable under the rule in *Hadley* v *Baxendale* because it neither (a) flows directly from the breach nor (b) was within the reasonable contemplation of the parties at the time they made the contract. In other words, regardless of whether there is a contractual term excluding or limiting liability for "consequential loss", such loss, as defined by the Court of Appeal, is likely to be unrecoverable under the rule in *Hadley* v *Baxendale* anyway.

The Court of Appeal's definition of "consequential loss" is also, in certain respects, illogical. The Shorter Oxford English Dictionary definition of the

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8 [1997] 87 BLR 42, at 50.
9 *Ibid*.
10 The issue here being whether this loss (or some of it) was direct and natural.

word "consequential" is "following, especially as an effect, immediate or eventual or as a logical inference". Logically everything which follows as a result of a certain event is consequent upon that event. Where a breach of contract causes loss that loss is, as a matter of logic, consequential, whether it is a direct or indirect result of the breach. The dictionary definition would therefore extend to literally all damages suffered as a result of a breach of contract because in the ordinary English sense all loss is consequential in that it follows logically from the breach.

The *British Sugar* case highlights how important it is for business people to glean an understanding of what is meant, in the legal sense, by terms which are included in their standard terms and conditions. The case serves as a salutary reminder that in legal documentation terms will not necessarily bear their dictionary meaning. As a result of *British Sugar* and the two previous Court of Appeal decisions the word "consequential" has been given a meaning which (as Waller LJ pointed out) the courts must now assume businessmen intend when it is inserted into commercial contracts.

The *British Sugar* case is also a lesson to the draftsmen of commercial contracts to use the term "consequential loss" only with extreme care and with a full understanding of what is meant by the term in the legal sense. In light of the meaning given to the term by the Court of Appeal it is difficult to envisage circumstances in which a supplier would wish to include it in a clause seeking to define loss for which the supplier does not assume responsibility. It is submitted that "consequential loss" as defined by the Court of Appeal is probably not going to be recoverable under the rule in *Hadley* v *Baxendale* anyway and therefore suppliers, by including the term in clauses in their contracts seeking to exclude or limit liability, are not really limiting their liability at all. As a result, if they are later in breach of contract, they could very well end up paying for consequences which are more than they thought they bargained for.

The safe course is to spell out clearly in the contract documents, whether they take the form of standard terms and conditions, or the form of a document which is being negotiated, exactly what type of loss is being excluded. If the aim is to exclude loss of profit then the contract should say so. It is much better to have the various heads of loss in respect of which liability is either to be excluded or limited clearly spelled out rather than to leave things to chance and end up arguing in court about what type of loss is properly classified as "consequential".

ORDERS CHARGING LAND – OVERKILL IN THE COURT OF APPEAL

David Capper, Reader in Law, Queen's University Belfast

John Kelly Limited t/a Kelly Fuels v *David Pollock (junior) t/a D Pollock & Son and Sylvia Pollock* (hereafter *Kelly* v *Pollock*),[1] is a decision of considerable importance relating to the enforcement of judgments. In a seven page judgment of sparse reasoning, the Court of Appeal has virtually swept away the settled practice of over 30 years whereby the Enforcement of Judgments Office granted an order charging land subject to the condition that the power of sale accompanying it was not to be exercised without the prior leave of the Master (Enforcement of Judgments).

The circumstances of the case were that the appellants (Kelly) had obtained a money judgment against the respondents (Pollock) in January 1999. After application to the Enforcement of Judgments Office for enforcement, the Office imposed an order charging the respondents' interest in their dwelling house, as the most appropriate enforcement order. The order was made pursuant to article 46 of the Judgments (Enforcement) (Northern Ireland) Order 1981 and was expressly subject to the condition that the power of sale of the land conferred by article 52(1) of the 1981 Order was not to be exercised without the leave of the Master.[2] When application was eventually made to the Master for leave to exercise that power, the Master refused leave because of what he saw as an imbalance of equities between the appellants as a commercial entity and the respondent wife. He held that the appellants had not demonstrated any need to recover the judgment debt and that the respondent wife had a greater right to remain in the property for the meantime. However the Master also indicated that circumstances would likely change over time so the appellants could make a further application later.

On the hearing of the appeal against this decision the respondents were not represented and the court invited the Attorney General to appoint counsel to act as *amicus curiae*. Very eminent counsel was appointed but the parties reached a settlement before argument was addressed to the court. In spite of the issue being of academic interest to the parties only the court accepted counsel for the appellants' invitation to consider whether the Enforcement of Judgments Office had this power to impose the leave condition because the court's guidance would be of general assistance. It is doubtful whether a matter of such importance should have been decided this way. If, as Sir Robert Megarry has put it, "argued law is tough law" there may be the appearance that the relevant arguments were not presented with all the vigour one would hope for with questions of such importance.

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[1] [2002] NIJB 249, (CA 8th May 2002).

[2] Article 46(2) confers a power to impose conditions – "An order charging land may be made either absolutely or subject to such conditions as to notifying the debtor or as to the time when the charge is to become enforceable, or as to such other matters, as may be specified in the order."

The Court's Reasoning

The court's decision largely turned on perceived differences between the system for enforcing judgments in England and Wales and the system in Northern Ireland. In England an order charging land, like other charging orders, may be made by the court under section 1 of the Charging Orders Act 1979. By section 3(1) of the same Act, which is in virtually identical terms to article 46(2) of the 1981 Order, the court may impose conditions on the order. The leading authority on section 3(1), *Harman* v *Glencross*,[3] supports the proposition that the court may impose conditions to the effect that the creditor should not seek to enforce the security for a specified period. That period could be for so long as a child of the debtor's marriage remains under the age of 17 and in full time education. All this was despite the fact that the courts had recognised that when an order for sale was sought under section 30 of the Law of Property Act 1925 sale could be postponed for similar reasons.[4] This is similar to the situation in Northern Ireland, where the court would have power under articles 48-49 of the Property (Northern Ireland) Order 1997 to consider these matters.

Campbell LJ, who delivered the judgment of the court, first observed that the order of the Master was not limited to any specified period of time. This was so far consistent with the English approach because it implied that if the Master had done what was indicated in *Harman* v *Glencross* his decision would have been unimpeachable. But this was not the holding of the Court of Appeal because Campbell LJ went on to say that the Master's order was incompatible with articles 18-19 of the 1981 Order, provisions having no parallel in England and Wales. These provisions require the Office to issue a certificate of unenforceability where it appears that a judgment cannot be enforced within a reasonable time. A potentially indefinite postponement because of the possibility that the Master will not grant leave was regarded as inconsistent with this obligation and an indication that the Office had no jurisdiction to impose the leave condition. The absence of a leave condition would not leave respondents without protection because the court could consider questions of hardship under articles 48-49 of the 1997 Order. There is, however, a very modest power to impose conditions under article 46(2) of the 1981 Order, for a specific reason and for a finite period of limited duration.

Commentary

The whole question of what discretion there exists, and in what bodies it resides, to block or postpone the eviction of a family from its home because of a judgment debt, is clearly a difficult one. There has been an unfortunate failure by the legislature to make clear whether the Master (Enforcement of Judgments) should exercise any such power or whether it should be the court.[5] If the power is to be shared then it has not been made clear what

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[3] [1986] Fam 81.

[4] See, *e.g. Re Holliday* [1981] Ch 405; *Thomas Guaranty Co* v *Campbell* [1985] QB 210.

[5] This failure is not unlike the similar failure in relation to judgments for the possession of land under article 53 of the 1981 Order; see D. Capper, "Enforcement of Judgments for Possession of Land" (2002) 53 *NILQ* 90.

questions are for the Master to decide and what questions for the court. It is also unsatisfactory that so little detail has been provided as to the grounds on which a creditor may be denied the right to enforce its security. Reform of the law along the lines suggested by the Scottish Law Commission,[6] although not a paradigm of welfarism, at least has the merit of clarity. There would be a two-stage process. First the order charging land would be registered and the second stage (application for sale) would be postponed for six months. Sale could be refused where the debt did not exceed £1,500 or where the proceeds of sale were not likely to realise more than the costs of the sale plus 10% of the debt. So it is perhaps understandable why the Court of Appeal came to the conclusion it did, and this conclusion does possess the merit of greater integration between the Office and court stages of the process. Despite that it is suggested that this is a decision more to be regretted than welcomed.

On the footing that *Harman* v *Glencross* should be followed it is not immediately apparent what difference really exists between the approach adopted there and the approach followed by the Office for over 30 years. Postponement of leave to exercise the power of sale until a child of the family reaches the age of 17 is not in substance different from an indefinite postponement with power to seek leave at any time. In this connection it is worth pointing out that by article 47 of the 1981 Order orders charging land automatically expire after 12 years from the date of judgment. Neither should articles 18-19 of the 1981 Order make the difference contended for. These provisions are part of Northern Ireland's more "joined-up" system of enforcement than the one operating in England and Wales. The clearer demarcation between Office functions and court functions drawn by *Kelly* v *Pollock* is more "joined-up" but so also would be a clearer prescribed power for the Master and one for the court. In any event why should it be assumed that the kind of postponements contemplated in *Harman* v *Glencross* are necessarily unreasonable in the sense intended by articles 18-19?

The judgment in *Kelly* v *Pollock* was also unfortunate in that it took no account of the recommendations of the *Hunter* Report on the enforcement system.[7] The view was there expressed that the debtor's personal and family circumstances should not be left to the court because court proceedings would be very expensive for the debtor and the Office would be more aware of all relevant circumstances. It was suggested that the Master could defer sale subject to payment of the debt by instalments, default to result in a sale. Where the amount of the debt is small in relation to the value of the property the Master could postpone sale to enable the debtor to obtain finance to discharge the debt, perhaps via a charge granted to another creditor. It would be desirable to specify the grounds on which sale could be postponed in the legislation. These examples bring to mind one situation where the *Kelly* v *Pollock* judgment could have unfortunate consequences. Large judgment debts are frequently enforced by a combination of instalment orders and orders charging land. If there is no power to require the creditor to seek

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[6] Scottish Law Commission, *Report on Diligence* (2001, Scot Law Com No 183), part 3.

[7] Northern Ireland Court Service, *Report of the Enforcement of Judgments Review Committee (Northern Ireland)* (Belfast, HMSO, 1987), paras 16.47-16.49.

leave to exercise the power of sale there would be nothing to stop a creditor seeking to sell the charged property even where the debtor had not fallen behind with instalments. It is, perhaps, less likely that these enforcement methods will be used in tandem in future.

Conclusion

There was another way of deciding *Kelly* v *Pollock* without abrogating a discretion which has been a settled feature of the Northern Ireland enforcement of judgments system since it commenced operations on 15th February 1971. That would have been to decline the invitation to examine a moot point between the parties but to consider whether the Master may have exercised his discretion on a wrong basis. The judgment of Campbell LJ did not indicate the size of the judgment being enforced, but correspondence with the Master indicated that it was for £31,928.67 plus £284 costs in default of appearance.[8] If it appeared that the debtor could have raised finance elsewhere to pay it off and secured that loan on the property then postponement of the kind suggested by the Hunter Committee may have been a more satisfactory disposition. If not, then granting leave may have been the preferred approach. It was surely possible to do justice between the parties without "throwing out the baby with the bath water." Alternatively the Court of Appeal could have decided that the approach in *Harman* v *Glencross* was misconceived as a matter of discretion because it was too favourable to the debtor. If there is anything in the article 18-19 point this could have supported this more moderate disposal.

As well as the right decision there is also the right time and the right way to be making that decision. It is not clear that the academic exercise undertaken in *Kelly* v *Pollock* considered all the relevant arguments as rigorously as they should have been in relation to a matter of such complexity and importance.

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[8] A custody warrant was issued by the Office for £33,291.07 (being the judgment debt, costs of judgment, costs and enforcement outlays, and interest).

BOOK REVIEW

PRIVATE PROPERTY AND ABUSE OF RIGHTS IN VICTORIAN ENGLAND. By Michael Taggart (Oxford University Press, 2002. Hardback, 235 pages, £45.50)

Almost everyone who has been a student of the common law at one time or another will have come across the case of *Bradford* v *Pickles*, finally resolved on appeal to the House of Lords at [1895] AC 587. It is a great case, involving (as do all the great cases) interesting and memorable facts, and doctrinal issues complex and controversial enough to keep it a staple on the curricula of our law schools even a century after its decision. Principally, it is regarded as a decision on the law of tort, and is most usually taken as standing for the principle that it is not unlawful for a holder of property rights to exercise those rights maliciously or to the detriment of others.

Professor Taggart's book (the latest volume in the Oxford Studies in Modern Legal History series) is work entirely devoted to an exploration of this great case. Describing itself in its subtitle as "The *Story* of Edward Pickles and the Bradford Water Supply" (my emphasis), it is just that: a compelling and interesting narrative, explaining the factual and legal background to the case, and unfolding the plot as it journeys through successive appeal courts. Moreover, Taggart continues where the law reports end, explaining and analysing the impact of their Lordships' decision on the main protagonists, and thus offering some reminder that legal rulings take effect in the real world.

The book in effect falls into two parts. In the first of these we find an exploration both of the litigation itself and its historical background. A short prologue describes succinctly the facts relevant to all stages of the litigation, and gives the ultimate outcome of two successive appeals, the first by the defendant, Edward Pickles, and the second by the plaintiff Corporation of Bradford. Pickles owned land adjoining a spring (Many Wells Spring) which for forty years had been used by the Corporation to supply water to the town of Bradford. The water came to the spring from underneath Pickles' land, percolating through undefined channels. In the early 1890's Pickles announced a plan to drain his land of the water, in an attempt to mine the land for flagstone. As Taggart records, "The plan gave the appearance of a contrivance to force the Corporation to pay a premium for Pickles' land or a water right over it" (page 1). Whether or not this was so was never authoritatively settled, the House of Lords holding that the question of motive was ultimately irrelevant. No use of property which would be legal if due to a proper motive could become illegal because it was prompted by an improper or malicious motive. In short, Pickles won the legal battle.

In an effort to place this legal victory in context, the early chapters offer something of a Victorian history. Chapter one explores the development of Bradford's water supply. A product of the industrial revolution, Taggart affirms the possibility that at one time Bradford was the fastest growing city in the world (page 6), adding historical significance to the legal wrangling in

Pickles. As an account of nineteenth century Britain it is eminently readable, and quite immaculately referenced, evidencing a degree of scholarship which suggests the author's deep fascination with his subject. The impression left in the reader is that no archive has been left undisturbed in Taggart's attempt to get to grips with this case, and his account is all the stronger for it.

Chapter two continues in the same vein, offering some detail on the importance of mining to the Yorkshire community, before descending to the more particular matter of the resources at Pickles' East Many Wells Farm. Very intriguing here is Taggart's record of a similar dispute occurring between Edward's father, Holmes Pickles, and the Corporation some 30 years before the eponymous litigation. The dispute was settled, the Corporation paying £1,000 for a 25-yard wide strip of lower-bed coal in an effort to cease disruption that was being caused to a natural underground reservoir by Holmes Pickles' coal mining activities (pages 23-27). The reader speculates with Taggart on the Corporation's apparent change of policy between 1860 and 1890, as the plot began to thicken in this legal affair. Moreover, this is but one example of the kind of real-life historical insight that permeates the book. Everywhere Taggart's work is laden with anecdotes and tangential asides (like the curiosity that leading counsel for each party were both members of Lincoln's Inn called to the bar on the same day: page 49), the latter commonly appearing in the elaborate and extremely detailed footnotes. The main protagonists are described as though they were characters in a novel, no detail being spared in the elaboration of almost every principal, from Bradford's "formidable" Town Clerk, William McGowen, to Pickles' solicitor, George Burr. The result is a compelling exposition that seems to breathe life into the short text that appears in the law reports (the decision in the House of Lords is reported in only 18 pages).

A third chapter deals in depth with each stage of the litigation in Pickles before making way for part two of the book. Here we find four chapters (and a short epilogue), each of them separately devoted to one of the doctrinal issues raised in the case. So there are chapters on statutory interpretation and the development of water law (chapters four and five respectively), and a brief epilogue touching on the public/private law divide (Taggart here reveals that the birth of his interest in Pickles was due to "the light it would shed on . . . the implications of (re)privatisation of public utilities, such as water companies.") But the heart of the book seems to be in chapters six and seven. The first of these concerns the failure of the English common law to adopt a doctrine similar to the doctrines of abuse of rights found in some Continental systems, according to which the exercise of a legal right is not an absolute privilege, and may be restricted or limited in circumstances where such exercise causes (or is calculated to cause) harm. Taggart remains neutral as to whether the common law should develop such a doctrine (page 165), but offers a short yet sophisticated account of reasons which may explain its absence. Most of these are historical and cover a wide range, including the presence in the nineteenth century of a growing, and fuller body of common law, a Diceyan suspicion of all things Continental, and the prevalence of positivism in legal theory (pages 155-166). Also interesting by way of explanation is Taggart's perception of the declining influence of the rules of equity in Victorian England, notwithstanding the Judicature Act of 1873 which expressly gave them priority over conflicting rules of common law (pages 152-155). Chapter seven explores the related question of the role

of malice in the law of torts, specifically the degree to which a malicious motive for the exercise of a common law right can have any bearing upon the legitimacy in law of that exercise.

All in all this is a superb monograph, and in truth a review of this length does scant justice to the wealth of interest and detail awaiting the reader. The footnotes alone merit careful study, and will provide stimulus for anyone interested in the history or development of the common law, though most especially for those pursuing a theoretical study in either torts or common law property. Perhaps a small negative is that there is some repetition in places. To be fair, the author in part concedes this, observing of the several chapters in the latter part of the book that each depends to some extent on some knowledge of what is contained in the rest (page 3). On this view then, repetition is defended "for the convenience of those who will dip into this book rather than read the chapters sequentially" (page 3). In truth such repetition as occurs is probably slightly more than is necessary to meet this goal: it is also evident, for example, in reading the early chapters. But still, this is the most minor of criticisms. The recaps are certainly sufficient enough to allow the later chapters to be treated as stand-alone discourses on their subject, and unobtrusive enough to be nothing like a hindrance to an avid reader progressing from cover to cover.

This is by no means the first time that the Pickles case has acquired the attention of the modern legal historian. In 1994, A.W.B. Simpson, General Editor of the Oxford series in which Taggart's work now appears, delivered a lecture to the Selden Society in which he investigated both the background to the case and the practical consequences of the House of Lords' decision. The present work, however, is one which in Professor Simpson's own words presents "a far more sophisticated study, both of [the case's] historical context, and of its legal and social significance" (page vii). It is a work of undoubted scholarship, yet one which remains readable and engaging. For these reasons it should satisfy the most demanding of private lawyers, whilst at the same time remaining interesting and accessible to anyone with even a passing interest in the history of the common law.

Robin Hickey
Queen's University Belfast