

NORTHERN IRELAND

LEGAL QUARTERLY

Introducing Publicity Rights? Breach Of Confidence,
The Photograph And Commodifying The Image
(*Ronan Deazley*)

Disqualification Of Company Directors In Kenya
(*Kiarie Mwaura*)

The Human Rights Act and Local Government:
Keeping the Courts at Bay (*Peter Leyland*)

Anti-Terrorism Laws And Data Retention: War Is Over?
(*Clive Walker & Yaman Akdeniz*)

Full table of contents inside

Vol. 54 No. 1

Spring 2003

CONTENTS

Introducing Publicity Rights? Breach Of Confidence, The Photograph
And Commodifying The Image (*Ronan Deazley*) 99

Disqualification Of Company Directors In Kenya
(*Kiarie Mwaura*) 118

The Human Rights Act and Local Government: Keeping the Courts at
Bay (*Peter Leyland*) 136

Anti-Terrorism Laws And Data Retention: War Is Over?
(*Clive Walker & Yaman Akdeniz*) 159

COMMENTS AND NOTES

Whose Funeral? Corpses And The Duty To Bury
(*Heather Conway*) 183

The Price Of Publicity (*David Capper*)..... 192

The Business Tenancies (NI) Order 1996 – To Agree Or Not To Agree?
(*Rosemary Carson & Norma Dawson*) 196

BOOK REVIEWS

Michael Moore: *Educating Oneself In Public. Critical Essays In
Jurisprudence* 201

Eileen Denza: *The Intergovernmental Pillars Of The European
Union* 205

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

ISSN 0029-3105



INTRODUCING PUBLICITY RIGHTS? BREACH OF CONFIDENCE, THE PHOTOGRAPH AND COMMODIFYING THE IMAGE

Ronan Deazley, Lecturer in Law, University of Durham

INTRODUCTION

At the end of the 1970s Sophie Calle began to follow strangers through the streets of Paris, for no other reason than the pleasure of following them. She took photographs of them without their knowledge and kept a record of their movements until she lost sight of her subjects. On one occasion, in January 1981, having followed a man in the streets of Paris for a few minutes before he was lost to her in a crowd, she met the same man, by chance, later that evening at a Gallery opening. During the course of their conversation he informed her of an imminent trip that he was planning to Venice. Calle decided to follow him to Venice where, over nine days, she secretly compiled a written and visual record of his movements. Her accounts of these clandestine pursuits are presented in *Double Game* published for the first time in English by Violette Editions in 1999.¹ In the same year, Phaidon Press published the work *L'Autre* incorporating a series of 90 photographs taken by Luc Delahaye of people, unknown to him, travelling the Paris metro. Between 1995 and 1997 Delahaye travelled the metro using a hidden camera to take portraits of numerous passengers sitting opposite him, the camera shutter snapping open and shut in time with the doors of the metro train.² In Calle's photographs her subjects are generally seen from behind, from a distance, blurred, indistinct. They are anonymous individuals engaged in the ordinary and the everyday. She records them making purchases, stopping to talk with friends, eating in a restaurant, making their way home, a voyeur of the commonplace. They provide truthful if banal records of random, different and indifferent lives. By contrast, with Delahaye's portraits one is struck by a disturbing pervading similarity. Each of them refusing to engage with the person sitting opposite them on the metro, all of Delahaye's subjects stare into a similar middle-distant emptiness. For Delahaye the portraits capture a violence in his subjects' calm (perhaps inevitable) indifference to the urban condition.

Both Calle and Delahaye deal in images of others who are unknown and unknowing. None of them have any relationship with their subject other than through the lens of the camera. Neither, however, are any of their subjects aware of the fact that they are being photographed. Their work raises

¹ Sophie Calle, *Double Game* (Violette, London, 1999).

² Luc Delahaye, *L'Autre* (Phaidon, London, 1999). Delahaye's approach was not a new one. Between 1938 and 1941 Walker Evans, the renowned American photographer, had taken a similar series of images, travelling the New York subway, with a camera concealed under his coat. The images he captured were exhibited in 1966 at the New York Museum of Modern Art, as well as being published as a collection entitled *Many Are Called* (Houghton Mifflin, Boston, 1966).

fundamental questions concerning the extent to which we can, or should be able to, control the public dissemination of our own image or likeness. Much has been written of late concerning the developments within the law of confidence and the emergence of an identifiable right to privacy, in the wake of the implementation of the Human Rights Act 1998.³ This article takes as its particular focus within that broader debate the photographic image; the suggestion here is that a number of recent decisions, concerning the publication of unauthorised and surreptitiously taken images, have seen the law of confidentiality develop in a manner approaching an informal recognition of *de facto* image rights.⁴ Moreover, within this general movement there are embryonic indications that the courts' direction allows for, not just the development of a relatively robust right of privacy pertaining to the image, but also for significant *rights of publicity* as well.

The Development Of Breach Of Confidence

The modern law of breach of confidence is generally traced back to the decision of *Prince Albert v Strange*⁵ which concerned a series of engravings that Prince Albert and Queen Victoria had made of each other for their own private enjoyment and consumption.⁶ Despite the fact that the etchings were generally kept under lock and key in the Royal household, William Strange, a printer in Paternoster Row, managed to acquire copies and reproduced them in a volume entitled *A Descriptive Catalogue of the Royal Victoria and Albert Gallery of Etchings*. Prince Albert brought an action before the courts seeking an injunction to prevent the exhibition, publication and sale of the etchings. Granting the injunction, Knight Bruce V-C commented that "the common law . . . shelters the privacy and seclusion of thoughts or sentiments committed to writing, and desired by the author to remain not generally known."⁷ The same principle he considered extended to the visual image.

³ See for example: Rabinder Singh and James Strachan, "The Right to Privacy in English Law" [2002] *EHRLR* 129; I. Hare, "Vertically Challenged: Private Parties, Privacy and the Human Rights Act" [2001] *EHRLR* 526; Gavin Phillipson and Helen Fenwick, "Breach of Confidence as a Privacy Remedy in the Human Rights Act Era" [2000] *MLR* 660.

⁴ Duncan Lamont, a media partner at Charles Russell, recently commented upon the drift "towards the French situation where identifiable members of a Parisian crowd celebrating France's World Cup win of 1998 were able to obtain compensation from publishers of French newspapers reporting on a huge story"; see 'No snap judgments', *The Guardian*, 12 August 2002.

⁵ *Prince Albert v Strange* (1849) 2 De G. & SM 652.

⁶ For a discussion of the development of the action in the early eighteenth century, see G Hammond, "The Origins of the Equitable Duty of Confidence" (1979) 8 *Anglo-American Law Review* 223.

⁷ The Vice Chancellor was influenced in his opinion by an orthodox, although erroneous, reading of *Donaldson v Becket* (1774) regarding the existence of a common law copyright in an author's unpublished manuscript. He commented as follows: "Upon the principle, therefore, of protecting property, it is that the common law . . . shelters the privacy and seclusion of thoughts and sentiments committed to writing, and desired by the author to remain not generally known . . . Such then being, as I believe, the nature and foundation of the common law as to manuscripts. . . its operation cannot of necessity be confined to literary subjects . . . To consider, then the case of mechanical works, or works of art, executed by a man for his private amusement or private use; whatever protection these, or some of

The actions of the printer amounted to “a breach of trust” and “a violation of confidence” and so should be curtailed.

The same cause of action extended equally well to photographs as it did to engravings. In *Pollard v Photographic Company*⁸ the claimant, Mrs Pollard, sat for a portrait taken by the Photographic Company, after which the defendant company, without her permission, began to sell Christmas cards bearing her image. In court she sought an injunction to prevent the company selling or exhibiting any more of the cards. Granting her relief, North J commented that “the customer who sits for the negative thus puts the power of reproducing the object in the hands of the photographer; and the photographer who uses the negative to produce other copies for his own use, without authority, is abusing the power confidentially placed in his hands.” It is “a gross breach of faith”, he continued “when a lady’s feelings are shocked by finding that the photographer she has employed to take her likeness . . . is publicly exhibiting and selling copies thereof.”⁹

Megarry J, in *Coco v Clark*¹⁰ gave formal structure to this common law offence, identifying a number of essential criteria that a claimant needed to satisfy before he or she could establish an actionable breach. He considered that:

- (i) the information must have the necessary quality of confidence about it;
- (ii) the information must have been imparted in circumstances importing an obligation of confidence;
- (iii) there must be unauthorized use of the information to the detriment of the party communicating it.

We can appreciate that the claimant in *Pollard* would satisfy Megarry J’s criteria, but consider the hypothetical situation in which someone surreptitiously takes a picture of an individual, in public, and later displays it on a gallery wall, or includes it in a published collection of his or her work? Could that person take an action against the photographer based upon breach of confidence? All three legs of the action as defined in *Coco* would seem to militate against that possibility; however, in light of recent developments, bringing a successful action no longer seems entirely implausible. Consider each of these criteria, in reverse order.

(i) Unauthorised use of the information to the detriment of the claimant

Whether there has been unauthorised use of the information will depend upon the scope of the obligation owed by one party to the other. When considering any form of personal information or private confidence it is

these, may have by an Act of Parliament, they are not, I apprehend, deserted by the common law”; *supra* n 5, at 695-96. However, for a reassessment of *Donaldson* and the notion that there existed a copyright at common law, see R.Deazley, “The Myth of Copyright at Common Law”, *CLJ* March (2003) (106).

⁸ (1889) 40 Ch D 345.

⁹ *Ibid.* Similarly, see *Stedall v Houghton* (1901) 18 TLR 126.

¹⁰ [1969] RPC 41. For a more recent restatement of the continued relevance of these three criteria see *Campbell v MGN Ltd* [2002] EMLR 30.

generally accepted that a person under an obligation of confidence makes unauthorised use of the information by simply disclosing it to a third party.¹¹ Whether the claimant must still demonstrate that the disclosure of the information has caused them harm remains a moot point.¹² In *X Health Authority v Y*¹³ in which a hospital employee disclosed personal information pertaining to two colleagues in work, Rose J commented that, in the circumstances, “detriment in the use of the information [was] not a necessary precondition” of liability.¹⁴ For Rose J, detriment had occurred simply because the information had been leaked, not because it necessarily caused the claimant any direct harm. In relation to the hypothetical action outlined above, this aspect of the three-strand *Coco* test would seem relatively easy to satisfy.

(ii) The information is imparted in circumstances importing an obligation of confidence

Traditionally, under this branch of the *Coco* test, two elements had to be satisfied before the obligation of confidence would arise. The first of these related to the existence of an intimate or confidential relationship between the two parties involved. The second element involved the finding of an agreement of confidentiality between those two parties, that is, that the information that passed between them was understood to be of a confidential nature. Relationships such as those between doctor and patient,¹⁵ pharmacist and customer,¹⁶ and employer and employee,¹⁷ typically gave rise to such obligations of confidence. This leg of the *Coco* test has similarly undergone some transformation;¹⁸ it has been made plain by the courts that they will not require the existence of a formal relationship of confidentiality before the action for breach of confidence will bite. In *Attorney General v Guardian*

¹¹ See for example *R v Department of Health, ex parte Source Informatics* [2001] QB 424, at 440, in which Simon Brown LJ set out that, when dealing with such information “[t]he concern of the law here is to protect the confider’s personal privacy.” In this case, the action of pharmacists in disclosing anonymised information relating to their customers’ prescriptions to a company who then sold the information to pharmaceutical companies for marketing purposes, was not considered to breach their customers’ confidentiality, as their privacy had not been invaded, but rather had been safeguarded.

¹² In *Attorney General v Guardian Newspapers (No.2)* [1990] 1 AC 109, at 281-82 Lord Goff, in restating the general principles relating to the breach of confidence action, considered that it was appropriate “to keep open the question whether detriment to the plaintiff is an essential ingredient . . . Obviously, detriment or potential detriment to the plaintiff will nearly always form part of his case; but this may not always be necessary.”

¹³ [1988] 2 All ER 648.

¹⁴ *Ibid*, at 657.

¹⁵ *W v Edgell* [1990] Ch 59.

¹⁶ *R v Department of Health, ex parte Source Informatics* [2001] QB 424.

¹⁷ *Attorney General v Guardian Newspapers* [1987] 1 WLR 1248.

¹⁸ In *Douglas v Hello! Ltd* [2001] QB 967, at 1012 Keene LJ remarked that “already before the coming into force of the Act there [had] been persuasive dicta . . . to the effect that a pre-existing confidential relationship between the parties is not required for a breach of confidence.”

*Newspapers (No.2)*¹⁹ Lord Goff, discussing the general principles underpinning this area of the law, observed that:

“[A] duty of confidence arises when confidential information comes to the knowledge of a person (the confidant) in circumstances where he has notice, or is held to have agreed, that the information is confidential, with the effect that it would be just in all the circumstances that he should be precluded from disclosing the information to others . . . [which situations would include] where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and then picked up by a passer-by.”²⁰

A number of subsequent decisions, involving photography, operate in the same way, confirming that an identifiable communication between the two parties is no longer considered a necessary ingredient of a successful claim.²¹ In all of this, Phillipson and Fenwick observe a general shift in emphasis away from the need to find a mutual agreement as to the nature of the information as between the two parties, to a *reasonable man test*.²² That is, if the reasonable man, in the shoes of the defendant, would assume that an obligation of confidence arose then one would in fact exist. Such an approach was recently endorsed by Lord Woolf CJ in *A v B & C*²³ when he found that “[a] duty of confidence will arise whenever the party subject to the duty is in a situation where he either knows or ought to know that the other person can reasonably expect his privacy to be protected.”²⁴ Would the

¹⁹ [1990] AC 109.

²⁰ *Ibid*, at 281.

²¹ *Shelley Films v Rex Features* [1994] *EMLR* 134; *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804; *Creation Records v News Group* [1997] *EMLR* 444.

²² *Supra* n 3. Simon Brown LJ, in *ex p Source Informatics* [2001] QB 424, at 439, commented that the appropriate question to ask, in the circumstances of that case, was “would a reasonable pharmacist’s conscience be troubled by the proposed use to be made of the patients’ prescriptions? Would he think that by entering Source’s scheme he was breaking his customers’ confidence, making unconscientious use of the information they provide?”

²³ [2002] *EMLR* 371.

²⁴ In *Venables v News Group Newspapers* [2001] *EMLR* 10, a decision concerning information about Robert Thompson and Jon Venables, the children responsible for the murder of Jamie Bulger, Butler-Sloss P pushed the boundaries of the law even further back, granting injunctions against the press restraining the disclosure of information about the claimants relating to their (i) present physical appearance, (ii) their new identities and whereabouts, (iii) their existing placements, and (iv) their time spent in secure units prior to August 2000. Recognising that she was being asked to extend the remit of the domestic law of confidence, Butler-Sloss P considered that the court had the authority to do so, where not to do so would be likely to lead to serious physical injury, or even death, of the applicant and there was no other way of protecting the applicant other than by granting the relief sought. She considered that “a duty of confidence could arise in equity independently of a transaction or relationship between the parties”, a dictum which has been subsequently approved in *Mills v News Group Newspapers* [2001] *EMLR* 41. Butler-Sloss P did make clear however that “the extension of the law in

reasonable person understand that his taking an unsolicited photograph of a stranger in public would be an unwarranted invasion of that stranger's privacy? In relation to the limits of such a reasonable man test, a recent decision of the Press Complaints Commission (the PCC) proves of some interest.²⁵ In *Tunbridge v Dorking Advertiser*²⁶ Mr Tunbridge complained about an article in the Dorking Advertiser that included a photograph of him taken without his consent.²⁷ This, he contended, amounted to a breach of clause 4 of the PCC's Code of Practice which provides that journalists and photographers "must not photograph individuals in private places."²⁸ A "private place" is defined within the Code as "public or private property where there is a reasonable expectation of privacy."²⁹ Mr Tunbridge had been photographed, with a companion, in a local café. The newspaper contended that the restaurant was a public place and therefore the complainant had no reasonable expectation of privacy. The Commission rejected the argument; it considered that "there may be places such as hotels which are accessible to the public where an individual will still have a reasonable expectation of privacy." "[C]ustomers of a quiet café", it continued, "could expect to sit inside such an establishment without having to worry that surreptitious photographs would be taken of them and published in newspapers." The claimant and his companion, it was concluded, "were clearly in a place where they had a reasonable expectation of privacy."

The position of the PCC in *Tunbridge* can be contrasted with their earlier determination concerning the complaint of Geoffrey Peck. In August 1995 the claimant, then suffering from depression, was caught on a CCTV surveillance system operated by the local council in Brentwood, Essex. Mr Peck was recorded walking alone at night through Brentwood city centre with a kitchen knife in his hand, having attempted suicide by cutting his wrists. The police were alerted, arrived on the scene and, after administering medical assistance, brought him to the police station where he was detained under the Mental Health Act 1983. He was subsequently examined and treated by a doctor and then released without charge. Thereafter, the council issued a number of press releases, including two stills from the footage taken of the claimant, in which he was identifiable, to highlight the benefits of the partnership between the council's CCTV system and the police. The story

confidence, by the grant of relief in the exceptional circumstances of this case" was unlikely to open the door "to the granting of general restrictions upon the media in cases where anonymity would be desirable" and doubted "whether it would be appropriate to grant injunctions to restrict the Press in this case if only Article 8 were likely to be breached."

²⁵ S 12(4)(b) of the Human Rights Act 1998 sets out that the courts, when considering whether or not to grant any relief that would interfere with the right to freedom of expression, must "have particular regard to", amongst other things, "any relevant privacy code", which of course extends to the Code of Practice as applied and interpreted by the Commission.

²⁶ (2002); a summary of the decision can be found online at <http://www.pcc.org.uk/reports/latestdetails.asp?id=323>.

²⁷ "Skullduggery over a butterscotch tart", *Dorking Advertiser* 22 February 2002.

²⁸ The PCC's Code of Practice is available online at <http://www.pcc.org.uk/cop/cop.asp>.

²⁹ *Ibid*, clause 3.

was taken up by two local papers, then in a local broadcast by Anglia Television, and finally by the BBC's *Crime Beat*, a programme that reached in excess of 9 million viewers. At the same time as applying, unsuccessfully, for leave to judicially review the council's decision to make public the CCTV footage in question, Peck complained to the PCC. Rejecting the complaint, the PCC did not consider that there had been a breach of the claimant's privacy within the meaning of their Code of Practice, given that the events in question had taken place in a town high street, open to public view.³⁰ This then, in the PCC's view at least, seemed to represent the high water mark as to when and where photographers should consider that their actions were likely to represent an unwarranted invasion of an individual's privacy. Capturing the actions of a private individual in an unquestionably public space would seem to be acceptable.

Mr. Peck, however, appealed to the European Court of Human Rights in relation to both the disclosure by the council of the footage, as well as its publication and subsequent broadcast, arguing that the State had failed to fulfil its positive obligation to protect his private life in making no effective domestic remedy available to him. The Court, considering that his case raised "serious issues" under both Articles 8 and 13, declared the application admissible. The UK government submitted that "the incident in question did not form part of [Mr Peck's] private life given the substance of what was filmed and the location and circumstances of the filming." As a result, the government suggested, the applicant's right to private life had not been engaged at all. By contrast, Peck maintained that the fact that the event had been captured in a public place "was only one element in the overall assessment of whether there was an interference with [his] private life."³¹ Recalling the decisions of the Commission in *Lupker v the Netherlands* (1992)³² and *Friedl v Austria* (1995)³³ the Court noted that there exists a

³⁰ The Broadcasting Standards Commission (BSC) had previously upheld Mr Peck's complaint that the BBC had embarked upon an unwarranted infringement of his privacy (13 June 1997). Similarly, the Independent Television Commission (ITC) upheld Peck's complaint against Anglia Television.

³¹ Other factors to take into account were the fact that: it was late at night; he was not taking part in a public demonstration; his psychological state; he was unaware of being filmed; the disclosure took place without his knowledge or consent; the later use of the footage; and the extent to which it was made available to the public.

³² Unreported, no. 18395/91, 7 December 1992.

³³ Judgment of 31 January 1995, series A no. 305-B. In *Friedl* the applicant alleged that the actions of the Austrian police in taking his photograph while he was participating in a public protest that he had organized with other persons, amounted to a breach of his right to respect for private life under art 8 of the Convention. The Austrian government, between the delivery of the opinion of the Commission, and the hearing before the Court, reached a settlement with the applicant, whereupon the Court struck the case out. When the Commission delivered its opinion, drawing upon the decision of the Court in *Niemietz v Germany*, judgment of 16 December 1992, series A no. 251-B, it made reference to the fact that "the notion of "private life" is not limited to the "inner circle" in which the individual may live his own personal life" but also comprised "to a certain degree the right to establish and develop relationships with other human beings and the outside world." However, taking note of the fact that "the photographs related to a public incident, namely a manifestation of several persons in a public place, in which the applicant was voluntarily taking part" as well as the

“zone of interaction of a person with others, even in a public context, which may fall within the scope of “private life.”” In this case, given that Peck was not in the street “for the purposes of participating in any public event” nor was he “a public figure”, the Court considered that “the relevant moment was viewed to an extent which far exceeded any exposure to a passer-by . . . and to a degree surpassing that which the applicant could possibly have foreseen when he walked in Brentwood on 20 August 1995.” As a result it was held that the disclosure of the footage by the Council constituted a serious interference with Peck’s right to respect for his private life under Article 8.³⁴

If the approach of the PCC in *Tunbridge* and the decision of the European Court in *Peck* do nothing else, they do at least indicate that, ultimately, there can be no bright line test for determining where the distinctions between public and private life are to be drawn, or when tests concerning reasonable expectations of privacy will be satisfied. If a photographer *should* assume that I have a reasonable expectation of privacy in a café, or walking home through an empty town centre late at night, giving rise to an obligation of confidence, can I have similar expectations in an art gallery, at the supermarket, or sitting in a carriage on the train?³⁵ What if I am walking to my car in the grounds of a hospital, or sitting in a public park? The point is, the simple fact that a claimant has been captured on film in a public place does not necessarily mean that he will not be able to satisfy the second of the three criteria set out in *Coco*.

(iii) The information has the necessary quality of confidence about it

Presume, for the sake of argument, the scenario is such that the reasonable person would import an obligation of confidence between the photographer and his subject. Before the claimant can succeed in his action, he must also demonstrate that the photograph in question has the necessary quality of confidence about it.³⁶ What is and what is not confidential information remains a matter of some conjecture, especially in relation to personal

fact that “they were taken solely for the purposes . . . of recording the character of the manifestation of the actual situation at the place in question [and of] the conduct of the participants”, the Commission considered that the taking of the photographs and their retention by the police for a limited period, did not amount to an interference with the applicant’s private life under art 8. Despite the unanimous opinion of the Commission in this case, Feldman writes that the approach adopted does at least make clear “that people carry privacy-related rights into the public domain, but permits them to be limited by reference to the nature of their activities and the related responsibilities of the state agencies”; David Feldman, “The Developing Scope of Article 8 of the European Convention on Human Rights” [1997] *EHRLR* 265, at 272.

³⁴ *Peck v United Kingdom*, application no. 44647/98, 28 January 2003.

³⁵ In this regard, it is of some interest that a recent application has been made to the European Court on behalf of the eldest daughter of Prince Ranier of Monaco, concerning the publication, in a number of German magazines, of photographs of her, her children and her companion, going about their daily lives; see *Von Hannover* (No 59320/00).

³⁶ Where the information is useless or of a trivial nature, the duty of confidence will not apply; *Attorney General v Guardian Newspapers (No.2)* [1990] 1 AC 109, at 282 *per* Lord Goff.

information.³⁷ In *Douglas v Hello!*, which concerned the publication of unauthorised photographs of the wedding of Michael Douglas to Catherine Zeta-Jones, counsel for the defence suggested that the photographs in issue did not really qualify as “information”. Sedley LJ, however, dismissed the argument as “plainly wrong”, continuing that “[t]he offending photographs convey the simple information: “This is what the wedding and the happy couple look like.””³⁸ As to the appropriate test to apply when determining whether certain information does indeed carry the mark of confidentiality, in *A v B and C*, Lord Woolf proffered that “usually the answer to the question whether there exists a private interest worthy of protection will be obvious.”³⁹ In the same decision he referred to the case of *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*, in which Gleeson CJ had indicated that “[t]he requirement that disclosure or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many respects a useful practical test of what is private.”⁴⁰ Both the comments of Lord Woolf and those of Gleeson CJ have received subsequent endorsement by Lord Phillips MR and the Court of Appeal in *Campbell v MGN Ltd*.⁴¹ That any given photograph may or may not satisfy either of these tests, and so attract the necessary badge of confidentiality, is not however the main problem here. The problem lies in the fact that, with the snap shot of the individual sitting in a restaurant or on a bus, arguably that individual has already chosen to make the relevant image (that is, the confidential information), freely accessible to all others who happen to come across him during the course of the day. In short, an image of his face cannot be of a confidential nature if he has chosen to make a public display of that face. The information under consideration is already in the public domain, and if it is already in the public domain then how can it be considered to be confidential?⁴² The initial reaction is to deny that the photograph of an individual in public can have anything in the way of confidentiality about it. However, again, a number of recent decisions begin to call this position into question.

³⁷ In *Duchess of Argyll v Duke of Argyll* [1967] Ch. 302, the plaintiff was able to prevent her husband from publishing information concerning her private life, personal affairs and private conduct in breach of an obligation of marital confidence.

³⁸ [2001] QB 967, at 1005. Similarly Keene LJ (at 1011) dismissed the point as “unsustainable”, observing that there was “no reason why the photographs inherently could not be the subject of a breach of confidence.” In *Hellewell* [1995] 1 WLR 804, at 807 Laws J commented that he had “no doubt that disclosure of a photograph may . . . be actionable as a breach of confidence.”

³⁹ [2002] *EMLR* 371, at 373.

⁴⁰ [2001] HCA 63, at para 42.

⁴¹ [2003] 2 WLR 80.

⁴² In *Attorney General v Guardian Newspapers (No.2)* [1990] 1 AC 109, at 282 Lord Goff observed that “the principle of confidentiality only applies to information to the extent that it is confidential. In particular, once it has entered what is usually referred to as the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential) then, as a general rule, the principle of confidentiality can have no application to it.”

Generally speaking, examples of situations in which images are taken in breach of confidence prove easy to conceptualise. We imagine the paparazzo, with his telephoto lens or his hidden camera, observing from an unseen platform, snapping images of the famous and infamous engaged in acts of a *private* and *personal* nature on *private* property.⁴³ One example might be the actress who chooses to sunbathe topless in the quiet seclusion of a private hotel;⁴⁴ another might be the television presenter photographed *in flagrante delicto* in a London brothel.⁴⁵ In both cases it is easy to comprehend how such photographs will be regarded as information carrying a necessary quality of confidentiality; in both cases injunctions were granted to prevent the publication of the images. Consider, however, the case of *A (A Child) v Newham LBC* in which photographs were taken on behalf of the Newham Borough Council of the claimant, a child who was attending a nursery run by the local authority.⁴⁶ These photographs were subsequently used, somewhat insensitively, to front brochures advertising council services such as their *Strategy for Children and any Young People who are Affected or Infected by HIV or AIDS*. The parents of the child complained. The court considered that the photographs had been reproduced in breach of confidence and awarded damages in the sum of £5,000.⁴⁷ But what is it about the image of a child playing in a local nursery that warrants the tag of having the necessary quality of confidence about it? Similarly, a photographer for the *Manchester Evening News* took photographs of Jodie, the survivor of the operation to separate her from her conjoined twin Mary. These photographs were taken, from a public footpath outside the hospital grounds, of the child when she was in the hospital car park. Jodie's parents, the Attards, had previously agreed a deal, allegedly worth between £350,000 and £500,000, with the *News of the World*, the *Mail on Sunday*, Granada TV and *Now Magazine* for their exclusive story, including images of Jodie, and so secured an injunction to prevent the publication of the surreptitiously taken photographs.⁴⁸ Again, this begs the question as to what actions 10-month old Jodie could have been engaged in that could be considered private or confidential in nature.

It might be suggested that the place in which both children were photographed constituted a significant factor in deciding that a breach of confidence was committed, in that the hospital car park and the local nursery represented quasi-private spaces. This, however, is not an entirely satisfactory explanation given that the courts have often indicated that an individual's actions are not necessarily of a private or personal nature simply

⁴³ For an interesting essay on the development of the paparazzi and their place within contemporary society see Carol Squiers, "Class Struggle: The Invention of Paparazzi Photography and the Death of Diana, Princess of Wales" in Carol Squiers (ed.), *OverExposed: Essays on Contemporary Photography* (The New Press, New York, 1999), at 269.

⁴⁴ *Amanda Holden v Express Newspapers* (2001) (unreported).

⁴⁵ *Theakston v MGN Ltd* [2002] WL 45379.

⁴⁶ [2002] WL 819950; see *The Guardian*, October 17 2001.

⁴⁷ The courts had previously indicated that damages may be awarded for breach of an equitable duty of confidentiality; see *Seager v Copydex* [1967] RPC 349.

⁴⁸ *The Guardian*, October 8 2001.

because they are not performed in public.⁴⁹ Alternatively the key factor could be the surreptitious nature of the photography, but again, this doesn't seem entirely convincing given the circumstances in the *Newham Borough Council* case – no paparazzo, no telephoto lenses, no hidden cameras. Rather, it appears to be the case that the judiciary seem willing to attribute a special significance to the photographic image and are prepared to intervene when that image is to be published and circulated contrary to the wishes of the subject.⁵⁰ In *Theakston* the court was willing to endorse the publication of information concerning the fact that the television presenter went to a brothel, as well as a full account of the activities engaged therein (on the basis that there was no obligation of confidentiality between a prostitute and client unless specifically requested) but drew the line at the publication of photographs of the same, and yet, wherein lies the essential difference between this verbal and visual information?⁵¹ In his decision in *Theakston* Ouseley J observed that “[t]he courts have consistently recognised that photographs can be particularly intrusive and have showed a high degree of willingness to prevent the publication of photographs, taken without the consent of the person photographed but which the photographer or someone else sought to exploit and publish.” He continued that the publication of the photographs would, in this case, “be particularly intrusive into the claimant’s own individual personality.”⁵²

⁴⁹ In *A v B and C* [2002] EMLR 371, at 382, Lord Woolf observed that “[a]n activity is not private simply because it is not done in public.” Similarly Gleeson CJ, in *Australian Broadcasting Corporation* [2001] HCA 63, commented that “[t]here is no bright line which can be drawn between what is private and what is not. Use of the term “public” is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford.”

⁵⁰ In this respect, one of the main reasons why Douglas and Zeta-Jones failed in their attempt to prevent the publication of the surreptitious photographs of their wedding was the fact that they had planned to publish similar photographs anyway; Keene LJ commented that “[i]n the present case, it is of considerable relevance that very widespread publicity was to be given in any event to the wedding very soon afterwards by way of photographs in “OK!” magazine;” see [2001] QB 967, at 1013.

⁵¹ My thanks to Dr George Pavlakos for pointing out to me that, regardless of the fact that the information conveyed is the same, the verbal and the visual differ in relation to the *intensity* of our interaction with, and knowledge of, that information.

⁵² [2002] WL 45379, my emphasis. Consider the following scenario: I go to a professional photographer to have a head and shoulders portrait of myself taken. On the way there something occurs to sully my mood and, as a result, the portrait shows me with a rather disinterested expression upon my face. Later I find out that the photographer was so taken with the photograph that he is to include it in the forthcoming national exhibition of his work (he rather pretentiously entitles it *Portrait of the Human Condition*). Leaving aside issues concerning breach of contract and copyright infringement, this would seem to be a rather clear case of a breach of confidentiality on the part of the photographer, as was the case in *Pollard*. This being the case, then the photograph (the information) would appear

The nature of this distinction between verbal and visual information was recently revisited by the Court of Appeal in *Campbell v MGN Ltd.*⁵³ The claimant, Naomi Campbell, had complained of stories that had been printed in the *Mirror* newspaper in February 2001, concerning her drug addiction and subsequent treatment, alleging that reporting the details of her treatment involved a breach of confidence on the part of the Mirror Newspaper Group. The newspaper articles were accompanied by photographs that depicted Campbell leaving one of her meetings at Narcotics Anonymous, however the photographs were not drawn within the ambit of the argument as to the breach of confidence.⁵⁴ At first instance Morland J held in favour of Campbell. He considered that reporting the details of her drug treatment amounted to a breach of confidence and rejected the respondents' argument

to have the necessary quality of confidentiality. Now, consider further: the reason why I was so surly and disaffected upon arriving at the photographers was because, on my way there, travelling by bus, the passenger sitting in front of me, just before getting off the bus, turned around and took my photograph without my permission. After getting off the bus he disappears around a corner leaving me with nothing but a bad mood and a surly expression. It later transpires that he too was a photographer of some national repute, and in his latest exhibition (opening coincidentally upon the same day as my portrait photographer's exhibition) he too has included the photograph of me (he rather unimaginatively calls his piece *Disinterested man on the bus*). Somewhat amazingly, this second image is almost identical to the first. Does this second, identical image lack the necessary quality of confidence in a manner in which the first photograph does not? If so, why is this the case?

⁵³ [2003] 2 WLR 80.

⁵⁴ Instead, it was argued that their publication amounted to a breach of the respondents' obligations under the *Data Protection Act* 1998 in that the photograph represented data of a sensitive and personal nature. Accepting that the photograph qualified as "sensitive personal data" in that it conveyed information as to Campbell's "physical or mental health or condition", Morland J ruled out the possibility that the defendants were exempt from liability under s.32 of the 1998 Act on the grounds that the wording of the section dealt only with "pre-publication processing." That being the case he considered that the defendant had acted in contravention of the First Data Protection Principle under s 4(4) in failing to deal with the data either fairly (in taking the photographs in a clandestine manner) or lawfully (in obtaining the details of her attendance at the meetings in breach of confidence). Moreover, he considered that the defendant had failed to meet any of the conditions set out in Sch 2 or Sch 3 of the 1998 Act, or to satisfy the requirements of para 3(1) of the *Data Protection (Processing of Sensitive Personal Data) Order* 2000 (SI 2000/417) in that the disclosure of the relevant details were not, in his opinion "in the substantial public interest." The Court of Appeal, in overturning this aspect of Morland J's decision, focused upon whether or not the s 32 exemption only applied up to the point of publication. Noting that "it would seem totally illogical to exempt the data controller from the obligation, prior to publication . . . but to leave him exposed to a claim for compensation . . . the moment the data had been published", the Court considered that the only meaning that would make sense would be to allow that s 32 applied "both before and after publication." Proceeding upon this basis, and considering the facts of the case, Lord Phillips held that, given that the details under consideration were "part of a journalistic package that it was reasonable to publish in the public interest", the defendant was entitled to rely upon the exemption within s 32 and so had not reproduced the photograph in breach of the obligations imposed under the 1998 Act; paras 120, 121, 137.

that they were nevertheless free to publish the information on the grounds that they were exercising their right to freedom of expression in circumstances in which there was a clear public interest. Observing that the Human Rights Act 1998 was not to be used to “whittle away to any extent rights to respect for private life under Article 8 of the Convention”, Morland J concluded that “[a]lthough many aspects of the private lives of celebrities and public figures will inevitably enter the public domain, in my judgment it does not follow that even with self-publicists every aspect and detail of their private lives are legitimate quarry for the journalist. They are entitled to some space of privacy.”⁵⁵ Upon appeal, the decision was reversed.

In the Court of Appeal, although the photographs were not incorporated within the breach of confidence claim, there was some obiter discussion of the place of the public photograph within the action in general. Noting a distinction between infringement of privacy “as a species of breach of confidence” and infringement of privacy “as a free-standing tort” Lord Phillips MR observed that “[t]he photographs published by the Mirror were of a street scene. They did not convey any information that was confidential.” The confidential information under consideration was that conveyed within the articles and the captions accompanying the photographs; the photographs in themselves added nothing, as they were merely supplementary to the written information.⁵⁶ He continued with the speculation that had Campbell sought to rely upon the photographs alone as the foundation of her action this would have involved her having to resort “to the free-standing tort of breach of privacy to make out her case.” They may have been “invasive” but, in Lord Phillips’ opinion, the photographs “did not convey confidential information.”⁵⁷ The fact that these photographs were of a public scene, a “street scene”, seems to have been influential in guiding these comments and as such, his observations appear to dispose of the possibility of mounting an action for breach of confidence when the information under consideration involves an image taken of any given individual in an obviously public space.

Had Lord Phillips concluded his observations upon street photography at that point, his obiter comments might have operated to retard the trend that seems to have developed throughout the decisions discussed above. However, later in his judgment, in deciding as to whether the written information in this case had the necessary quality of confidence about it, and, while adopting the same test as Morland J but rejecting his conclusions, Lord Phillips doubted whether “a reasonable person of ordinary sensibilities, on reading that Miss Campbell was a drug addict, would find it highly offensive . . . that the Mirror also disclosed that she was attending meetings of Narcotics

⁵⁵ Paras 54–71.

⁵⁶ Lord Phillips, at para 34, commented in the following terms: “[W]e consider that the publication of the photographs adds little to Miss Campbell’s case. They illustrate and draw attention to the information that she was receiving therapy from Narcotics Anonymous. Insofar as publication of that information constituted a breach of confidence, the illustrations constituted an aspect of that breach that had potential relevance to the assessment of damages. Insofar as publication of that information was not a breach of duty, that position was not altered by the publication of the accompanying photographs.”

⁵⁷ *Ibid* at para 33.

Anonymous.”⁵⁸ He continued that “[t]he reader might have found it offensive that what were obviously covert photographs had been taken of her, but that, of itself, is not relied upon as a ground of legal complaint.”⁵⁹ The concession is an interesting one. Again, as was the case with the decision of Ouseley J in *Theakston*, Lord Phillips leaves open the possibility that the verbal information that Campbell was a drug addict leaving a particular therapy group, and the visual record of that information (the photograph), could be treated differently under an action for breach of confidence. The acceptance that a reasonable person might make such a distinction between the written and visual information (especially when captured in a covert manner) is an important admission in this regard. Moreover, it is an admission that colours what might fruitfully be taken from Lord Phillips’ earlier comments in relation to the fact that the photograph was of a public scene.⁶⁰ The Court of Appeal conceded that “the fact that an individual has achieved prominence on the public stage does not mean that his private life can be laid bare by the media”, but set out that, underpinning their decision, and its accommodation of Article 8 and Article 10 rights, was the principle that “where a public figure chooses to make untrue statements about his or her private life, the press will normally be entitled to put the record straight.”⁶¹ It is not just the fact that any individual had been photographed in public; rather, of significance was that it was Naomi Campbell, the self-publicising supermodel, who was photographed in the street. The concession that Lord Phillips admits, in relation to the reasonable reader’s potential attitude to the publication of covert street photography, as well as the overt rhetoric of Ouseley J in *Theakston*, when married to the individual decisions concerning Jodie and *Child A*, arguably betray an emergent judicial attitude to the public dissemination of a private individual’s image that signals potentially serious consequences for the work of any photographer operating within the public sphere. Moreover, the development is one that will arguably derive additional support from the attitude and decision of the European Court in *Peck*.

CONCLUSION

This article does not suggest that we have reached a point, similar to that in France and other legal jurisdictions, where private individuals do have a general right to control the dissemination of their image, even though they

⁵⁸ Lord Phillips commented as follows (para 53): “Given that it was legitimate for the appellants to publish the fact that Miss Campbell was a drug addict and that she was receiving treatment, it does not seem to us that it was particularly significant to add the fact that the treatment consisted of attendance at meetings of Narcotics Anonymous.”

⁵⁹ *Ibid*, at para 54.

⁶⁰ It is of interest to recall that the *Mirror* in reproducing the photographs had taken the step of pixellating the faces of those other individuals leaving the meeting at the same time as Campbell; para 32 *ibid*.

⁶¹ *Ibid*, at paras 41 and 43. This aspect of the decision accords with that part of the general guidance set out by Lord Woolf in *A v B and C* pertaining to the diminished nature of the right of privacy that a public figure can expect to enjoy as a result of his public profile.

have been captured on film in public.⁶² In Delahaye's work, he refers to the fact that he "stole" his metro photographs since it was against the law to take them – it was "forbidden."⁶³ Should he engage in the same experiment on the London underground it is unclear as to whether his actions would be similarly "forbidden". All that has been suggested here is that, in the light of recent developments regarding the law of confidence, it is possible to conceive of an individual making use of an action in confidence to prevent the publication of such images, *especially* when taken in the necessarily covert manner in which Delahaye and others operate.⁶⁴ Some might object that the courts would be slow to develop the common law action in such a fashion, but, given the special significance that the courts appear willing to attribute to the photographic image and its relationship with "the integrity of [a] claimant's personality", the argument remains to be made. Of late, drawing clear distinctions between that which is confidential and that which is non-confidential has become more problematic; the lines between private and public information, spaces and actions, stand revealed as chimerical, elastic, unknowable.⁶⁵ In *Douglas Keene* LJ proffered the observation that "breach of confidence . . . is a developing area of the law, the boundaries of which are not immutable but may change to reflect changes in society, technology and business practice."⁶⁶ Similarly, in *Campbell* Lord Phillips

⁶² For a recent review of those jurisdictions within which such rights subsist, see Michael Henry (ed), *International Privacy, Publicity and Personality Laws*, (Butterworths, London, 2001).

⁶³ Henry notes that the right to protection of one's likeness under French law involves the right "to prohibit the production and distribution of an individual's likeness without the subject's consent". Nevertheless there are some judicially developed exceptions to this right: (1) When the image is incidental and was taken in a public place; (2) When it concerns a subject of a current event and is published soon after; (3) When it concerns the reporting of a trial; (4) When it concerns the likeness of a public figure in his public life. *Ibid*, at 152–53.

⁶⁴ In *Hellewell* [1995] 1 WLR 804, at 807 Laws J observed that "[i]f someone with a telephoto lens were to take from a distance and with no authority a picture of another engaged in some private act, his subsequent disclosure of the photograph would, in my judgment, as surely amount to a breach of confidence as if he had found or stolen a letter or diary in which the act was recounted and proceeded to publish it. In such a case, the law would protect what might reasonably be called a right of privacy, although the name accorded to the cause of action would be breach of confidence." Lord Woolf, in *R v Loveridge* (2001) EWCA Crim 973, commented that within the ambit of the right to respect for a private life "secret filming in a place to which the public has free access can amount to an infringement even where there is no private element to the events filmed. Secret filming is considered objectionable, because it is not open to those who are the subject of the filming to take any action to prevent it: *BSC, ex p BBC* [2000] 3 WLR 1327." In his earlier judgment in *ex p BBC*, at 1337–38, having observed that "we are in an area involving open textured concepts. An interference with privacy is not even like an elephant, of which it can be said it is at least easy to recognize if not define. The meaning of privacy can be influenced by the context in which it appears", Lord Woolf continued that "clandestine filming is objectionable. The fact that it is secret prevents those who are being filmed from taking any action to prevent what they are doing being filmed."

⁶⁵ See for example the comments of Gleeson CJ in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* *supra* n 40.

⁶⁶ [2001] QB 967, at 1011.

observed that “[t]he courts are in the process of identifying, on a case by case basis, the principles by which the law of confidentiality must accommodate [our] Article 8 and the Article 10 rights.”⁶⁷ What is at issue here is the production of a newly modelled breach of confidence action capable of preventing indiscriminate exchange and display of public images captured in public spaces but which also appropriately balances respect for privacy and freedom of expression.

Consider, for example, recent work by Beat Strueli who takes urban portraits, with the use of a telephoto lens, rendering background details blurred and abstract, and capturing unknowing subjects engaged in moments of daily routine, but moments which betray often dramatic qualities of personal and private introspection.⁶⁸ Similarly, in Philip-Lorca di Corcia’s series, *Heads*, the photographer introduces theatrical lighting effects into photographs that are triggered by the movement of unwary passers-by tripping motion sensors linked to both camera and lights positioned some distance away.⁶⁹ It is no longer inconceivable that the courts, if asked, would step in to prevent the unauthorised publication of such work, or indeed the work of any one of a number of other photographers working in a clandestine manner on the street. That the courts could, in theory, act to prevent such publication is one issue for consideration. Whether or not the courts *should* act to prevent such publication is another matter; there are clearly important social, cultural and legal considerations to weigh in the balance.

In the first place, adopting legal strategies that begin to function as *de facto* image rights represents a serious threat to the very existence of street photography, be it for the art gallery, for commercial publication or for photojournalism as a genre. As Geoffrey Batchen has established, the art of surveillance photography (that of “seeing without being seen”) “has been a central tenet of the practice of photography throughout its history;” its influence and importance can be traced back in time through the work of numerous seminal figures such as Lazlo Moholy-Nagy, Bill Brandt, Erich Salomon and Walker Evans, right back to the very inception of the tradition, incorporating many of the images captured by the pioneer of British photography William Henry Fox Talbot.⁷⁰ Di Corcia, in an earlier series of photographs, redistributed grant money that he had received to rent-boys, drug addicts and drifters inhabiting the Santa Monica Boulevard in Los Angeles in exchange for the opportunity to photograph them. Such an

⁶⁷ [2003] 2 WLR 80, at para 43.

⁶⁸ Examples of Strueli’s work, as well as those of a wide range of other street photographers, can be found in *Open City: Street Photographs since 1950* (MOMA Oxford/Hatje Cantz Publishers, 2001).

⁶⁹ Philip-Lorca di Corcia, *heads*, (PaceWidenstein/Steidl, New York, 2001).

⁷⁰ Batchen describes how Fox Talbot was “in the habit of leaving his small camera obscure lying around the grounds of his estate to allow for the long exposure times necessary for his photogenic drawings. This detached prosthesis of his own eye would record the outlines of his house, but also anything else that might venture into its field of vision and hang around long enough.” He also recounts that Fox Talbot’s wife Constance referred to his camera as a “mousetrap”, a nickname that referred to both its small size as well as its hidden, and dangerous capacity for capturing subjects unawares. See Geoffrey Batchen, “Guilty Pleasures”, in Thomas Y Levin, Ursula Frohne, Peter Weibel (eds), *Rhetorics of Surveillance from Bentham to Big Brother* (MIT Press, 2002).

approach would no doubt become the norm rather than the exception. Conceding the prospect that photographers necessarily negotiate with those they photograph in public spaces (either before or after the fact of the photograph) would not only fundamentally shift the nature of the relationship between photographer and subject, but would introduce unwarranted and unwanted aspects of control and censure into a field of photography that seeks to address questions of the spontaneous, the real and the true. It may be the case that, in relation to the press photographer at least, the consequences of a more robust action for breach of confidence would be ameliorated by the special weight that the courts attribute to the importance of maintaining a free and democratic press⁷¹ but even this has its limitations when considering the interests of the private individual; moreover, there is no guarantee that similar considerations will necessarily be extended to the creators of culturally significant works of art.

More worrying, however, is the clear danger of twisting the traditional action of breach of confidence out of all recognition. In this regard the *Manchester Evening News* case suggests a radical break with the function that confidentiality serves in relation to the dissemination of personal and private information. In his exploration of privacy and publicity rights, Peter Jaffey recently commented upon the importance of drawing a distinction between the right to prevent harm and rights of ownership, suggesting that claims pertaining to breach of confidence can take either form.⁷² When dealing with commercially exploitable trade secrets, confidentiality operates in much the same manner as any other intellectual property right, and the rights of the confider are akin to ownership. By contrast, when considering situations involving the disclosure of sensitive information, confidentiality functions to protect against “embarrassment, self-consciousness or humiliation;” in appropriate circumstances, it operates as a “proto-tort of privacy” designed to protect against harm to the claimant.⁷³ This latter form of confidence does not and should not serve any proprietary interests. Simon Brown LJ made this point explicitly in *ex p Source Informatics*, which concerned the information that customers provided pharmacists when retrieving their prescriptions, in stressing the fact that in this area the concern of the law:

[I]s to protect the confider’s personal privacy. That and that alone is the right at issue . . . The patient has no proprietary claim to the prescription form or to the information it contains. Of course he can bestow or withhold his custom as

⁷¹ See for example the comments of Lord Woolf in *A v B and C* [2002] *EMLR* 371, at 381: “The fact that if the injunction is granted it will interfere with the freedom of expression of others and in particular the freedom of the press is a matter of particular importance . . . Any interference with the press has to be justified because it inevitably has some effect on the ability of the press to perform its role in society. This is the position irrespective of whether a particular publication is desirable in the public interest. The existence of a free press is in itself desirable and so any interference with it has to be justified . . . The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest.”

⁷² Peter Jaffey, “Privacy, Publicity Rights and Merchandising: Hello!” in E Barendt & A Firth (eds) *Yearbook of Copyright and Media Law*, Vol. VI (OUP, 2002) 21.

⁷³ *Ibid.*, at 23-24.

he pleases . . . [b]ut that gives the patient no property in the information and no right to control its use provided only and always that his privacy is not put at risk.⁷⁴

Jaffey comments that “[d]amage to the reputation of an individual (or intrusion on his privacy) is not normally understood to be a form of financial or economic loss,”⁷⁵ and yet this is exactly what seemed to influence the approach of the court in the *Manchester Evening News* case. The fact that Jodie’s parents, the Attards, had secured a six-figure publication deal for their story including exclusive pictures of their daughter, certainly appears to have influenced the decision. This is not about the prevention of harm and the protection of the child’s privacy, so much as the first steps upon the road to establishing a nascent *right of publicity*, that is, a general right that operates to protect the commercial exploitation of one’s image, as an outgrowth of a newly modelled common law action that is primarily concerned with securing certain aspects of the private life of the individual.⁷⁶ Such a development is to be strongly resisted; as Jaffey observes: “[I]t would be anomalous if the right of privacy in the Convention encompassed a right of publicity or merchandising right.”⁷⁷ Delahaye in his introduction to *L’Autre* remarks that “our image, this worthless alias of ourselves, is everywhere without us knowing it” and, given this reality, he asks: “How and why can it be said to belong to us?” The point however is not so much how our image can be said to belong to us; legally, it demonstrably can. Rather, the question should be, can we tolerate the realities of a world in which ownership, control and circulation of the public image resides in the hands of the private individual?

⁷⁴ [2001] QB 424, at 440.

⁷⁵ *Supra* n 72 at 25.

⁷⁶ Clear parallels can be drawn between these embryonic developments within the UK and the American experience in which rights of publicity developed as an outgrowth of the right to privacy. See for example: Melville B Nimmer, “The Right of Publicity” (1954) *Law & Contemp. Probs* 203; William L Prosser, “Privacy” (1960) *Cal.LR* 383; Harold R Gordon, “Right of Property in Name, Likeness, Personality and History” (1960) *NwULR* 553; Oliver R. Goodenough, “The Price of Fame: the Development of the Right of Publicity in the United States” (Parts 1 and 2) [1992] *EIPR* 55 and 90; Michael Madow, “Private Ownership of Public Image: Popular Culture and Publicity Rights” (1993) *Cal.LR* 127; Oliver R. Goodenough, *Privacy and Publicity: Society, Doctrine and the Development of the Law* (Intellectual Property Institute, 1996). An interesting point of difference between the historical development of the law within the US and the way in which these nascent publicity rights appear to be emerging within the UK is that, while the American tradition represented a response to the inability of the public celebrity to restrict the unauthorized commercial exploitation of his or her image and personality, within the UK, such publicity rights would, ironically, primarily function to protect the economic interests of the *private* individual. In this regard it is interesting to contrast the attitude of the Court of Appeal in *Douglas v Hello!* where it was willing, on the balance of convenience, to allow publication of the pictures and leave the claimants to pursue appropriate damages (or an account of profits) from the defendants should their action succeed at the trial stage, with that of the court in the *Manchester Evening News* decision, which ostensibly addressed the same fundamental concern of safeguarding the commercially lucrative image.

⁷⁷ *Supra* n 72, at 27.

DISQUALIFICATION OF COMPANY DIRECTORS IN KENYA

Dr Kiarie Mwaura, Lecturer in Law, Queen's University Belfast¹

INTRODUCTION

Disqualification of directors protects the public by placing a prohibition on a miscreant director being involved, for a specific period, in the management of companies.² In addition, disqualification orders serve as a deterrent to those who might be tempted to engage in fraudulent activities.³ Therefore, where a director breaches his obligations and, as a result, occasions loss to creditors, the public interest requires that the misconduct be punished by disqualification.⁴

Given that the State has the responsibility of providing an unbiased commercial environment, which ensures that the formation of companies takes place smoothly and that the public is protected from miscreant directors, there is a need to balance these conflicting interests for the sake of a healthy economy. Although strict regulations in relation to the disqualification of directors may ensure that unfit directors do not serve on boards, it is undoubtedly the case that over-regulation or stringent disqualification proceedings may result in fewer people being interested in serving as directors. This would in turn adversely affect the economy, as few companies would be able to attract appropriate and competent directors.

Although shareholders generally decide who sits on a board of a company, some exceptions regarding the people they can choose are imposed by Parliament. The Companies Act⁵ (the "Act") contains some provisions that prescribe those who are able to act as directors.⁶ As shareholders are not always able to prosecute errant directors, disqualification provisions supplement other provisions that seek to protect creditors and other stakeholders.⁷

¹ I am grateful to Professor Andrew Keay, Peter Walton and David Capper for comments on an earlier draft of this article. Responsibility for any errors or omissions remains with the author.

² S. Griffin, *Personal Liability and Disqualification of Company Directors*, (Hart, 1999) p 131.

³ *R v Kazmi* (1984) 7 Cr App Rep 115, at 116.

⁴ *Per Vinelott J in Re Stanford Services* [1987] BCLC 607, at 620.

⁵ Cap 486, Laws of Kenya.

⁶ The Act makes provisions for share qualifications of directors (s 183), minimum age of appointment (21 years, s 186), disqualification of undischarged bankrupts (s 188), restraint on fraudulent persons from managing companies (s 189), and disqualification of persons of unsound mind and absence from meetings of directors for six months (Table A, art 88).

⁷ In view of the difficulties encountered by minority shareholders in pursuit of errant directors, directors are unlikely to be accountable for their defaults unless the board changes hands or the company goes into liquidation. See Hicks, "Disqualification of Directors-Forty Years On" [1988] JBL 27, at 28.

Despite the existing requirements for the appointment of directors⁸ and the disqualification provisions, companies have been run, especially during the last regime of the KANU Government, by incompetent, negligent, and fraudulent directors who have contributed to the insolvency of other companies.⁹ Some 45 parastatals and other companies in which the Government has shares have been placed in receivership since 1980. Some of the directors who were responsible for the collapse of such companies were not only been appointed to other directorships, they were also appointed to the Cabinet.¹⁰

For instance, despite the public outcry and prosecution¹¹ that followed the investigation of the former managing director of Kenya Posts and Telecommunications (KPTC), Mr Kipng'eno Arap Ng'eny, for masterminding the loss incurred by the corporation, he was retired in 1993 and appointed to head the Kerio Valley Development Authority.¹² According to the 1990/91 Auditor General's Report on the Kenya Posts and Telecommunication, the managing director was responsible for a number of fraudulent dealings. First, in 1985, the corporation lost 9 million Kenyan Shillings (£90,000) after making payments to a firm of advocates to wind up the former Kenya External Telecommunications Corporations (KETC). The payment was made despite the fact that KETC was in the process of being merged with KPTC.¹³ The winding-up process was rendered a sham when the two companies merged. Secondly, by 30th June 1990, the corporation had failed to remit to various public authorities statutory deductions from staff salaries amounting to 176.5 million Kenyan Shillings (£1,765,000).¹⁴

Despite several recommendations made by the Parliamentary Public Investment Committee that the people it adversely named should be charged in court and barred from holding public offices, such individuals continued to serve in high positions both in the government and the private sector.¹⁵ As a result of such irregularity, the Public Investment Committee proposed that legislation should be enacted to enable Parliament to vet all nominees for the leadership of parastatals.¹⁶ The Committee in its Ninth Report highlighted the weaknesses of the present regulatory framework by citing the example of the former chief executive of the Nyayo Tea Zone Development Corporation, Mr Isaiah Cheluget, who had failed to pay money owed to the corporation despite numerous attempts by Parliament to recover the money from him.

⁸ According to ss 183 (1) and 186 of the Act, directors must be natural persons, they must have share qualifications, and minors may not be appointed as directors.

⁹ "45 parastatals, Govt firms in receivership" *East African Standard*, 12 July 2001.

¹⁰ *Ibid.*

¹¹ He was charged with fraud on July 17, 2000. See "Drama as Ng'eny is Finally Charged" *East African Standard*, 18 July 2000.

¹² His prosecution followed the recommendations made by the Parliamentary Public Investments Committee. See "Minister Quizzed on Sh 250 Million" *Daily Nation*, 1 June 2000.

¹³ K. Kibwana *et al*, *The Anatomy of Corruption in Kenya: Legal, Political and Social-Economic Perspectives* (1996) p 73.

¹⁴ *Ibid.*

¹⁵ Leakey, "Wako Grilled by PIC", *East African Standard*, 9 March 2000.

¹⁶ "New 'List of Shame' Tabled in Parliament", *East African Standard*, 28 July 2000.

Despite this default he was subsequently appointed a commissioner with the Electoral Commission of Kenya.¹⁷ As the *Daily Nation* notes:

“The tragedy in Kenya is that those who have mismanaged the Government, the Development Finance Institutions, and even multinational corporations are those who continue to circulate in and out of Government as ministers, assistant ministers, advisers and so on.”¹⁸

Such cases have done much to reduce the confidence of investors. In fact, a survey conducted by the author in 2001 revealed that disqualification orders in Kenya are extremely rare.¹⁹ It is against this backdrop that this article examines whether the disqualification restrictions provided for by the Act are adequate to protect the interests of the corporate entity, creditors, and other stakeholders. The article also assesses measures that can be adopted by the new Kenyan government to prevent miscreant individuals from serving as directors.

Grounds For Disqualification

In Kenya, a director must cease to be a director if he fails to take up any prescribed shares within two months of his appointment.²⁰ A director is automatically disqualified if he becomes an undischarged bankrupt or if he makes any arrangement or composition with his creditors generally.²¹ Other grounds, which necessitate disqualification of directors, include whether he is prohibited from being a director by reason of any order made under section 189. This section restrains fraudulent persons from managing companies. Further grounds for disqualification contained in the Act include: where a director is of unsound mind;²² where he resigns his office by notice in writing to the company;²³ or he is absent without permission for more than six months from meetings of the directors held during that period.²⁴

Bankrupts

Persons who are undischarged bankrupts are barred from acting as directors under the Act. The Act provides:

“If any person who has been declared bankrupt or insolvent by a competent court in Kenya or elsewhere and has not received his discharge acts as a director of, or directly or indirectly takes part in or is concerned in the management of, any company except with the leave of the court, he shall be liable

¹⁷ “Probe M’Mukindia, Kiplagat-PIC”, *East African Standard*, 29 July 2000.

¹⁸ Nyong’o, “How Bad Governance Strangles Business”, *Daily Nation*, 10 June 2001.

¹⁹ Mwaura, “Regulation of Directors in Kenya: An Empirical Study” [2002] 13 *International Company and Commercial Law Review* 465, at 478.

²⁰ The Act, s 183.

²¹ *Ibid*, s 188.

²² Article 88 (d), Table A.

²³ *Ibid*, art 88 (e).

²⁴ *Ibid*, art 88 (f).

to imprisonment for a term not exceeding two years or to a fine not exceeding ten thousand shillings or both.”²⁵

As people who have failed to manage their finances, bankrupts are automatically disqualified from taking part in the management of companies. As such, their disqualification is not dependent upon wrongdoing, negligence, or the making of a disqualification order by the court. However, a bankrupt may apply to court for leave to act as a director.²⁶ For leave to be granted, the bankrupt must show that he or she may be safely involved in the management of companies.²⁷

Acting as a director while disqualified results in criminal penalties and personal liability²⁸ for the debts and other liabilities of any company in whose management a disqualified person was involved.²⁹ The personal liability extends to any person involved in the management of the company who knowingly acts on the instructions of a disqualified person.³⁰

In the UK, the Company Directors Disqualification Act 1986³¹ (hereinafter referred to as “CDDA”) prohibits individuals who are undischarged bankrupts from acting as directors.³² A director can also be disqualified on grounds of unfitness for entrusting the management of a company to someone known to be bankrupt or disqualified.³³ Apart from the automatic disqualification of undischarged bankrupts, all other grounds for disqualification require a court order specifying the duration of disqualification.³⁴

Disqualifying bankrupts from managing companies is helpful as it prevents them from starting a business and raising credit using a limited liability company.³⁵

²⁵ The Act, s 188 (1).

²⁶ *Ibid.*

²⁷ S 188(2).

²⁸ S 188(1).

²⁹ S 323(1).

³⁰ The Act states “any persons who were knowingly parties to the carrying on of the business in the manner aforesaid shall be personally liable.” See s 323 (1) (a) *ibid.*

³¹ The UK government introduced the Act to curb abusive practices as it was adopting a free market philosophy. The new laws were meant to punish miscreant directors and thereby deter misconduct. They were also aimed at facilitating screening so as to make it difficult for unsuitable individuals to run companies and in turn protect the public. Between 1998 and 1999, 1,284 disqualification orders were made under s 6, 20 under s 8, and 178 under the other provisions of the Act. See B.R. Cheffins, *Company Law, Theory, Structure, and Operation* (1997) p 551; S. Mayson *et al*, *Company Law* (17th ed, 2000) p 720.

³² Ss 2 & 11.

³³ *Re Moorgate Metals Ltd* [1995] 1 BCLC 503.

³⁴ The Insolvency Bill 1985 unsuccessfully attempted to introduce automatic disqualification where a director has been involved in more than one insolvent company. See Parry, “Personal Insolvency as a Restriction on Involvement in Company Management” [1999] *Insolvency Lawyer* 199, at 200

³⁵ Hicks, *supra* n 6, at 30.

Management of the Company

The Act requires the court, in its discretion,³⁶ to disqualify a person who is guilty of an offence as a director or promoter of a company, or is in any way, whether directly or indirectly, concerned or participating in the management of a company. The Act provides thus:

“Where a person is convicted of any offence in connection with the promotion, formation or management of a company; or in the course of a winding up a company it appears that a person has been guilty of any offence for which he is liable (whether he has been convicted or not under section 323); or has otherwise been guilty, while an officer of the company, of any fraud in relation to the company or of any breach of his duty to the company, the court may make an order that the person shall not, without leave of the court, be a director of or in any way, whether directly or indirectly, be concerned or take part in the management of the company for such period not exceeding five years as may be specified in the order.”³⁷

The phrase “in connection with management” does not only refer to offences involving misconduct in the company’s affairs, but includes the entire purpose for which the company exists.³⁸

The provision is somewhat vague, as it is possible for a wide range of people, including employees in the lower cadre of the company, to be involved in indirect management. This makes it difficult for a disqualified person to ascertain what role he might assume once a company employs him.³⁹ For instance, since the concept of management involves policy-making and decision-making activities which affect the company as a whole, or a substantial part of it, and which may affect its financial standing,⁴⁰ a management consultant advising on financial management may be said to be concerned in the management of the company for the purposes of disqualification.⁴¹

³⁶ Disqualification arising from such grounds is automatic in some jurisdictions, such as Australia. As such, a director, when applying for leave to act, bears the burden of proving why the order should not be made. For a detailed analysis on automatic disqualification see Australia’s Corporations Act 2001, s 206B; Hicks, “Making and Resisting Disqualification Orders” (1987) 8 *Co Law* 243.

³⁷ S 189(1).

³⁸ *R v Austen* (1985) 7 Cr App R 214. Since it is difficult to formulate a rule, which would adequately cover all wrongdoing related to the company, Drake argues that disqualification on such grounds should be reserved for the Articles. See Drake, “Disqualification of Directors – “The Red Card” [1989] *JBL* 474, at 477.

³⁹ *In Re Altim Pty Ltd* [1968] 2 NSWLR 762 the applicant wanted leave of the court to be in charge of the New South Wales branch of a company making window frames. This was assumed to be a function of the management and the court refused to grant leave to take the job.

⁴⁰ *Commissioner for Corporate Affairs v Bracht* [1989] VR 821.

⁴¹ *R v Campbell* [1984] BCLC 83.

As a result, full disqualification might not only remove a person from the board⁴² but also make him unemployable.⁴³ Although a person may apply for a declaration or for leave to act, there can be no doubt that the slow and expensive judicial process would adversely affect directors who have been automatically disqualified.⁴⁴ Therefore such a broad disqualification is clearly inappropriate if it occurs automatically.⁴⁵

Fraud

The Act provides for disqualification as a result of fraud. A court may disqualify a person from taking part in the management of a company if a person is “convicted of any offence in connection with the promotion, formation or management of a company.”⁴⁶ A person can also be disqualified if, in the course of winding up of a company, it appears that he, while an officer of the company, has been guilty “of any fraud in relation to the company or of any breach of his duty to the company.”⁴⁷

In contrast to the Act, the Ghanaian Companies Code provides for disqualification on the basis of conviction of any offence (not necessarily relating to a company) involving fraud or dishonesty. The conviction need not be in Ghana. Similarly, Singapore, in 1967, adopted the Australian version of disqualification for criminal offences⁴⁸ to cover not only offences in connection with the promotion, formation or management of corporations, but also offences involving fraud or dishonesty not connected with the company, where the maximum penalty is more than three months imprisonment, whether imposed or not.

Sufficient grounds, rather than mere allegation of fraud, need to be established in order to prove fraud under the Act. The onerous duty of proving fraud was illustrated in the case of *Kassam Ebrahim v Tair*⁴⁹ where the Official Receiver applied under section 196 of Uganda’s Companies Ordinance⁵⁰ for the public examination of company directors, Kassam Ebrahim and Mohamedali Damji. The company, Kassam Ibrahim & Co Ltd, was incorporated for the purposes of taking over a business formerly carried on in partnership involving the two directors. The Official Liquidator alleged that the partnership was insolvent at the time that the company was formed. The liquidator therefore sought to have a public examination of the

⁴² The Ghanaian Code imposes specific restrictions to prevent errant directors from being concerned in company management even when he is not a director. See s 186 (1) (b) Ghana’s Companies Code.

⁴³ Where disqualification does not disqualify a director from serving a corporation as an employee, it cannot be said to have the effect of taking their livelihood away. See Leigh, “Disqualification Orders in Company and Insolvency Law” (1986) 7 *Co Law* 179, at 183.

⁴⁴ Automatic disqualification may be justified in cases of personal insolvency and criminal offences. See Hicks, *supra* n 6, at 41.

⁴⁵ Automatic disqualification was rejected in England and Singapore. See Hicks, *ibid* n 6, at 41.

⁴⁶ S 189(1).

⁴⁷ S 189(1)(b)(ii).

⁴⁸ Singapore Companies Act, s 154.

⁴⁹ [1935] EACA 51.

⁵⁰ Cap 105.

directors on the basis that the incorporation was fraudulent on the creditors of the company. He also sought to recover two sums of money that were said to have been received by the directors from the company, and to hold them personally liable for the debts of the company. Finding that the Official Receiver had failed to prove fraud, Law CJ followed the judgement of Lord Halsbury in *Ex parte Barnes*,⁵¹ which provided that:

“In order to give the Court jurisdiction to make such an order, there must be a finding of fraud, and a finding of fraud against an individual who is thereby made subject to being summoned before the court. . . I do not mean that the particular word ‘fraud’ must be used, but that such facts must be found by the Official Receiver as suggests fraud against the person incriminated: and that there must be an individual person incriminated: it is not enough that there is a general finding that fraud must have existed somewhere, which would mean nothing.”⁵²

One reason persuading Law CJ that fraud had not been proved was that the money received by Kassim Ebrahim from the company as part of the purchase price of his interest in the partnership business did not raise any suspicion. Moreover, the Receiver did not show when the sum was received, what the capital of the company was, and how the formation of the company constituted fraud on the creditors.⁵³

As a result of the onerous burden of proving fraud in Kenya, disqualification, only on grounds of fraud when a company is a going concern, might be insufficient to ensure commercial propriety and foster an appropriate business environment. This reason led the UK’s Cork Committee to favour disqualification based on the wrongful acts of directors rather than fraud.⁵⁴ Thus section 214 of the Insolvency Act 1986 followed as a result of the recommendations of the Committee. A director therefore becomes liable for the wrongful trading of the company where the company has gone into insolvent liquidation and at some time before the commencement of the winding up of the company the director knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation. A liquidator may apply to the court for a

⁵¹ [1896] AC 146.

⁵² *Ibid*, at 152.

⁵³ [1935] EACA 51, at 57.

⁵⁴ S 188 of the UK’s Companies Act 1948 gave courts the power to disqualify a director following conviction for fraud in the operation of a company. This was widened by the Companies Act 1976 s 28(1), which allowed disqualification for persistent default. S 3 of the Companies Act 1981 extended the provision further by empowering the making of disqualification orders to liquidators, receivers, and managers of the property of a company. All the provisions were consolidated in the Companies Act 1985 s 300, which preceded the Company Directors Disqualification Act 1986. Although a director had to be associated with two successive insolvencies before he could be disqualified under s 300, he may now be disqualified under s 6 of the 1986 Act if the court is satisfied that he has been a director of a company which has at any time become insolvent (whether while he was a director or subsequently) and that his conduct as a director of that company makes him unfit to be concerned in the management of a company.

declaration that a person who is or has been a director is liable to make a contribution to the assets of the company. However, it is a defence for a director to show that he took every step with a view to minimising the potential loss to the creditors of the company. A disqualification order may also be made against a director found liable for wrongful trading.⁵⁵

It is not possible for a director to be disqualified in Kenya unless he been convicted of an offence in connection with the promotion, formation, or management of a company; or the company is in the process of being wound up and it appears that a director is guilty of any fraud or breach of duty in relation to the company.⁵⁶ This provision renders it impossible to disqualify directors for breach of duties when a company is a going concern. Thus, broadening the scope of section 189 (1) to provide for disqualification arising from breaches of duty when a company is a going concern would make it more of a deterrent. This may be achieved by disqualifying directors on the basis of their unfitness to act in the management of companies, a ground which is applied in the UK. This ground of disqualification is considered in the following section.

Unfitness

A director in Kenya cannot be disqualified⁵⁷ for being unfit to be involved in the management of a company. Thus, whilst breach of duty is a sufficient ground for disqualification if a company is in the course of winding up,⁵⁸ fraud needs to be proven for a director to be disqualified when the company is a going concern.⁵⁹ In contrast, a director in the UK can be disqualified under section 8 of the CDDA for being unfit⁶⁰ when the company is a going concern. The Secretary of State can make an application under this section for a disqualification order where it appears to him, from an Inspector's report, that it is necessary in the public interest to have the director declared unfit. In such an event the court can exercise its discretion to make a disqualification order where it is satisfied that the conduct of a director in relation to the company makes him unfit to be concerned in the management of a company.

In the UK, the CDDA makes it compulsory for a judge to make an order, under the unfitness ground, if the terms of the legislation are satisfied.⁶¹ For a director to be declared unfit, the court must be satisfied that the director has exhibited gross incompetence or conduct in breach of commercial morality

⁵⁵ CDDA, s 10.

⁵⁶ S 189(1) of the Act.

⁵⁷ S 6 of the CDDA obliges the court to make a disqualification order against an individual if it is satisfied that he is or has been a director of a company which has become insolvent and that his conduct as a director of that company makes him unfit to be concerned in the management of a company.

⁵⁸ The Act, s 189(1)(b)(ii).

⁵⁹ S 189(1).

⁶⁰ In determining whether a director is unfit under both sections, s 9 obliges the court to have regard to matters mentioned in Part I of Sch I. In case the company has become insolvent, the court must have regard to matters mentioned in Part II of Sch 1.

⁶¹ Under both ss 6 and 9.

that constitutes a danger to the public.⁶² This may arise, for instance, where a director conducts business in total disregard of the interests of creditors. In *Re Ipcon Fashions Ltd*⁶³ knowledge by the director that the company was insolvent when he siphoned off its business to another company, incurring liability to the old company, was held to be a ground for disqualification. Similarly, in *Re McNulty's Interchange Ltd*⁶⁴ a director who had no new ideas about improving the business of a company, which was continuously accumulating debts, was liable for disqualification.⁶⁵ Explaining what makes a person unfit in the UK, Sir Nicolas Browne-Wilkinson VC said in *Re Lo Line Electric Motors Ltd*:

“Ordinary commercial misjudgement is in itself not sufficient to justify disqualification. In the normal case, the conduct complained of must display a lack of commercial probity, although I have no doubt that in an extreme case of gross negligence or total incompetence disqualification could be appropriate.”⁶⁶

The courts have, therefore, refused to disqualify directors for mere mismanagement, as the aim of disqualification is the protection of the public and not punishment of directors.⁶⁷ It therefore follows that despite the mandatory nature of section 6 of the CDDA, the courts may decline to disqualify a director in the absence of sufficient evidence to prove unfitness.⁶⁸ Although the courts assess whether a director should be disqualified on the balance of probabilities, the amount of evidence required to find a director liable is often more onerous than that,⁶⁹ as the evidence required in practice extends the standards of proof beyond the normal civil one. Given that the application of the balance of probabilities test would lead to disqualification of many directors, the onerous standard of proof is

⁶² *Per* Hoffmann J in *Dawson Print Group Ltd* [1987] BCLC 601. In assessing unfitness the court, by virtue of s 6(1)(b) considers the conduct of the director in relation to that company and any other company or companies. For more details see Hicks, *supra* n 6, at 33.

⁶³ (1989) 5 BCC 733.

⁶⁴ (1988) 4 BCC 533.

⁶⁵ *In Re Douglas Construction* (1988) 4 BCC 553 a director had put a lot of his own money into the company in order to keep it going and was held not to have contravened the principles of business morality. Hoffmann J in *Dawson Print Group Ltd* [1987] BCLC 601 found a director not liable for failing to pay debts due to the Crown and continuing to trade when he ought to have known that the company was insolvent. This was different from the judgement of Vinelott J in *Re Stanford Services Ltd* (*The Times*, 29 April 1987) where he found the commercial test unhelpful and disqualified a director for two years for using money collected as VAT or PAYE as part of their cash flow needs.

⁶⁶ [1988] Ch 477, at 486.

⁶⁷ *Per* Henry LJ in *Re Grayan Building Services Ltd* [1995] BCC 554, at 577.

⁶⁸ *In Re Arctic Engineering Ltd* (No 2) [1986] BCLC 253 persistent defaults by an accountant in making necessary returns did not result in disqualification since there was no dishonesty.

⁶⁹ Laddie J in *Re Living Images Ltd* [1996] 1 BCLC 348 favoured the view that the evidence against a director ought to be overwhelming rather than indicative of the director's wrongdoing.

thus applied in favour of directors so as to ensure that they can continue to run companies where risk is not apparent.⁷⁰

While assessing unfitness, the courts examine the role of directors in making the company insolvent. For instance, the failure to provide goods and services which have already been paid for, giving preference to one group of creditors over another,⁷¹ or entering into a transaction at an undervalue would be pointers to unfitness.

Incompetence

In Australia, a disqualification order can be made where a director acts dishonestly or fails to exercise reasonable care.⁷² As such, a conviction is not a prerequisite for a disqualification order. The courts and the Australian Securities and Investments Commission require the respondent to show why he should not be disqualified.⁷³ This involves assessing matters of incompetence or breach of duty. Similarly, in New Zealand a disqualification order can be made in a case where a director has acted in a reckless and incompetent manner.⁷⁴

In the UK, the Jenkins Report of 1962⁷⁵ proposed that directors ought to be disqualified if they had acted in an improper, reckless or incompetent manner in relation to the affairs of a company.⁷⁶ Although it was argued that this proposal was excessive on the basis that the standard required to prove recklessness and incompetent behaviour is not as high as that for proving unfitness, the test is used in the assessment of unfitness following insolvent liquidations in cases involving consideration of questions of commercial incompetence.⁷⁷

In assessing both recklessness and incompetence,⁷⁸ courts pay attention to the need to allow directors to take commercial risks. For instance, seeking and acting on competent outside advice⁷⁹ in the event of financial difficulties⁸⁰ is

⁷⁰ Griffin, "Standards of Proof Applicable to s 6 of the Company Directors Disqualification Act 1986" (1997) 18 *Co Law* 24, at 25; Hoey, "Disqualifying Delinquent Directors" (1997) 18 *Co Law* 130, at 132.

⁷¹ Paying only those creditors who pressed for payment and taking advantage of those who did not in order to provide the working capital has been held to amount to unfitness. See *Re Sevenoaks Stationers Retail Ltd* [1991] Ch 164 (CA).

⁷² S 206F (1) (c) empowers the Australian Securities and Investments Commission to disqualify a person from managing corporations for up to five years if the Commission is satisfied that disqualification is justified.

⁷³ For UK, see CDDA, s 8.

⁷⁴ New Zealand's Companies Act 1993, s 383.

⁷⁵ *Report of the Company Law Committee* (June 1962, Cmnd 1749), paras 80 – 85.

⁷⁶ The Report had proposed that a series of insolvent liquidations would be a pointer. See Hicks, *supra* n 6, at 43.

⁷⁷ For a detailed analysis see, S. Griffin, *supra* n 1, p 171.

⁷⁸ *Ibid*, p 169.

⁷⁹ Although the CDDA was effective in dissipating public dissent in respect of directors misconduct, it has been criticised for discouraging the best directors from assuming directorships and usage of company expenses by directors to hire expensive professional advisers, rather than attempting to solve the problem, to the detriment of shareholders and creditors. See B.R. Cheffins, *supra* n 30, p 552;

evidence of competence even when the advice does not forestall the insolvency of a company.⁸¹ Given that directors would always be found liable for negligence if any collapse of business was treated as evidence of negligence, consideration of the risks they take gives them room to manage companies without interference.⁸²

Although breach of duty is a sufficient ground for disqualification when the company is in the course of winding up in Kenya, the unfitness ground in the UK is more appropriate, as it is wider. For instance, the company does not have to be in the course of winding up for the unfitness ground to be applied under section 8 of the CDDA. The unfitness ground also introduces a desirable application of objective standards,⁸³ such as breach of commercial morality, gross incompetence, recklessness, and being a danger to the public, by which to judge the conduct of directors.⁸⁴ Therefore, whilst a director who fails to monitor and supervise delegated activities would escape liability for being judged subjectively in Kenya, he can be disqualified on the ground of unfitness in the UK.⁸⁵ The application of objective standards has, in effect, raised the standards of skill and care in the UK.⁸⁶

The provisions in Singapore, UK, and Australia therefore adopt a wider scope than that of the Act. The fact that the Singapore and Australian Acts disqualify directors automatically without requiring a disqualification order from the court makes the enforcement easier by speeding up the disqualification process. The onus is usually on the disqualified person to apply to court for leave to direct a company.⁸⁷

Filing Returns

In Kenya, whilst the failure to file annual returns by a director makes a director liable to a fine,⁸⁸ it is not a ground for disqualification. However, in the UK⁸⁹ and Australia⁹⁰ the courts can disqualify a director for up to five

B. Pettet, *Company Law* (2001) p 453; Hicks, "Advising on Wrongful Trading: Part 2" (1993) 14 *Co Law* 55, at 58.

⁸⁰ In the event of disqualification arising after the liquidation of a company, it is the creditors who bear the costs of disqualification proceedings as the office holder in charge is paid out of the company's assets in priority to all other claims. Despite not benefiting from directors' disqualification, creditors are made to bear such costs. Where directors contest disqualification orders a great deal of legal expenses are usually expended. See CDDA, s 7 (3), Insolvency Act 1986 s 115.

⁸¹ *Re Douglas Construction Services Ltd* [1988] BCLC 397.

⁸² P.L. Davies, *Gower's Principles of Modern Company Law*, (1997) p 686. *In Re Richborough Furniture Ltd* [1996] 1 BCLC 507 a director was disqualified for three years for lack of experience, knowledge, and understanding.

⁸³ The application of objective standards is illustrated in *Secretary of State for Trade and Industry v Ball* [1999] 1 BCLC 286.

⁸⁴ For a detailed analysis of the standards see Dine, "Disqualification of Company Directors" (1988) 9 *Co Law* 213; *Re Dawson Print Group Ltd* [1987] BCLC 601; and *Re Stanford* [1987] BCLC 607.

⁸⁵ *Re Barings Plc (No.5)* [1999] 1 BCLC 433.

⁸⁶ *Re D'Jan of London Ltd* [1994] 1 BCLC 561, *per Hoffmann LJ*. See also Walters, "Directors' Duties: The Impact of the CDDA of 1986" [2000] 21 *Co Law* 110.

⁸⁷ Hicks, *supra* n 6, at 33.

⁸⁸ The Act, s 125(3).

⁸⁹ CDDA 1986, s 3.

years for being in default of filing returns with the Registrar of Companies. Although the failure to comply with the reporting requirements of legislation, such as failure to file annual accounts, produce audited accounts, and to maintain proper accounting standards, is a separate ground for disqualification in the UK, it is also an indicator of unfitness. A director is liable to disqualification under this section if breaches occur persistently.⁹¹ In contrast to the UK provision, the Australian provision is of wider scope, as it covers all breaches of companies legislation, rather than only those dealing with the filing of returns or other documents.

Given that disqualification under this head may improve the level of compliance in filing, it raises the accountability of directors to shareholders because shareholders and others are able to keep track of the affairs of the company. It is, therefore, to be supported for inclusion in the Act.

The Length Of Disqualification Orders

Under section 189 a disqualified director is prevented from being involved in the management of companies for a period not exceeding five years. Other jurisdictions have recognised the need for longer periods of disqualification. For instance, Australian courts can disqualify a person from managing corporations for a period that the Court considers appropriate.⁹² The UK's CDDA imposes a minimum disqualification for unfitness of two years and a maximum of fifteen years.⁹³

The Nigerian Law Reform Commission of 1987 recommended that directors who have been convicted of company related offences or any other offences should be disqualified for a mandatory ten years after conviction.⁹⁴ Five years disqualification after conviction was found to be too lenient. The Nigerian Commission rejected the Jenkins'⁹⁵ proposals to the effect that a person who has persistently failed to comply with the Act should be disqualified for a further five years after release from prison, on the basis that it was excessive and could therefore deter even the best people from accepting directorships. The Commission also recommended the broadening of the range of the persons disqualified to include infants less than 18 years.⁹⁶ Furthermore, it took the view that it was necessary to utilise a mandatory disqualification on the basis that a discretionary one could still enable

⁹⁰ Corporations Act 2001, ss 4, 10, 285.

⁹¹ Breaches are said to occur persistently if it is shown that a person has been convicted in more than three instances within five years for failing to provide information. See s 3(2) and (3), CDDA 1986; *Re Arctic Engineering Ltd* [1986] 1 WLR 686.

⁹² Corporations Act 2001, s 206C and 206 E.

⁹³ Under s 6 CDDA. In assessing the appropriate length of the disqualification order, the court considers: the nature of the offence, whether it was closely connected with management, the nature of the person's involvement in the offence, his general character and reputation etc. See Hicks, *supra* n 35, at 246.

⁹⁴ Nigeria Law Reform Commission, *Working Papers on the Reform of Nigerian Company Law: Volume 1-Review and Recommendations* (1987) p 184.

⁹⁵ *Report of the Company Law Committee* (June 1962, Cmnd 1749), paras 80 and 85.

⁹⁶ Nigeria Law Reform Commission, *supra* n 94, p 184. S 186 (1) of the Act imposes the age of 21 as the minimum age for appointment.

fraudulent directors to find their way to boards with the consent of the courts.⁹⁷

Given that there are many directors who are involved in repeat offences, the period of disqualification of five years is insufficient.

Procedure For Disqualification

In Kenya, application for a disqualification order can be made by the Official Receiver, liquidator of the company or by a person who is or has been a member or creditor of the company.⁹⁸ Enabling creditors and members to make applications for disqualification enhances the process for the disqualification of miscreant directors, especially where the Attorney General would not otherwise take action due to lack of independence. However, given that the ability of creditors and members to make an application might be constrained by lack of financial resources, a public independent body might protect their interests more effectively.

In the UK, the Secretary of State is empowered to make an application for disqualification.⁹⁹ However, if the company in question is in compulsory liquidation, the Secretary of State may direct the Official Receiver to make the application.¹⁰⁰ Similarly, the Australian Securities and Investments Commission can also apply to court for disqualification orders.¹⁰¹

The Ghanaian Code provides that such an application can only be made by the Registrar, Official Trustee, or by the liquidator of any body corporate. Professor Gower¹⁰² recommended this measure in order to prevent malicious applications. Although the adoption of such a provision in Kenya might curb malicious prosecution to some extent, it is also possible for the provision to

⁹⁷ It also sought to incorporate art 87 of Table A in relation to vacation of office. Art 87 provides for a director to vacate office if he does not take up his shares after the required period, when he becomes bankrupt, he becomes of unsound mind, he resigns, he is absent for more than six months without permission of the other directors. See Nigeria Law Reform Commission, *supra* n 94, p 185.

⁹⁸ S 189(4).

⁹⁹ CDDA, s 7(1)(a).

¹⁰⁰ S 7(1)(b). The UK's Cork Committee, *Report of the Review Committee on Insolvency Law and Practice*, Chairman Sir Kenneth Cork (1982, Cmnd) recommended that apart from the Secretary of State and the Official Receiver, liquidators and creditors should be permitted to make applications, as limiting the applications to the Insolvency Service was considered inadequate due to the fact that the Service might not have enough information about directors, especially when the company is wound up voluntarily and therefore the Official Receiver is not involved. Although liquidators, administrators and receivers are required to report to the Secretary of State on the conduct of directors, the quality of information is not always of the right quality. Another factor that would affect the effectiveness of Insolvency Service is the quantity and quality of resources utilised to enforce the provision. See National Audit Office, *Company Director Disqualification* (HMSO, 1993).

¹⁰¹ Under the Corporations Act 2001, ASIC may apply for disqualification of a person: for contravening a civil penalty provision (s 206C), "if within the last 7 years, the person has been an officer of two or more corporations when they have failed" (s 206D).

¹⁰² He drafted the Final Report of the Commission of Enquiry into the Working and Administration of the Present Company law in Ghana, 1961.

restrict the number of persons who institute proceedings to the detriment of creditors. Since government interference in the duties of public officials has been common in the past, there is a danger of fewer cases being brought to court if the range of persons who can apply is not widened.¹⁰³

In Kenya, the Registrar, as an official in the office of the Attorney General, has been less likely to enforce the disqualification provisions due to political interference.¹⁰⁴ In the past, this has been clearly illustrated by several cases.

First, the past investigation of the Attorney General by the Parliamentary Public Investments Committee over an alleged failure to prosecute persons named in corrupt deals lends credence to lack of independence on his part.¹⁰⁵

Secondly, the Attorney General was reluctant to prosecute those implicated in the Goldenberg fraud despite the fact that the Government lost \$400 million in public funds to Goldenberg International Ltd, trading gold and diamonds that Kenya did not produce.¹⁰⁶ Although some directors have been prosecuted, some senior government officials in charge of the Ministry of Finance and the Central Bank have not been investigated.¹⁰⁷

Thirdly, the Ninth Report of the Public Investments Committee recommended that the Registrar of Companies should be dismissed over a transaction in which the former Kenya Posts and Telecommunications (KPTC) irregularly lost 6,569,345 Kenyan Shillings (£65,693). The Registrar was accused of failing to avail himself of information on the transaction in which KPTC bought 196 maisonettes at 64,680,000 Kenyan Shillings (£646,800) and then sold them for the same amount to the Office of the President six years later. The failure on the part of the corporation to include an amount of 6,569,345 Kenyan Shillings (£65,693) in respect of legal fees led to a direct loss of the same amount to the corporation.¹⁰⁸

Fourthly, the lack of political will by the former government to enforce disqualification provisions can also be discerned from a recent proposal by the Attorney General which sought to grant amnesty to individuals who had committed economic crimes before December 1, 1997. The implementation of the proposal, which was contained in the Anti-Corruption and Economic Crimes Bill 2000, would have had grave implications on corporate governance, as companies would not be able to recover money from

¹⁰³ Leigh, "Disqualification Orders in Company and Insolvency Law" (1986) 7 *Co Law* 179, at 182.

¹⁰⁴ "Anti-Corruption, Economic Crimes Bill Debate Rages", *East African Standard*, 21 July 2001 and "A-G in Spotlight for Sloppy Drafts", *East African Standard*, 25 July 2001.

¹⁰⁵ *Supra* n 14.

¹⁰⁶ Investigative series by Sarah Elderkin in the *Daily Nation*, 30 July – 6 August 1993.

¹⁰⁷ Holman & Wrong, "Moi Weighs Tough Corruption Probe", *Financial Times*, 28 July 1997.

¹⁰⁸ "Ng'eny: I will not Resign" *Daily Nation*, 19 July 2000.

miscreant directors.¹⁰⁹ Besides, some cases, which are pending in court, against directors would come to an end.¹¹⁰

The fact that the Attorney General favoured the granting of amnesty to errant persons rather than investigating the offences and subsequently seeking the disqualification of those, for instance, responsible for companies' fraud is a clear indication of the interests that he was protecting. However, in spite of the possible drawbacks that might arise as a result of the implementation of the amnesty clause, the clause might also have some considerable benefits. First, given that the prosecution of past economic crimes might take many years to finalise, the implementation of the amnesty clause would enable the courts to deal more effectively with present economic crimes.¹¹¹ Second, the clause might streamline the transition process by making individuals less apprehensive of losing power and wealth as a result of a comprehensive reform of the law and less likely to try to cover up the past.¹¹²

Enforcement Of Disqualification Orders

The implementation of a disqualification framework would hardly be effective without reliable enforcement mechanisms. To satisfy the objectives of disqualification orders, the Act makes a disqualified person who gets involved in the management of a company personally responsible for the debts of the company incurred while he was so involved. The responsibility attaches where it appears in the course of winding up that any business of the company has been carried on with intent to defraud creditors of the company or for any fraudulent purpose.¹¹³

Limited and Conditional Orders

The Act does not make provision for limited and conditional orders. The court therefore either imposes an absolute disqualification order or makes no disqualification order. Limited and conditional orders may be useful in

¹⁰⁹ Although the Bill undermined donor institution conditions to the Government, the IMF supported the Bill. See "Amnesty Proposal Angers Opposition" *Sunday Standard*, 15 July 2001.

¹¹⁰ According to the Bill, the amnesty would not apply to persons who were under investigation or were prosecuted by the former KACA, the A – G or the police for corruption related offences prior to 22 December 2000. It was also not meant to apply in the cases of offences committed by persons who were not in Kenya or against whom a warrant of arrest was outstanding on that date. See "Amnesty Proposal Angers Opposition", *East African Standard*, 15 July 2001.

¹¹¹ The Attorney General reckoned that it would take between ten and twenty years to work through past economic crimes. See Ochieng, "Call for Amnesty Team on Graft and Clashes", *Daily Nation*, 2 August 2002; Wachira, "Repent, Amnesty Seekers are Told", *East African Standard*, 2 August 2002.

¹¹² The initiatives of the Truth and Reconciliation Commission in South Africa arguably enhanced the political transition process.

¹¹³ S 323(1). In the UK, a person who acts or who is willing to act on the instructions of a person he knows to be disqualified can also be disqualified under CDDA, s 15. S 214 of the UK Insolvency Act 1986 gives the court a discretion to declare, on the liquidator's application, that a director be liable to contribute to an insolvent company's assets where he is guilty of wrongful trading. The court may also order disqualification for up to fifteen years. See Insolvency Act 1986, ss 213 -214; Hicks, *supra* n 6, at 46.

instances where the court feels that it may, for instance, be appropriate to disqualify a director from a public company and not a private one¹¹⁴ in order to safeguard commercial interests.¹¹⁵ Therefore, where damage to the company is not apparent, conditional disqualification orders are useful because they allow the courts to balance the interests of the public, employees and the director in question and, in turn, encourage enterprise and protect creditors at the same time. Thus, where the courts are reluctant to impose absolute disqualifications due to their harsh consequences, they might be far more amenable to making limited and conditional orders. For instance, the UK courts can give directors leave to act under certain circumstances.¹¹⁶ It is possible for leave to act to be utilised as a limited disqualification order where a director is allowed to serve in certain capacities only.¹¹⁷ Similarly, Australian courts may impose such conditions or limitations as they think fit.¹¹⁸ Thus, the courts can protect creditors effectively by use of conditional orders rather than the far-reaching absolute disqualification orders.

Undertakings

In view of the delay problem in the Kenyan courts, Kenya might need to adopt a disqualification regime that does not clog up the court system. The adoption of undertakings by directors, for instance, would enable disqualification proceedings to be settled without reference to the courts. The directors would undertake not to be involved in the management of companies for a specific period of time. Such undertakings have already been adopted in the UK. The Insolvency Act 2000 empowers the Secretary of State to accept the undertaking of a director without requiring him to

¹¹⁴ Hicks, *ibid*, at 42.

¹¹⁵ In *Re Majestic Studios Ltd* [1989] BCLC 1, Mervyn Davies J allowed a director to continue trading after a disqualification order on condition that he was accountable to an independent assessor. In so doing the court was able to save fifty jobs which were at risk.

¹¹⁶ Under CDDA, s 17. In *Re Lo-Line Electric Motors Ltd* [1988] 3 WLR 26 a director was disqualified for a three year period but permitted to remain as a director of two companies so long as a named qualified accountant remained a director of the company. In *Re Majestic Studios Ltd* [1989] BCLC 1, Mervyn Davies J allowed a director to continue trading after a disqualification order on condition that he was accountable to an independent assessor. Such conditions are not different from the conditional orders given in other jurisdictions. See Hicks, *supra* n 35, at 247.

¹¹⁷ Hicks, *ibid*.

¹¹⁸ S 206G (1) of the Corporations Act 2001 enables the courts to grant leave to manage "corporations, particular class of corporations or a particular corporation." Under s 206G (2) the court determines the conditions and exceptions to accompany the leave. In *Re Magna Alloys & Research Pty Ltd* (1974-76) 1 ACLR 203 a person was given leave to take part in the management of three specified companies when their boards were controlled by independent non-executive directors. Similarly, in *Re Leomond Properties Pty Ltd* (1983) 1 ACLC 1370 leave to be a director of seven companies was given following conviction for handling stolen crucifixes. In *Re Minimix Industries Ltd* (1982) 1 ACLC 511 a New Zealand court gave a person leave to be a manager of a specified company so long as he would not be signing cheques on behalf of the company.

admit the actual basis of disqualification. While such undertakings might be expedient and cheaper on the public purse, they might pose a problem in that directors might accept a period of disqualification to avoid the cost burden of defending disqualification proceedings.¹¹⁹ Besides, the Insolvency Service might be tempted to accept undertakings in order to achieve the policy objective of disqualifying many directors.¹²⁰

Register of Disqualified Persons

Whilst Kenya has no provision for a register of disqualification orders, the Ghanaian Code requires the Registrar to publish a register of disqualified persons in the Gazette and maintain it for the purposes of public inspection.¹²¹ Similarly, the UK Secretary of State maintains a register of disqualification orders,¹²² which is open to inspection free of charge.¹²³ The court sends the particulars of the order to the Secretary of State for entry in the register. In addition, any variation and grant of leave to act must be communicated to the Secretary of State.¹²⁴ Similarly, section 243 of the Australian Corporations Law requires the Australian Securities and Investments Commission to keep a publicly available register of disqualified company directors.

In Kenya, as there is no publication, it is not possible to enforce disqualification orders adequately, as a director might secretly continue to act. To ensure effective enforcement of disqualification orders, there is need to publicise the orders given by the courts.

CONCLUSIONS

The disqualification regime in Kenya fails significantly to deter directors who might be tempted to engage in activities that are detrimental to the well-being of a company. Although the present provisions do provide for disqualification of directors, they are not as effective as they might be. Some provisions in the other jurisdictions discussed above are clearly more stringent than the Act. Kenya needs to broaden the scope of provisions, offences, and grounds covered by the Act in order to prevent errant directors from finding their way into boardrooms, and to stamp out corruption.

The disqualification framework only enables a director to be disqualified on the basis of fraud when a company is a going concern. Thus, a director cannot be disqualified on the basis of breach of duty, unfitness, and failing to

¹¹⁹ Walters, "Directors Disqualification: The Vice-Chancellor's Address to the Chancery Bar Association" (2000) 21 *Co Law* 90.

¹²⁰ Walters, "Bare Undertakings in Directors Disqualification Proceedings: The Insolvency Act 2000, *Blackspur* and Beyond" (2001) 22 *Co Law* 290, at 297.

¹²¹ S 186 (7) provides that "where any order is made or leave is granted under this section the court making the order or granting leave shall forward a copy to the Registrar who shall cause a summary thereof to be published in the Gazette. The Registrar shall maintain a register of orders made under this section and shall enter thereon particulars of each order and any leave granted and such register shall be open to the inspection of any person."

¹²² This was introduced in the UK by the Companies Act 1976.

¹²³ CDDA 1986, s 18. Similar provisions exist in Australia, see Corporations Act 2001, s 1274AA.

¹²⁴ S. Mayson, *supra* n 30, p 727.

file returns. A director can only be disqualified, under section 189, for breach of duty when a company is in the course of winding up. This does little to raise the standards of the conduct of directors and to protect the public from miscreant directors. This provision would be more of a deterrent if it also covered unfitness of directors when the company is a going concern.

Although creditors and shareholders can make applications for disqualification,¹²⁵ their interests might be compromised when their financial resources are constrained. This problem might be resolved by establishing a publicly funded body with the mandate to make such applications. The body ought to be independent from the political establishment so as to be effective.

A public register of disqualification orders would offer more protection to creditors and the general public because they would be in a position to register their protest where a disqualified person manages companies. The use of limited or conditional disqualification orders by the courts as opposed to absolute prohibitions would serve all stakeholders well because they would give courts some flexibility, which would protect both the interests of the creditors and commercial interests.

Whilst broadening the scope of disqualification would go a long way to regulating directors more effectively, it is worth noting that some stringent provisions, such as automatic disqualification, might punish directors far too much in spite of their usefulness to creditors.

¹²⁵ S 189(4).

THE HUMAN RIGHTS ACT AND LOCAL GOVERNMENT: KEEPING THE COURTS AT BAY*

Peter Leyland, Senior Lecturer, School of Law, Governance and International Relations, London Metropolitan University

Local authorities as public bodies are not only subject to the HRA but are also responsible for the implementation of policy in many areas where human rights issues commonly arise, ranging from education, social services, housing, the environment and planning. Procedures of local authorities have been modified to take account of the provisions of the Act¹ but commentators have remarked on the 'paucity of empirical accounts of the impact of such rights on social attitudes and political processes.'² In conceiving this article, which draws attention to certain dangers in the new culture of human rights, I intended to commence the discussion by mentioning the positive impact of the Human Rights Act (HRA). Such a view was to be supported by mentioning ways in which the Act was effecting how local government now operated. The idea was to try to demonstrate that one important effect of the HRA has been to promote greater respect for Convention Rights. It was to be argued that the Act has encouraged an increased awareness of the potential impact of convention rights. One kind of evidence that might have been adduced in support of this view is exemplified by a consultation paper published by Camden Council on its draft interim licensing policy. This publication was in relation to the council's management of licensed activities, including public and private entertainment, night cafes, sex establishments and chairs on the public highway.³ The document points out that the European Convention is incorporated by the HRA and that it is unlawful for a local authority to act in a way which is incompatible with the convention. In respect to the policy in question, it is pointed out that article 6 requires a fair and public hearing within a reasonable time by an independent and impartial tribunal. In addition, it is pointed out that under article 8, everyone has the right to respect for his home and private life. This includes an entitlement to a good nights sleep. The case of *Hatton v United Kingdom*⁴ is cited in the consultation paper as authority for this view.⁵ While being

* This article originated from a paper given at a conference entitled: 'Governing After the Human Rights Act' held at London Metropolitan University in January 2003. I would like to thank Gordon Anthony and Professor Bill Bowring for their very insightful comments on an earlier draft.

¹ See e.g. A Finlay 'The Human Rights Act: The Lord Chancellor's Department's Preparations for Implementation' [1999] EHRLR 512-519.

² D Feldman (2002) 24 *Legal Studies* 651, reviewing T Campbell, K Ewing and A Tomkins (eds) *Sceptical Essays on Human Rights* (2001).

³ 'Night In, Night Out: Draft Interim Licensing Policy', Consultation Paper, Camden Council, March 2002.

⁴ [2002] 34 EHRR 1.

⁵ In *Hatton* it was held that the policy allowing night flights into Heathrow was unlawful because it was in breach of art 8 of the ECHR. The majority came to this conclusion because they reasoned, applying a proportionality test, that the economic objective could not justify the degree of interference caused with the convention rights of the claimants. It is worth noting that the dissenting opinion of

confident that further research would have unearthed many examples across a wide spectrum of policy areas, it also became clear that undertaking such a survey would have been a formidable undertaking in its own right. Nevertheless, I would like to suggest at the outset that the HRA is affecting the way local authorities and other public bodies are modifying their practices and that improved strategies of consultation might be cited as a benefit currently being enjoyed by citizens.

The discussion that follows concentrates on three questions concerning the Human Rights Act 1998, all of which have implications for local government. The first question discusses judicial policy towards the application of section 3 and section 4 of the Act. In particular, it considers the consequences of using either declarations of incompatibility, or purposive interpretation to undermine statutory schemes which confer powers on local government. The second question concerns an aspect of the public private law divide and relates to how far convention rights ought to be protected in situations where public bodies, such as local authorities, contract out the services which they are under a statutory obligation to provide. The third and final section focuses on how the influence of the HRA is leading to increased exposure of local authorities and other public bodies to liability in tort.

The central overall concern is to consider with reference to the questions outlined above the impact the Act is having on any constitutional balance that previously existed between Parliament, the executive and the courts. It is apparent that a clear policy dimension is emerging from recent judicial decisions. These are forming a new set of ground rules and differences in approach between senior judges will be discernible from close analysis of judicial positions. Moreover, it is important to recognise the massive constitutional importance of the reformulation of the relationship between the courts, Parliament and the executive. This is not intended as a theoretical discussion, but it needs to be made clear at the outset that the application of rights jurisprudence involves a genuine tension between different philosophical conceptions of the relationship between law and politics which are also represented in the judgments.⁶ For example at the extremes, it might be argued that the aim of liberal legalism, which represents one strand of this debate, is to secure ‘the enclosure of politics within the straightjacket of the

Sir Brian Kerr rejects this reasoning and argues for a deferential approach. See G. Anthony ‘Interacting Legal Orders and Inter-Court Disputes: The ECHR Beds into UK Public Law’ in G Amato, G Braibant and E Venizelos (eds) *The Constitutional Revision in Today's Europe* (2002) p 577, 597.

⁶ For a recent example see the judgment of Laws LJ in *Thoburn v Sunderland City Council* [2002] 3 WLR 247 which provides a controversial discussion of sovereignty. But extra judicial contributions to the debate pre-date the HRA see e.g. J Laws ‘Is the High Court the Guardian of Fundamental Constitutional Rights’ (1993) *PL* 63; Lord Woolf ‘Droit Public-English Style’ (1995) *PL* 57; S Sedley ‘Human Rights: a Twenty-First Century Agenda’ (1995) *PL* 386; Lord Irvine ‘Judges and Decision-Makers: The Theory and Practice of Wednesbury Review’ (1996) *PL* 59; and have continued since it reached the statute book: see e.g. Lord Hoffman ‘Human Rights and the House of Lords’ (1999) *MLR* 159; Lord Bingham ‘Dicey Revisited’ (2002) *PL* 39; Lord Steyn ‘Human Rights: The Legacy of Mrs. Roosevelt’ (2002) *PL* 473.

law⁷ and such a court centred approach is underpinned by an assumption that answers to all political disputes can ultimately be found in law. On this view, the conferment of increased power on the judges as part of a new constitutional order is justified, not only by the failure of Parliament to protect rights, but by its more general demise as an effective counter-balance to ‘elective dictatorship’ in a situation where political opposition is weak and also ineffective.⁸ This is achieved by a new emphasis on human rights.⁹

On the other hand, human rights sceptics believing in a form of political constitutionalism might begin with an entirely different premise. Indeed, perhaps the central problem for them is that the theories of rights (e.g. ECHR) to which rights constitutionalists (as adherents of legal liberalism) tend to defer have not reconciled the very questions that lie at the heart of political debate.¹⁰ The point being that political constitutionalists recognise ‘the inevitability of sustained disagreement over justice, policy and the content, meaning and priority of rights in circumstances of political pluralism’.¹¹ From this perspective also, the reinforcement of liberal constitutionalism is likely to be an impediment to any progress with a social democratic agenda since it endorses a constitutional order that lacks any commitment to political and economic equality.¹² The key issue comes down to determining who should ultimately decide these contested questions. Should this be achieved by means of a political process or by the courts? Those believing in a form of political constitution will prioritise the political over the legal and call for a theory of authority which demands a high degree of participation or equal participation in decisions over rights. Notwithstanding the problems of elective dictatorship, voter apathy etc. politics is regarded as *the* medium of conciliation.¹³ For political constitutionalists there should be a recognition of the importance of participation in decision making by ordinary people and this must be given priority over decision making by a supposedly expert minorities such as judges. Of course, these positions are included to broadly characterise opposing viewpoints. There are many stances which could be charted on a continuum between these polarities.

It is argued in this article that a form of political constitutionalism much closer to the latter view should prevail. This is because allowing routine

⁷ A Tomkins ‘In Defence of the Political Constitution’ (2002) 22 *OJLS* 157,169ff.

⁸ See A Lester ‘Human Rights and the British Constitution’ in J Jowell and D Oliver *The Changing Constitution* (2000) and A Lester ‘Developing Constitutional Principles of Public Law (2001) *PL* 684.

⁹ However, any claim of neutrality here can be challenged. For if this path were to be followed, the Act might become the pretext for the courts to promote the narrow individualistic view of rights that is contained in the ECHR.

¹⁰ Perhaps the most vociferous and sustained scepticism has come from JAG Griffith see ‘The Political Constitution’ (1979) *MLR* 1 and more recently ‘The Brave New World of Sir John Laws’ (2000) *MLR* 156 and ‘The Common Law and the Political Constitution’ (2001) *LQR* 42.

¹¹ N Walker ‘Human Rights in a Postnational Order’ in T Campbell *et al* (eds) n 2 above p 123ff. This section of Walker’s essay is a discussion of the ideas of J Waldron, *Law and Disagreement* (1999).

¹² K Ewing ‘The Unbalanced Constitution’ in T Campbell *et al* (eds) n 2 above p 112.

¹³ Tomkins n 7 above, 174.

judicial challenges against local authorities and indeed other public bodies performing public duties will have adverse consequences for the community as a whole. While it might be desirable in some circumstances to provide citizens with remedies when their convention rights have been compromised, the courts should not be involved in the process of administration beyond establishing narrow questions of legality. In other words, the special powers of interpretation that have been given to the courts should be used with great restraint. The way forward in the public law domain is not to encourage the long drawn out process of litigation, or have judges decide matters of resource allocation, but rather to first consider the type of remedy that is appropriate and then to introduce a universal statutory system to deliver that form of relief on a universal basis.¹⁴ If systemic failings are identified, a declaration of incompatibility has the advantage of placing the ball firmly back in Parliament's court. It is for Parliament to introduce a remedy of general application.¹⁵

(1) Applying the HRA: signs of judicial restraint?

It is important to recognise that in the domain of public law the Human Rights Act has the potential to undermine statutory regimes under which policy is delivered. This could have far reaching implications for local government which often is made responsible for policy implementation by Parliament. From the time the HRA came into force there have been signs that the Act might disturb any balance between the courts and the executive.¹⁶ Although a court is not empowered to strike down primary legislation under section 4, it can issue a declaration of incompatibility if it feels that legislation is incapable of an interpretation under section 3 that is compatible with the convention.¹⁷ This solution was intended to prevent parliamentary supremacy from being replaced by judicial supremacy. For example, the issue has arisen in respect to planning law. In *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions*¹⁸ the Divisional Court found a structural incompatibility between article 6 and the system of planning appeals contained in sections 77-79 of the Town and Country Planning Act 1990. The matter was referred to the House of Lords for final resolution. Their Lordships overruled the decision of the Divisional Court as they did not accept that article 6(1) required a court to rehear the merits of decisions. Lord Clyde stated: 'We are concerned with an administrative process and an administrative decision. Planning is a matter for the formation and application of policy. The policy is not a matter for the courts but for the executive'. Nevertheless, the decision in the House of Lords recognised that

¹⁴ See e.g. The Housing Act 1996 and Homelessness Act 2002.

¹⁵ C Harlow "Public" and "Private" Law: Definition without Distinction' (1980) 43 *MLR* 241.

¹⁶ See R Carnwarth, 'The Reasonable Limits of Local Authority Powers' (1996) *PL* 244 who discusses the task of refining the negative restraints imposed on local authority powers and emphasises the importance of further developing framework principles to determine the relationship between central and local government.

¹⁷ There have been several declarations of incompatibility. See e.g. *R (on the application of International Transport Roth GmbH) v Secretary of State for the Home Department* [2002] 3 *WLR* 344.

¹⁸ [2001] UKHL 23; [2001] 2 *WLR* 1389.

the convention rights of claimants had been effected and that such questions should be determined by an independent and impartial tribunal. It should be noted that, even if the House of Lords had supported the earlier decisions of the Divisional Court and the Court of Appeal, the system of planning appeals would have remained in operation until legislative changes were made with the approval of Parliament.¹⁹ This failure to issue a declaration of compatibility demonstrates a reluctance by the House of Lords to step in and effectively undermine the established statutory regime by adopting a different standard of proportionality review which lowered the threshold for intervention. It would appear from the views expressed by Lord Slynn that article 6 did not require judicial review to conduct a rehearing of the merits of planning policy, rather, he suggested, the focus of attention should be on the legality of decisions taken and on the procedures that have been followed.²⁰ However, it has been argued that the House of Lords ducked the issue, which was simply whether the decision making under planning legislation in the current political climate was compatible with the Convention. By issuing a declaration of incompatibility their Lordships would not have been establishing an alternative form of decision making, but merely inviting Parliament to reconsider the question of whether current decision conflicted with convention rights.²¹ Finally, it should be stressed that the context, taking fully into account the statute and the nature of any interference with the convention right under question, will be crucial in determining whether a declaration of compatibility is issued by the court.²² To date, the indications are that the courts have been circumspect in exercising their powers under section 4 of the HRA.

The interpretative obligation to construe legislation compatibly with the Convention rights under section 3 of the HRA might be seen as an even more potent weapon in the hands of the courts and it is one that could open the door to merits review.²³ Some commentators have argued that a refusal to

¹⁹ For another example of the involvement of the courts in the planning process under the Human Rights Act see *R (Friends Provident Life) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 1450. This concerned a challenge under s 77 of the Town and Country Planning Act 1990. The challenger arose after a local council had granted planning permission for a major shopping centre but the Secretary of State refused to set up an independent public inquiry. The court agreed that the claimant's rights had been affected by this failure to have an inquiry and that therefore art 6 of the Convention was engaged. However, the court held that there was no absolute rule that an inquiry had to be set up for determining matters that were essentially *intra vires* matters of planning judgment.

²⁰ I Leigh, 'Taking Rights Proportionately: Judicial Review, the Human Rights Act and Strasbourg' (2002) *PL* 265, 272ff.

²¹ M Poustie 'The Rule of Law or the Rule of Lawyers? Alconbury, art 6(1) and the Role of the Courts in Administrative Decision Making' [2001] *EHRLR* 656, 672.

²² A case that might be contrasted with *Alconbury* is *H. v Mental Health Review N & E London Region*, *The Times*, April 4, 2001. In this instance a remedial order under s 10 followed the declaration of incompatibility concerning the reverse burden of proof at mental health tribunals. See J Wadham, 'The Human Rights Act: One Year On' [2001] *EHRLR* 620, 636ff.

²³ *Tower Hamlets LBC v Runa Begum* [2002] 2 All ER 668. It was held by Laws LJ that although JR not appropriate for the resolution of factual disputes the judge had ample power to decide whether the decision could be properly made on the

apply a possible section 3 interpretation cannot be justified, because to do so would be in breach constitutional principle by encroaching into the legislative sphere. It is suggested that such a non-interventionist approach undermines the intention of Parliament when it enacted the HRA. This appears to be a call for much more active judicial intervention in cases where convention rights are at stake.²⁴ Others have pointed out that if new methods of purposive interpretation are adopted, which include conformity with convention rights, statutes could tend to be read down so that ECHR rights are given a higher status. Further, a morally purposive approach has the potential to be inherently expansive and creative. It will not be confined to rights but will apply to interpretation in general.²⁵

There have been indications from the case law of emerging difficulties in the revised approach to statutory interpretation, this was apparent even before the HRA was fully in force. For example, the contested issue in *Macdonald v Ministry of Defence*²⁶ was the policy of the RAF in dismissing personnel on grounds of their homosexuality. It was argued before the Scottish Employment Appeal Tribunal that this practice was discriminatory and contrary to the Sex Discrimination Act 1975 (SDA). In determining the issue the Tribunal held that the word 'sex' in the Act should be read to mean 'sexual orientation'. However, the decision to construe sex in this way was overturned on appeal by the Court of Session. It was accepted by the appellate court that in deciding how to treat any individual those who apply the policy are concerned with sex as a matter of the gender of that individual. Both homosexual men and women were subject to dismissal and therefore were treated in the same way. On this view it followed that they were not discriminated against by virtue of gender.²⁷

Lord Caplan explained how he viewed the court's role:

"I do not see the 1998 Act as requiring the insertion of omitted provisions so as to enhance the legislation under consideration. If there is a collision between that legislation and the Convention then one would look for a possible approach that may resolve the problem. However, that does not mean that omitted provisions should be added where no ambiguity exists and the scope of the Act is clearly not intended to deal with what is omitted."

An awareness of the dangers of a more interventionist stance is clearly discernible from the judgment in *Re S, Re W (Children) (Care Order: Implementation Care Plan)*.²⁸ In this case the House of Lords was not prepared to follow the lead of the Court of Appeal in regard to the

available evidence. See F Klug and C O'Brien 'The First Two Years of the Human Rights Act' (2002) *PL* 649, 661.

²⁴ R Clayton 'The Limits of What's "Possible": Statutory Construction under the Human Rights Act' [2002] *EHRLR* 559, 565.

²⁵ T Campbell, 'Incorporation through Interpretation' in T Campbell *et al* (eds) n 2 above, p 84.

²⁶ [2001] 1 All ER 620; [2001] SLT 819.

²⁷ See G Anthony, *UK Public Law and European Law: The Dynamics of Legal Integration* (2002), p 166.

²⁸ [2002] 2 *WLR* 720.

supervision of child care plans which had been justified on HRA grounds. The Court of Appeal had proposed a new procedure after a care order had been granted requiring a local authority to inform the child's parents of any departure from a care plan that might give rise to a risk that the human rights of the child or his parents might be infringed, so that an application might be made to the court for further directions. Lord Nichols stated that the court operated as the gateway into care and thereafter had no continuing role in relation to the care order which then became the responsibility of the authority. The reading by the Court of Appeal of the legislation under section 3 of the HRA went beyond interpretation and amounted to amendment of the Children Act 1989. Herring puts this in the clearest possible terms:

“At the end of the day, the real issue behind this case . . . is money. Local authorities have limited resources and cannot provide all of the services they would like for every child in their care. Sometimes financial difficulties mean that a local authority is not able to implement a care plan. To permit a court to compel local authority expenditure in respect of one child might cause great harm to other children in the local authority's care”.²⁹

Nevertheless, given the problems with the statutory scheme, this leaves open the question of how the children's rights are to be meaningfully protected under article 6. It might be suggested that a declaration of incompatibility under section 4 would allow Parliament to amend the legislation so as to address the article 6 issue, but with the advantage that Parliament would be able to keep the general resource implications in mind when it considered amending the legislation.³⁰

*Adan v Newham LBC*³¹ is another recent case in which the courts resisted the call to intervene. In this instance it was argued that the local authority had been in breach of article 6 because the review officer handling homelessness claims was neither independent or impartial.³² Under section 204 of the Housing Act 1996 there was provision for an appeal to the county court on a point of law. However, it was argued that the disputed issues of fact should also be considered by the county court in order to render the procedure in conformity with article 6. This approach was firmly rejected by the Court of Appeal as stepping beyond the mark. Brook LJ stated: ‘It would involve a judicial sleight of hand to enlarge the jurisdiction of the county court beyond that given to it by Parliament. Parliament has decided that the local authority should be the final arbiter of the facts, not the courts, and the courts do not in my judgment, have the power to put these arrangement into reverse’.

²⁹ J Herring ‘The Human Rights of Children in Care’ (2002) *LQR* 534, 538.

³⁰ There have been a number of other case with resource implications. See *e.g. Lee v Leeds City Council*, *The Times*, January 29 2002 – an attempt to suggest that art 8 imposed an unqualified obligation on the authority to remedy problems caused by housing defects.

³¹ [2002] 1 All ER 931.

³² R Clayton n 24 above, 564. This would suggest that purposive construction means that the Human Rights Act trumps other legislation in much the same way as the European Communities Act 1972.

The issue for the House of Lords to determine in *Begum v Tower Hamlets LBC*³³ was whether the appellate procedure adopted by the council in the allocation of rented housing accommodation contravened the appellant's convention rights. The Court of Appeal's decision not to invalidate the statutory scheme was upheld in the House of Lords. In reviewing the Strasbourg jurisprudence³⁴ on the requirements of article 6(1) in an administrative law context, Lord Hoffman observed that '. . . utilitarian considerations have their place when it comes to setting up . . . schemes of regulation or social welfare' and that 'Parliament is entitled to take the view that it is not in the public interest that an excessive proportion of the funds available for a welfare scheme should be consumed in administration and legal dispute'.³⁵ In his Lordships view the exercise of administrative functions do not necessarily require a mechanism for independent findings of fact or a full appeal, but any procedures adopted need to be lawful and fair.

From these decisions we can identify emerging guidelines indicating how far the court are able to depart from the scheme of the legislation in exercising their interpretative obligation.³⁶ For the time being at least, the impact on administration is being contained by a cautious judicial approach which, once again, has attached considerable weight to the policy context. However, it has been argued that a concept of due deference needs to be developed which sets out principles to be applied by the courts in determining when intervention is appropriate in the contemporary constitutional context.³⁷

(2) Local Government and the Horizontal Impact of the HRA in the 'Contracting State'

The next section of this article addresses a somewhat different problem, namely, the extent to which it is possible to protect convention rights given the trend towards governance which has increasingly led to the delivery of policy at a local level under contractual arrangements. In recent years it has been apparent that central government has 'asserted its pre-eminence . . . by stripping local government of many of its powers and much of its capacity for independent action . . .'.³⁸ Not only has there been a trend towards a concentration of power at the core of government but also the public dimension of the activities of local authorities have been progressively reduced by forms of privatisation so that many services, still nominally in the

³³ [2003] UKHL 5; [2003] 2 WLR 388.

³⁴ *Bryan v United Kingdom* (1995) 21 EHRR 342.

³⁵ See Lord Hoffman at paras 43 and 44.

³⁶ F Klug and C O'Brien n 23 above, 650ff.

³⁷ See M Hunt 'Sovereignty's Blight: Why Contemporary Public Law Needs the Concept of "Due Deference"' in N Bamforth and P Leyland (eds) *Public Law in a Multi-Layered Constitution* (2003, forthcoming); J. Jowell, "Due Deference under the Human Rights Act", and Tim Owen, "Assessment of Fact, Due Deference and the Wider Impact of the Human Rights Act in Administrative Law" in J Jowell and Cooper (eds), *JUSTICE/UCL Seminars* (2002).

³⁸ M Loughlin, 'Central Local Government Relations' in J Jowell and D Oliver (eds) n 8 above, p 138. This stands in contrast to a tradition of municipal activism of Victorian councils. For a discussion of the emergence of the city in the nineteenth century see the introduction to A Briggs *Victorian Cities* (1968).

hands of local government, are in fact actually carried out by private sector companies or other organisations³⁹. The scene for this discussion must be set by reference to government policies which have removed the financial autonomy of councils⁴⁰ and which have led more generally to a reduction of the powers of local government. This is to the extent that local government has ended up with performing what one commentator described little more than 'a residual market support function'.⁴¹ It is true that, to a marginal extent, recent legislation has increased autonomy in some areas⁴² and the government has indicated that any conferment of greater freedom in the future will depend on authorities being able to demonstrate their capacity to modernise in line with the agenda it sets out.⁴³

In addition, it is significant that Part I of the Local Government Act 2000 allows additional scope for authorities to develop participation with the community taking up the themes of partnership and 'joined up' government.⁴⁴ Local government moves from merely being a service provider to having a role as community leader. This involves 'A multi-organisational, community-based process, initiated by the council, for creating a shared vision of community identified priorities leading to a programme of actions which demonstrate the commitment and support of the groups involved'.⁴⁵ Sections 2 and 3 of the Local Government Act 2000 give local authorities powers to take any steps which they consider are likely to promote the well-being of their area or their inhabitants. For this purpose, under section 4, councils, together with other local bodies, must develop community strategies. These provisions are intended to give local authorities increased opportunities to improve the quality of life of their local communities.⁴⁶ The approach here confirms that local authorities are to have a role in providing leadership and co-ordination on the policy front rather

³⁹ Examples of services that have been put out to tender include: refuse disposal, street cleaning and road maintenance.

⁴⁰ See M Loughlin *Legality and Locality: The Role of Law in Central-Local Government Relations* (1996). See e.g. The Local Government Finance Act 1992, ss 53-63.

⁴¹ Loughlin, n 38 above, p 147.

⁴² For example, the best value regime under the Local Government Act 1999 and Part 1 of the Local Government Act 2000. Also, devolution has probably increased autonomy for local government in Scotland, Wales and Northern Ireland. However, T Hunt 'Freedom of the city' *The Guardian*, 29 July 2002 points out that local government has become a client state of Westminster with three quarters of its funds directly controlled from Whitehall. He maintains that 'to foster effective civic leadership, the government must allow councils the freedom to fail: to let them have access to the financial resources and political autonomy which have historically produced the most enterprising municipalities'.

⁴³ See *Modern Local Government: In Touch with the People* (1998) Cm 4014 at para 2.17.

⁴⁴ See *Modernising Government* (1999) Cm 4310 and *Modern Local Government: In Touch with the People* (1998) Cm 4014.

⁴⁵ V Jenkins, 'Learning from the Past: Achieving Sustainable Development in the Reform of Local Government' (2002) *PL* 130,138.

⁴⁶ Although they were previously able to incur expenditure in the interests of their area under s 137 of the Local Government Act 1972 this was subject to many restrictions which are now relaxed by s 8 of the LGA 2000.

than having responsibility for direct service provision⁴⁷. If housing is taken as an example, the traditional method was for a local authority to rely on its own stock of council housing to satisfy social housing requirements (under statute) by providing rented accommodation for council tenants. In contrast, the role of the council under this new scheme: 'is to identify local needs and problems, and to respond flexibly to these by facilitating initiatives involving partnerships between a wide range of actors in the local, private and voluntary sectors'.⁴⁸ This suggests that councils will promote and oversee new schemes for low cost housing, but that the private and voluntary sector will be increasingly responsible for the implementation of such projects at every stage.⁴⁹ It is apparent that the extent of contracting out by public bodies has been on the increase and that this trend is likely to be even more prevalent in the future. In sum, Local government as part of the contemporary administrative state, is to a substantial extent delivered by an assortment of hybrid bodies, voluntary organisations, and private companies. This has important implications when it comes to the application of the Human Rights Act because in providing a remedy when convention rights are at stake the reach of the HRA to these various bodies will have a bearing on its impact.

The Human Rights Act (HRA) has 'vertical' effect by requiring *public* bodies such as government, local government, the courts and the police in their dealings with the public to adhere to the convention. Section 6 is directed primarily at public authorities but it is clear that there are other ways in which convention rights apply 'horizontally' under the Act.⁵⁰ The HRA gives no direct right to sue in the civil courts for an alleged breach of a convention right by another individual or private company, but the courts are a public body to which the Act applies. Therefore, if an action is taken to sue in the courts on a private law matter which involves interpreting a statute effecting convention rights, the courts are now required to interpret that statute, according to section 3, in a way that is compatible with convention rights. The same obligation attaches to the common law which must be interpreted in a ECHR compatible manner. However, it should be noted that the Act makes clear that a remedy under section 8 can only be granted in

⁴⁷ This is a trend which can also be linked to a broader principle of subsidiarity within the nation state. For example, in relation to proposals for a EU constitution Jack Straw has recognised the need to entrench and enforce the principle of subsidiarity on a community wide basis to ensure that decision making takes place at a local level. See speech by Jack Straw, Foreign Secretary to the Edinburgh Chamber of Commerce, August 27, 2002.

⁴⁸ P Vincent-Jones 'Values and Purpose in Government: Central-local Relations in Regulatory Perspective' (2002) 29 *JLS* 27, 40.

⁴⁹ For many years local authorities have worked in harness with voluntary sector organisations in this field. See *e.g.* *Poplar v Donoghue* [2001] 3 WLR 183 and *Heather v Leonard Cheshire Foundation and HM Attorney-General* [2001] EWHC Admin 429. For further analysis of these judgments see below and P Craig 'Contracting Out, The Human Rights Act and the Scope of Judicial Review' (2002) 118 *LQR* 551.

⁵⁰ This was widely discussed before the HRA came into force. See *e.g.* M Hunt 'The "Horizontal Effect" of the Human Rights' (1998) *PL* 423, 435 and N Bamforth 'The Application of the Human Rights Act to Public Authorities and Public Bodies' (1999) 58 *CLJ* 159, 163ff.

respect of acts of public authorities. The HRA contains the important qualification that rights are generally asserted against public bodies by private individuals, and are not *directly* enforceable in respect of exclusively private bodies exercising private functions, or between private individuals. This means that the HRA places no *direct* obligations in regard to the conduct of private citizens, private companies and private organisations.

The courts are required to decide what constitutes public functions for these purposes, and, now that the Act is in force, it also has to be determined how far these provisions extend. This is complicated by the fact that, as we have just observed, the *private* sector frequently carry out high profile *governmental* services. These are often publicly funded (e.g., in the realm of health, education, housing, prisons and so on). While it is clear that ECHR rights are directly enforceable against public bodies in respect of *all* of their activities, it is far less clear whether rights are directly enforceable against hybrid bodies and private companies in respect of their *public* functions.⁵¹ The term “hybrid” has been used to describe arrangements which consist of a mixture of market and hierarchical ordering . . . Thus the concept precisely captures the notion of relationships . . . which are partly based on contractual notions of exchange and partly on . . . notions of hierarchical decision making.⁵² The position is that privatisation and contracting-out have now become the norm and thus we find that there are a new sets of contractual relationships. These may be between local authority and private company or service-provider and customer, but crucially, the public dimension is a statutory regime that establishes duties of service-provision, or powers of regulation. As Cane puts it: ‘It is not that contract and statute operate side-by-side in such a way that certain aspects of a relationship are governed by contract and others by statute. Rather the two elements are intertwined or blended with the result that the contract must be interpreted and applied in the light of relevant statutory provisions, and the statutory provisions must be interpreted and applied taking account of the contract’.⁵³

In determining the extent to which the HRA applies there are already some indications that the courts will give a narrow definition to what constitutes a *public body* and such an approach limits the scope of the Act.⁵⁴ The issue in *R v Servite Houses and Wandsworth LBC, ex parte Goldsmith and Chatting*⁵⁵ was whether a housing association could close a residential home after a promise had been given to residents that they could remain in the home for the remainder of their lives. In other words did they have a substantive

⁵¹ See Human Rights Act section 6(3)(b) ‘any person certain of whose function are functions of a public nature’.

⁵² C Scott, ‘The Juridification of Relations in the UK Utilities Sectors’ in Black, Muchlinski and Walker (eds), *Commercial Regulation and Judicial Review* (1998), p 59.

⁵³ See P Cane ‘Accountability and the Public/Private Distinction’ in N Bamforth and P Leyland (eds) n 37 above.

⁵⁴ In regard to the susceptibility to judicial review there has been an important debate over the definition of what constitutes a public as opposed to private body. Compare e.g. *R v Panel on Takeovers and Mergers, ex p Datafin* [1987] 1 All ER 564 and *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan* [1993] 2 All ER 853.

⁵⁵ (2000) *LGLR* 997.

legitimate expectation? However, any public law claim depended on first deciding whether a housing association which had terminated a contract constituted a public or a private body. Moses J rejected the idea that the local authority was acting as an agent of the local authority because there were no powers to delegate statutory obligations under the National Health Service and Community Care Act 1990. He then considered the source of the power. It was reasoned that, if the source of power of a body tended towards a statutory basis rather than being set on a contractual footing, this would be an important determining factor. This would be particularly so where a general regime of statutory control was discernible. However, in the instant case, he accepted that under section 26 of the National Assistance Act 1948 the local authority was able to enter into arrangements that divorced a service provider from its public law obligations. Accordingly, it was held that the courts were not in a position to impose public law standards upon a body the source of whose power were contractual. There was a lack of sufficient statutory penetration because the 1948 Act was not a statute that added public functions but one that allowed the discharge of obligations by private law arrangements.⁵⁶

Paul Craig for one has been strongly critical of the reasoning above, which suggests that protection under the HRA will not apply when there is a contracting out situation. As a result, in these instances there will be no remedy available against the service provider. Craig observes that: 'It is a non-sequitur to assume that contracting out must inexorably mean that the service providers' obligations reside solely in private as opposed to public law. The imposition of public law obligations, and the HRA would not in any sense undermine the contracting out option provided for in legislation. It would simply mean that a private party entering into a contract with a public body for the provision of services would take these obligations into account when bidding for the work . . .'.⁵⁷ This seems a reasonable conclusion but the implications of extending liability more generally are discussed towards the end of this section.

Further analysis of what constitutes a public authority is provided in *Poplar v Donoghue*.⁵⁸ The facts of this case were that the claimant contended that a possession order issued by a housing association was in breach of article 8 and article 6 of the ECHR. However, it first had to be determined whether housing associations, operating as registered social landlords after local housing authorities had transferred their stock of housing to them, were acting in a public or a private capacity. The Court of Appeal held that housing associations as a class are not standard public authorities but what can make an act by such a body, which would otherwise be private, public, is a feature, or a combination of features which impose a public character or stamp on the act. This might include providing accommodation for rent, charitable status, statutory authority etc. Lord Woolf also explained that, '[t]he more closely the acts that could be of a private nature are enmeshed in the activities of a public body, the more likely they are to be public'. The Court of Appeal came to the conclusion that while activities of housing

⁵⁶ See Craig n 49 above, 561ff.

⁵⁷ *Ibid*, 555.

⁵⁸ [2001] 3 WLR 183

associations need not involve the performance of public functions, in this case, in providing accommodation for the defendant and then seeking possession, the role of Poplar was so closely assimilated to that of Tower Hamlets that it was performing public and not private functions. In this case no remedy was granted on the substantive issues. Lord Woolf recognised that distinguishing between interpretation and what might amount to judicial legislation was a difficult task that would be overcome by the practical experience of seeking to apply section 3 of the HRA. He went on to suggest that ‘if it is necessary in order to obtain compliance to radically alter the effect of the legislation this will be an indication that more than interpretation is involved’. It was also recognised that this is an area in which ‘. . . the courts must treat the decisions of Parliament as to what is in the public interest with particular deference’.

The approach to justiciability in *Heather v Leonard Cheshire Foundation and HM Attorney-General*⁵⁹ can be contrasted with that in *Poplar v Donoghue*. In this case a claimant sought to argue that a decision to close one of its homes by the Leonard Cheshire Foundation (LCF) was an infringement of article 8 of the Convention. To succeed the LCF must be fulfilling a public function to come under section 6 of the HRA. Residents are sent to the homes under statutory powers. Section 21(1) of the National Assistance Act 1948 states that local authorities must provide accommodation for claimants in need of care and attention. Lord Woolf stated that if the authority provides accommodation it is clearly performing a public function and that it is also a public function if it makes arrangements for the accommodation to be provided by the LCF. However, if a body which is a charity, like LCF provides accommodation to those to whom the authority owes a duty under section 21 in accordance with an arrangement under section 26, it does not follow that the charity is performing a public function.⁶⁰ In other words, the mere fact that accommodation was funded by the local authority did not place the function in the public category.⁶¹ A contrast can also be made here between *Poplar* which was a statutory housing association formed to take over the council’s housing stock, and the Leonard Cheshire foundation which always has been a non-statutory charitable organisation specialising in the provision of residential care.

Despite his analysis and findings on the issue before him, Moses J remarked in the *Servite Homes* case above:

“I cannot conclude this matter without expressing my sympathy for the applicants. The case represents more than tension between public law and private law rights, but a collision. If I am right in my reasoning, it demonstrates an inadequacy of response to the plight of applicants now that

⁵⁹ [2001] EWHC Admin 429.

⁶⁰ *Ibid.* Craig, n 49 above, points out at 556 that this conclusion is counter intuitive. It is difficult to see why the nature of a function should alter if it is contracted out rather than performed in house.

⁶¹ It has been argued that the Leonard Cheshire case is an example of where a hybrid authority exercises a public function in relation to some persons but not others. See also J Johnston ‘The Meaning of “Public Authority” under the Human Rights Act’ [2001] *JR* 250, p 253.

Parliament has permitted public law obligations to be discharged by entering into private law arrangements".⁶²

At first encounter, in circumstances where a statutory function is being met by a contracting arrangement, it is difficult to see why protection under the HRA should vary with the method of service delivery. A test according to a list of criteria, such as those set out in *Poplar v Donoghue*, is bound to end up in drawing lines in the sand somewhere which inevitably results in preventing certain claimants from taking action. There are obvious reasons for introducing HRA protection in regard to the performance of public functions with statutory underpinning standing behind the provision of services. This is particularly the case in such areas as care for the elderly or the provision of rented accommodation to the most needy applicants, as in the cases discussed above. However, as was noted above, Lord Woolf in *Poplar v Donoghue* was in no doubt that the courts must treat the decisions of Parliament under the housing legislation as to what is in the public interest with particular deference. He pointed out that a procedure which ensured possession could be obtained expeditiously had been provided by Parliament. *Poplar* should follow this procedure when considering the rights of tenants under article 8. Also, it was relevant that tenants had remedies besides those provided under section 21(4) of the Housing Act 1988.⁶³ Equally, there is a recognition that if the court had found in favour of the tenant this would have resulted in queue jumping to the detriment of others on the housing list who were perhaps in circumstances of greater need. However, we have seen it convincingly argued by Craig that there is nothing in the nature of contracting out which, in principle, suggests that the HRA should not apply to private or voluntary bodies under a contracting out agreement.⁶⁴

If we pause to consider the possible implications of a more interventionist approach, are there good reasons for the judicial caution that has so far been exercised? Assuming that the courts decided to adopt a broad functions test, which subjected the private sector or voluntary sector organisations to claims under the Human Rights Act: would this have a detrimental impact on the way the system operated? I believe that this might undermine the implementation of schemes administered by local authorities, such as those in the cases discussed above. It could lead to the possibility that private and voluntary organisations entering into contracts with local government (and other public bodies) would have to face the possibility of a new category of claims. To date in cases of this type, the courts have recognised in certain circumstances that residents might enjoy a legitimate expectation. This could be that a home will remain open for their lifetime. In particular, this will be if there has been an express promise⁶⁵ but what would be the outcome

⁶² *R v Servite Houses and Wandsworth LBC, ex parte Goldsmith and Chatting* (2000) LGLR 997, 1025.

⁶³ As per Lord Woolf in *Poplar v Donoghue* [2001] 3 WLR 183.

⁶⁴ See Craig, n 49 above, 564ff.

⁶⁵ In *R v North and East Devon Health Authority, ex p Coughlin* [2000] 3 All ER 850 it was held that because of an express promise not to close a home a substantive legitimate expectation arose which could only be departed from if there was a sufficient overriding interest. It was also acknowledged that the closure of the home would be an interference with the rights of residents under art 8.

if it were held that a decision to close a home constituted a breach of respect for private and family life and that this was not justified under the exceptions referred to under article 8(2)? This would have a radical impact, as it could result in a requirement to keep open homes for the elderly that were proving to be a drain on resources. It might also be argued that a remedy for breach of article 8 should be awarded. This might be in the form of grants of compensation for the disruption caused through the closure of homes.⁶⁶ It would appear to follow that if the financial consequences of such claims turned out to be substantial, the private and voluntary sector organisations would indemnify themselves by taking out insurance, or do so directly by other charges. The upshot would be that the cost would be passed on as part of the bidding process, and ultimately it would have to be met by the public authority charged with carrying out the statutory duty. The increased cost of the satisfaction of individual claims would impact on the unit cost of providing the service, and the reduction in the resources available to the authority would then have an effect on the extent of the service provision and standard of the service provided. It should be remembered that under the ECHR civil and political rights are made justiciable while social and economic rights are not. In preference to a case by case approach, it is possible to envisage rights based claims leading to more limited procedural remedies open to individuals caught up in the contracting out of services.⁶⁷ Indeed, it might be argued that in order to provide effective redress, as is necessary and desirable to satisfy article 13, a new form of remedy is called for. It is proposed that this might be cast in terms of a new statutory right for certain classes of citizens in receipt of such benefits. They would have a right to adequate and meaningful consultation and perhaps also to limited compensation. At the same time the introduction of the remedy would also prevent routine questions of resource allocation from being determined by judicial intervention.

(3) Human Rights and Tort Liability of Local Authorities

Extending the tort liability of public authorities will have a very significant affect on local government and this is another area where there have been indications of the influence of human rights considerations on domestic law.⁶⁸ For example, it is now unlawful under section 6 for a public authority to act in a way which is incompatible with a Convention right and a person who claims that a public authority has acted, or proposes to act, in a way which is made unlawful under section 6 may bring proceedings against the authority under section 8. It has been suggested that this will mean in practice that the common law will have to evolve in a manner which is compatible with the Convention.⁶⁹ In regard to this discussion article 6 of

⁶⁶ Under HRA 1998 s 8 a court is empowered to grant a remedy but damages can only be awarded by a court which has a power to award damages, or to order compensation in civil proceedings.

⁶⁷ Ewing n 12 above, p 111 acknowledges with reference to *R v North and East Devon Health Authority, ex p Coughlin* [2000] 3 All ER 850 that the ECHR and HRA have the capacity to enhance social rights in limited respects by regulating the allocation of services.

⁶⁸ C Gearty, 'Tort Law and the Human Rights Act' in T Campbell *et al* (eds) n 2 above, p 243.

⁶⁹ *Ibid* at 255

the Convention can be seen to have particular importance. It requires that that everyone should be entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. It should also be remembered that the jurisprudence from Strasbourg (including *Z v UK*) has to be taken into account under section 2(1) but is not binding on the UK courts. However, the controversial *Osman* decision in Strasbourg found that the strike out provisions were in breach of article 6(1). These required that it must be fair, just and reasonable to impose a duty of care. Added to this, following the introduction of the HRA, it would appear that there is a presumptive right to pursue a public authority in damages for breach of statutory duty.

Turning to domestic law, the judgment of Lord Browne-Wilkinson in *X v Bedfordshire*⁷⁰ set limits on the exposure of local authorities (and other public bodies) for damages in the exercise of their statutory duties and powers (as opposed to free standing causes of action). It had established that on a general basis it was not just and reasonable for them to be subject to a duty of care enforceable by damages for the exercise of statutory duties and powers. This was not however an unqualified immunity in circumstances where they were exercising statutory powers but was made subject to certain provisos. These were set out in *X v Bedfordshire* and further explained by Lord Hoffman in *Stovin v Wise*⁷¹: ‘The minimum preconditions for basing a duty of care upon the existence of a statutory power, if it can be done at all, are first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute required compensation to be paid to persons who suffer the loss because the power was not exercised’. That is to say that there was a public law *Wednesbury* threshold of unreasonableness that had to be surmounted in assessing the conduct of the decision maker before liability can arise. Before proceeding to consider the subsequent case law, it is important to recognise that the Human Rights Act 1998 has seen the introduction of a proportionality test which applies where convention issues are at stake. It is clear from that proportionality operates on a different basis to *Wednesbury*. As Lord Steyn explained in *R v Secretary of State for the Home Department, ex parte Daly*⁷² a court now has:

“to assess the balance which the decision maker has struck, not merely whether it is within range of reasonable decisions. Secondly, the proportionality test may go further than traditional grounds of review in as much as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly. . . the intensity of review . . . is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the sense of meeting pressing social need, and the question whether the interference was really proportionate to the legitimate aim being pursued”.

⁷⁰ [1995] 2 AC 633.

⁷¹ [1996] AC 923 at 953.

⁷² [2001] 2 WLR 1622 at 1635.

It has been suggested that this makes judicial review more intensive and brings public law closer to the test applied in private law. It is now apparent that in any claim with a human rights dimension to it: ‘the court is obliged to exercise an independent judgment as to the propriety of the action when weighed against the human rights in question’. And, if this is so, there can be no automatic restriction on public law liability.⁷³

A policy/operations dichotomy is another factor that has been relevant in the public sphere. In general decisions regarded as matters of policy have been regarded as non-justiciable while negligent operational decisions have tended to be more susceptible to challenge.⁷⁴ There has been a recent crop of decisions which indicate that public services have been more widely exposed to claims of compensation for negligent conduct. For example, there have been cases involving fire service and police forces with an operational dimension to them. The first signs of this change in approach were apparent in *Capital and Counties and Digital Equipment v Hampshire CC*⁷⁵ where it was found that a fire authority could be held accountable in regard to property destroyed because of negligent fire fighting. After a blaze had broken out in commercial premises the station officer ordered the sprinkler system to be turned off. As a direct result control over the fire was lost and the building destroyed. Under the third limb of the *Caparo* test it was held to be ‘fair, just and reasonable’ to recognise a duty of care in these circumstances.⁷⁶

In *Barrett v Enfield BC*⁷⁷ the House of Lords acted to qualify the immunity recognised in *X v Bedfordshire*. They did so before the HRA came into force and without expressly invoking *Osman* (It is worth noting that the *Osman* case is *not* relied upon by the Law Lords as the basis for their decision.). Their Lordships unanimously decided to overturn a decision by the Court of Appeal striking out a negligence claim against a local authority. In view of the ever increasing media profile of cases involving the abuse of children in recent years, it is worth noting that the facts were that P suffered physical abuse from his natural parents and was taken into local authority care as a very small child. After a lapse of time he was placed by the local authority with a succession of different foster parents. However, these placements proved problematic and he was moved to a number of different children’s homes. By the time he was released from care at the age of 17 a pattern of very disturbed behaviour had manifested itself. The basis of the claim was that his behavioural problems originating from an early age could be attributed to negligent treatment at the hands of the council. It was

⁷³ C Newdick ‘Damages for Public Authority Negligence – Public Interests and the Human Rights Act’ (2002) 10 *Tort Law Review* 127, 140.

⁷⁴ As Lord Slynn explained in *Barrett v Enfield BC* [1999] 3 WLR 79: ‘The greater the element of policy involved, the wider the area of discretion accorded, the more likely it is that the matter is not justiciable so that no action in negligence can be brought’.

⁷⁵ [1997] 1 QB 1004.

⁷⁶ A change in direction is also apparent in regard to cases involving the police. See *Swinney v Chief Constable of the Northumbria Police* [1997] QB 464; *Darker v Chief Constable West Midlands* [2000] WLR 747.

⁷⁷ [1999] 3 WLR 79.

contended that the authority had been in breach of a common law duty of care owed to him.

The Court of Appeal had upheld an earlier decision to strike out the case. This was partly on the basis that the action rested on showing that the council had negligently exercised its statutory discretion. On this point the Court concluded that, since it was unlikely that the *Wednesbury* threshold of unreasonableness could be demonstrated in the exercise of its discretion, the action was likely to fail. It was further held by Lord Woolf MR (as he then was) in the Court of Appeal that, although the first two requirements in *Caparo Industries v Dickman* of foreseeability and proximity were satisfied, the third requirement was not. Therefore, it would not be just and reasonable in the present case to impose a duty of care on a local authority for the careless exercise of a statutory discretion. However, their Lordships came to a different conclusion on the crucial issue of striking out. This was on the basis that no duty of care was owed.

It should be stressed again that there was no direct reference to the Human Rights Act and the Act was not in force when the House of Lords decided the case. However, it was obvious that the court was aware of developments in Strasbourg. In particular, Lord Browne-Wilkinson provided strongly critical appraisal of *Osman* (which has been vindicated by the decision in *Z v UK*). His judgment recognised the potential impact of the Human Rights Act 1998 in preventing such cases from being struck out. However, Lord Browne-Wilkinson pointed out that a guarantee of rights under article 6(1) applied only in circumstances where an individual had a pre-existing right to a hearing under domestic law which was then denied. The point being that the striking out procedure, which had been adopted did *not* restrict access to a court, but was made after deliberation on the question of a duty of care. As Gearty points out: “The meta-confusion lying at the heart of the *Osman/Z* line of cases from a UK point of view relates to the question of what constitutes ‘an immunity’”.⁷⁸ There was no liability to be immune from, because the third limb of the *Caparo* test was missing. Indeed, the decision by the EctHR in *Z* recognises that in relation to article 6 ‘the inability of the applicants to sue the local authority flowed not from an immunity but from the applicable principles governing the substantive right of action in domestic law’.⁷⁹ The position following *Z* appears to be that a court must determine whether article 6(1) applies to any given situation and if it does so, the court must go on to decide whether there has been a breach in terms of the procedural safeguards that are required under article 6. Lord Browne-Wilkinson recognised that this introduced the prospect of an exclusionary rule having to be decided afresh in each individual case. *Osman* also raised other awkward questions. For example, any revised approach would need to take account of circumstances where a view has been taken that the imposition of liability would not be fair and reasonable in the circumstances and Lord Browne-Wilkinson reiterated the difficulty in identifying a clear boundary between decisions falling under the head of policy and discretion, and those matters that are considered as falling under the ambit of operations.

⁷⁸ C Gearty, ‘Osman Unravels’ (2002) *MLR* 87, 90.

⁷⁹ [2001] 2 *FLR* 612; Application 29392/95. 10 May 2001 para 100.

In his judgment, Lord Slynn makes a crucial distinction between the facts in *X v Bedfordshire* and the *Barrett* case. The former was non-justiciable because the contested decisions concerned the exercise of a statutory discretion. In *X v Bedfordshire* itself the central issue was deciding whether a child should be taken into care. While the latter case concerned acts done *after* a child had been taken into care. His Lordship reasoned that although the decision to take the child into care might not be found open to question, it did not follow that the child's subsequent treatment at the hands of the authority was not actionable. Any such treatment concerned the ways in which the powers of the authority were exercised at an operational level.

The position adopted by the House of Lords in *Barrett* is that a claim should *only* be struck out if operational carelessness *could not have caused* the damage or injury. Lord Slynn recognised that the allegations concerned the way in which the powers of the local authority were exercised and he suggested that there is jurisdiction to consider, first, whether there is a duty of care in respect of these acts. Second, in considering whether this duty has been broken, once it is shown that there is an arguable case, this becomes a question to be determined by the court on the facts. Thus the focus of attention has shifted to the breach stage. Any liability will ultimately depend on the capacity of the plaintiff/claimant to establish a causal link between negligent operational acts and any resulting psychological injuries. If the negligence was not caused by the operational acts of the authority, but flowed from policy decisions there will be no liability. But their Lordships held that the mere fact that there was a statutory discretion did not rule out the possibility of liability. At an operational level the court regarded social workers as skilled professionals who were in an analogous position in regard to owing a duty of care to other comparable groups such as health care professionals and teachers.⁸⁰

The House of Lords has since decided that a local authority can be vicariously liable in respect to the provision of education and educational services. In *Phelps v Hillingdon LBC*⁸¹ three of the claimants were suffering from severe educational difficulties and were referred by the local authority to expert educational psychologist who failed to identify dyslexia. It was argued that in each case severe problems flowed from the misdiagnosis. These consequences ranged from lack of educational progress, to social deprivation and psychiatric injury. G, the final claimant, was a boy with Duchenne muscular dystrophy who had been removed from a mainstream school and transferred to a school with facilities for special disabilities, but not provided with computer technology and suitable training to cope educationally. Likewise this claimant suffered from lack of educational progress, social deprivation and psychiatric injury in the form clinical depression.⁸²

It was held that a person exercising a particular skill or profession might owe a duty of care in its performance and it was stressed that those engaged in education should possess and observe the highest standards. 'Since it was

⁸⁰ P Craig and D Fairgrieve, "Barrett, Negligence and Discretionary Powers" (1999) *PL* 626, 633.

⁸¹ [2000] 3 *WLR* 776.

⁸² M Harris, 'Education and Local Authorities' (2001) *LQR* 25.

clear that that the child's parents and teachers would act on the advice a duty of care arose. The professional should exercise reasonable skill and care when assessing the child and then when advising the educational authority'. Lord Nichols stated that this '. . . seems to me to be, on its face, an example par excellence of a situation where the law will regard the professional owing a duty of care to a third party as well as his own employer'. To put it simply, 'the adverse consequence of the plaintiff's dyslexia could have been mitigated by early diagnosis and appropriate treatment or educational provision'. Accordingly, it was also held that the authority could be vicariously liable for the negligence of its educational psychologist for the failure to discharge a statutory duty arising under the Education Acts 1944 and 1981 which was to make a correct diagnosis dyslexia. Although a right to pursue a claim is recognised by this decision, it should be noted that the litigant is still faced (as recognised in *Barrett* above) with the task of establishing a causal link between the erroneous diagnosis (of dyslexia), the subsequent educational problems that have been experienced and any psychiatric injury that it is claimed has resulted from this. The question for the court will be whether any foreseeable harm has been inflicted on the plaintiff. The upshot is that teachers and educational psychologists acting in an advisory capacity are placed under an equivalent duty of care to doctors, lawyers and other persons with an equivalent type of special skill, and that a local authority employing them will be vicariously liable in respect to their negligent acts and omissions.

As has been pointed out, *Phelps* has gone significantly further than *Barrett* in extending liability. This is first because it was held that the claim was fully justified and liability was upheld on the basis of facts established in court. Secondly, it is because the 'practical' difficulties in establishing a duty of care in education cases was not allowed to stand in the way of making a deserving claim.⁸³ The argument that this would lead to defensive practices was not accepted by their Lordships. In fact, the court took on board the alternative view, namely, that recognising a duty of care would drive up standards and act as a deterrent for sloppy conduct. The danger that this would open the floodgates to a torrent of litigation was also rejected. The Bolam test⁸⁴ would serve as a deterrent for unmeritorious claims because this requires the claimant to show that the professional concerned did not exercise the skills of a competent professional. This requires the claimant to convince the court that there had been a failure to act in accordance with the accepted views of a substantial reputable body of opinion. In other words the standard set by the professions are taken into account by the courts and this will constitute an obstacle for ill founded claims.⁸⁵ Lord Nichols stated in *Phelps v Hillingdon LBC*⁸⁶ that teachers must owe a duty of care to *all* their pupils. The exclusionary rule has been relaxed but the question of direct liability for teachers was not resolved, nor have the limits of liability been clearly defined.

⁸³ D Fairgrieve, 'Pushing back the Boundaries of Public Authority Liability: Tort Law Enters the Classroom' (2002) *PL* 288, 295.

⁸⁴ *Bolam v Friern Hospital Management Committee* [1957] 1 *WLR* 582.

⁸⁵ Fairgrieve n 83 above, 302.

⁸⁶ [2000] 3 *WLR* 776.

The influence of EU law is another factor to be taken into account here. It has been pointed out⁸⁷ that by not awarding damages for breaches of statutory duty in cases such as *X v Bedfordshire* there was a sense in which the House of Lords appeared to be travelling in the opposite direction to EU jurisprudence. It will be remembered that national courts under the doctrine of state liability are required to award damages to an individual whose EU law rights have been breached. Since the principle was established by the ECJ in *Francovich and Bonifaci v Italy*,⁸⁸ recovery of damages has been allowed against national governments for a sufficiently serious breach of community law which takes place irrespective of fault.⁸⁹ It has been argued that a process of harmonisation for UK domestic law is called for in order to correct the discrepancy⁹⁰ of approach between EU and domestic law. In essence, the proposal is that a comparable common law liability for unlawful administrative acts could be developed, with the important requirement of sufficient seriousness providing some flexibility for the courts in reconciling competing interests.⁹¹

CONCLUSION

We must recognise that the HRA is having a profound impact on the constitutional balance between Parliament, the executive and the courts. At the outset we noted that some commentators broadly welcome the more prominent judicial role under the HRA and view this as a response to executive dominance and many perceived shortcoming in parliamentary control. However, although there may be some gains in protecting certain rights by judicial intervention, it is argued here that ‘. . . law is not and cannot be a substitute for politics’.⁹² This assertion has a contemporary resonance and it has provided the context for our discussion. As Professor Griffith recognised ‘the danger of arguing from rights is that the real issues can be evaded. What are truly questions of politics and economics are presented as questions of law’.⁹³ In relation to the preceding discussion, the *Barrett* and *Phelps* decisions are related to the new rights based culture. It is becoming clear that this relaxation in immunity is part of wider trend allowing litigation against public authorities.⁹⁴ This has been particularly evident in the National Health Service. For example, it is reported that as a

⁸⁷ See Anthony n 27 above, p 143; W Wade and C Forsyth *Administrative Law* (2000), p 763.

⁸⁸ [1991] ECR I-5357.

⁸⁹ See *R v Secretary of State for Transport, ex p Factortame* (No 5) [1999] 3 WLR 1062.

⁹⁰ R Carnwath ‘Welfare services: liabilities in tort after the Human Rights Act’ (2001) *PL* 210, 217ff.

⁹¹ See Anthony n 27 above, p 142ff for an expanded discussion of the wider debate over the integration of European Union law. For two opposing views on this question see: P Craig, ‘Once More Unto the Breach: The Community, The State and Damages Liability’ (1997) 113 *LQR* 67 and J Allison ‘Transplantation and Cross-fertilisation’ in J Beatson and T Tridimas (eds), *New Directions in European Public Law* (1998), p 169.

⁹² JAG Griffith ‘The Political Constitution’ (1979) *MLR* 1, 16.

⁹³ *Ibid*, 17.

⁹⁴ Relaxing the striking out rule so that more cases to go to trial appears to run contrary to the spirit of the reforms in case management introduced under the Civil Procedure Rules of 1999.

result of litigation the amount of compensation paid by insurance companies and public authorities amounts to one per cent of GDP, and that the figure is growing by 15 per cent a year.⁹⁵ It has been pointed out that allowing claims to soar in the health service gives rise to problems which inevitably have resource implications.⁹⁶ The crucial factor to keep mind is that health authorities are not in the same situation as private hospitals. They are under an obligation to provide their services free at the point of delivery for those that need them, and they must achieve this within limited budgets. This has implications for doctors working overlong hours, as it does for patients treated by these doctors. Exposure to general liability is a fundamentally inefficient way of delivering compensation. Indeed, the cost of claims has become so great⁹⁷ that the government is currently considering how to introduce a statutory scheme which seeks to achieve ‘a more responsive and patient focused approach to both complaints and clinical negligence claims handling, which provides remedies more closely tailored to individual patients’ needs – including practical, non-financial and financial remedies which address concerns directly and quickly’.⁹⁸ Equally, the anticipated growth in litigation across the public sector will have serious consequences for local government in its capacity as the provider of education, social services and housing. For example, it has been argued that the new approach to striking out post *Barrett* will encourage claims. This is because defendant authorities cannot recover costs against claimants eligible for legal aid. As well as more cases going before a court, the likely result is that local authorities and other public bodies will increasingly be inclined to settle rather than run the risk of trial and the prospect of defeat.⁹⁹

It has been argued by some commentators that: ‘. . . the Human Rights Act has already transferred an extensive legislative power to the judges. But Parliament has not explicitly given away its general policy or resource allocation powers, and it would be quite wrong for the courts to use the Human Rights Act in order to seize the initiative in such areas.’¹⁰⁰ In regard to the assessment of the initial case law arising directly from the Human Rights Act, we have observed that there has been, on the whole, remarkable judicial restraint, with an acute awareness of the dangers of encroaching on the most sensitive political territory.¹⁰¹ In addition, as was also noted above, a response to rulings by the domestic courts and the ECHR opening up

⁹⁵ R Verkaik “Lawyers Earning £3 billion yearly from UK injury culture”, *The Independent*, 17/12/02. The Cost of Compensation Culture; J Rosenberg ‘The Price of Suing for every mishap is £10 billion’ *Daily Telegraph* 17/12/02.

⁹⁶ C Newdick n 73 above, 132.

⁹⁷ Clinical negligence: what are the issues and options for reform? National Audit Office report 2002. This put the projected figures for claims at £3.9 billion.

⁹⁸ Handling Clinical Negligence Claims in England: Report by the Comptroller and Auditor General HC403, Session 2000-2001, 3 May 2001. New schemes might involve establishing tribunals or introducing a commission to mediate, arbitrate and determine claims.

⁹⁹ See Craig and Fairgrieve, n 80 above, 638. The extent to which this is happening is obviously difficult to precisely quantify as many claims are not reaching court.

¹⁰⁰ Gearty n 68 above, p 256.

¹⁰¹ See e.g. *R (on the application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23; [2001] 2 WLR 1389 above.

liability in further policy areas, is likely to be legislation designed to provide a remedy and therefore prevent potential challenges under article 13.¹⁰² In fact, there is a strong case for introducing statutory schemes for no-fault compensation in the public sphere which, in all but the most serious cases, would replace the costly and inefficient option of litigation.¹⁰³ The wider availability of statutory remedies would have the effect of outflanking a more general move towards litigation under the HRA, but at the same time, it satisfies the requirement of providing a remedy under the Convention.

Moreover, the suggestion (which was made in *Phelps* above) that the threat of legal action will act as the catalyst for the improvement of standards in any public service environment, whether it be social services, housing, education or the health service, is very difficult to sustain, given the complexity of the systems of management and the number of players that are often involved in the delivery of these services. Rather, there is considerable evidence to suggest that the prospect of litigation is counter productive and merely results in a safety first approach by public sector organisations of defensive and self-justifying conduct. However, it must be acknowledged that there are members of the public who feel intense anger and frustration at the lack of an adequate response from public bodies when things go seriously wrong. Accordingly, it is argued that there also needs to be radical reform of internal disciplinary procedures and accountability systems of public bodies to make professionals and other players working in these fields more accountable for their actions in the context of their employment and also to increase operational transparency.¹⁰⁴

¹⁰² Also, local authorities may well modify their modes of operation to comply with the decision in *Z v UK* (and others like it) by adopting a procedure that provides an *intra vires* remedy.

¹⁰³ See C Harlow, *Understanding Tort Law* (1994), p 183.

¹⁰⁴ See the inquiry presided over by Lord Laming into the death of Victoria Climbié. Social Services Minister Jacqui Smith stated 14/10/02: "The government is committed to improving safeguards for children, and has introduced new legislation, new guidance, new structures and new policy initiatives to make children safer and to ensure that there is a proper focus on children at the very heart of government." Revised codes for professional bodies are another path to obtaining improved standards.

ANTI-TERRORISM LAWS AND DATA RETENTION: WAR IS OVER?

*Clive Walker, Professor of Criminal Justice Studies, Department of Law, University of Leeds and
Yaman Akdeniz, Lecturer in Cyberlaw, Department of Law,
University of Leeds**

ABSTRACT

The Anti-terrorism, Crime and Security Act 2001 signals a determined response to the attacks of September 11th. One aspect involves the facilitation of the use of electronic surveillance in order to prevent, detect or prosecute the perpetrators of terrorism. The role of Part XI of the 2001 Act is to augment existing surveillance powers in the Regulation of Investigatory Powers Act 2000. This paper plots the relationships between those two statutes and also their relationship to data protection laws. Delays and difficulties in enforcement are noted and are related to a process of return to greater normality after an initial period of panic.

CYBERSPACE UNDER INVESTIGATION

Several deeply-seated factors have tended to impel policing agencies in late modern societies towards a focus on communications data. One concerns the reliance of society on such technology and therefore its augmented vulnerability to attack. This feature is reflected in changes to the definition of “terrorism”. Section 1 of the Terrorism Act 2000 explicitly encompasses:¹

“(2) Action . . . if it . . .

(e) is designed seriously to interfere with or seriously to disrupt an electronic system.”

The enhanced perception of the vulnerabilities of networks to terrorist attack has also resulted in the appointment within the Cabinet Office of a Central Sponsor for Information Assurance and Resilience² and the creation of a National Infrastructure Security Co-ordination Centre (NISCC), an interdepartmental organisation set up to co-ordinate and develop existing

* An earlier version of this article was presented to the South East Conference of the American Association of Law Schools, Kiawah Island, South Carolina, July 2002 by invitation of Professor Russ Weaver, University of Louisville.

¹ For a discussion of the definition in section 1, see: C Walker, *The Anti-Terrorism Legislation* (2002).

² Defence Committee, *Defence and Security in the United Kingdom* (2001-02 HC 518) para 125.

work within Government departments and agencies and bodies in the private sector to defend the Critical National Infrastructure against electronic attack.³

As well as a defensive stance, communications data also elicit an offensive disposition in the form of techniques of surveillance. Reasons for this development include that information technologies have developed enormously and pervade the economies and societies in western states.⁴ Their uses are both for good and ill, the latter being the subject of policing. The technologies provide both a new site for policing⁵ and quasi-policing⁶ regulatory activity and also furnish a variety of opportunities for surveillance which would not previously have been feasible but which also raise significant privacy concerns.⁷ They may allow “investigators for example to establish links between suspected conspirators (itemised bill) or to ascertain the whereabouts of a given person at a given time, thereby confirming or disproving an alibi (cell site analysis)”.⁸ The trend next represents part of a fundamental switch away from the reactive and overt policing of incidents to the proactive and covert policing and management of risks,⁹ which may either take the form of people (such as “target criminals”)¹⁰ or sites of activity such as the perennial panics about internet chat rooms and their use by paedophiles.¹¹

In line with these impulses towards greater police attention to information and communications technologies, the National Hi-Tech Crime Unit (NHTCU) was launched within the National Criminal Intelligence Service in April 2001.¹² The NHTCU is tasked with the key role in the response to cyber-crime, especially as practised by serious and organised crime. The NHTCU comprises of four main divisions – Investigation, Intelligence, Support and Forensic Retrieval.

³ See further <<http://www.niscc.gov.uk/>>. Note also the activities of the Communications-Electronics Security Group (CESG) at <<http://www.cesg.gov.uk/>>.

⁴ See Y Akdeniz, C Walker, and D Wall, *The Internet, Law and Society* (2000).

⁵ It is estimated that around 500,000 mobile phone records are checked by the police each year: *The Independent* 21 December 2002 4; E Philips, “Mobile phone – friend or foe?” (2002) 42 *Science & Justice* 225. The All Party Parliamentary Internet Group, Communications Data: Report of an Inquiry by the All Party Internet Group (January 2003, <<http://www.apig.org.uk/APIGreport.pdf>>, paras 9, 10) suggests requests for communication data are closer to a million per year (mainly relating to subscriber data) but emphasises that fewer requests by far are made to Internet Service Providers.

⁶ See especially the activities of the Internet Watch Foundation (<<http://www.iwf.org.uk/>>).

⁷ See C Dandeker, *Surveillance, Power and Modernity* (1990); D Lyon, *The Electronic Eye: The Rise of Surveillance Society* (1994); S Davies, *Big Brother: Britain's Web of Surveillance and the New Technological Order* (1996); D Banisar, *Privacy & Human Rights: An International Survey of Privacy Laws and Developments* (2000).

⁸ Home Office, Regulatory Impact Assessment: Anti-terrorism, Crime and Security Bill (London, 2001).

⁹ See RV Ericson, and KD Haggerty, *Policing the Risk Society* (1997).

¹⁰ See <<http://www.ncis.gov.uk/business.asp>>.

¹¹ The issue was immediately raised, for example, in the case of the disappearance of Jessica Chapman and Holly Wells in Soham: *The Times* 10 August 2002 p 7.

¹² See NCIS Press release 18/010.

Given the process of the “hollowing out” of the late modern state,¹³ one cannot expect that all the data of interest to the forces of law and order will conveniently be held by compliant public authorities. Rather, a great deal of computer and communication data will be in the clutches of the private Communications Service Providers (CSPs), who sign up customers in return for communication services such as home phone and mobile phone connection and related services such as Wireless Application Protocol (WAP) and General Packet Radio Service (GPRS), e-mail and Internet access and facilities. At the same time as this proliferation of communications access is viewed as a positive trend from the point of view of the establishment of the information society,¹⁴ the abundance of nodes of entry can become a negative trend from the law enforcement perspective. Not only may it result in greater complexities in terms of locating the relevant network and database on which to track down the desired information, but also it may mean that there is nothing to be discovered at the end of the day because customer and financial pressures on fiercely competitive CSPs demand that data be shed as soon as possible. According to the Home Office’s Regulatory Impact Assessment: Retention of Communications Data in 2001:¹⁵

“Changes to the business model are leading to a reduction in the amount of data which is needed for billing purposes (e.g. pre-pay/ subscription/ “always on”). Combined with pressure from the privacy lobby, this is leading to a decrease in data retention overall.”

Leading policing and security agencies have pondered for some time how to react to the new challenges of cyberspace. The attacks of September 11th 2001 on the World Trade Centre, New York and the Pentagon, Washington DC, reinforced by subsequent apprehensions about assaults by anthrax and other horrifying weapons of mass destruction, constructed a compelling trigger for action both by policy-makers and legislators. In the months that ensued, there was a readiness to enact virtually any measure which was conceivably related to “the first war of the twenty-first century”¹⁶ conjured by US President Bush against terrorism and many which were not even claimed to be vaguely connected. However, it is the contention of this article that the first phase of official reaction to September 11th which afforded such indulgence has passed and that there has been a partial re-establishment of earlier legal stances in relation to terrorism, which emphasise the rule of law and policing models, rather than derogation and military models, though without allaying concerns about privacy rights. This trend is evidenced by the development of the law providing for the retention of communications data both before and after September 11th.

¹³ See B Jessop, “Post-Fordism and the State” in A Amin, (ed), *Post-Fordism: A Reader* (1994) p 251.

¹⁴ See Akdeniz *et al*, n 4 above chap 1.

¹⁵ *Loc cit* para 6.

¹⁶ *The Guardian* 14 September 2001 p 5.

The Enactment of Part XI of the Anti-terrorism, Crime and Security Act 2001

Part XI of the Anti-terrorism, Crime and Security Act 2001 seeks to ensure that CSPs will retain communications data for an investigatory rainy day.¹⁷ The data must be held for a specified period. If access for investigatory purposes is actually required, attention must then be turned to the Regulation of Investigatory Powers Act 2000 (RIPA 2000), since the Anti-terrorism, Crime and Security Act 2001 itself grants no further provisions about access, disclosure or utilisation.

Despite this limit, Part XI was criticised as excessive during its passage. Whilst confined to “communications data”, the effect can be to provide a complete dossier on private life—who you contact, what are your interests and habits and where you are and have been – like a CCTV inside your head, as one commentator put it.¹⁸ The measure suggests a certain failure on the part of those authorities tasked to collect focused intelligence so as to combat terrorism, with the result that the entire population must be treated as potentially suspect. Part XI may have been easier to stomach if designed around the concept of “terrorist investigations” under section 32, but the current text is explicitly wider and encourages mass snooping, and like other parts of the Act,¹⁹ it betokens earlier and wider origins than the combating of terrorism.

Taking up the last point, Part XI was not entirely devised after September 11th. The idea may probably be traced to lobbying from the National Criminal Intelligence Service (on behalf of the police, HM Customs and Excise, the Security Service, Secret Intelligence Service and GCHQ) as the next step on from the passage of the Regulation of Investigatory Powers Act 2000²⁰ and to ensure that it will be effective in implementation. It is alleged that those agencies called for communications data to be retained by CSPs for a minimum period of 12 months and then to be archived, either in-house or by a Trusted Third Party agency or contractor, and retained for a further six-year period.²¹ According to their Report, the retention of communications data has great value to law enforcement:

¹⁷ See generally House of Commons Research Paper on Communications Data: Access and Retention, 02/63, 21 November 2002.

¹⁸ C Bowden, “CCTV for inside your head” (2002) 8 *Computer and Telecommunications Law Review* 21. Even the Home Office admits that “a detailed profile” can be compiled: Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003, para 5.2.

¹⁹ The criticism was directed, for example at Parts III (relating to the disclosure of information held by government department and agencies) and X (relating to extended powers granted to the Ministry of Defence Police and British Transport Police). See: Walker, n 1 above, chaps 4 & 9; Northern Ireland Select Committee, *The Financing of Terrorism in Northern Ireland* (2001-02 HC 978) para 119.

²⁰ See Y Akdeniz, N Taylor, and C Walker, “Regulation of Investigatory Powers Act 2000: Bigbrother.gov.uk” [2001] *CrimLR* 73.

²¹ R Gaspar, NCIS Submission to the Home Office; *Looking to the Future: Clarity on Communications Data Retention Law* (see <<http://cryptome.org/ncis-carnivore.htm>>, 2000) para 6.

“1.2.1 Communications data is crucial to the business of the Agencies. It is pivotal to reactive investigations into serious crime and the development of proactive intelligence on matters effecting not only organised criminal activity but also national security. At the lower level, it provides considerable benefit to the detection of volume crime. . . . Short term retention and then deletion of data will have a disastrous impact on the Agencies’ intelligence and evidence gathering capabilities.

1.2.2 Communications data is becoming increasingly important to provide evidence to establish innocence. Premature deletion will seriously compromise the interests of justice. Communications data has a unique value to promoting a safe and free society. This provides the overriding justification for longer-term retention.”

This progeny is officially denied.²² However, conspiracy theories seem to be abound in this field, and a further allegation is that the retention of communications data was alleged to be part of the demands for enhanced security written by the US President to the European Commission President Romano Prodi on the 16 October 2001, including the call for the moderation of data protection principles “in the context of law enforcement and counter-terrorism imperatives”.²³

In detail, Part XI establishes that, under section 102, the Secretary of State can issue a voluntary code of practice²⁴ relating to the retention of “communications data” by “communications providers” (by section 107, meaning a person who provides a postal service or a telecommunications service). No distinction is made between public and private communication service providers,²⁵ such as the United Kingdom universities’ JANET network²⁶ or the Parliamentary Data and Video Network,²⁷ though one hopes that purely domestic networks operated for personal, family or household affairs will be exempt.²⁸ “Communications data” has the same interpretation as in section 21(4) in Chapter 2 of Part 1 of the Regulation of Investigatory Powers Act 2000, which means it is data relating to the mode and nature of telephone, Internet and postal communications (traffic, service, and subscriber data), but it is not meant to include the contents of the

²² House of Lords Deb. vol 629 col 770 4 December 2001, Lord Rooker.

²³ <<http://www.statewatch.org/news/2001/nov/06uslet.htm>>; W Malcolm, and D Barker, “Privacy and surveillance” (2002) 152 *New Law Journal* 80, 81.

²⁴ A draft code has been published for consultation in March 2003: Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003.

²⁵ House of Lords Deb. vol 629 col 756 4 December 2001, Lord Rooker.

²⁶ <<http://www.ja.net/>>.

²⁷ <<http://www.adaptwestminster.co.uk/html/HoCDepts/PDVNGuidInfo.htm>>.

²⁸ This is the current intention: Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003, Annex A, para 13.

communications itself. This distinction is thought to be fallible in the case of Internet data:²⁹

“Knowing the numbers dialled by an individual may yield useful information to the authorities but does not, by itself, reveal the content of the conversations which took place. However, if you have access to the clickstream, you can ascertain the content of everything that the target has read, viewed or downloaded. And because everything is in digital form, the whole process can be automated. The algorithm goes like this: read the URL; fetch the page; parse the content; decide whether content matches certain criteria; store decision; read next URL. A five-year-old could write the code to do it.”

The Telecommunications (Data Protection and Privacy) Regulations 1999³⁰ currently regulate the retention of such data by communication service providers but do so from the opposite, restrictive approach to Part XI. Such data can only be retained for certain specific commercial purposes such as to send a bill to a customer and ensure legal enforcement where necessary (regulation 7) otherwise it must be erased or made anonymous. Whilst the Regulations (regulations 32 and 33) permit the retention of communications data on national security and crime prevention grounds, there is currently no general guidance as to where these might apply or for how long.³¹ Several Data Protection Principles in the Data Protection Act 1998, including the First (having a legitimate basis for processing), Third (to ensure that data are relevant and not excessive in relation to the purpose for processing) and Fifth (a data controller should not hold personal data for longer than necessary for its own purpose for processing the data) would almost certainly forbid the blanket storage of logs recording such details as web-sites browsed or e-mail addresses. Other data, such as the length of the link to the CSP, may be kept so long as relevant to billing or fraud control, as permitted by the Telecommunications Regulations of 1999. The need for retention of data would be judged against the continued necessity for the business purposes of the CSP such as for sending out a bill, dealing with a disputed matter or ensuring the security of its network. Whilst national security or crime prevention purposes may empower the retention of data beyond these in-house purposes under sections 28 and 29 of the Data Protection Act 1998 under exceptional circumstances, they certainly do not place the CSP under a duty to retain on the chance that such a purpose will arise.³² In practice,

²⁹ J Naughton, “Take a tip m’lord – save cookie talk for teatime” (2000) *The Observer* 18 June, <<http://www.guardian.co.uk/Archive/Article/0,4273,4030723,00.html>>.

³⁰ SI no 2093. These Regulations implement Directive 97/66/EC of the European Parliament and the Council concerning the processing of personal data and privacy in the telecommunications sector. It is intended to replace by 31 October 2003 this Directive by Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

³¹ In the case of national security requirements under regulation 32, there is also the difficulty that a cumbersome Ministerial certificate has to be issued.

³² Applications for access under the Data Protection Act 1998 are also considered unsatisfactory since the legislation grants a privilege against subject action for disclosure of their data, but it does not impose any duty to comply with the

while some CSPs already keep data for a year or more (and have therefore expressed some acceptance of these measures),³³ others delete it just days after the traffic has occurred and so would incur costs to adopt other practices for law enforcement purposes only.

In the light of this varied practice, Part XI and the envisaged code of practice³⁴ will give guidance to CSPs as to the basis for retaining on national security and crime prevention grounds communications data beyond the period that they require it for their own business purposes. Once finalised, the code of practice will apply to communications data that the CSPs have generated or otherwise possess. Further agreements³⁵ with specific CSPs (especially those with direct access to the Internet structure rather than those renting from the major half dozen operators) will afford greater detail as to the type of data to be retained and the conditions of retention and state subventions.³⁶ This partnership approach followed a meeting, on 24 October 2001, involving representatives of the Home Office and the Department of Trade and Industry, the Internet Services Providers Association (ISPA), the London Internet Exchange (LINX), the CBI and telecommunications companies. The sector as a whole comprises around 280 public telecommunications operators, 570 international simple voice resale providers and 300 Internet Service Providers.³⁷

The core measure of Part XI is in section 102(3), by which the code and any agreements may contain provisions necessary to safeguard national security or for the purposes of prevention or detection of crime or the prosecution of offenders which may relate directly or indirectly to national security,

requests of law enforcement agencies (see All Party Parliamentary Internet Group, Communications Data: Report of an Inquiry by the All Party Internet Group, January 2003, at <<http://www.apig.org.uk/APIGreport.pdf>> para 59). There is the further problem that a request granted by a compliant data user might then become disclosable to the data subject. The Regulation of Investigatory Powers Act 2000 Chapter 1 Part II would provide for enforceable and secretive requests but is not yet in force. It should be noted that access under compulsion may in the meantime be obtained under a variety of legislation, the most notable of which is the Police and Criminal Evidence Act 1984 ss 8, 9, but which also includes the Charities Commission Charities Act 1993, the Environment Agency Environmental Protection Act 1990, the Health & Safety Executive Health & Safety at Work etc Act 1974, the Inland Revenue Taxes Management Act 1970, the Radiocommunications Agency Wireless Telegraphy Act 1974, the Telecommunications Act 1974, the Serious Fraud Office Criminal Justice Act 1987, the Social Security Investigators Social Security Administration Act 1992, and the Trading Standards Officials Consumer Protection Act 1987 (see All Party Parliamentary Internet Group, Communications Data: Report of an Inquiry by the All Party Internet Group, January 2003, <<http://www.apig.org.uk/APIGreport.pdf>> para 104).

³³ Internet Service Providers Association (ISPA) Council Statement, <http://www.ispa.org.uk/html/statement_2510dp.htm>, 26 October 2001.

³⁴ See Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003.

³⁵ *Ibid*, Appendix B.

³⁶ *Ibid*, Annex A para 20.

³⁷ Home Office, Regulatory Impact Assessment: Retention of Communications Data (2001) paras 21-23.

additional to, and without prejudice to, the communication provider's own business purposes. The width of the purposes should be noted. It was said to be impractical to limit the measure to terrorism data³⁸ and a House of Lords amendment to this effect was reversed.³⁹ An amendment in the dying stages of the Parliamentary process, up against the deadline of the Christmas recess and without time for full debate,⁴⁰ added the words "which may relate directly or indirectly to national security" to the purpose of prosecution, but the permissive "may" does not absolutely delimit the purposes (albeit that the Government opposed the amendment). In addition, the retention of data will only be accomplished on a blanket basis, so retained data will be available for access under the Data Protection Act (and other legislation already described and under the Regulation of Investigatory Powers Act 2000 as described below). With his customary charm, Home Secretary David Blunkett explained the government's insouciance as follows:⁴¹

"The amendment, in relation to part 11 therefore suggests that we should try to separate out those parts of data. As I tried to explain on a number of occasions, including last night, it is not possible to do that, but paradoxically, because it is not possible to do it, it is not reasonable to suggest that we should not do it. I am therefore prepared to accept the amendments that have been tabled. In order to be able to implement what they want, we will have to retain the data, so that it can be accessed to test out whether the intelligence services are right in believing that it is relevant in tackling terrorists. That is how stupid the Liberal Democrats are."

The Government may now seek to justify its stance by comparison with the recent European Union Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications).⁴² The relevant provision on data warehousing, article 15, allows for (but does not require) the retention of data for a limited period to safeguard national security, defence, public security or the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communications system, as referred to in article 13(1) of Directive 95/46/EC. The inclusion of such a provision within the Directive represents a sea-change in data retention policy. It mainly follows the request of the Council of the European Union on 20 September 2001 from the European Commission to submit proposals "for ensuring that law enforcement authorities⁴³ are able to investigate criminal acts involving the use of

³⁸ House of Lords Deb. Vol 629 col 774, 4 December 2001, Lord Rooker.

³⁹ *Ibid* col 981 6 December 2001, col 1479, 13 December 2001.

⁴⁰ *Ibid* col 1474, 13 December 2001.

⁴¹ HC Debs vol 376 col 1111, 13 December 2001.

⁴² EU Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) of 12 July 2002, Official Journal of the European Communities 31.7.2002, L 201 pp 37-47.

⁴³ Note also Enfopol 55: Council Resolution on law enforcement operational needs with respect to public telecommunication networks and services, 9194/1, Brussels 20 June, 2001.

electronic communications systems and to take legal measures against their perpetrators.”⁴⁴ Only two weeks before this request, on 6 September, 2001, the European Parliament recommended in a resolution that “a general data retention principle must be forbidden,”⁴⁵ and that “any general obligation concerning data retention” is contrary to the proportionality principle.⁴⁶ It is also no secret that the UK government strongly lobbied for the explicit reference to the scope for data retention provisions during negotiations in Council.⁴⁷ Despite strong criticism from civil liberties organisations,⁴⁸ the communications industry,⁴⁹ and Radical Party MEPs,⁵⁰ and despite this being a third pillar issue under Title VI of the EU Treaty, a data retention provision was included within article 15 of the new first pillar EU Directive on privacy and electronic communications.

In devising the code under Part XI, there are three stages to be followed under section 103. First, there must be consultation with the CSPs and also with the Information Commissioner (the successor to the Data Protection Commissioner under the Freedom of Information Act 2000). In practice, the Internet Crime Forum,⁵¹ consisting of policing and industry members, played a significant consultative role. Home Office ministers have met twice with

⁴⁴ Extraordinary Council meeting, Justice, Home Affairs and Civil Protection, Brussels, 20 September 2001, 12019/01 (Presse 327), para 4.

⁴⁵ Strategy for Creating a Safer Information Society (A5-0284/2001), text adopted by the European parliament on 6 September, 2001: Recommendation of the European Parliament on the Strategy for Creating a Safer Information Society by Improving the Security of Information Infrastructures and Combating Computer-related Crime (2001/2070(COS)), C 72 E/323-329 Official Journal of the European Communities, 21.3.2002.

⁴⁶ *Ibid*, paragraph J.

⁴⁷ See for example House of Commons European Scrutiny Committee Thirty-Second Report, HC 152-xxxii. Session 2001-02, July 2002 (19. DTI (23528) Personal data and privacy in telecommunications).

⁴⁸ Global Internet Liberty Campaign (representing around 60 public interest organisations) letter dated 22 May, 2002 at <http://gilc.org/cox_en.html>.

⁴⁹ EuroISPA, ETNO & ECPA, Joint Industry Memo in view of the 2nd Reading of the Cappato Report: The Implications of “Data Retention” in art 15.1 of the Common Position on the Electronic Communications Data Protection Directive addressed to the Members of the Committee on Citizens' Freedoms and Rights, Justice and Home Affairs. April 16, 2002, at <http://www.euroispa.org/docs/160402_dataretent.doc>.

⁵⁰ Open letter of Marco Cappato, Radical MEP and EP draftsman on privacy in electronic communications, to the President of the EU Council and to the President of the EU Telecoms Council: the fight against terrorism shall not hinder fundamental freedoms and rights such as the right to privacy, 5 December 2001, at <http://www.radicalparty.org/privacy/lett_cap_e.htm>. See further Committee on Citizens' Freedoms and Rights, Justice and Home Affairs (Rapporteur: Marco Cappato), Recommendation For Second Reading on the Council common position for adopting a European Parliament and Council directive concerning the processing of personal data and the protection of privacy in the electronic communications sector (15396/2/2001 – C5-0035/2002 – 2000/0189(COD)), A5-0130/2002, 22 April 2002.

⁵¹ <<http://www.internetcrimeforum.org.uk/>>. See further its paper on data types: Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003.

the Forum representatives, and on three occasions with the Office of the Information Commissioner to discuss data retention policy between January and March 2002.⁵² Second, the code must be published in draft, allowing for public representations; it has at last appeared in this form in March 2003. Once the consultation on the draft is over, the final stage will involve the authorisation of the code by a statutory instrument approved by Parliament.⁵³

Under section 106, there may be government payments in order to compensate CSPs (similar to the largesse distributed under the Regulation of Investigatory Powers Act 2000, section 24). The ISPA has estimated costs at around £20m; the Government says at least £9m.⁵⁴ Part of the discrepancy may arise because, according to the draft code of practice, where the national security need for retaining data is not substantially different from the business need, retention costs will continue to be borne by the CSPs.⁵⁵ A reasonable proportion of the marginal cost as appropriate would be provided by the government only when data retention periods are significantly longer for national security purposes than for business purposes.⁵⁶ Phone companies keep detailed records of traffic data in order to calculate customers' bills, and the main provider, BT, retains them for seven years. By contrast, Internet Service Providers do not charge by traffic volume, and so do not need to keep the information that long (AOL retains email traffic data for three months, Freeserve for 90 days and Claranet for two weeks).⁵⁷ In the light of this pattern, there is a worry that the burdens will fall upon smaller or niche-market firms and will more widely affect international competitiveness.⁵⁸ However, even a major CSP like AOL, which retains data as necessary for billing purposes, fraud prevention or security, has argued at the European Commission level that "imposing mandatory longer data retention period will not be proportionate, will impose vast costs which will not be in line with business needs".⁵⁹

It is emphasised that the code will be voluntary, and there are no legal penalties in the 2001 Act for non-compliance, though the code or any specific agreement can be invoked in legal proceedings brought against a communications provider by a person whose communications data they hold. This proviso is intended to prevent a CSP incurring civil liability for storing data in accordance with the code (though, as discussed below, it may not overcome express restraints under data protection laws which may ultimately be interpreted over the heads of UK legislatures and judiciary by the

⁵² House of Lords Deb vol 632 col 143wa 20 March, 2002, Lord Rooker.

⁵³ House of Lords Deb. vol 629 col 1282 11 December 2001, Lord Rooker.

⁵⁴ Home Office Regulatory Impact Assessment: Retention of Communications Data (2001) para 27.

⁵⁵ Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at http://www.homeoffice.gov.uk/docs/vol_retention.pdf 2003, Annex A para 23.

⁵⁶ Marginal costs may include, for example, the design and production of additional storage and searching facilities. See *ibid*, para 24.

⁵⁷ (2001) *The Guardian Online* 15 November.

⁵⁸ Home Office, Home Office Regulatory Impact Assessment: Retention of Communications Data (2001) paras 9, 10.

⁵⁹ AOL and Data Retention, document presented at the EU Cybercrime Forum plenary meeting, 27 November 2001. See generally <<http://cybercrime-forum.cec.eu.int/>>.

European Court of Justice). Retention for a maximum period of 12 months for subscriber information and telephony data⁶⁰ will be required under the provisions of the draft code of practice without prejudice to any longer retention period which may be justified by the business practices of the communications provider.⁶¹ However, communications data may eventually be subject to compulsory retention under European law for 12-24 months⁶² according to a draft EU Framework Decision on the retention of traffic data and access to this data in connection with criminal investigations and prosecutions⁶³ which was drafted by the Belgium presidency and leaked to Statewatch.⁶⁴ Under the draft Framework Decision, such retention of traffic data would not be disproportionate in view of the needs of criminal prosecutions as against the intrusion into privacy that such a retention would entail.⁶⁵ Terrorism is just one of the possible crimes for which data retention would be required, and the draft Framework Decision would extend data retention for any serious crime including rape, arson, swindling, and offences under the Council of Europe CyberCrime Convention.⁶⁶ One EU member states' competent authority would also be able to access data retained in another member state under the draft Framework decision.⁶⁷

Returning to the 2001 Act, if, "after reviewing the operation of any requirements contained in the code of practice and any agreements under section 102, it appears to the Secretary of State that it is necessary to do so", then, by section 104, the Secretary of State can issue compulsory directions.

⁶⁰ A maximum period of 6 months is required for email data, ISP data, SMS, EMS, and MMS data. On the other hand the draft code requires a maximum retention period of 4 days for web activity logs. See Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003, Annex A, Appendix A for further technical details.

⁶¹ Home Office, Draft Code of Practice on the Retention of Communication Data under Part XI of the Anti-Terrorism Crime & Security Act 2001, Pre Public Consultation Process Draft Document, August 2002, para 15. See further Home Office Regulatory Impact Assessment: Retention of Communications Data (2001) para 11.

⁶² Interpol also supports a retention period of 12-24 months for traffic data. Interpol Expert Statement, Overview of vital traffic data necessary for investigations which the European Working on Information Technology Crime asks the general retention by telecommunication operators and telecommunication access and service providers, EU Cybercrime Forum plenary meeting, 27 November, 2001. See generally <<http://cybercrime-forum.cec.eu.int/>>.

⁶³ Draft Framework Decision on the retention of traffic data and on access to this data in connection with criminal investigations and prosecutions, Belgian proposal for Third Pillar legislation, at <<http://www.statewatch.org/news/2002/aug/05/datafd.htm>>.

⁶⁴ Statewatch Analysis No 11: Surveillance of telecommunications: data retention to be 'compulsory', August 2002, at <<http://www.statewatch.org/news/2002/aug/05/datafd1.htm>>.

⁶⁵ Draft Framework Decision on the retention of traffic data and on access to this data in connection with criminal investigations and prosecutions, Belgian proposal for Third Pillar legislation, para 12.

⁶⁶ ETS 185, 2001.

⁶⁷ As far as the implementation of the draft Framework Decision is concerned, member states would be required to comply by 31 December 2003.

So, compulsion can apply if the CSPs “don’t volunteer enough”.⁶⁸ Precise criteria on which to judge success or failure are not set out in the Act but were expected to be detailed in the voluntary code of practice (in fact, there is no mention as yet in the current draft).⁶⁹ Mandatory directions may apply to all CSPs, a particular type of CSPs, or one or several specific CSPs. Some consultation is again required (including with the CSPs and the Information Commissioner), as well as approval of a statutory instrument by Parliament. Compensation may be payable under section 106. In the event of non-compliance by CSPs, the Secretary of State may bring civil proceedings for an injunction or other appropriate relief.

The absence of criminal sanctions demonstrates how hesitant Parliament felt about the grant of these powers. This apprehension is also evidenced by section 105, by which any mandatory scheme under section 104 will itself lapse after two years (on the 14 December 2003) unless renewed (which can occur more than once) by affirmative order.

The implications of Part XI of the Anti-terrorism, Crime and Security Act 2001

One way or another, many more terabytes of data will have to be stored by CSPs as a result of the threat or operation of Part XI. Yet, it may be doubted whether Part XI will achieve its ultimate objective of providing evidence against nefarious activities for at least two practical reasons.

The first is the doubt whether it can provide convincing evidence of wrongdoing. Though computer evidence is potentially admissible as evidence,⁷⁰ traffic data cannot beyond reasonable doubt link a technical occurrence recorded as data to personal identity. In other words, the mobile phone or the e-mail message might be used by an identifiable username but the person making the keystrokes may not necessarily be the username owner.⁷¹ This first doubt is not, however, fatal to the enterprise. Just as with arrests under section 41 of the Terrorism Act 2000 and its predecessors, few police interventions either result in court cases or are intended to do so. The main point of anti-terrorism policing is preventing and countering the threat rather than producing cases to be processed beyond reasonable doubt through courts in the public domain.⁷²

The second practical obstacle is that evasion is relatively simple. With standard e-mail programs (such as Pegasus or Microsoft Outlook), the e-mail address and name of the person being contacted is logged by the system and the potentially unique Internet Protocol (IP) address⁷³ of the sender is

⁶⁸ “The net’s eyes are watching”, *Guardian Online*, 15 November 2001.

⁶⁹ House of Lords, Deb Vol 629 col.800, 4 December 2001, Lord Rooker.

⁷⁰ P Sommer, “Downloads, logs and captures: evidence from cyberspace” (2002) 8 *Computer and Telecommunications Law Review* 21.

⁷¹ C Bowden, n 18 above, 21.

⁷² See C Walker, n 1 above, chap 5.

⁷³ Every machine logged into the Internet uses a unique identifying 32-bit binary number, called an IP Address (your own IP address can be readily found by logging into <http://www.anonymizer.com/snoop/test_ip.shtml>). “Dynamic” IP addresses are often assigned from a pool by CSPs at the start of a customer’s log-in, but this is less common with ADSL (cable) connections.

revealed. Detection is thereby facilitated by the evidence chain so created. However, the task of law enforcement becomes much more tricky if web-based e-mail systems, such as Hotmail, are used. For example, the FBI only discovered that Zacarias Moussaoui, charged as a conspirator in the September 11th attacks, had utilised three Hotmail accounts through his written pleadings in July and August 2002. Amongst the challenges faced by investigators in that case are the initial problem that the identities of account-holders are not verified by Microsoft, the owners of Hotmail. Provided the account-holder gives a false identity,⁷⁴ does not use a traceable IP address (which can be achieved by using an Internet terminal in a public library, Internet cafe⁷⁵ or shopping mall) and does not download information to a traceable storage mechanism (a hard-disk or floppy disk),⁷⁶ then the usage can remain anonymous. Microsoft can in theory (but refuses as a matter of policy) to trace messages by a combination of IP address and date/time of the message, provided the information has not been erased from its records because an account has been inactive for 30 days. But even that potential path to detection can be defeated by the use of more sophisticated anonymised web browsing systems such as Anonymizer.com. Although the draft Code of Practice will require CSPs to retain communication data that relates to “subscribers resident in the UK or subscribing to or using a UK-based service. . . whether the data is generated or processed in the UK or abroad,”⁷⁷ it is relatively easy to set up a foreign POP3 or IMAP e-mail account and then access that account securely by using web based systems like mail2web.com. In this way, the mail will always be stored and accessed in a foreign system, circumventing not only the purpose of data retention but also any e-mail interception power under RIPA 2000.⁷⁸ In the main, Part XI is conceived with switched telephony in mind, and it was forlornly admitted by one government minister that “e-mail is more difficult . . . I do not fully understand the details of headers and so forth. I have never used hotmail,

⁷⁴ Moussaoui’s accounts were called xdesertman@hotmail.com, pilotz123@hotmail.com and Olimahammed2@hotmail.com, with his registered name in one case as Zuluman Tangotango: *US v Zacarias Moussaoui*, Crim. No. 01-455-A, US District Court for the Eastern District of Virginia (Alexandria Division): Governments Response to Court’s order on computer and email evidence, <<http://news.findlaw.com/hdocs/docs/terrorism/usmouss90402grsp.pdf>>, 2002.

⁷⁵ Moussaoui was a customer of Kinko’s (<<http://www.kinkos.com/>>), a company which also strengthens privacy by wiping the memory of their computers every 24 hours.

⁷⁶ The http log of the computer used will only show that the site <<http://www.hotmail.com>> was visited and not any e-mail details.

⁷⁷ Home Office, Draft Code of Practice on the Retention of Communication Data under Part XI of the Anti-Terrorism Crime & Security Act 2001, Pre Public Consultation Process Draft Document, August 2002, para 12.

⁷⁸ Within this context see further I Brown and B Gladman, ‘The Regulation of Investigatory Powers Bill – Technically inept: ineffective against criminals while undermining the privacy, safety and security of honest citizens and businesses’, <<http://www.fipr.org/rip/RIPcountermeasures.htm>>, 2000. The Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003, Annex A para 13, accepts that CSPs who store data abroad may not be able to comply with the Code.

although I have used Internet and e-mail services.”⁷⁹ So much more likely is it that trained terrorists will know how to cover their tracks. One is therefore left with the worry that the government was as much engaged in an exercise of flexing muscles against the allegedly anarchic Internet as in actually garnering useful information to combat terrorism.

In the process, and as a further more principled objection, one can expect damage to individual rights, especially respect for individual privacy under article 8 of the European Convention, which expressly applies to communications.⁸⁰ In her comments on the Bill, the then Information Commissioner, Elizabeth France, has stated that the proposed provisions “could have a significant impact on the privacy of individuals whose data are retained” and suffer from a “lack of proportionality such as to render the prospective legislation incompatible with Convention rights”.⁸¹ Alongside the ethical emphasis on individual autonomy must be set democratic and legal accountability, not easy to square with private power-holders such as CSPs.

Flowing from this principled problem, there are also troublesome legal implications. There is the basic issue of compatibility with the Human Rights Act 1998, which reproduces the requirements of Article 8 of the European Convention. It may be assumed at the outset that CSPs will be treated as ‘public authorities’ and are thereby within the duties of section 6 of the Human Rights Act 1998 for these purposes. Just as in *R (on the application of Ford) v Press Complaints Commission*,⁸² the PCC readily conceded that it was a public authority when enforcing a code of practice recognised by statute (the Human Rights Act, section 12). At first glance, CSPs look to be in a similar position in regard to the enforcement of any codes under Part XI of the Anti-terrorism, Crime and Security Act 2001.⁸³

Turning to the substantive legal issue of compatibility, the question is whether Part XI can be justified under article 8(2) “as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. One might concede that the purposes for which the Part XI powers are likely to be used will amount to a *prima facie* legitimate purpose within Article 8(2). A more difficult hurdle is whether the interference will be “in accordance with the law”, given that the instrument for control is a voluntary code of practice. Codes of

⁷⁹ House of Lords, Deb Vol 629 cols 757, 781, 4 December 2001, Lord Rooker.

⁸⁰ See EA Mohammed, “An examination of surveillance technology and their implications for privacy and related issues” (1999) (2) *Journal of Information, Law & Technology*; PM Schwartz, “Privacy and democracy in cyberspace” (1999) 52 *Vanderbilt Law Review* 1609.

⁸¹ Information Commissioner news release, Information Commissioner contributes to scrutiny of anti-terrorism bill, <<http://www.dataprotection.gov.uk/dpr/dpdoc1.nsf>>, 13 November 2001. See further Information Commissioner’s Office press release, Monitoring must be justified, 10 July 2002.

⁸² [2001] EWHC Admin 683 para 11.

⁸³ This point has also been raised by B Emmerson & H Mountfield, Advice to the Information Commissioner on ATCSA 2001 Retention and Disclosure of Communications Data, July 2002.

practice have been viewed in the past as insufficiently clear instruments to guide officials or citizens, most notably in the case of *Malone v United Kingdom*.⁸⁴ However, Part XI may be distinguishable in that the code arises under a statutory requirement, and there are legal enforcement powers if it fails.

Even more tricky is that the interference must be “necessary” and “proportionate”. The Government could be criticised for promoting new legislation such as the Anti-Terrorism, Crime, and Security Act 2001 and extending its powers before the inadequacy of its existing measures has been established. These include such powers as the acquisition and disclosure of communications data under Part I Chapter II as described above, and the investigation of electronic data protected by encryption under Part III of the Act. While these are yet to be implemented by the government, and their impact to be tested, even more new powers are given to law enforcement agencies under the Anti-Terrorism, Crime, and Security Act 2001. Whether more surveillance will necessarily result in detection and prevention of such terrible crimes happening is debatable. As the Earl of Northesk stated in the House of Lords “there is no evidence whatever that a lack of data retained has proved an impediment to the investigation of the atrocities on 11th September.”⁸⁵

The issue of the retention of data in another context is currently being litigated in the case of the *R (on application of S) v Chief Constable of South Yorkshire* and *R (on application of M) v Chief Constable of South Yorkshire*.⁸⁶ The applicants sought judicial review of the Chief Constable’s decision to retain fingerprints and DNA samples taken in the course of a criminal investigation in circumstances where there had been an acquittal or a discontinuance. Though the governing legislation, the Police and Criminal Evidence Act 1984, section 64(1A), as amended by the Criminal Justice and Police Act 2001, section 82, allows for indefinite retention even after an acquittal. The applicants argued this provision was incompatible with the right to respect for private life under article 8(1). The Administrative Court rejected the application, viewing section 64(1A) as compatible with article 8 (2) by addressing the pressing social need of the prevention of disorder or crime in a way which was proportionate. The actual retention of information (as opposed to accessing it) was not in any event considered an interference to an individual’s right to privacy. Later, the Court of Appeal (Civil Division) did at least accept that the retention of fingerprints interfered with Article 8(1) rights but at the same time concluded that the adverse consequences to the individual were proportionate to the benefits to the public under Article 8(2). The Court also observed (Lord Justice Sedley dissenting) that whilst all citizens were entitled to be regarded as innocent, the differential treatment of those who had been the subject of an unproductive criminal investigation could be consistent with rights against discrimination under Article 14.

⁸⁴ App no 8691/79, Ser A 82, (1984) 7 EHRR 14.

⁸⁵ House of Lords Debates vol 629 col 808, 4 December 2001. But note the subsequent case of *Moussaoui*, discussed above, where data retention was one of several issues of concern.

⁸⁶ [2002] EWHC 478, [2002] EWCA Civ 1275.

These interpretations appear rather more grudging than the sweeping approach of the European Court of Human Rights that⁸⁷

“ . . . states do not enjoy unlimited discretion to subject individuals to secret surveillance or a system of secret files. The interest of a State in protecting its national security must be balanced against the seriousness of the interference with an applicant’s right to respect for his or her private life.”

So far as the activities of intelligence services are concerned, the Strasbourg court reiterates that “powers of secret surveillance of citizens are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions.”⁸⁸ Concerns for national security do not provide a blanket right for secret surveillance of citizens by the state and⁸⁹

“ . . . in respect of national security as in respect of other purposes, there has to be at least a reasonable and genuine link between the aim invoked and the measures interfering with private life for the aim to be regarded as legitimate. To refer to the more or less indiscriminate storing of information relating to the private lives of individuals in terms of pursuing a legitimate national security concern is . . . evidently problematic.”

Although the retention of some data for national security purposes may well be justified under article 8(2) for an extended period of time, that does not necessarily mean that blanket retention is justified⁹⁰ or that access to such data under section 22 of RIPA 2000 is justified for any of the wider law enforcement purposes within that section. One may argue that access to communications data retained longer than it is necessary for business purposes is disproportionate and goes much further than pursuing a legitimate national security concern especially for reasons other than national security such as for wider law enforcement purposes under section 22(2) of RIPA 2000 (as described further below).⁹¹ Part XI of the 2001 Act and section 102(3) in particular should have been narrowly tailored to address national security concerns only without providing access to such data under section 22(2) of RIPA 2000 for other law enforcement purposes. In fact, the draft Code of Practice encourages relevant public authorities under Chapter II of Part I of RIPA 2000 by stating that “it is outside of the scope of this code of practice to address the issue of acquisition of data after it has been

⁸⁷ *Rotaru v Romania*, App no 28341/95, judgment of 4 May 2000, concurring opinion of Judge Wildhaber, joined by Judges Makarczyk, Türmen, Costa, Tulkens, Casadevall and Weber.

⁸⁸ See *Klass and Others v Germany*, App no 5029/71, Ser A 28, para 42.

⁸⁹ *Rotaru v Romania*, *loc cit* concurring opinion.

⁹⁰ Compare the decision of the National Security Appeals Panel of the Information Tribunal in *Norman Baker v Secretary of State for the Home Department* (<<http://www.lcd.gov.uk/foi/bakerfin.pdf>>, 2001). An automatic blanket exemption from subject access under the Data Protection Act 1998 in respect of personal data held by the Security Service was quashed.

⁹¹ See further B Emmerson & H Mountfield, *Advice to the Information Commissioner on ATCSA 2001 Retention and Disclosure of Communications Data*, July 2002.

retained”⁹² and “this code cannot itself place restrictions on the ability of these bodies or other persons to acquire data retained under the code for other purposes through the exercise of any statutory power”⁹³ Even more explicitly, the draft code of practice states that:⁹⁴

“In particular, this code can not place any restrictions on the ability of the public authorities listed in Chapter II of Part I of the Regulation of Investigatory Powers Act 2000 to acquire data retained under this code for any of the purposes set out in section 22 of that Act which do not relate to national security.”

The next legal difficulty is that it is left unspecified what is the relation between Part XI and the Data Protection Act 1998. Part XI does not expressly amend or delimit the Data Protection Act. Presumably, the latter Act will override any codes or even statutory regulations which ask for retention of data on an excessive scale (by reference either to time length or type).⁹⁵ In contrast to the initial interpretation in *R. (on the application of S) v Chief Constable of South Yorkshire*, it is clear that Data Protection Principles (Schedule 1, Principle 5) expressly view the retention of data as affecting *per se* data privacy. But the government view, expressed in the draft code, is that such retention of data for the specified period of time by the code is “necessary for the purpose of national security”⁹⁶ and accordingly “the national security exemption in section 28 of the Data Protection Act 1998 could be relied on to exempt such data from the fifth principle so enabling it to be retained in accordance with the code.”⁹⁷

As mentioned before, if access to retained communications data for investigatory purposes is then actually required, attention must be turned to the Regulation of Investigatory Powers Act 2000, consideration of which throws up several legal problems in its intersection with Part XI.⁹⁸ Communications data can be accessed by a designated public authority under Chapter II of Part I of RIPA. Chapter II is yet to come into force (though there has been consultation on a draft code of practice).⁹⁹ The fact that it is not in force suggests strongly again that these measures in the 2001 Act were not as vital or as relevant to terrorism as alleged. Under section 21 of RIPA, there is a distinction between (i) interceptions of communications, including their contents, in the course of their transmission, which falls under chapter 1

⁹² Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003, Annex A, para 25.

⁹³ *Ibid*, Annex A, para 27.

⁹⁴ *Ibid*.

⁹⁵ The draft code of practice states that ‘data retained under the code are subject to the data protection principles found in the Data Protection Act 1998.’ *Ibid*, pp 20-21, paras 6-11.

⁹⁶ *Ibid*, p 21, para 9.

⁹⁷ *Ibid*.

⁹⁸ See Y Akdeniz *et al*, n 20 above.

⁹⁹ Home Office, Accessing Communications Data Draft Code of Practice, <<http://www.homeoffice.gov.uk/ripa/pdcpc.htm>>, August 2001. The Regulation of Investigatory Powers Act 2000 (Commencement No. 2) Order 2001 SI No.2727 allows for draft and final Codes to be issued, but the consultation period on the draft code ended on 2 November 2001 and nothing has appeared since that time.

of Part I of RIPA,¹⁰⁰ and (ii) conduct involving the obtaining or disclosure of “communications data”. This term includes “traffic data” comprised in or attached to a communication (whether by the sender or otherwise) for the purposes of any postal service or telecommunication system by means of which it is being or may be transmitted or other information about the usage or provision of telecommunications or postal services made by any person. Examples of “communications data” include equipment and location details, telephone subscriber details, itemised telephone bill logs, e-mail headers, Internet Protocol addresses, and information on the outside of postal items. Criticisms of this purported distinction have already been related, and the concern remains that far more detailed and intrusive records will be made available about electronic communications than would be the case for postal messages.¹⁰¹

Data of these kinds may be obtained under section 22(2) where necessary, *inter alia*, “(a) in the interests of national security; (b) for the purpose of preventing or detecting crime or of preventing disorder; (c) in the interests of the economic well-being of the United Kingdom; (d) in the interests of public safety; (e) for the purpose of protecting public health. . .” Any action taken must be proportionate and necessary (section 23(8)). These purposes obviously go beyond those specified in the Anti-terrorism, Crime and Security Act 2001, so there is a potential not just for confusion but for the abuse of powers, when data retained for some purposes is requested for others as mentioned above. The CSP may not realise that an abuse is occurring since the reasons given by law enforcement agencies are unlikely to be very explicit. The problem could be solved if the Secretary of State issued a direction under section 25 (3) of RIPA, limiting further the purposes of requests for access to the data retained under the Part XI Code. But this would still depend upon CSPs being able to distinguish between data normally retained for business purposes, and therefore accessible under the wider objectives of RIPA, and data specially retained for the purposes listed in Part XI. Furthermore, if the latter purposes of Part XI are interpreted narrowly, and are confined essentially to security purposes, then would it be lawful to act upon an application under Schedule 1 of the Police and Criminal Evidence Act 1984 for the production of communications data which may relate to the investigation of a serious arrestable offence which has been retained longer than the normal business purpose period? Such potential confusions are of “real concern” to the Information Commissioner.¹⁰² The decision in *R. (on the application of NTL Group Ltd) v Ipswich Crown Court*¹⁰³ suggests that access to data (content data in this case) under section 9 and Schedule 1 of the PACE 1984 is a possibility to be borne in mind by a CSP. Therefore, pending the making of an order under

¹⁰⁰ Note the Interception of communications code of practice, August 2002, at <<http://www.homeoffice.gov.uk/ripa/ioccop.htm>>. This code of practice relates to the powers and duties conferred or imposed under Chapter I of Part I of the Regulation of Investigatory Powers Act 2000.

¹⁰¹ All Party Parliamentary Internet Group, Communications Data: Report of an Inquiry by the All Party Internet Group, January 2003, at <<http://www.apig.org.uk/APIGreport.pdf>> para 39.

¹⁰² Information Commissioner, Annual Report 2001-02 (2001-02 HC 913) 18.

¹⁰³ *R v Ipswich Crown Court, ex parte NTL Group Ltd* [2002] EWHC 1585 (Admin).

paragraph 4 of Schedule 1 to the PACE 1984, the relevant material (or data) could be preserved in accordance with the terms of paragraph 11 of Schedule 1. If and when an order is made under paragraph 4, the CSPs would be required to disclose the data retained in their system. According to the judgment, retention of such data by a CSP (NTL in this case), would not amount to an offence under section 1 of RIPA 2000.

As already mentioned, the dangerous overlap of purposes is recognised by the Home Office draft Code of Practice, but it offers no solutions. One suitably restrained approach would be to adopt “data preservation” (storing only data of suspects identified to CSPs) rather than blanket “data retention”, thus providing clearer proportionality in balancing the law enforcement needs with privacy concerns. Under a data preservation regime, upon the request of appropriate authorities, data relating to named suspects could be ordered to be preserved for possible later access following a further disclosure order. Such a case by case basis approach is rejected as futile by the Home Office consultation paper on a Code of Practice for Voluntary Retention of Communications Data, though the arguments about not being sure who might become suspects and therefore not being sure about which data to retain for the future really does sound like the pleadings of a paranoid police state.¹⁰⁴ Even the strongly criticised Council of Europe CyberCrime Convention does not include data retention provisions¹⁰⁵ and instead opted for measures involving data preservation.¹⁰⁶ Though data preservation itself represents an “entirely new legal power or procedure in domestic law”¹⁰⁷ for most European countries, nevertheless, these measures “do not mandate the collection and retention of all, or even some, data collected by a service provider or other entity in the course of its activities.”¹⁰⁸ They are also limited “for the purpose of specific criminal investigations or proceedings”.¹⁰⁹ Such data would be preserved for a period of time as long as necessary, up to a maximum of 90 days.¹¹⁰ The Convention furthermore enables real-time collection of traffic data “associated with specified communications”.¹¹¹ But these powers do not intrude as far as Part XI:¹¹²

¹⁰⁴ Home Office, Consultation paper on a code of practice for voluntary retention of communications data, at <http://www.homeoffice.gov.uk/docs/vol_retention.pdf> 2003, para 12.4.

¹⁰⁵ J Fisher, “The Draft Convention on Cybercrime: Potential Constitutional Conflicts” (2001) 32 *U. West. L.A. L. Rev.* 339.

¹⁰⁶ See further art 16 (Expedited preservation of stored computer data), and art 17 (Expedited preservation and partial disclosure of traffic data) of the Council of Europe CyberCrime Convention, ETS No 185, 2001.

¹⁰⁷ See paragraph 155 of the Explanatory Report of the Council of Europe CyberCrime Convention, <<http://conventions.coe.int/treaty/en/Reports/Html/185.htm>>, 2001. Data preservation as opposed to data retention is also supported as a preferred option by the All Party Parliamentary Internet Group, Communications Data: Report of an Inquiry by the All Party Internet Group, January 2003, <<http://www.apig.org.uk/APIGreport.pdf>> para 189.

¹⁰⁸ *Ibid*, at para 152.

¹⁰⁹ See art 14(2) of the Council of Europe CyberCrime Convention, ETS No 185, 2001.

¹¹⁰ *Ibid*, art 16(2).

¹¹¹ *Ibid*, art 20.

“... the Convention does not require or authorise the general or indiscriminate surveillance and collection of large amounts of traffic data. It does not authorise the situation of ‘fishing expeditions’ where criminal activities are hopefully sought to be discovered, as opposed to specific instances of criminality being investigated. The judicial or other order authorising the collection must specify the communications to which the collection of traffic data relates.”

Furthermore, while the Explanatory Report of the CyberCrime Convention claims the privacy interests arising from the collection of traffic data are diminished compared to the interception of content data, it nevertheless acknowledges that

“... a stronger privacy issue may exist in regard to data about the source or destination of a communication (e.g. the visited websites). The collection of this data may, in some situations, permit the compilation of a profile of a person’s interests, associates and social context.”¹¹³

CSPs already co-operate consensually with law enforcement agencies. However, compelled access to traffic data stored for business purposes will become possible under RIPA 2000. Where authorisation is given under RIPA for obtaining and disclosing of the data, then the operator can be compelled (if necessary by civil proceedings) to provide it (section 22(4), though the issuing authority may decide (for example to maintain secrecy or because of superior technical capabilities) to obtain the data itself (section 22(3)). Authorisation will be in writing and must define the conduct authorised and the data to be obtained; the authorisation remains valid for one month (section 23). The issuing authority under chapter 2 is not the Secretary of State but will be an office-holder designated by statutory order within the police, intelligence services, Customs and Excise, Inland Revenue, or any other public authority specified by statutory order.

RIPA is an improvement on the previous free-for-all, but it potentially empowers an alarmingly large range of public agencies to snoop and for a rambling array of reasons. And most serious of all, it allows intervention on the basis of standards and procedures which are intentionally lax on the specious grounds that interception of communications content is a much greater intrusion than the collection of traffic data to such an extent that the latter seems hardly to matter.¹¹⁴ So, speakers who avow the RIP Act as the “greatest safeguard that exists in any democracy in the world... for protecting our rights”¹¹⁵ are simply inaccurate. The Data Protection Commissioner (now the Information Commissioner) was also critical of RIPA, contending that “access to traffic and billing data should also be made

¹¹² See para 219 of the Explanatory Report of the Council of Europe CyberCrime Convention, 2001.

¹¹³ *Ibid*, at para 227.

¹¹⁴ See Home Office, *Interception of Communications in the United Kingdom* (Cm 4368, London, 1999) para 10.9.

¹¹⁵ Per David Blunkett, the Home Secretary, House of Commons Debates vol 372 col 935, 15 October 2001.

subject to prior judicial scrutiny”¹¹⁶ and feared that the lack of precision and foreseeability in the legislation might not comply with Article 8 (privacy rights) under the European Convention.¹¹⁷ The dilution in judicial oversight is also a feature of the US PATRIOT Act 2001¹¹⁸ in connection with a Pen Register/Trap Trace (PR/TT)¹¹⁹ authority for Internet data, though even that process does require an application to a court (albeit that it cannot deny the application) and a report back to a judge. PR/TT authority may be used to collect ‘addressing’ information on the Internet but not the content of communications. The PR/TT authority under section 216 enables law enforcement agencies to install their own monitoring devices such as the FBI’s DCS1000, formerly known as Carnivore¹²⁰ on computers belonging to a public provider. Systems such as Carnivore are capable of intercepting content of communications and accountability remains difficult with the use of such “black-box” technology. Moreover, disclosures of either content or non-content customer records in emergencies involving an immediate risk of death or serious physical injury to any person to law enforcement agencies by CSPs is now possible under section 212 of the PATRIOT Act 2001.¹²¹

War is over?

Returning to the thesis at the start of this article that “War is over”, it may be indicative that the legal crisis caused by September 11th has been abating by the slow pace of implementation of Part XI and of Part I, Chapter II of RIPA. As for the latter, when the Home Office issued the draft secondary legislation in June 2002 under section 25 of RIPA, it raised a storm of criticism and was withdrawn. The concern was that the (draft) Regulation of Investigatory Powers (Communications Data: Additional Public Authorities) Order 2002 would afford powers to a very broad range of official bodies to access communications data, a range well beyond those expressed in the body of the Act itself, such as the police, customs, secret services and the Revenue, and including a wide range of Government departments, local authorities, the NHS and other public authorities.¹²² However, the government backed down

¹¹⁶ Data Protection Commissioner, Briefing For Parliamentarians on RIP, <<http://www.fipr.org/rip/DPCparRIP.htm>>, 2000.

¹¹⁷ News Release, 13 November 2001.

¹¹⁸ Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (Pub. L. No. 107-56, 115 Stat. 272 (2001), s 216).

¹¹⁹ See 18 U.S.C. s 3122(b)(2).

¹²⁰ IITRI, Independent Technical Review of the Carnivore System, Final Report, December 8, 2000, at <http://www.epic.org/privacy/carnivore/carniv_final.pdf>.

¹²¹ This voluntary disclosure, however, does not create an affirmative obligation to review customer communications in search of such imminent dangers. See generally Computer Crime and Intellectual Property Section (CCIPS), Field Guidance on New Authorities That Relate to Computer Crime and Electronic Evidence Enacted in the USA Patriot Act of 2001, at <<http://www.cybercrime.gov/PatriotAct.htm>>.

¹²² A total of 24 were listed, but only two (Scottish Drugs Enforcement Agency and UK Atomic Energy Authority Constabulary) could be said to be primarily criminal justice related. The Government later averred that the extension would have been less startling that first appeared because the rank of authorising officer would have been set by a further draft statutory instrument (Regulation of Investigatory Powers (Communications Data: Prescription of Officers, Ranks and Position) Order 2002) at a level higher than attainable by some organisations – an

after a week of vilification,¹²³ having planned to put the changes for approval before a delegated Legislation Select Committee (on the 19th June 2002) after the Joint Committee on Statutory Instruments had concluded that it was an Instrument to which the Committee did not need to draw the special attention of both Houses.¹²⁴ The government's *bona fides* was damaged by the contemporary revelation that a Department of Transport special adviser had sought information about the political affiliation of certain members of the Paddington rail crash survivor's group.¹²⁵ The Home Secretary, David Blunkett, said defensively that "I have no intention that we should be Big Brother".¹²⁶

Admitting that they "got it wrong", the Home Office published a consultation paper entitled *Access to Communications Data: Respecting Privacy and Protecting the Public from Crime* in March 2003.¹²⁷ The government accepted that there must be further limits as to the range of empowered authorities and that the types of data which can be accessed must be limited in most cases.¹²⁸ Though some further safeguards are suggested – especially prior scrutiny by the Office of the Interception Commissioner¹²⁹ – prior judicial authorisation, the channelling of all access through the police, or the confinement of the empowered authorities to a select handful are all rejected.¹³⁰

Yet, even without the full activation of RIPA, Chapter 1 Part II, it should not be assumed that the government has been wholly defeated in its intentions. The powers under RIPA already require extensive data collection through "black boxes" to record internet traffic data under RIPA section 12, which provides that:

"The Secretary of State may by order provide for the imposition. . . on persons who. . . are providing. . . public telecommunications services. . . of such obligations as it appears. . . reasonable to impose for the purpose of securing that it is and remains practicable for requirements to provide assistance in relation to interception warrants to be imposed and complied with."

example might be a parish council: All Party Parliamentary Internet Group, *Communications Data: Report of an Inquiry by the All Party Internet Group*, January 2003, <<http://www.apig.org.uk/APIGreport.pdf>>, para 76. The variable authorisation level might in turn create the need for one public agency acting for others: *ibid*, para 91.

¹²³ *The Times* 18 June 2002 p 4, 19 June p 4.

¹²⁴ Thirty-First Report 2001-02 HL 128, HC 135-xxxii.

¹²⁵ House of Commons Deb. vol 386 col 856 12 June 2002; P. Lewis, 'Is big brother getting even bigger?' (2002) *The Times Law* 18 June p 3.

¹²⁶ *Daily Telegraph* 19 June 2002 p 23.

¹²⁷ Home Office, Consultation paper on *Access to Communications Data: Respecting Privacy and Protecting the Public from Crime*, March 2003, at <<http://www.homeoffice.gov.uk/docs/consult.pdf>>, Foreword, para 5.

¹²⁸ *Ibid*, para 3.22. For most of the relevant public authorities, there would be no access to traffic data: para 3.46, 3.48.

¹²⁹ *Ibid*, para 3.49.

¹³⁰ *Ibid*, paras 3.32, 3.38, 3.44.

For this purpose the Regulation of Investigatory Powers (Maintenance of Interception Capability) Order came into force in August 2002.¹³¹ This order sets out the obligations which it appears to the Secretary of State reasonable to impose on the CSPs for the purpose of securing that it is and remains practicable for requirements to provide assistance in relation to interception warrants to be imposed and complied with. The obligations include the provision of “a mechanism for implementing interceptions within one working day of the service provider being informed that the interception has been appropriately authorised,”¹³² and “to enable the simultaneous interception of the communications of up to 1 in 10,000 of the persons to whom the service provider provides the public telecommunications service, provided that those persons number more than 10,000.”¹³³

A necessary component of the surveillance network being created is the Government National Technical Assistance Centre, a mass surveillance facility in the Security Services London headquarters which it is hoped will become operational during 2002.¹³⁴ Potentially all United Kingdom internet traffic data could find its way to the Security Service, and it will in particular perform decryption services for law enforcement.¹³⁵ Beyond this facility there is the even more uncontrolled UKUSA spy network known as ECHELON, based on the sharing of signals intelligence between the United States, United Kingdom, Canada, Australia and New Zealand.¹³⁶

The implementation of Part XI of the Anti-terrorism, Crime, and Security Act 2001 is in much deeper trouble and progress has been remarkably slow. The draft code of practice was published for consultation in March 2003, 15 months after the 2001 Act was enacted. Important questions such as whether investigative work has improved, how many requests have been made, whether a voluntary structure is sufficient, and market impacts will need to be answered when the code will be reviewed within three months from the date it receives parliamentary approval.¹³⁷

Further details of the problems created by the measures within the 2001 Act and the related draft code of practice were set out in a report by the All Party Parliamentary Internet Group (APIG) in January 2003.¹³⁸ Based especially upon concerns about the legality under European Convention jurisprudence of acting under voluntary codes, APIG recommended that the Home Office

¹³¹ 2002 SI no 1931.

¹³² *Ibid* para 5.

¹³³ *Ibid* para 11.

¹³⁴ <<http://www.homeoffice.gov.uk/oicd/ntac/ntac.htm>>.

¹³⁵ See BBC News, Questions over net snooping centre, 6 June 2002, at <<http://news.bbc.co.uk/1/hi/sci/tech/2027377.stm>>.

¹³⁶ See generally <<http://www.echelonwatch.org/>>. Note the European Parliament resolutions on the existence of a global system for the interception of private and commercial communications (ECHELON interception system) (2001/2098(INI), dated 5 September 2001, and 7 November, 2002 (B5-0528/2002).

¹³⁷ Home Office, Consultation paper on *Access to Communications Data: Respecting Privacy and Protecting the Public from Crime*, March 2003, at <<http://www.homeoffice.gov.uk/docs/consult.pdf>> para 33.

¹³⁸ All Party Parliamentary Internet Group, Communications Data: Report of an Inquiry by the All Party Internet Group, January 2003, at <<http://www.apig.org.uk/APIGreport.pdf>>.

immediately drop their plans to introduce a voluntary scheme for data retention under Anti-terrorism, Crime, and Security Act 2001.¹³⁹ An even more stark verdict from APIG was that the Government equally should not invoke its powers under section 104 to impose a mandatory data retention scheme; the concerns include costs, incompatibility with data protection and surveillance provisions as well as conflict with foreign regimes which have adopted different stances and which would come into play when data is processed or warehoused abroad.¹⁴⁰ Given the publication of the draft code of practice in March 2003, it now seems less likely that the whole scheme will be allowed to lapse on 14 December 2003 without firing any legal shot in anger. Nevertheless, instead of an oppressive scheme of blanket data retention,¹⁴¹ greater attention should be paid to targeted data preservation, even if the target is at times defined in rather wide and woolly terms.¹⁴²

In conclusion, we are getting back to “normal” by the standards of security laws in the United Kingdom. On the surface, the normal decencies of debate and scrutiny are observed, and the laws are maintained, subject to the blemish of a derogation under Article 15 of the European Convention in respect of powers of detention of suspected foreign terrorists, though even the validity of that notice has now been attacked by some judges.¹⁴³ A move away from a war model is to be welcomed, for, like the “war on drugs” or the “war on crime”, that approach is conducive to a lack of accountability and proportionality – the application of overwhelming rather than sufficient force and finances – and it also threatens an endless departure from civil society.¹⁴⁴ But the shift is by no means secure – threatened armed action against those governments which the President of the United States accuses of being part of an “axis of evil” – Iraq can now be deleted from the list, but Iran and North Korea remain and Syria seems close to candidate status – could quickly change the atmosphere.¹⁴⁵ Furthermore, the alternative to the war model is still an extensive security state. “War is over”, but state surveillance is gathering pace.

¹³⁹ *Ibid*, para 141.

¹⁴⁰ *Ibid*, para 178.

¹⁴¹ Of course, as pointed out earlier, regard must be had to the capabilities under RIPA s 12.

¹⁴² The preservation of all data for 'the period around the attacks' on September 11, which was undertaken on a voluntary basis and resulted in data being preserved until February 2002, is so wide as to amount to blanket retention. See All Party Parliamentary Internet Group, Communications Data: Report of an Inquiry by the All Party Internet Group, January 2003, at <<http://www.apig.org.uk/APIGreport.pdf>> para 182

¹⁴³ The discriminatory nature of Part IV of the Anti-terrorism, Crime and Security Act 2001 convinced Mr Justice Collins in a Special Immigration Appeals Commission hearing to declare the derogation to be in breach of art 14 but the Court of Appeal reversed that judgment: *A v Secretary of State for the Home Department*, [2002] EWCA Civ 1502.

¹⁴⁴ See FA Allen, *The Habits of Legality* (1996) pp 37-40.

¹⁴⁵ <<http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html>>, 2001.

COMMENTS AND NOTES

WHOSE FUNERAL? CORPSES AND THE DUTY TO BURY

Dr Heather Conway, School of Law, Queen's University, Belfast

INTRODUCTION

Recent media reports concerning the fate of the preserved body of Edward MacKenzie, found hidden in the Plymouth studio of controversial artist Robert Lenkiewicz, have focused attention on the question of who has the legal right to claim human remains for the purposes of burial.¹ MacKenzie, a homeless tramp better known as Diogenes,² was a friend and model for Lenkiewicz who made a pact with the vagrant before his death in 1984 that the artist would embalm MacKenzie's body rather than give it up for burial. Despite several unsuccessful attempts by the local council to locate the corpse, it was only discovered in a hidden drawer at Lenkiewicz's studio after his death in August 2002. The remains were held for several weeks by the Plymouth and South Devon Coroner before being released to the Lenkiewicz Foundation which was deemed to have a lawful right to claim the body.

Not all disputes concerning the fate of the recently deceased occur in such bizarre and high-profile circumstances. Instead, the majority occur between family members on the death of a relative. Most people assume that when they die their body will be disposed of by their immediate family, who will come together to take care of funeral arrangements and ensure that burial³ takes place in accordance with the deceased's wishes or at least in a dignified and appropriate manner. Where family members are agreed on a particular form of burial, few problems arise. However, such displays of family unity do not necessarily follow the death of a loved one. The deceased's relations may disagree on various aspects of the funeral arrangements – for example, whether the corpse should be interred in the ground or cremated,⁴ the site of

¹ “Artist Kept Tramp’s Corpse in a Cupboard”, *The Times*, 12 October 2002 and “Tramp’s Embalmed Body Leaves Problem for Coroner”, *The Guardian*, 12 October 2002.

² Named after the Greek philosopher Diogenes of Sinope, 412-322 BC, who denounced material possessions and lived as a tramp in Athens, postulating that true happiness is not reliant on wealth and power.

³ For convenience, the term “burial” is used here in a broad sense to denote the disposal of human remains either by interment in the ground or by cremation (whether or not the latter is followed by interment of the ashes).

⁴ See *Holtham v Arnold* [1986] 2 BMLR 123.

the deceased's final resting place,⁵ whether burial should be in accordance with particular religious or cultural beliefs.⁶ In the absence of a compromise solution between the deceased's "nearest and dearest", the courts must intervene to allocate responsibility for burial and ensure that disposal of the dead takes place. In these circumstances, who is entitled to custody of the deceased's remains and thus to dictate the manner of burial?

I. Burial Instructions Not Legally Binding

It has long been established that there is no property in a dead body, whether unburied⁷ or buried.⁸ One important consequence of this common law rule is that a person cannot dictate the fate of his/her remains after death, since a corpse does not constitute an item of property which can be bequeathed by will or any other instrument.⁹ Burial instructions, while perhaps imparting some sort of moral obligation, do not impose any legal obligation and cannot be enforced. The ultimate decision lies with those persons who have responsibility for burying the deceased,¹⁰ and they may completely disregard his/her wishes when deciding on an appropriate means of burial.

An individual does have a statutory right to donate his/her body or parts thereof to an authorised person or institution for research or transplant purposes under the Human Tissue Act 1961 and the Anatomy Act 1984, where such a request has been made in writing or orally in the presence of at least two witnesses.¹¹ However, no such use will be made of the deceased's remains in the event of objections from a surviving spouse or surviving relatives.¹²

II. The Duty to Bury

While there is no property in a corpse, certain persons are under a legal duty to bury the dead and this is accompanied by a right to possession of the remains for this purpose.¹³ Burial of the dead is regarded as essential not

⁵ As in *Grandison v Nembhard* [1989] 4 BMLR 140, *Calma v Sesar* (1992) 106 FLR 446 and *Burrows v Cramely* [2002] WASC 47.

⁶ See, for example, *Saleh v Reichert* (1993) 104 DLR (4th) 384, *Hunter v Hunter* (1930) 65 OLR 586, *Meier v Bell*, Supreme Court of Victoria, unreported, 3 March 1997 and *Buchanan v Milton* [1999] 2 FLR 844.

⁷ *Dr Handyside's case* (1749) 2 East PC 652 and *Williams v Williams* (1882) 20 Ch D 659.

⁸ *Haynes' case* (1614) 12 Co Rep 113 and *Re Sharpe* (1857) Dears and Bell 160. For an overview of the relevant authorities see P. Matthews, "Whose Body? People as Property" [1983] CLP 193, at 197-205 and 208-214, as well as M. Pawlowski, "Dead Bodies as Property" (1996) 146 NLJ 1828.

⁹ As established in *Williams v Williams* (1882) 20 Ch D 659. See further *Holtham v Arnold* [1986] 2 BMLR 123 and *Saleh v Reichert* (1993) 104 DLR (4th) 384.

¹⁰ See below.

¹¹ 1961 Act, s 1 and 1984 Act, s 4.

¹² *Ibid.*

¹³ This is one of two exceptions to the common law rule that there is no property in a dead body. The second relates to the application of work or skill to a dead body, so that it acquires attributes differentiating it from a mere corpse awaiting burial and thus becomes the property of the person who carried out the work – as devised by Griffith CJ in *Doodeward v Spence* (1908) 6 CLR 406, at 414, and applied by

only in terms of respect for the deceased, but in the interests of public health to avoid the spread of disease resulting from the inevitable decay of the corpse.¹⁴

To fulfil these objectives, there is a legal hierarchy of persons who have responsibility for carrying out burial and are thus entitled to custody of the deceased's body for this purpose. The persons with principal responsibility for burial are the deceased's executors as appointed by will,¹⁵ or the deceased's personal representatives who are entitled to letters of administration in respect of the estate where the deceased died intestate.¹⁶ In the latter situation, the personal representatives are the designated next-of-kin who claim in order of their relationship with the deceased, ranking from a spouse,¹⁷ children, parents and siblings to other specified family members.¹⁸ Executors are entitled to claim possession of the deceased's remains even before the grant of probate.¹⁹ In contrast, personal representatives do not take title from the date of death, but from the grant of letters of administration which will be at least 7 days later.²⁰ While the Court of Appeal in *Dobson v North Tyneside Area Health Authority*²¹ suggested that personal representatives might be unable to claim the deceased's remains before the grant of letters of administration, the respective courts in the Australian cases of *Meier v Bell*²² and *Brown v Tulloch*²³ asserted that the duty to bury nevertheless falls on the highest-ranking person who would be entitled to claim letters of administration upon making such an application. This top layer of the legal hierarchy will account for the majority of burials, at least in respect of deceased adults. As regards infant children,²⁴ the duty to bury falls jointly on the parents.²⁵ Where a dispute arises between different

the respective courts in *Dobson v North Tyneside AHA* [1996] 4 All ER 474 and *R v Kelly* [1998] 3 All ER 741.

¹⁴ See *In re Blagdon Cemetery* [2002] 3 WLR 603.

¹⁵ See *Williams v Williams* (1882) 20 Ch D 659 and *Murdoch v Rhind* [1945] NZLR 425, as well as *Schara - Tzedek v Royal Trust Co* [1951] 2 DLR 228.

¹⁶ See *Brown v Tulloch* (1992) 7 BPR 15101, *Dobson v North Tyneside Area Health Authority* [1996] 4 All ER 474 and *Smith v Tamworth City Council* (1997) 41 NSWLR 680.

¹⁷ Excluding a judicially separated spouse, who is regarded as having predeceased the intestate – Matrimonial Causes Act 1973, s 18(2) and Matrimonial Causes (NI) Order 1978, art 20(2).

¹⁸ Administration of Estates Act 1925, s 46 and Administration of Estates Act (NI) 1955, ss 6-12.

¹⁹ *Buchanan v Milton* [1999] 2 FLR 844.

²⁰ Or 28 days in the case of a surviving spouse due to the survivorship stipulation in s 46(2A) of the Administration of Estates Act 1925 (as inserted by s 1(1) of the Law Reform (Succession) Act 1995) and s 6A of the Administration of Estates Act (NI) 1955 (as inserted by art 3 of the Succession (NI) Order 1996).

²¹ [1996] 4 All ER 474.

²² Supreme Court of Victoria, unreported, 3 March 1997.

²³ (1992) 7 BPR 15101. See further *Burrows v Cramley* [2002] WASC 47.

²⁴ Or adult children who die intestate, and without a surviving spouse or issue.

²⁵ See *Clarke v London General Omnibus Company Ltd* [1906] 2 KB 648 and *Grove v Moore* [1935] NZLR 739. If the child's parents are dead, the persons with legal responsibility for the child have the duty to bury – *Watene v Vercoe* [1996] NZFLR 193. Where the child's parents cannot agree on the mode of burial, courts will resolve the dispute on the basis of who will effect prompt burial

sets of parents, the wishes of adoptive parents will prevail over those of natural parents,²⁶ while natural parents will take priority over foster parents when making funeral arrangements for a child.²⁷ In the absence of a person with a higher ranking claim within the overall “pecking order”, responsibility for burial falls on the householder on whose premises the body lies.²⁸ Failing this, the obligation to bury unclaimed remains falls on the local authority with control over the city, town or district in which the body is found.²⁹

This legal hierarchy imposes a duty to bury on specific persons, with a concomitant right to possession of the deceased’s remains which will be protected by the courts, if necessary, in the event of unauthorised interference.³⁰ This possessory right also extends to the deceased’s ashes following cremation and to determining their ultimate fate.³¹ Where the deceased was interred in the ground, it has been suggested that the right to possession extends beyond burial, thus preventing a dissatisfied relative from

and as a matter of practicality. Thus, in *Calma v Sesar* (1992) 106 FLR 446 custody of the son’s remains was awarded to his mother who had already made arrangements for the funeral to take place in Darwin, notwithstanding her estranged husband’s wish to have the remains moved to Port Hedland, Western Australia for burial near the place where the deceased was born. In *Fessi v Whitmore* [1999] 1 FLR 767, the court refused to divide the ashes of a 12 year old child between his parents following cremation. Instead, it awarded the ashes to the mother who intended to scatter them in the area where the family had always been based and, in the court’s opinion, where the family could have some focus and come together to see a fitting memorial to the child. The father’s request to have the ashes interred near his new home was rejected as causing enormous distress to the family, this being the place of the accident which had caused the child’s death. However, contrast this with recent newspaper reports of an American court dividing the cremated remains of a Northern Ireland man who died in the September 11th terrorist attacks on the World Trade Centre between his mother, his fiancée and youngest son, and two sons living with his former wife – “Tug of War over Ulster Twin Towers Victim Ends”, *The Belfast Telegraph*, 26 June 2002.

²⁶ *Buchanan v Milton* [1999] 2 FLR 844.

²⁷ *R v Gwynedd County Council, ex p B* [1992] 3 All ER 317 and *Warner v Levitt*, Supreme Court of New South Wales, unreported, 23 August 1994.

²⁸ *R v Stewart* (1840) 12 Ad & El 773.

²⁹ Public Health (Control of Diseases) Act 1984, s 46. (There does not appear to be an equivalent Northern Ireland statutory provision). In terms of financial liability for burial, the person who is under a duty to bury can recover the costs of doing so from the deceased’s estate – see *Davey v Rural Mun. Cornwallis* [1931] 2 DLR 80, *Rees v Hughes* [1946] KB 517 and *Smith v Tamworth City Council* (1997) 41 NSWLR 680. However, a person who is not lawfully in possession of the deceased’s remains cannot recover any costs incurred in disposal of the body, even where this has been in accordance with the deceased’s wishes – *Williams v Williams* (1882) 20 Ch D 659. Here, the executors were not liable to reimburse the testator’s friend for the cost of disinterring his body and having it cremated in Italy, despite the fact that the testator’s will had expressly directed the friend to do so and requested the executors to pay any costs incurred.

³⁰ Most often by means of an injunction – *Calma v Sesar* (1992) 106 FLR 446 and *Re Lockowiak* [1997] SASC 6301.

³¹ See *Re Korda*, *The Times*, 23 April 1958 and *Robinson v Pinegrove Memorial Park*, Supreme Court of New South Wales, unreported, 5 June 1986 (deceased’s executors entitled to custody of his ashes over the deceased’s son in both cases).

disinterring the remains immediately after burial and re-burying them elsewhere.³² However, persons falling within this hierarchy cannot claim that they “own” the body of the deceased in a traditional property law sense – such persons have a mere right to possession of the corpse and for the purposes of burial only.³³

III. A Matter of Legal Entitlement, Not Emotional, Religious or Cultural Claims

The above hierarchy determines who is entitled to custody of the deceased’s remains, and thus provides the focal point for resolving family burial conflicts. In the majority of cases, responsibility for burial will fall on the executors or the deceased’s immediate family acting as his/her personal representatives. While executors and personal representatives are expected to consult with other family members over the proposed funeral arrangements, they are not under any legal obligation to do so,³⁴ and may opt for a form of burial which is opposed by the deceased’s (other) relatives.³⁵

When resolving family burial conflicts, courts have adhered strictly to the legal framework and awarded custody of the deceased’s remains on the basis of who has the duty to bury and associated right to possession of the corpse within the established hierarchy. Judges have consistently stressed the need to find a legal solution to such disputes, and to resolve the matter as quickly as possible to facilitate burial of the dead.³⁶ Arguments for a particular form of burial based on mere expressions of preference or emotional sentiment are irrelevant. Thus, in *Grandison v Nembhard*³⁷ the court held that the distress and inconvenience caused to the deceased’s daughter as a result of the executor’s decision to have the deceased buried in his native Jamaica in accordance with his wishes was irrelevant, as was the extra expense involved.³⁸ Likewise, the fact that those persons who were closest to the deceased during his/her lifetime may be denied any say in the deceased’s funeral does not affect the outcome of family burial conflicts, even where

³² *Waldman v Melville* (1990) 65 DLR (4th) 64. However, a corpse subsequently becomes part of the land in which it is buried, so that any unlawful interference with or removal of the interred body may be actionable in trespass – see *Dowse v Wynward Holdings* [1962] NSWLR 252, as well as *O’Connor v City of Victoria* (1913) 4 WWR 4 and *McNulty v Niagra Falls* (1904) 4 OWR 443. However, this may require a certain amount of decomposition to have occurred – A. Grubb, “‘I, Me, Mine’: Bodies, Parts and Property” (1998) 3 *Medical Law International* 299, at 307, citing *R v Jacobson* (1880) 14 Cox CC 522.

³³ *AW v CW* [2002] NSWSC 301.

³⁴ *Smith v Tamworth City Council* (1997) 41 NSWLR 680. However, it appears that they must provide details of the funeral arrangements to the deceased’s relatives where the latter request such information – *Sopinka v Sopinka* (2001) 55 OR (3d) 529.

³⁵ See the various cases discussed below.

³⁶ See, for example, the respective comments of Martin J in *Calma v Sesar* (1992) 106 FLR 446, at 452 and Ashley J in *Meier v Bell*, Supreme Court of Victoria, unreported, 3 March 1997, at pp 6-7 judgment, as well as those of Hale J in *Buchanan v Milton* [1999] 2 FLR 844, at 854.

³⁷ [1989] 4 BMLR 140.

³⁸ See further *Murdoch v Rhind* [1945] NZLR 425 and *Re Korda*, *The Times*, 23 April 1958 discussed at n 31 above.

such persons are seeking to uphold the deceased's wishes. For example, the legal classification of personal representatives for the purposes of intestacy is based on traditional notions of familial relations which are not always representative of the relationships which the deceased enjoyed while alive. Thus, in *Holtham v Arnold*³⁹ the court held in favour of the deceased's estranged wife who was entitled to letters of administration in respect of her husband's estate and intended to have him cremated, despite objections from the deceased's cohabiting partner of two years who sought to have him buried in accordance with his wishes.

Objections to the proposed funeral arrangements based on divergent religious or cultural beliefs are also immaterial to the resolution of burial conflicts. In *Hunter v Hunter*⁴⁰ the deceased had been a devout Protestant during his lifetime, but shortly before his death had expressed a desire to be buried beside his wife who was a devout Roman Catholic. The deceased was baptised into the Roman Catholic faith three weeks before his death, although there was conflicting evidence as regards his mental capacity at this time. The judge held in favour of the son as executor who wished his father to be buried in a Protestant cemetery, against the wishes of the deceased's wife and other three children who wanted him to be buried in a Catholic graveyard.⁴¹ In *Buchanan v Milton*⁴² and *Meier v Bell*⁴³ the respective courts also rejected suggestions that the deceased (both being of Aboriginal descent) should be buried in accordance with culturally prescribed rituals in specific burial grounds.⁴⁴ Awarding custody of the corpse to the person entrusted with administration of the deceased's estate, Ashley J in the latter case stressed that courts could not depart from established legal principles simply to accommodate particular factual disputes; the existence of religious or cultural values in this context was "simply . . . beside the point."⁴⁵

In the event of family burial disputes, courts will award custody of the deceased's remains to the person with the strongest entitlement to possession of the corpse under the established hierarchy, and thus the right to determine the manner and place of burial. Arguments from other family members, whether based on the presumed wishes of the dead or the actual views of the

³⁹ [1986] 2 BMLR 123.

⁴⁰ (1930) 65 OLR 586.

⁴¹ See further *Saleh v Reichert* (1993) 104 DLR (4th) 384 in which the court awarded custody of the deceased's remains to her husband as personal representative for cremation, notwithstanding protests from the deceased's father that the corpse should be interred in the ground in accordance with the Muslim faith in which his daughter had been raised.

⁴² [1999] 2 FLR 844.

⁴³ Supreme Court of Victoria, unreported, 3 March 1997.

⁴⁴ In *Buchanan v Milton* the deceased's adoptive parents were entitled to possession of his remains for burial against the wishes of his natural parents, while the wishes of the deceased's cohabiting partner and mother of his young daughter took precedence over those of his sister in *Meier v Bell*. Although cohabitants cannot claim as next-of-kin for the purposes of intestacy in the UK, the position is different in several Australian states where the relevant statutory provisions allow cohabitants of sufficient standing to obtain a grant of administration in respect of their deceased's partner's estate, as illustrated in *Meier v Bell*.

⁴⁵ At p 7 judgment. See further the comments of Martin J in *Calma v Sesar* (1992) 106 FLR 446, at 452.

living are irrelevant. It is simply a matter of legal entitlements arising from death and burial – not perceived emotional, moral, religious or cultural claims. Judges can only encourage mediation, and intervene to resolve the matter when families cannot find a solution.

IV. Arguments Based on the Human Rights Act?

Incorporation of the provisions of the European Convention on Human Rights into domestic law under the Human Rights Act 1998 may provide scope for disgruntled relatives to challenge the form of burial proposed by those persons with legal responsibility for this task. For example, reference has already been made to the possibility that the judicial resolution of burial conflicts may prevent the deceased's immediate family from having the final say on funeral arrangements.⁴⁶ Creative use of Article 8 of the Convention and its guarantee of a right to respect for private and family life might provide a means for such persons to challenge those decisions where, for example, the deceased's executors or personal representatives choose to bury the deceased in a place other than the family burial plot or in a manner contrary to the wishes of his/her immediate family.⁴⁷ Moreover, since Article 8 extends to families falling outside the traditional classification under domestic law,⁴⁸ it might also provide scope for challenges by persons in close personal relationships with the deceased, such as cohabitants.⁴⁹

Article 9 of the Convention and its guarantee of a right to freedom of thought, conscience and religion might be invoked where the funeral arrangements are not in keeping with the religious or cultural beliefs of the deceased or his/her family. Recent cases in which domestic courts have permitted exhumation of remains on the basis of a possible Article 9 infringement⁵⁰ suggest that judges might at least be receptive to arguments from quarrelling relatives which are based on religious beliefs. Thus, family members might insist that a particular burial practice is essential to their religious or spiritual convictions and invoke Article 9 where the proposed form of burial does not accord with these values – for example, where arrangements have been made for the deceased to be cremated and interment in the ground is preferred on religious grounds, or where the person with legal responsibility for burying the dead proposes a Christian burial, yet the deceased did not espouse any such values during his/her lifetime.⁵¹

⁴⁶ See above.

⁴⁷ Although *In re Blagdon Cemetery* [2002] 3 WLR 603 recently held that refusal of a faculty authorising parents to exhume their son's remains for reburial in a cemetery close to where the parents had chosen to retire did not constitute an interference with their rights under Article 8.

⁴⁸ See, for example, J. Liddy, "The Concept of Family Life under the ECHR" [1998] EHRLR 15.

⁴⁹ Since such persons constitute a "family" for the purposes of Article 8 – see *Johnston and others v Ireland* (1987) 9 EHRR 203.

⁵⁰ *In re Durrington Cemetery* [2000] 3 WLR 1322 and *In re Crawley Green Road Cemetery* [2001] 2 WLR 1175, but see criticisms of this approach in *In re Blagdon Cemetery* [2002] 3 WLR 603.

⁵¹ The Commission has given a broad interpretation to the words "religion or belief" in Article 9 so that it is not limited to traditional religions but extends to a wide range of convictions and philosophies, and also incorporates non-religious beliefs – see *Arrowsmith v UK* (1978) 3 EHRR 118 and *Kokkinakis v Greece* (1993) 17

However, as with Article 8, the potential impact of Article 9 is at best speculative, and its effect (if any) on family burial disputes remains to be seen.

CONCLUSION

Burial conflicts are situations in which death, instead of uniting a family, promotes deep divisions. Such disputes may be fuelled by a perceived sense of “doing right” by the deceased, or by a desire to make amends for transgressions committed during the deceased’s lifetime. Alternatively, it may simply be a case of death re-igniting old family quarrels which were being suppressed while the deceased was still alive. The common feature of family burial disputes is that they are typically due to misplaced assumptions on the part of the main protagonists as regards who is entitled to claim the deceased’s remains for the purposes of burial. The fixed hierarchy of persons with the duty to bury the dead determines who is entitled to make the necessary funeral arrangements. The person with legal responsibility for burial within this hierarchy has the final say and is entitled to possession of the corpse for this purpose.

In the majority of cases, courts will award custody of the deceased’s remains to his executors or personal representatives. Such persons are thus entrusted not only with the disposal of the deceased’s financial estate but also his bodily estate. However, family members who retained close ties with the deceased while alive may be dismayed to discover that another notionally closer family member can dictate the form of burial⁵² or, in the case of executors, that the final decision rests with someone outside the family unit and who may dispose of the remains in a manner which is opposed by the deceased’s immediate family.⁵³ Persons who enjoyed close personal relationships with the deceased may likewise find that they have no say in the deceased’s funeral by virtue of falling outside the legal hierarchy of persons entrusted with burial of the dead.⁵⁴ By establishing a hierarchy of persons with a duty to bury, the current framework ensures that family disputes are resolved quickly so that burial can take place within a short space of time. In this respect, it arguably fulfils the joint objectives of prompt disposal of and respect for the dead.⁵⁵ However, it fails to take account of the diverse factual circumstances surrounding each particular dispute, or the emotional turmoil of grief-stricken relatives often bolstered by

EHR 397. However, problems may arise in terms of demonstrating that a proposed burial ritual is a manifestation of a particular religious or philosophical conviction by a discernible practice as required under Article 9 – see *X v Federal Republic of Germany* (1981) 24 DR 137.

⁵² As with personal representatives where the person entrusted with burial ranks higher in the established order of who constitutes the deceased’s next-of-kin – see for example *Saleh v Reichert* (1993) 104 DLR (4th) 384 and *Meier v Bell*, Supreme Court of Victoria, unreported, 3 March 1997, both discussed above.

⁵³ As in *Grandison v Nembhard* [1989] 4 BMLR 140 discussed above, and *Re Korda*, *The Times*, 23 April 1958.

⁵⁴ Obvious examples include the deceased’s cohabiting partner (as in *Holtham v Arnold* [1986] 2 BMLR 123 discussed above), as well as a fiancé(e) or step-child who has not been appointed as the deceased’s executor under his/her will and does not qualify as next-of-kin for the purposes of intestacy.

⁵⁵ See n 14 and text above.

strong religious and cultural beliefs. To date, judges have slavishly adhered to the established framework and have refused to be swayed by such issues. Such a dogmatic stance has undoubtedly yielded unfair results, as illustrated by some of the cases mentioned in this article. As suggested above, the Human Rights Act 1998 may provide some scope for disenfranchised relatives to challenge the existing legal framework in certain circumstances. Whether this will persuade courts to adopt a more flexible approach and consider a wider range of factors in the resolution of family burial conflicts overall remains to be seen.

THE PRICE OF PUBLICITY

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

These are not very good days for airlines. The main international and flagship carriers have been very badly hit by September 11, the downturn in the world economy, and most recently the second Gulf War and the virulent strain of pneumonia originating in south and east Asia. US Airways has just unwillingly emerged from chapter 11, United Airlines is deeply entangled in the same bankruptcy proceeding and may only exit via chapter 7 (liquidation), American Airlines is desperately trying to avoid bankruptcy, and even British Airways has had to resort to massive redundancies. Many of the problems of the larger carriers could be management issues to do with high salary costs and unnecessary frills. In relation to these the budget, low cost airlines are commonly viewed as having an advantage, although these carriers do not have to meet the challenges of long haul inter-continental travel. Consequently they appear to have been less badly affected by the recent troubles in the airline industry. However theirs' remains a very competitive business and Ryanair could certainly have done without the kind of publicity "own goal" generated by the case reviewed in this note.

*Jane O'Keeffe v Ryanair Holdings plc*¹ was a tale of a publicity ploy gone badly wrong. The plaintiff was supposedly the one millionth passenger ever to travel with Ryanair when she flew from Dublin to London on 20th October 1988. In fact there is no good reason to believe that she was the one millionth passenger. Ryanair knew that their one millionth passenger would fly with them some time during the week in which 20th October 1988 fell. When the plaintiff checked in for her London flight on 20th October she was asked if she would like "to be" the one millionth passenger. The prize for this was that she got free flights with Ryanair to any location it flew to for life for herself and a named companion. This was not a gift because the plaintiff had to agree to participate in publicity to mark the occasion. Much publicity was generated because the event was featured on television and radio news bulletins that day and in the national newspapers in Ireland. The plaintiff was at the time a 21 year old secretary. The judgment does not say whether she was photogenic but it is a fair inference that Ryanair would not have chosen her were she not. The whole episode resembled a kind of budget *Carbolic Smoke Ball*.² Instead of making an "offer to the world" of free flights to whoever actually turned out to be the one millionth passenger to fly with Ryanair, the defendant picked out someone from the crowd that they thought would serve their publicity purposes. When they reneged on the deal nine years later they discovered that the plaintiff was no pushover and they suffered a defeat in a high profile court case which must do some damage to themselves (and, perhaps, other low cost airlines) at a time when they could conceivably capitalise upon the difficulties being experienced by the larger carriers.

¹ [2003] 1 ILRM 14.

² *Carlill v Carbolic Smoke Ball Co* [1893] 1 QB 256.

Why the defendants chose to challenge the plaintiff's right to free air travel is by no means apparent. It may have been that after nine years they felt they had got enough out of the arrangement and that the plaintiff would be satisfied with what she'd got and create no fuss. They seem to have taken the position that as there was nothing in writing there was no contract. The plaintiff thus had to prove the existence of the contract through oral testimony. There were several sharp conflicts of evidence between the plaintiff and the defendants' witnesses, including the chief executive (Mr Michael O'Leary). The judge (Kelly J) resolved every one of these conflicts in favour of the plaintiff, including one where the plaintiff alleged and Mr O'Leary denied that he acted in a hostile, aggressive and bullying manner towards her. The judge held that Ryanair had broken its contract with the plaintiff and had to pay damages in the sum of 67,500 Euro. The first element in this was a sum of 6,000 Euro for the loss of free travel from 1997 (when the defendants reneged on the contract) until the trial in 2002. This was arrived at by taking the average return fair for Ryanair of 150 Euro per person, and an average of four return journeys a year (the plaintiff's average from 1988 to 1997), for these five years. The second element was 60,000 Euro. The judge assumed here that as the plaintiff and her husband got older and their children grew up they would be likely to travel more, ten trips a year being a not unreasonable estimate. It was further assumed that the cost of air travel would continue to reduce and 120 Euro per return flight was taken as a reasonable estimate of average fares. The number of years of travel was taken as 25, not unlike the figure taken as the multiplier for personal injury awards. The final element was 1,500 Euro for disappointment, frustration and upset arising out of the loss of a holiday weekend in October 1997 (when Ryanair reneged) and the "unpleasant and shabby treatment" the plaintiff suffered on that occasion.

Although the main significance of the case lies in the adverse publicity for Ryanair there were two important legal issues worthy of comment.

Consideration

One of Ryanair's defences to the plaintiff's claim was that, if there was any agreement between the parties, there was no enforceable contract because Ryanair's promise to provide free flights was not supported by consideration moving from the plaintiff. Kelly J had little trouble dismissing this argument. The plaintiff's agreement to participate in publicity was a benefit to the defendants (why else would they have asked her to do this?) and a detriment to her because she had to surrender her anonymity and privacy.³ Arguments about the insufficiency of consideration are not likely to get too far at the contractual formation stage. Today they seem only to arise in the context of contractual variations and even here the part payment of debt rule is effectively the only one left standing. *Williams v Roffey Bros and Nicholls (Contractors) Ltd*⁴ virtually abolishes the pre-existing duty rule and effectively holds that any "practical benefit" for a promisor offering more for an already due return contractual performance will meet the requirement for consideration. In other words the courts take the view that it is up to the

³ [2003] 1 ILRM 14, at 25.

⁴ [1991] 1 QB 1.

parties to decide what is of benefit to them, subject only in the contractual variation situation to any argument about duress or other unconscionable conduct. In the contractual formation situation it is not at all likely that the courts will readily entertain an argument that something specifically requested does not amount to sufficient consideration.

Before leaving this issue it may be worth considering the status of cases where requested benefits were of an even more ethereal quality than the positive publicity of *O’Keeffe v Ryanair*. In particular what does this case say about promises to stop complaining,⁵ or to abstain from alcohol and tobacco?⁶ What does it say about the Northern Ireland Court of Appeal’s refusal to recognise as consideration the promise of a religious order to pray for an architect who did work for it?⁷ It is suggested that the courts would find themselves in an impossible position if they tried to judge the sufficiency of these considerations on a case by case basis. They would be in almost as difficult a position if they tried to formulate some objective test for distinguishing these cases from *Williams v Roffey* and *O’Keeffe v Ryanair*. It would be better to recognise the value of party autonomy and afford the status of sufficient consideration to anything a person of sound mind and not subject to any unconscionable influence was prepared to pay for. Neither should courts dwell much on the question whether this is a benefit to the promisor or a detriment to the promisee. If it is requested by the promisor then in the absence of anything suggesting this party could not exercise a free choice it should be recognised as good and sufficient consideration. That does not mean that all such “promises” would be enforceable. The doctrine of intention to create legal relations could be invoked to deny contractual status to some of these agreements. Thus promises like those made in *O’Neill v Murphy* and *O’Keeffe v Ryanair* should normally be enforced because the nature of the transaction is commercial. Promises like those made in *White v Bluett* and *Hamer v Sidway* should require stronger evidence that they were intended to be legally binding because the transaction is between family members.

In those cases where the benefit derived by the promisor or the detriment suffered by the promisee is not requested and is an accidental result of a promise there should be no finding of sufficient consideration. These are the classic sorts of cases in which the doctrine of estoppel can operate. At the moment English law probably provides a less comprehensive remedial regime for these cases than does the jurisprudence of the American and Australian courts. English promissory estoppel seems mainly to provide the promisee with a defence if the promisor takes legal action inconsistently with the promise.⁸ American jurisprudence seems to allow the promisee to bring an action for breach of the promise but may limit the remedy to something

⁵ *White v Bluett* (1853) 23 LJ Ex 36 (no consideration here).

⁶ *Hamer v Sidway* (1891) 27 NE 256 (consideration provided here).

⁷ *O’Neill v Murphy* [1936] NI 16.

⁸ See *Combe v Combe* [1951] 2 KB 215. Cf R Halson, “The Offensive Limits of Promissory Estoppel” (1999) *LMCLQ* 256.

less than full expectation.⁹ The High Court of Australia gave cautious support for this approach in *Waltons Stores (Interstate) Ltd v Maher*.¹⁰

Damages for Distress and Disappointment

The judge awarded the plaintiff 1,500 Euro for the distress, frustration and upset of losing a weekend's holiday in October 1997 when the defendants reneged on the agreement. It is also reasonably clear that this award was influenced by the judge's dim view of Mr O'Leary's hostile, aggressive and bullying attitude towards the plaintiff.¹¹ So far as the disappointment of a lost holiday was concerned the judge based the award on the decision of the Court of Appeal in England in *Jarvis v Swan Tours Ltd*.¹² The better approach would have been to seek guidance in the decision of the House of Lords in *Farley v Skinner*.¹³ There, Lord Scott indicated that awards for intangible losses like distress and disappointment were appropriate in cases where the protection of such interests was part of the agreed contractual performance or where such losses were foreseeable in the *Hadley v Baxendale*¹⁴ sense.¹⁵ It is probable that the plaintiff's losses were part of the agreed contractual performance. There was no agreement as to whether flights should be for business or pleasure so it was probably understood by the parties that at least some of the plaintiff's travel would be for holidays. But the award of 1,500 Euro, at five times the judge's finding of the average return flight for two persons, does seem very much on the high side.¹⁶ It seems that Kelly J was awarding damages for the humiliating way in which Ryanair had breached the contract. It seems very doubtful whether this can be done and if that was the judge's approach it would have been better had it been more openly acknowledged. In *Malik v Bank of Credit and Commerce International*¹⁷ the House of Lords appears to have softened the line taken in *Addis v Gramophone Co Ltd*¹⁸ that damages cannot be awarded for the humiliating manner or stigma attached to an employee's dismissal. But that was in relation to an employment contract where dismissal may have a bearing on the employee's ability to obtain future employment. The same does not apply to contracts for air travel so this part of *O'Keefe v Ryanair plc* is open to criticism.

CONCLUSION

This case attracted a lot of attention in the press and media. Its greatest significance is probably in the adverse publicity it attracted for Ryanair. But as this note may reveal it considered some very important legal issues as well.

⁹ *Restatement of Contracts* 2d s 90.

¹⁰ (1988) 76 ALR 513 (remedy was reliance measure or "minimum equity").

¹¹ See [2003] 1 ILRM 14, at 27.

¹² [1973] QB 233.

¹³ [2001] 3 WLR 899.

¹⁴ (1854) 9 Exch 341.

¹⁵ See [2001] 3 WLR 899, at 926-928.

¹⁶ Lord Scott thought these awards should be modest, see *ibid* at 932.

¹⁷ [1997] 3 All ER 1.

¹⁸ [1909] AC 488.

THE BUSINESS TENANCIES (NI) ORDER 1996 – TO AGREE OR NOT TO AGREE?

*Rosemary Carson, Partner, Carson McDowell, Solicitors; and
Norma Dawson, Professor of Law, Queen's University, Belfast.**

In an earlier issue of the *Quarterly*¹ we addressed some practical difficulties arising from the Business Tenancies (NI) Order 1996 ('the Order'). Our remarks were prefaced by a brief introduction to the legislation and the principal changes that it made to the law of business tenancies in Northern Ireland. Readers who wish to be reminded of the general background to this topic are referred to those introductory comments, which will not be repeated here. The purpose of this paper is to highlight potential difficulties arising from the service of a tenant's request for a new tenancy under article 7 of the Order.

First steps in the renewal procedure

As a business tenancy draws to an end, the renewal procedure under the Order can be triggered by the service of one of two notices, either a notice to determine the tenancy served by the landlord on the tenant under article 6 of the Order, or a request for a new tenancy served by the tenant on the landlord under article 7 of the Order.² In a buoyant market, where rents are rising, it is likely that business tenants will wait until the landlord makes the first move under article 6. Under earlier legislation, the Business Tenancies Act (NI) 1964, it was possible for a tenant to gain an advantage by making a pre-emptive strike in the renewal procedure. If the tenant acted first and made a request for a new tenancy, by a judicious choice of dates of service and commencement for the new term, the tenant might secure several additional months at the old rent. Under the Order, however, the Lands Tribunal has the power either to vary the rent in a continued tenancy or to backdate the commencement date of the new rent, pursuant to articles 11(3) and 18(4) respectively, thus lessening the economic advantage formerly gained by a pre-emptive strike. It may therefore be more likely now than under the previous legislative regime, that the renewal process will be triggered by a notice to determine under article 6 than by the making of a request for a new tenancy under article 7. Even so, some tenants will choose to act first. The problems considered in this paper arise when that is the case.

In a practical sense, the request for a new tenancy may be the tenant's first bid in a process of negotiation and the tenant is accordingly required to set out proposals for the terms of the new tenancy. Article 7(3) provides that:

A tenant's request for a new tenancy shall not have effect unless it is made by notice in the prescribed form served on the

* We are grateful to those members of the legal profession who drew our attention to the problem addressed here.

¹ (2002) 53 *NILQ* 28.

² The parties must use the forms prescribed under the Business Tenancies (Notices) Regulations (NI) 1997 (S.R. N.I. No. 2), Forms 3 and 4.

landlord and sets out in general terms the tenant's proposals as to-

- (a) the property to be comprised in the new tenancy (being either the whole or part of the property comprised in the current tenancy);
- (b) the rent to be payable under the new tenancy;
- (c) the duration of the new tenancy; and
- (d) the other terms of the new tenancy.

Following service of the tenant's request, article 7(6) of the Order requires the landlord to serve a counter-notice as follows:

Within 2 months of the making of a tenant's request for a new tenancy in accordance with this Article, the landlord shall serve notice on the tenant -

- (a) that he is willing to grant a new tenancy on the tenant's terms (or on those terms as modified by an agreement reached between the landlord and the tenant); or
- (b) that he will oppose a tenancy application by the tenant (and any such notice shall state on which of the grounds mentioned in Article 12 the landlord will oppose the application).³

Article 7(6)(a): 'agreement reached'

The first question that arises under article 7(6), to which the Order itself provides no clear answer, is the meaning of the word 'reached' in paragraph (a). Does it mean an agreement *to be reached* in the ensuing negotiations, or an agreement *already reached* between the parties? The answer is relevant in the following scenario.

A landlord receives a request for a new tenancy and is in general terms willing to grant a renewal, but finds the terms proposed by the tenant unacceptable. The two-month period for service of the landlord's counter-notice is coming to an end. The parties have not yet reached agreement on the terms of renewal. Can the landlord safely serve a counter-notice under article 7(6)(a), indicating that he is willing to grant a new tenancy on the tenant's terms 'as modified by an agreement reached' between the parties, in the hope that agreement may still be reached after the notice has been served? If 'reached' means 'already reached', the answer is no. If this is the correct interpretation of 'reached', the period for negotiation is unduly restricted to two months from the service of the tenant's request, which arguably runs counter to the policy underlying the Order⁴ and puts

³ Prior to the enactment of the Order, the Law Reform Advisory Committee for Northern Ireland considered whether the landlord's counter-notice should be abolished as a step in the procedure but decided in favour of its retention as an integral part of the process: LRAC Discussion Paper No. 3, *A Review of the Law relating to Business Tenancies in Northern Ireland* (1992), HMSO, para 4.2.7, LRAC Report No. 1, *Business Tenancies* (LRAC No. 2, 1994), HMSO, para 4.3.4.

⁴ LRAC Report No. 1, paras 4.4.5–6, where it is suggested that the legislation should facilitate negotiation.

considerable pressure on the parties, especially the landlord. The alternative interpretation, that article 7(6)(a) embraces agreements already reached and to be reached, is more consistent with the general scheme of the Order but may give rise to a second difficulty, which we shall now consider.

Article 7(6)(a) – failure to agree

If we assume that the landlord has served a counter-notice under article 7(6)(a), indicating a willingness to renew on terms still to be agreed, and that negotiations subsequently end without agreement on those terms, the question arises, what happens next? Ideally, the matter should be brought before the Lands Tribunal, which has the power to decide the terms of the new tenancy in the absence of agreement between the parties.⁵ The difficulty is that on these facts neither party appears to have any right to make a tenancy application bringing the matter within the Tribunal's jurisdiction. Only landlords who have opposed renewal may make a tenancy application.⁶ In our scenario, the landlord served a counter-notice under article 7(6)(a), expressing willingness to renew on terms to be agreed, and not under article 7(6)(b) stating grounds of opposition to renewal. Equally, the tenant is precluded from making a tenancy application as a result of the wording of article 10(3):

Where a tenant has served a notice containing a request for a new tenancy, a tenancy application may be made to the Lands Tribunal at any time between the date of service of a notice served by the landlord under article 7(6)(b) and the date specified in the tenant's request for the beginning of the new tenancy.

This is reflected in the Lands Tribunal (Amendment) Rules (NI) 1997⁷ which provide as follows:

E2.- (1) A tenancy application may be made by serving on the registrar a written application in Form EA together with the following documents . . .

where a tenancy application is an application made by a tenant for an order for the grant of a new tenancy . . .

(ii) a copy of the request for a new tenancy served by the tenant under Article 7(3) and, in that case, a copy of the notice served by the landlord under Article 7(6)(b).

The obvious problem is that the landlord in the case under consideration has served a counter-notice under article 7(6)(a), not article 7(6)(b).

It therefore appears that there is no statutory basis upon which the case may be brought before the Lands Tribunal. As a result, the tenancy will end in accordance with article 7(5) of the Order, immediately before the date specified in the tenant's request for the beginning of a new tenancy. If the tenant continues in occupation paying rent, it is arguable that a periodic tenancy will arise subject to the terms of the Order, and that the parties go

⁵ Arts 16 - 19.

⁶ Art 12(1).

⁷ S.R.N.I. 1997 No. 73, Schedule.

back to the beginning of the process.⁸ By a somewhat circuitous route, this loophole could even re-create the rental advantage formerly gained by the pre-emptive strike. This outcome was probably not intended. The Law Reform Advisory Committee Report on *Business Tenancies* recommended that:

Where a tenant requests a new tenancy either party should be able to apply to the Tribunal at any time between the date of service of the landlord's counter-notice and the date specified in the tenant's request for the beginning of the new tenancy.⁹

Thus, in the main body of its report, the Committee made no distinction between a landlord's counter-notice under article 7(6)(a) or (b). Had that been carried into legislation, a tenant could make a tenancy application when the parties failed to reach agreement (as happened under the 1964 Act, subject to adherence to strict time limits). The draft Order appended to the LRAC Report does, however, make a distinction between counter-notices served under article 7(6)(a) and those served under article 7(6)(b), only permitting a tenancy application by the tenant where the landlord has served the latter type of counter-notice, an approach that has been adopted in the Order as enacted. This position would appear to support the argument that the words 'by an agreement reached' in article 7(6)(a) means an agreement reached before the two-month time limit has expired, since if agreement is reached during this period, the tenant does not need to make a tenancy application as terms will already have been agreed.

Conclusion

The confusion surrounding the correct interpretation of article 7(6)(a) and the practical outcome of the loophole caused by a combination of articles 7 and 10, is contrary to the Law Reform Advisory Committee Report on *Business Tenancies*, and unsatisfactory for both landlords and tenants. It could also result in landlords who are willing to renew on terms to be agreed, seeking to avoid the problem by opposing renewal from the outset or alternatively by not responding to a tenant's notice as they are bound to do pursuant to article 7(6), thereby delaying the process into the bargain. If the landlord serves no notice within the two-month time limit under article 7(6), in order to gain time for further negotiations which later break down, the landlord might then apply to the Lands Tribunal for leave to serve a notice out of time. The Tribunal has power under article 10(5)(b) to vary the time limit under article 7(6). If the landlord then serves a notice under article 7(6)(b), the tenant would now be able to make a tenancy application under article 10(3). Thus, it is possible, but by no means certain, that a landlord's failure to serve any notice within the time limit in article 7(6) may afford a means of avoiding the problems raised earlier. Where, however, a landlord has proceeded in good faith to serve a notice under article 7(6)(a) and negotiations break down at a later stage, the problems that we have described appear to be inevitable. The matter could be resolved by clarification of the meaning of article

⁸ See *Walji v Mount Cook Land Ltd* (2001) 81 P & CR D24, for a recent example. The case is discussed in R Highmore and G Clutton, "Buying Time to Negotiate" (2002) *Sol J* 39.

⁹ Para 4.4.6.

7(6)(a), and the deletion of '(b)' after 'Article 7(6)' in article 10(3) of the Order.

BOOK REVIEWS

EDUCATING ONESELF IN PUBLIC. CRITICAL ESSAYS IN JURISPRUDENCE. By Michael Moore [Oxford University Press, Oxford, 2000, xiv + 464, Hardback £70]

In the preface of the book the author mentions that in choosing the title he wanted to engage himself in the modest project of “educating oneself in public” rather than delivering a grand, Hegel-like system of thought (Hegel, the author informs us, originally used that expression in order to comment, in a somewhat pejorative way, on Schelling’s large volume of published preliminary work). Modest as his project may be, Moore certainly managed to educate this reader with the rigour of his analytical thought and the clarity with which he discusses the complex philosophical problems that underlie jurisprudential thought. Finally, the solutions he suggests to many of these problems have far-reaching philosophical implications that exceed the boundaries of jurisprudence.

The essays that compose the volume are organised around three major jurisprudential themes: Legal Positivism (essays 2 to 5), Legal Realism (essay 6) and Natural law (essays 7 to 9). These are in turn taken to reflect three major trends of philosophical thought: Conventionalism, Scepticism and metaphysical Realism. In addition there is a fourth part (essays 10 and 11) that deals in more detail with the tenet of Interpretivism as it has been put forward in philosophy and jurisprudence in particular. Finally, the volume is completed by an extensive new introduction that presents the single chapters in the light of a common theme and, at the same time, is of great help to the reader in navigating through the plethora of the topics and ideas raised in the book. Given the multiplicity of the issues raised and the thoroughness of the exposition, I will confine the comment at hand to the two chapters that discuss the theories of Hart and Dworkin (chapters 3 and 8 respectively). This is the more meaningful, as the issues addressed in those chapters recur throughout the book.

Chapter 3 argues for the possibility of Hart’s external jurisprudence. In specifying the features of Hart’s external account, Moore says that it is *general* (i.e. purports to apply to any legal system), *normative* (i.e. it aims to account for legal obligation) and involves a *semantic account* for the concept “law”, in other words an account of the meaning of that concept. Notoriously, external jurisprudence stumbles over the requirement of normativity, as there is no general consensus on whether a description of facts pertinent to legal sources or actors’ behaviour, manages to ground the notion of obligation that is central in any account of normative phenomena. Yet Hart thought it possible to report facts about the legal practice of a community which can exhaust the content of “obligation”, without resorting to an internal analysis of what it *actually takes* for actors to be obligated. This, he thought, was possible by depicting those facts that refer to the external behaviour of actors who take themselves to be obligated. In particular, Hart focused on facts about the behaviour of those legal officials (judges) who regard themselves as obligated by a master rule (the so-called

Rule of Recognition) which contains the conditions of legal validity and, in effect, distinguishes law from all other normative domains. What is more, the actual reasons for which judges regard themselves as being obligated, *vis-à-vis* the Rule of Recognition, are irrelevant to Hart's jurisprudence. To that extent, Hart's theory is content with something like an *appearance of obligation* and does not make any demands on the content of the obligating reasons. It follows that, according to Hart, there is no necessary connection between any kind of substantive reasons (say justice-related reasons) and legal obligation and that, at least to the extent that obligation exhausts normativity, there is no connection between substantive reasons and law's normativity. Along these lines, descriptive jurisprudence can hold that law is necessarily normative without holding that it is necessarily just or correct.

It is not entirely clear whether Moore is defending the enterprise of external jurisprudence and the method it employs in general, or if he is just trying to defend Hart's sophisticated version of it *vis-à-vis* Dworkin-type criticisms. Despite the general language he is using at various places, he appears to be arguing merely for the latter point, in which case I would like to make a few critical remarks regarding the success of any sophisticated version of external jurisprudence. For sophisticated versions of external jurisprudence to succeed they need to sustain a clear distance from naïve versions thereof. This can be put succinctly as follows:

(1) Not everyone who conforms to a regular pattern of behaviour is under an obligation.

Accordingly, sophisticated external jurisprudence, as opposed to the naïve one, needs to offer an external account of obligation. The externality of the account is ensured by bracketing off all substantive considerations that obligate actors (obligating reasons) and focusing merely on the external manifestation of actors' beliefs about them being under an obligation.

(2) An external account of obligation consists in an account of facts about the behaviour of those who regard themselves as obligated.

Given this, it is possible that:

(3a) Judge A manifests external behaviour B because he believes that legal norm L is just.

(3b) Judge B manifests behaviour B' because she believes that legal norm N is unjust but is concerned about social pressure.

(3c) For any external jurisprudence to succeed B and B' should constitute evidence for the same thing, namely for the fact that the addressees of a legal norm believe that they are under an obligation irrespective of obligating reasons. It follows that B and B' are indiscernible as proofs for the existence of an obligation.

But then:

(4a) B and B' will also be indiscernible from some other token of conforming behaviour, say B'', when an actor is abiding by a standard of conduct and when no belief in an obligation exists, as in:

(4b) Judge C manifests behaviour B'' because he is bribed by the mafia.

Given that external jurisprudence is only interested in the external aspects of actors' behaviour and that there is nothing *externally* that could give away any obligating reason, it follows that:

(5) For all we know, any external behaviour of conformity (B, B', . . . B_n) to a pattern of behaviour corresponds to a belief that one is under an obligation.

And finally:

(6) For all we know, anyone who conforms to a regular pattern of behaviour is under an obligation.

Clearly the contradiction that arises between (1) and (6) is the result of the way external jurisprudence chooses to conceptualise obligation, namely as a belief of actors in the existence of an obligation; moreover this belief can be exhaustively reported by describing its behavioural output rather than the reasons that generate it. Contrapositively, resolving the contradiction would require one to move from an external towards some form of internal form of analysis that allows obligating reasons into the account of actors' beliefs in obligation.

To be fair to Moore, it should be noted that towards the end of the chapter he concedes that external jurisprudence needs to be supplemented by an internal jurisprudence and proceeds to sketch the main tenets thereof, which, however, he takes to be different from Dworkin's version and more akin to some full-blooded kind of Natural Law theory. Given its deep deficiencies, I am less convinced that external jurisprudence should be practiced even alongside internal jurisprudence and more that it should not be practiced at all.

Chapter 8 can be read as Moore's effort to lay down some general guidelines with respect to the content of a tenable internal jurisprudence. This is performed in an indirect way, via a detailed engagement with the main tenets of Ronald Dworkin's Interpretive jurisprudence, a species of internal jurisprudence. According to Moore, Dworkin's metaphysical commitments are untenable and, at the end of the day, fail to carry through his ambitious Interpretive program, which aspired to occupy a middle position between conventionalism and metaphysical realism. A conventionalist lawyer is someone who takes legal sentences to be meaningful within the boundaries of the (linguistic) conventions of a legal community and otherwise to be meaningless (as in the case of "art is unjust"). In contrast, for the metaphysical realist, the issue of meaningfulness is not as important: any sentence that is well formed, grammatically and syntactically, is meaningful. What can vary in this case, and is worth investigating, is its truth-value: the realist helps himself to the binary code true/false on the basis of a robust metaphysics, which assumes that what makes a sentence true or false is an entity that exists in the environment in a mind-independent way.

Moore, in borrowing an expression from Raz, accuses Dworkin of "cheating" in respect of his metaphysics: he helps himself to the language of truth-values plus all attendant advantages, without being prepared to carry the appropriate metaphysical burden. As a result, Dworkin dismisses sentences like "art is unjust" not merely as meaningless but as wrong, without wanting to accept that their wrongness derives from something that exists as part of the fabric of the world and is independent of the practices of

a community. What is more, Dworkin tries to substantiate the view that there is a middle space to occupy between conventionalism and some form of crude realism, wherein truth-values are not pre-fixed but, instead, need to be determined on the basis of a substantive theory in whose light sets of facts about practices and/or the environment acquire normative (legal or moral) significance. Moore rejects the existence of such a middle space and argues that the very idea of “substantive theory” is a version of conventionalism.

The insightful criticisms of Moore notwithstanding, it is still possible to grant the existence of such a middle space, albeit not entirely along Dworkinian lines. The starting point is the realisation that a crucial element of Dworkin’s substantive theory is what he calls the “point of a norm”. In other words, a substantive theory is the hermeneutic enterprise of trying to make the most coherent sense of sets of data about the practice of a community and/or the phenomenal environment, *in the light of the point of a set of norms*. The crucial question regarding the substantive theorist’s metaphysical commitments is whether any of the normative points are exempted from the hermeneutic process. In other words, whether normative points (be it one or many) constitute an indisputable foundation for any substantive theory.

A positive answer to that question suggests the existence of certain foundational norms akin to the Kantian *a priori* norms of morality. These allow a substantive theory to ascribe truth-values (right/wrong) to normative sentences in an objective way. At the same time, these norms occupy a metaphysical space that is neither realist nor conventionalist: in being some sort of thought-dependent abstract objects, they belong to our conceptual scheme. However, in being *a priori* knowable they constitute the boundaries of our conceptual scheme and, hence, the conditions of our understanding of anything as being a norm of law, morality etc. What is more, they allow for the possibility of ascribing truth-values to normative statements in an objective way.

Admittedly, to go down this line of reasoning would require one to part with the strict lines of Dworkin’s Interpretive program. Be that as it may, the idea of *a priori* norms/normative points seems to stand a chance in grounding the middle space between conventionalism and realism, whose possibility Moore vehemently resists, without explicitly opposing the fundamentals of Dworkin’s Interpretive program.

DR GEORGE PAVLAKOS
School of Law, Queen’s University of Belfast

THE INTERGOVERNMENTAL PILLARS OF THE EUROPEAN UNION. By Eileen Denza [Oxford, OUP, 2002, xxxv + 387 pp inc. index; £60.00]

In establishing the European Union, the Treaty of Maastricht made the European law jargon slightly more colourful, albeit not any clearer, by introducing the term “pillar”. The European Union is the overall structure within which integration is achieved in different areas at a different pace. As ancient temples were based on pillars, the European Union is based on three sets of rules. The first one consists of the European Community, the European Coal and Steel Community and the European Atomic Energy Community; the second pillar is entitled Common Foreign and Security Policy (CFSP); and the third pillar is now entitled Police and Judicial Cooperation in Criminal Matters. These sets of rules are distinct in nature, in so far as the EC is organised on the basis of various supranational features, whereas the second and third pillars are, in essence, intergovernmental. Despite their distinct normative characteristics, the pillars often interact in terms of their institutional structures, administrative provisions, legal machinery and political momentum.

In her book, Eileen Denza studies the second and third pillars. To underline the timely nature of this book is to mention the obvious. On the one hand, the legal framework within which the Member States have carried out their common foreign policy started developing to a very considerable extent even prior to the current debate about the Future of Europe. The development of the European Security and Defence Policy and the war in Iraq have recently made it all the more relevant. On the other hand, the post-9/11 period has seen active cooperation amongst Member States in criminal matters. However, there is another reason which makes Denza’s book all the more welcome: the voluminous body of literature on the above issues has been produced, mainly, by political scientists and international relations specialists. It is most refreshing to see that lawyers are still attracted to the rules pursuant to which the EU acts in areas closely associated with national sovereignty. In the light of her experience as a Legal Counsellor to the Foreign and Commonwealth Office and a Legal Advisor to the UK Representation to the EC, as well as her academic expertise, Denza’s book is all the more interesting to read.

The first chapter sets out the canvas against which the analysis of the second and third pillars are to be carried out. It identifies the public international law genesis of those pillars, overviews the main characteristics of intergovernmental law-making and concludes that EC law and international law “are capable of cross-fertilization and [that] they are cross-fertilizing to an increasing extent” (page 32). It is rightly pointed out that the so-called Community method is not the only valid one for managing integration, a conclusion borne out by the post-Maastricht revisions of the EU Treaty. The following two chapters overview the genesis and development of the CFSP and the third pillar under the Maastricht Treaty. The fourth chapter seeks to define the achievements and weaknesses of the CFSP. In doing so, it focuses on specific activities undertaken by the European Union under the second pillar, both in terms of its approach to specific geographical areas (such as Russia, South Africa, Bosnia) and in terms of more general policies (such as

the Stability Pact, landmines, sanctions, regulation of exports of dual-use goods and arms exports). This is a most interesting analysis as it provides a measured and thoughtful response to the widely-held and, in this reviewer's opinion unjustified, perception of the EU as a spectacular failure in the area of foreign policy. Denza shows that, whilst not necessarily spectacular, the successes of the EU in the area of foreign policy have been considerable given the institutional limitations set out in the TEU and various practical problems of implementation. In relation to Bosnia, for instance, it is argued that that "the Community and later the Union deployed all the sticks and carrots which were legally within their power" (page 119) and concludes that "[e]ven if the Union had had more powerful tools at its disposal, it is unlikely that they would have been deployed in the absence of a clear mandate from the national parliaments and the peoples of Europe for serious involvement" (page 120).

The fifth chapter examines the amendment of the CFSP framework introduced at Amsterdam and provides a commentary of the relevant TEU provisions. This is a detailed and most useful analysis of the legal provisions of CFSP. An interesting issue examined by Denza at some length is that of the legal personality of the EU. Whilst the Member States rejected proposals at both Amsterdam and Nice to endow the EU with express legal personality, they did provide for treaty-making power. This is so both in the CFSP area pursuant to Article 24 TEU and the third pillar under Article 38 TEU. These provisions raise the question whether the EU has, in fact, implied legal personality. Whilst academic opinion seems to accept this conclusion, especially on the basis of agreements actually concluded pursuant to those provisions, Denza is not convinced. She argues that, in relying upon Articles 24 and 38 TEU, the EU institutions merely exercise a delegated treaty-making power on behalf of the Member States; accordingly, it is the latter which are bound in international law by those agreements negotiated and concluded on their behalf. Whilst following a tightly argued line of reasoning, this conclusion does not sit comfortably with EU practice. All agreements concluded under Article 24 TEU refer to the EU as a contracting party. A case in point is the recent Council Decision 2003/222/CFSP on the conclusion of the Agreement between EU and FYROM on the status of the European Union-led Forces in FYROM ([2003] OJ L 82/45), Article 2 of which authorises the President of the Council "to designate the person empowered to sign the Agreement in order to bind the European Union". Be that as it may, there can be no doubt that "the Member States are more concerned with questions of their own internal procedures than with their potential responsibilities under international agreements" (page 177).

Chapter 6 examines the achievements and weaknesses of the third pillar and chapter 7 provides a commentary on the legal provisions of the third pillar as laid down in the Amsterdam Treaty. The following chapter sheds light on the extent to which the legally distinct EU pillars in fact interact by examining specific actions such as common strategies, the legal regime of sanctions and exports of dual-use goods and visa policy. Denza concludes that "on the evidence of recent instruments, the institutions are becoming familiar with cross-pillar techniques and are now able to use their various powers in a consistent and convincing manner" (page 309). The following two chapters examine the extent to which judicial and parliamentary supervision is exercised over the pillars, the latter referring to the role of

national parliaments too. Finally, chapter 11 analyses the security and defence policy of the European Union.

The international law background of the author and the practical insights she has gained from her career make reading of this book all the more rewarding. All in all, this is an excellent book, comprehensive in scope and detailed and succinct in its analysis. Denza's measured tone and thoughtful approach to the subtleties of intergovernmental law-making render it essential reading for anyone interested in the intergovernmental pillars of the EU.

DR PANOS KOUTRAKOS
School of Law, University of Birmingham.