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TRANSSEXUALS – THE ECHR IN TRANSITION?

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1. INTRODUCTION

In *Christine Goodwin* v *the United Kingdom*[2] and *I* v *the United Kingdom*[3] the European Court of Human Rights – sitting as a Grand Chamber – made a remarkable and significant transformation in its attitude to transsexuals, with implications which may transcend its consequences for transsexuals. In doing so it employed an innovative approach. Both cases involved a postoperative male to female transsexual, who each claimed that there had been a violation of Articles 8 ("private life") and 12 (the right to marry) of the European Convention on Human Rights. In both cases the Court held unanimously that the refusal of the State to grant legal recognition to the new status of post-operative transsexuals infringed their right to private life, and that their right to marry had also been infringed.

The unanimity was striking,[4] as only four years before the majority also by a Grand Chamber in the opposite direction was 11-9 on Article 8 and 18-2 on Article 12. Following the latter cases the House of Lords made a declaration of incompatibility under the Human Rights Act 1998 of section 11(c) of the Matrimonial Causes Act 1973, which provides that a marriage is void if the parties are not respectively male and female.[5] Additionally, Advocate General Ruiz-Jarabo Colomer founded on the *Goodwin* case to argue before the European Court of Justice that: ". . . transsexuals have a fundamental

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[1] We wish to thank Ms C Lyons, Prof R Paisley and Prof P Beaumont of this law school for reading drafts of this and for helpful comments. We are indebted also to the analysis of case law in the paper by The Hon Lord Reed (Judge of the Court of Session and High Court of Justiciary, Scotland), Splitting the Difference: Transsexuals and European Human Rights Law (Presented to the International Bar Association Conference held in Amsterdam on 17-22 September 2000, unpublished paper referred to, and quoted from, in Liberty's submission to the Strasbourg court in *Goodwin and I* v *the United Kingdom* - A Comparative Study Of European, Commonwealth And International Law And Practice Regarding The Civil Status Of Transsexual People) <http://www.liberty-human-rights.org.uk/resources/ interventions/pdfs/goodwin .pdf> Reed's paper, cited as in Liberty's submission, is referred to *infra*.

[2] *Christine Goodwin* v *the United Kingdom* [GC], judgment of 11 July 2002, ECHR 2002-VI, hereafter *Goodwin*.

[3] *I* v *the United Kingdom* [GC], judgment of 11 July 2002, ECHR 2002-VI, hereafter *I* v *the United Kingdom*.

[4] See Tsang, 'Lawyer of the week: Julia Sohrab', *The Times* (Law) 23 July 2002, 10. Sohrab, Goodwin's lawyer, was also struck by the Government's half-hearted defence, and by the Court's statements on human dignity and human freedom, and on personal autonomy. The historic shift was also noted by *Sawyer, Goodwin* v *United Kingdom*. IFLJ (2002) 123.

[5] *Bellinger (FC) (Appellant)* v *Bellinger* [2003] UKHL 21 in which a male to female transsexual sought recognition of a marriage conducted in her acquired gender.

right to marry on conditions which take account of their acquired sex ."[6] In the Strasbourg Court of Human Rights the decisions of *Goodwin* and *I* were followed in a subsequent case involving a transsexual, who successfully complained about German court proceedings being in breach of Articles 6 and 8 of the ECHR.[7] *Goodwin* and *I* were also referred to as "helpful" in the Family Court of Australia, in *Attorney-General for the Commonwealth* v *Kevin and Others*,[8] where the marriage of a transsexual was recognised, upholding a decision referred to by the Strasbourg Court itself.[9]

The decisions of the Strasbourg Court are commendable for their directness,[10] and sympathetic tone, and seem to reflect a disposition on the part of the Court to do what it can to alleviate the perceived plight of transsexuals.[11] The decisions, however, raise several issues surrounding the meaning of the right to private life and its relation to concepts of dignity and autonomy; the extent of the right to marry; and the expansive approach of the Strasbourg Court's jurisprudence in its interpretation of the Convention. The Strasbourg Court's use of the concepts of autonomy and dignity in interpreting "private life" is intriguing. Its reliance on the idea of dignity (nowhere mentioned expressly in the Articles in question) and its invocation of the notion of autonomy are notable features of the Court's approach. Its willingness to recognise the right of transsexuals to marry is unprecedented in its jurisprudence and inevitably raises the question of the recognition of so-called "same-sex" marriage. Its judgments in these cases are distinguished by a willingness to adhere to what is identified as an "evolutive" approach.

The claims of the transsexuals in these cases may have provided a welcome opportunity for the Court to "transition" the ECHR from its existing state. Hence it added an interpretative gloss to reinforce broader ideas of autonomy and dignity, and broadened the accepted scope of the right to marry. It also took the opportunity to refer to the Charter of Fundamental Rights – strictly speaking a document having an exclusively EU dimension, and whose legal status was at the very least questionable[12] – in a way which is innovative and transforming, yet nonetheless raises questions about the level of activism displayed by the Court.

The following section examines the Court's emphasis on the concepts of autonomy and dignity in relation to the Article 8 claim. Part 3 considers the Court's new reading of the right to marry in Article 12, while Part 4

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6 AG Ruiz-Jarabo Colomer in Case C-117/01, *KB* v *The National Health Service Pensions Agency and the Secretary of State for Health*,10 June 2003, paras 68-69.

7 *van Kück* v *Germany*, judgment of 12 June 2003, ECHR 2003.

8 *Attorney-General for the Commonwealth* v *Kevin and Others*, 30 Fam LR 1 (2003)

9 *Goodwin*, para 82; *I* v *the United Kingdom*, para 62: "It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (see the dissenting opinion of Thorpe LJ in *Bellinger* v *Bellinger* cited in para 52 above; and the judgment of Chisholm J in the Australian case, *Re Kevin*, cited in para 55 above)."

10 See AG Ruiz-Jarabo Colomer *ibid*, referring to the unanimity and "particularly forceful terms" as regards the Art 8 claim.

11 See *Goodwin*, paras 77, 91; *I* v *the United Kingdom*, paras 57, 71.

12 See p 234.

examines in particular its consequences for claims about the illegitimacy of bans on homosexual marriage. Part 5 comments on the "evolutive approach" to interpretation emphasised by the *Goodwin* Court, including the Court's use of the Charter of Fundamental Rights as an interpretative tool. Part 6 contains a summary of conclusions and comment.

2. Article 8 and The Values Of Privacy, Autonomy and Dignity

The Court of Human Rights noted that a serious interference with private life can arise where domestic law conflicts with an important aspect of personal identity, as in this case. It stated that the "very essence" of the Convention is respect for human dignity and human freedom,[13] a far-reaching claim highlighted by Goodwin's lawyer.[14] This eloquent phrase, full of potential, reflects the view of dissenters in the context of Article 12 in the Commission in *Sheffield and Horsham v the United Kingdom*.[15] It was also used in the *Dianne Pretty* case,[16] though not by a Grand Chamber, and is similar to a declaration made by the ECJ in *P* v *S and Cornwall County Council*.[17] The Court of Human Rights further pointed out that under Article 8, with the important underlying notion of personal autonomy – again echoing the *Pretty* case[18] – protection is given to the personal sphere of each individual,

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[13] *Goodwin*, para 90; *I* v *the United Kingdom*, para 70. See also *Goodwin* at para 91, *I* v *the United Kingdom*, para 71: "No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost."

[14] See n 4.

[15] Thune, Geus, Mucha, Lorenzen and Herndl, partly dissenting, *Sheffield* v *the United Kingdom*, Report of 21 January 1997, Annex to *Sheffield and Horsham* v *the United Kingdom*, Reports of Judgments and Decisions 1998-V, referring in the context of Article 12 to the "fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom . . ."; *cf.* Judge Martens in *Kokkinakis* v *Greece*, judgment of 25 May 1993, Series A no. 260-A: "The basic principle in human rights is respect for human dignity and human freedom."

[16] See *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 65

[17] Case C-13/94 *P* v *S and Cornwall County Council* [1996] ECR I-2143, para 22: "To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard."

[18] See *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 61: "Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."; *cf Keenan* v *the United Kingdom*, judgment of 3 April 2001, ECHR 2001-III, paras 86, 91, where the UK Government referred to "the principles of individual dignity and autonomy, underlying the Convention", and the Court referred to "autonomy"; see also Thorpe LJ in *Bellinger* v *Bellinger* [2001] EWCA Civ 1140, para 156, citing Judge Martens in the *Cossey* case at para 5.5. The ideas of personal autonomy or self-determination were founded on in relation to Article 8, but unsuccessfully, in the House of Lords in *R (Pretty)* v *DPP* [2002] 1 AC 800, counsel referring, 804,

including the right to establish details of their identity as individual human beings.[19] This emphasis on the idea of autonomy – underlying "personal identity" – is noteworthy. It endorses the important dissenting opinion of Judge van Dijk in *Sheffield and Horsham* v *the United Kingdom*, where he refers to the "fundamental right of self-determination" – not "separately and expressly included in the Convention, but. . . at the basis of several of the rights laid down therein" – and "a vital element of the 'inherent dignity' which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world."[20] This acknowledges that "self-determination" is at best implicit in the ECHR He echoes the ringing claim of Judge Martens in the Cossey case that:

> "The principle which is basic in human rights and which underlies the various specific rights spelled out in the Convention is respect for human dignity and human freedom. Human dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality."[21]

Autonomy, like "self-realisation", is a distinct concept from privacy in the orthodox sense of the "private" sphere – certainly in the sense of being "left alone"[22] or even of having "personal relationships" – although the two are closely connected in circumstances such as those at issue in this case.[23] The closest to this idea of autonomy/self-realisation was perhaps in the Commission Report in *van Oosterwijck*. As Reed and Murdoch point out, the Commission had already clearly rejected in a transsexual case what was called an Anglo-Saxon and French concept of private life as freedom from adverse publicity in favour of a concept that encompassed personal

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to Convention organ cases *X and Y* v *the Netherlands*, judgment of 26 March 1985, Series A no 91, and contrasting *Laskey, Jaggard and Brown* v *the United Kingdom*, judgment of 19 February 1997, Reports of Judgments and Decisions, 1997-I; see also *NHS Trust A* v *M*; *NHS Trust B* v *H* [2001] HRLR. 12, *per* Dame Butler-Sloss, para 38: "As I have already said Article 8 protects the right to personal autonomy, otherwise described as the right to physical and bodily integrity. It protects a patient's right to self-determination . . . "

19 *Goodwin*, para 90; *I* v *the United Kingdom*, para 70; see also *van Kück* v *Germany*, judgment of 12 June 2003, ECHR 2003, para 69.

20 *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, dissenting, at para 5.

21 Judge Martens, dissenting, in *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 2.7, cited by Butler-Sloss, President, and Walker LJ, in *Bellinger* v *Bellinger* [2001] EWCA Civ 1140, para 79, and quoted by Lord Reed, *Splitting the Difference*, *supra* n 1, p 33. In *Cossey*, at the Commission stage, Frowein, joined by Ermacora, Gözubüyük, Rozakis, Schermers, Thune, argued for a breach of Article 8 on grounds of dignity – Annex to *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184.

22 See Judge Martens below n 41.

23 For a recent and comprehensive discussion of the relation between privacy and its component concepts see Solove, 'Conceptualizing Privacy' (2002) 90 *Calif LR* 1088.

relationships.[24] Reed, the Hon. Lord Reed, a Scottish judge, separately did interpret *van Oosterwijck* as adopting a concept of private life "which went well beyond any question of privacy or confidentiality, and was much closer to the concept of self-determination found in the German Basic law", and similar to a decision of the *Bundesverfassungsgericht*.[25]

The Court of Human Rights had clearly accepted the idea that Article 8 extends beyond the "inner circle" and protects relationships and personal identity,[26] and it did in *Goodwin* and *I v the United Kingdom* characterise the breach of Article 8 as a breach of the right to establish details of the applicants' identity as individual human beings.[27] It could thus simply have characterised this case as, and limited it to, an "important aspect of personal identity",[28] or "to personal development and . . . physical and moral security",[29] or "personal identity",[30] or "gender identification",[31] "identity"[32], or "sexual identity",[33] or perhaps "moral integrity".[34] It could have focused

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[24] See the Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, 583, para 51: "The concept of private life contained in Article 8 is however wider than the definition given by numerous Anglo-Saxon and French writers, according to which it is the right to live, as far as one wishes, protected from publicity; for the Commission, 'it comprises also to a certain degree the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality'."; Reed and Murdoch, *A Guide to Human Rights Law in Scotland*, (2001), para 6.15.

[25] The Hon Lord Reed, *Splitting the Difference*, *supra* n 1, at pp 24, 27 (the German case is referred to also in *van Kück* v *Germany*, judgment of 12 June 2003, ECHR 2003, para 29, and below at n 62). His comment on *van Oosterwijck* is referred to in *Bellinger* v *Bellinger* [2001] EWCA Civ 1140, per Butler-Sloss, President, and Walker LJ, para 71.

[26] See *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 61; *Bensaid* v *the United Kingdom*, judgment of 6 February 2001, ECHR 2001-I, para 47; *Niemietz* v *Germany*, judgment of 16 December 1992, Series A no 251-B, at para 29; see also *Mikulić* v *Croatia*, judgment of 7 February 2002, ECHR 2002, paras 53-55. Indeed in *Botta* v *Italy* the Court stated that Article 8 is *primarily* "intended to ensure the development, without outside interference, of the personality of each individual in his relations with other human beings. . . " *Botta* v *Italy*, judgment of 24 February 1998, *Reports of Judgments and Decisions* 1998-I, para 32.

[27] *Goodwin*, para 90; *I* v *the United Kingdom*, para 70.

[28] *Goodwin*, para 77; *I* v *the United Kingdom*, para 57.

[29] See *van Kück* v *Germany*, judgment of 12 June 2003, ECHR 2003, para 69.

[30] *Cf* the reference to change of sex as part of "personality" in a case referred to by Lord Reed, *supra* n 1, p 28, Application no 9420/81, 38 *Transsexuals* v *Italy*, 1982, unpublished.

[31] See *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 61, *PG and JH* v *the United Kingdom*, judgment of 25 September 2001, ECHR 2001-IX, para 56, *Bensaid* v *the United Kingdom*, judgment of 6 February 2001, ECHR 2001-I, para 47, referring to *B* v *France*, judgment of 25 March 1992, Series A no 232-C; see also *Peck* v *the United Kingdom*, judgment of 28 January 2003, ECHR 2003, para 57.

[32] See *van Kück* v *Germany*, judgment of 12 June 2003, ECHR 2003, para 56, referring to *Goodwin*, and *I* v *the United Kingdom*, and at para 75.

[33] See Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, 584, para 52.

[34] See Feldman, 'Human Dignity as a Legal Value–Part I' (1999) *PL* 682, 694 (referring to *X and Y* v *the Netherlands*, judgment of 26 March 1985, Series A no 91, and *Costello-Roberts* v *the United Kingdom*, judgment of 25 March 1993,

on the difficulties of the humiliation mentioned by *Goodwin* for example or the embarrassment referred to by *Ms "I"*. But it had found that the levels of intrusion, the interference and embarrassment, did not reach the levels attained in *B* v *France*.[35] *Nonetheless*, it said, echoing an important dissent in *Sheffield and Horsham* v *the United Kingdom*,[36] the very essence of the Convention is respect for human dignity and human freedom,[37] before referring to "autonomy". This, albeit "underlying", notion of autonomy, tending to or suggesting self-realisation, or self-identification, goes further than intrusiveness in the orthodox sense, and arguably addresses the real rationale. Following *Pretty* v *the United Kingdom* to an extent, it restated the broader underlying notion of autonomy and that the "essence" of the Convention lies in "dignity" and "human freedom". In doing so it addressed arguably the crux of the case, the perceived need for the recognition – and affirmation – of transsexuals' self-realisation.[38] The Court indeed later referred to a transsexual's "freedom to define herself as a female person, one of the most basic essentials of self-determination."[39]

The notion of autonomy only "underlies" Article 8, but it embodies a different, more expansive, idea of the meaning of private life. It goes well beyond (negative) protection of "private life" in the sense of a personal intimate sphere, though that "inner circle" idea had been rejected somewhat already.[40] It extends to (positive) acts which involve expression of self-realisation, in private or not, and indeed demand public recognition by the State, though a demand for State recognition of status is not new in itself.[41]

Whether this is conceptually helpful is however open to question. It focuses less on "negative interference" by the State which is the primary focus of

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Series A no 247-C) suggesting that "moral integrity" is related to dignity and the freedom to make choices in decisions and life style. However the "moral integrity" in those cases concerned rather different matters than transsexualism.

35 *B* v *France*, judgment of 25 March 1992, Series A no 232-C.

36 Thune, Geus, Mucha, Lorenzen and Herndl, partly dissenting, *Sheffield* v *the United Kingdom*, Report of 21 January 1997, Annex to *Sheffield and Horsham* v *the United Kingdom*, Reports of Judgments and Decisions 1998-V, referring to the right to marry – see n 91.

37 See also *van Kück* v *Germany*, judgment of 12 June 2003, ECHR 2003, para 69.

38 Judge Martens, dissenting, in *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 3.2, n 15, referred to the argument that: "At the heart of the complaint is the very issue of the non-recognition of the identity itself."

39 *van Kück* v *Germany*, judgment of 12 June 2003, ECHR 2003, para 73, referring to self-determination also at para 78.

40 *Niemietz* v *Germany*, judgment of 16 December 1992, Series A no 251-B, at para 29.

41 This dual dimension of the concept of privacy, combining protection for positive expressions of identity as well as a more negative protection against the disclosure of confidential information or other official intrusions into private life is emphasised by Judge Martens, dissenting, in *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 5.5, referring to "a markedly increased recognition of the importance of privacy, in the sense of being left alone *and* having the possibility of living one's own life as one chooses." (emphasis added); see also Thorpe LJ in *Bellinger* v *Bellinger* [2001] EWCA Civ 1140, para 156. Recognition of status by the State under Article 8 is not a new idea in itself – see *Markx*, judgment of 13 June 1979, series A no. 31.

Article 8,[42] than on positive personal realisation as a right which is regarded as more important than the State's assessment of the appropriateness of "self-realisation", at least in this area. It denotes a further shift in emphasis from negative or defensive freedom – the personal or intimate envelope[43] – to positive self-identity. It expresses a principle that focuses more on the individual and his/her perceptions, which is capable of growth. It focuses on the right of a person to be or become the kind of person one wants to be and have a chosen lifestyle.[44] This development from a negative freedom to a positive concept of freedom – not to be confused with the State's positive obligations – may be seen as welcome. The reference to "autonomy" may be seen as a change in focus on the individual rather than the State, where the enquiry starts with the individual and his/her self-realisation rather than with the limits of the otherwise legitimate power of the State.

It may be misleading or alarmist to read too much into the use of a concept apparently ideally suited to two cases about transsexualism, since, arguably, the real issue in such cases is indeed the recognition of the "autonomy" of transsexuals' in their self-realisation.[45] But the concept is expressed generally and also echoes not only the *Pretty* case but also individual judges' remarks previously. The idea of self-determination was not surprisingly used also in *van Kück* v *Germany*.[46] It does suggest a shift in thinking using language that has been evident elsewhere.

In the US Supreme Court Kennedy J., writing for the Court in *Lawrence et al* v *Texas*, claimed that:

> "Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[47]

Kennedy J reiterated the view that:

> ". . . choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept

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[42] See *Marckx*, judgment of 13 June 1979, Series A no 31, para 31 – ". . . the object of the Article is 'essentially' that of protecting the individual against arbitrary interference by the public authorities.", adding that there may be positive obligations also. The interpretation in that case of that Article to include positive obligations is a different matter than the scope of "private life"; *cf* as to the object of Article 8 Judge Fitzmaurice, dissenting, in *Marckx*, judgment of 13 June 1979, Series A no 31, at para 7.

[43] See n 51.

[44] See de Waal, Currie, Erasmus, *The Bill of Rights Handbook* (2001) p 275: "The second reason for protecting privacy is to enable individuals to develop their personalities. Put another way, the right of privacy protects the right of individuals to be or become, at the personal level, the kind of person they want to be. The implication is that the state may not compel individuals to conform to a stereotypical view of what a model citizen is. In this sense, the right to privacy issues such as the right to choose the kind of lifestyle one wants to lead." They refer to the adoption of the notion of self-realisation in the German Constitution and discuss *Bernstein*, referred to *infra*.

[45] See n 38.

[46] See n 39.

[47] *Lawrence et al* v *Texas*, 539 U.S._ (2003).

> of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."

In dissent, Scalia J wrote acerbically:

> ". . . if the Court is referring not to the holding of *Casey*, but to the dictum of its famed sweet-mystery-of-life passage, *ante*, at 13 ('"At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life"'): That 'casts some doubt' upon either the totality of our jurisprudence or else (presumably the right answer) nothing at all. I have never heard of a law that attempted to restrict one's 'right to define' certain concepts; and if the passage calls into question the government's power to regulate *actions based on* one's self-defined 'concept of existence, *etc*.,' it is the passage that ate the rule of law."

Kennedy J also added:

> "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[48]

In South Africa, in *National Coalition for Gay and Lesbian Equality and Another* v *Minister of Justice and Others*, Sachs J concurring, stated that:

> "It has become a judicial cliché to say that privacy protects people, not places. Blackmun J in *Bowers, Attorney General of Georgia* v *Hardwick et al* made it clear that the much-quoted 'right to be left alone' should be seen not simply as a negative right to occupy a private space free from government intrusion, but as a right to get on with your life, express your personality and make fundamental decisions about your intimate relationships without penalisation. Just as 'liberty must be viewed not merely "negatively or selfishly as a mere absence of restraint, but positively and socially as an adjustment of restraints to the end of freedom of opportunity"', so must privacy be regarded as suggesting at least some responsibility on the State to promote conditions in which personal self-realisation can take place. . ."[49]

Sachs J then partly cited Ackermann J in *Bernstein and Others* v *Bester and Others NNO*:[50]

> ". . . 'rights, like the right to privacy, are not based on a notion of the unencumbered self, but on the notion of what is necessary to have one's autonomous identity."

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[48] Referring to *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 120 L Ed 2d, 674, 505 U.S 833, 851 (1992). Scalia J responded, dissenting: ". . . what justification could there possibly be for denying the benefits of marriage to homosexual couples exercising '[t]he liberty protected by the Constitution,' "

[49] See also Hale LJ in *Shirley Phyllis Pearce* v *The Governing Body of Mayfield School*, [2001] EWCA Civ 1347, CA Civil Division, 31 July 2001, para 17.

[50] *Bernstein and Others* v *Bester and Others NNO*, 1996 (2) SA 751 (CC).

He added:

> "Viewed this way autonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act freely from interference by the State. What is crucial is the nature of the activity, not its site. While recognising the unique worth of each person, the Constitution does not presuppose that a holder of rights is as an isolated, lonely and abstract figure possessing a disembodied and socially disconnected self. It acknowledges that people live in their bodies, their communities, their cultures, their places and their times."[51]

That case concerned sexual relationships, which were known to be covered already by the concept of "private life" under the ECHR. But *Goodwin* and *I* v *the United Kingdom* provide a basis to shift the focus of Article 8 jurisprudence from protection against State interference to guaranteeing individual autonomy, which favours the freedom of the individual to determine the course of his/her own life. The Court's self-conscious elevation of the value of autonomy as self-determination to such a prominent place in its Article 8 analysis may even seem to be part of an attempt to develop or provide a basis on which to develop its jurisprudence in a direction which opens it up more fully to claims based on the notion of individuals' freedom to choose their own lives. "Private life" is thus more than the "private" sphere not to be intruded on, and more about positive self-realisation than the negative "unencumbered self".[52] Thus, arguments about access to abortion could be presented as direct appeals to the value of autonomy, which the Court took such pains to emphasise here.[53] So also may arguments about the freedom to engage in unorthodox sexual activities,[54] or possibly self sufficiency because of physical inadequacy,[55] or

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[51] *National Coalition for Gay and Lesbian Equality and Another* v *Minister of Justice and Others* 1999 1 (SA) 6 (CC) at paras 116-117.

[52] See Ackerman J in *Bernstein and Others* v *Bester and Others NNO*, 1996 (2) SA 751 (CC), para 65.

[53] See Solove, *supra* n 23, 1117-1118, who refers to *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 120 L Ed 2d, 674 (1992), 698, where the Supreme Court refers to choices central to dignity and autonomy, and the right to determine one's own concept of existence, noting that some critics argue that the Supreme Court's privacy cases are really about liberty and autonomy; see also *Thornburgh* v *American College of Obstetricians and Gynecologists*, 90 L Ed 2d 779 (1990), 801; *Lawrence et al* v *Texas*, US Supreme Court 539 US_(2003). C. Feldman, 'The Developing Scope of Article 8 of the European Convention on Human Rights' (1997) 3 EHRLR 265, 273 (LEXIS), at 270: ". . . considerations of dignity and moral integrity could influence the Court to hold that Article 8 encompasses abortion rights."

[54] In *Laskey, Jaggard and Brown* v *the United Kingdom*, judgment of 19 February 1997, *Reports of Judgments and Decisions*, 1997-I, the Court of Human Rights referred to personal autonomy, at para 44; in *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, paras 41, 74, the Court referred back to that case.

[55] See *Nikky Sentges* v *the Netherlands*, App no 27677/02, Decision on Admissibility, 8 July 2003, concerning a claim that the State provide a robotic arm which claim failed partly because there was no conceivable link with private life.

perhaps the taking of drugs.[56] In addition the emphasis in other cases may shift toward the individual. If Article 8 protects the fundamental freedom of the individual to determine the course of his/her own life, the State will have to be ready to provide more convincing justifications of laws which foreclose just that freedom in a range of sensitive social areas. The potential of this line of reasoning for the development of Article 8 argument is also important because it assists in the difficult distinction between public and private spheres, making it even clearer that privacy protects people as well as, or possibly indeed rather than, places. [57]

But the text of the ECHR protects "private life" rather than autonomy. The question arises whether this interpretative gloss was necessary and whether it is judicial creativity that is justified. It can certainly be argued that it changes the focus away from the community,[58] though Article 8(2) or the fair balance of interests for positive obligations does still come into play. Further, it introduces a liberal philosophy not shared by all those with an interest in the institutions and practices of human rights[59] and suggests a liberal approach to interpretation also not shared by all – not least Justice Scalia.[60]

Dignity

Another core notion, which the Court invokes in its interpretation of Article 8, is "dignity", which is apt in view of the humiliation referred to by

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[56] See the Memorandum submitted by "Liberty", Memorandum 36 to the Select Committee on Home Affairs, Third Report, 2001-2002, The Government's Drug Policy: Is It Working?, Memoranda of Evidence, HC 318-II. <http://www.publications.parliament.uk/pa/cm200102/cmselect/cmhaff/318/318m52.htm> referring to Art 8 of the ECHR : "In a society that respects fundamental freedoms of the individual, and in particular the right to individual autonomy and choice, general restrictions and criminalisation of taking of drugs, cannot be justified." for the memorandum see also: <http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2001/pdf-documents/sept.pdf>.

[57] See Mole, Shaw, de la Mare, 'Right to respect for private and family life, home and correspondence', in Lester and Pannick, eds, *Human Rights Law and Practice* (1999), 4.8.11; *PG and JH* v *the United Kingdom*, judgment of 25 September 2001, ECHR 2001, para 56, and *Peck* v *the United Kingdom*, judgment of 28 January 2003, ECHR 2003, para 57: "There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life'." See also n 51, and Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty' (1994) 47(2) *CLP* 41, 59, considering autonomy and dignity in public places.

[58] Lord Reed, *Splitting the Difference*, *supra* n 1, p 33, and referring to Judge Martens' approach, *supra* n 21, reflects that it could be argued that individuals cannot simply be treated as free agents as they are also members of a community, society being more than a collection of self-determining individuals, but united by prevailing ideas such as sexual identity and marriage. But he also refers to adherence to the Convention values such as tolerance and pluralism, and to the evolution of prevailing values/ideas in the Member States, in a way akin to the Court.

[59] Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty', *supra* n 57, at 54, describes "autonomy" as "central to liberal theory."

[60] See p 216. See also his dissent in *Planned Parenthood of Southeastern Pennsylvania* v *Casey*, 120 L Ed 2d, 674, 505 US 833, at 983f (1992).

Goodwin.[61] The combination of the concepts of autonomy and dignity mirrors a German decision of 1978 on transsexuals, with the difference that the concept of dignity was expressed in the German Constitution.[62]

That is not the case with the ECHR. But the first provision in the Charter of Fundamental Rights of the European Union (and the accompanying "clarifying" *Explanations*) emphasises the primary or fundamental notion of dignity, the "real basis" of fundamental rights.[63] The dignity of individuals is one of the overarching principles that supports the various human rights set out in the European Convention on Human Rights.[64] It is also, in cases such as this,[65] closely connected to the ideas of autonomy and of privacy.[66] An individual denied the right to make fundamental decisions concerning his/her private life is thereby deprived of autonomy, and consequently suffers the indignity of being robbed of the ability to determine the course of his/her

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[61] See also Feldman, 'Human Dignity as a Legal Value', *supra* n 34, 695, referring to previous transsexual cases, stating that the production of documents or making declarations disclosing a change of gender seriously undermines dignity.

[62] This case (BverfGE, 11 October 1978, NJW 1979, 595) is referred to by Lord Reed, *Splitting the Difference*, *supra* n 1, and is cited here as from his paper, p 19, only: he cited the German Basic Law as protecting dignity (Article 1) and the development of personality (Article 2) and quotes the *Bundesverfassungsgericht* as stating that: "Art 1(1) BL protects the dignity of a human person as he sees himself in his individuality and self-awareness. Part of this is that the human person can make decisions for himself and can autonomously determine his own fate."

[63] Charter Of Fundamental Rights Of The European Union:(OJ 2000/C 364/01)
Article 1: **Human dignity**: Human dignity is inviolable. It must be respected and protected. The *Explanations* (Charter of Fundamental Rights of the European Union: Explanations relating to the complete text of the Charter, December 2000) states that "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined this principle in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.'"; the Updated Explanations relating to the text of the Charter of Fundamental Rights, July 2003, CONV 828/03. <http://register.consilium.eu.int/pdf/en/03/cv00/cv00828en03.pdf> adds: *"In its judgment of 9 October 2001 in case C-377/98 Netherlands* v *European Parliament and Council, 2001 ECR 7079, at grounds n° 70 - 77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law."*

[64] See also the *Pretty* case referred to in n 16; *Refah Partisi (The Welfare Party) and Others* v *Turkey*, judgment of 31 July 2001, ECHR 2001-, para 43: "The European Convention on Human Rights must be understood and interpreted as a whole. Human rights form an integrated system for the protection of human dignity; in that connection, democracy and the rule of law have a key role to play."; the Grand Chamber made no reference to this in the same case.

[65] See also Judge van Dijk, *supra* n 20, and Martens, *supra* n 21.

[66] For the connection between autonomy and dignity see Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty', *supra* n 57, at 54-55, suggesting that respect for people as moral agents is important, and that dignity is "essential to the forms of human flourishing which depend on the exercise of autonomy" and Feldman, 'Human Dignity as a Legal Value', *supra* n 34, 685.

own life. The ideas of freedom and dignity are linked too in *P* v *S and Cornwall County Council*.[67]

These references to dignity supplement the idea of autonomy suggesting a theory of privacy like that of the perhaps overbroad concepts of "integrity of the personality" or "personhood",[68] within which denial of an individual's autonomy may also be a deprivation of dignity.[69] A principal reason for the promotion of autonomy as an individual right is that it respects and enhances the dignity of the persons who possess it. There is a view that the core of "privacy" as a civil liberty is the entitlement to dignity and autonomy within a social circle, dignity being "essential to the forms of human flourishing which depend on the exercise of autonomy".[70] The need to protect dignity gives the Court a reason to promote autonomy, and in turn to read into the guarantee of "private life" a conception of privacy that seeks to harmonise ideas of dignity, autonomy and self-determination. If developed subsequently along the lines set out in *Goodwin* and *I* v *the United Kingdom*, the use of these underlying concepts could expand Article 8 jurisprudence significantly.

3. Article 12 and The Right To Marry – Expanding The Horizon

On the Article 12 argument, the Court held unanimously that refusal to permit transsexuals to marry violated the right to marry, since the *very essence* of the right to marry had been infringed. It might seem that having found that the UK had failed in a positive obligation to recognise the transsexual's chosen sex a breach of Article 12 would follow automatically if the "new sex" – female – were not recognised for marital purposes.[71] The Court however noted that Article 8 is not co-extensive with Article 12, as under Article 12 conditions imposed by national laws "are accorded a

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[67] Case C-13/94 *P* v *S and Cornwall County Council* [1996] ECR I-2143, para 22**:** "To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled, and which the Court has a duty to safeguard."

[68] See Solove, *supra* n 23, 1116*f*.

[69] See also Feldman, 'Human Dignity as a Legal Value', *supra* n 34, 685. He makes the point that the right to make decisions about one's fate and to contribute to other's decisions affecting one's life can contribute to dignity, and that dignity can bolster individual freedom by making it desirable to enhance autonomy and moral integrity. He also makes the point that dignity is not inextricably linked to a liberal-individualist view: the State may have a view on what is required for a dignified life, and regulate in such a way as to interfere with individual choices.

[70] See Feldman, 'Secrecy, Dignity, or Autonomy? Views of Privacy as a Civil Liberty', *supra* n 57, 55.

[71] See Judge van Dijk, dissenting (supported by a declaration of Judge Wildhaber) in *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, at para 8; see also Commission Report in *Rees* v *the United Kingdom*, judgment of 17 October 1986, Series A no 106, Annex, Opinion of Frowein, Busittil, Trechsel, Carrillo, Schermers (*cf W* v *the United Kingdom*, Application no 11095/84, 63 DR, 1989, Schermers, dissenting, and the dissenting Opinion of Frowein and Trechsel in the Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, with the same argument), whereas Fawcett, Tenekides, Gözubüyük, Soyer, Batlinger argued that Articles 8 and 12 proceed on a different plan.

specific mention"[72] – *i.e.* it refers to the right to marry according to the national laws.[73] It found that there was a breach of Article 12 because:

> "The exercise of the right to marry . . . is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired . . . The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed."[74]

The *unanimous* conclusion on Article 12 is startling; the decision on Article 8 may have been predictable but this aspect was less so.[75] The shift from the Grand Chamber decision of *Sheffield and Horsham* v *the United Kingdom*[76], in which the majority was 18-2 the other way, is remarkable both because the judgment is relatively brief on this issue and also because marriage is such a sensitive issue.[77]

In *D* v *Council* the ECJ indeed stated that "It is not in question that, according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex."[78] That stress on opposite sex also indicates the scale of change in the idea of marriage represented in *Goodwin* and *I* v *the United Kingdom*, though the ECJ was focusing on homosexual relationships.

Before *Goodwin* and *I* v *the United Kingdom*, McGlynn had described the Strasbourg Court's position on Article 12 as very strict and referred to the

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[72] *Goodwin*, para 101; *I* v *the United Kingdom*, para 81.

[73] See also Commission Report in *Rees* v *the United Kingdom*, judgment of 17 October 1986, Series A no 106, Annex, Opinion of Fawcett, Tenekides, Gözubüyük, Soyer, Batlinger, but stressing in contrast the intent behind Article 12 to refer to the physical capacity to procreate, as shown in the preparatory documents and the text, thus excluding transsexuals and homosexuals; *cf* the dissent of Judge Martens in *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 4.4.3.*f*., 4.5.2; Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, 586, para 59.

[74] *Goodwin*, paras 99, 101; *I* v *the United Kingdom*, paras 79, 81.

[75] See Reed and Murdoch, *supra* n 24, paras 6.02, 6.45, predicting change as regards Article 8 but not Article 12.

[76] *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V. It was 14-4 *against* a violation of Article 12 in *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, and unanimously *against* a violation in *Rees* v *the United Kingdom*, judgment of 17 October 1986, Series A no 106.

[77] Lord Reed, *Splitting the Difference*, *supra* n 1, p 52, pointed out that ". . . the context of marriage is especially sensitive. This is unsurprising. Marriage remains one of the central institutions of most Western societies, and it is an especially sensitive area for the expression of ethical and social values, not least because it is an institution with religious as well as legal aspects."

[78] Joined Cases C-122/99 P and C-125/99 P, *D* v *Sweden and Council* [2001] ECR 5(B) I-4319, para 34. See also Sumner *infra* n 155.

sensitive 'family laws' of the Member States.[79] McCafferty describes the Strasbourg Court's approach in *Goodwin* and *I* v *the United Kingdom* as "unusual" on the ground of the (relative) lack of consensus, although it appears that 54% of Member States permit it.[80] It may seem removed from the approach in a previous case on marriage:

> ". . . the Convention must be interpreted in the light of present-day conditions . . . However, the fact that, at the end of a gradual evolution, a country finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect offends the Convention, particularly in a field – matrimony – which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit."[81]

The Court found that a "waiting period" before re-marriage violated the "very essence" of the right to marry. Nevertheless Judge Martens gained the impression from that and other cases that:

> ". . . the Court, at least as far as family law and sexuality are concerned, moves extremely cautiously when confronted with an evolution which has reached completion in some member States, is still in progress in others but has seemingly left yet others untouched. In such cases the Court's policy seems to be to adapt its interpretation to the relevant societal change only if almost all member States have adopted the new ideas. In my opinion this caution is in principle not consistent with the Court's mission to protect the individual against the collectivity and to do so by elaborating common standards."[82]

That cautious outlook referred to by Martens has changed. But the sensitivity of marriage has not: has the Strasbourg Court been overly eager to grant the right to marry to transsexuals?

The H.L. in *Bellinger* v *Bellinger* also highlighted the sensitive nature of marriage. Lord Hobhouse of Woodborough noted that many transsexuals revert to their original "biological" sex, and that some alternate between the two sexes throughout their lives – which also raises the question of same-sex marriage. He stated:

> "All this underlines the novelty of the idea of gender by choice and how great a departure it represents from the pre-Goodwin human rights law and the previous understanding of what the

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[79] McGlynn, 'Families and the European Charter of Fundamental Rights: Progressive Change or Entrenching the Status Quo?' (2001) 26 *ELRev* 582, 591-592, anticipating the possible employment of Article 21 of the Charter, on non-discrimination.

[80] McCafferty, 'The Right to Marry – Recent Developments', *Human Rights*, December 2002, 219, 223, referring to the minority protection approach in *Young, James and Webster* v *the United Kingdom*, judgment of 13 August 1981, Series A no 44.

[81] *F* v *Switzerland*, judgment of 18 December 1987, Series A no 128, para 33.

[82] *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, dissenting, para 5.6.3.

> words 'respectively male and female' meant. Similar fundamental novelties and changes in the use of language, culturally controversial, are involved in giving effect to the ECtHR's interpretation of the word 'marry' in Article 12."[83]

Lord Nicholls of Birkenhead also referred to marriage being an institution deeply embedded in the social and religious culture in the UK, and "deeply embedded as a relationship between two persons of the opposite sex". He referred to "a fundamental change in the traditional concept of marriage" were the "opposite sex" requirement removed for the purposes of marriage.[84]

EU Council Directive 2000/78 on discrimination, including the ground of sexual orientation, as regards employment and occupation, states in its preamble expressly (paragraph 22) that it is without prejudice to national laws on marital status and linked benefits, again indicating the sensitivity of marriage.[85]

The consequences of the successful Article 8 claim, although likely to involve the issue of official documentation and related benefits, are likely to remain essentially private in nature. Marriage is a much more visible social institution than the system of registering births or the pension scheme, and the State can be seen as endorsing and legitimating the relationship. Marriage itself is an important institution, which has a central place in society, but this is now under challenge in its traditional form. Thus it is perhaps no surprise that pre-*Goodwin* Lord Reed referred to the greater reluctance, than under Article 8, to find a definite right to marry on the part of transsexuals,[86] and to the sensitivity of marriage.[87]

The new approach to the interpretation of Article 12 employs two distinct strands – first, the essence of the right to marry, and second, the reconsideration of what "marriage" entails – the separation of the right to marry from the right to found a family, and the allied rejection of the importance of procreation as the basis of marriage, coupled with a significant reliance on the Charter of Fundamental Rights.

(a) The essence of the right to marry:

The Court found in *Goodwin* v *the United Kingdom* and *I* v *the United Kingdom* that the applicants' right to marry had been infringed since, in particular: ". . . the very essence of her right to marry has been infringed."[88] This approach in *Goodwin* and *I* v *the United Kingdom* mirrors the view *in van Oosterwijck*[89] that the "essence of the right" must not be denied, and also

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[83] *Bellinger (FC) (Appellant)* v *Bellinger* [2003] UKHL 21, para 76.
[84] *Bellinger (FC) (Appellant)* v *Bellinger* [2003] UKHL 21, paras 46-48.
[85] Council Directive 2000/78 EC of 27 November 2000, establishing a general framework for equal treatment in employment and occupation, OJ 2000, L 303/16 – "This Directive is without prejudice to national laws on marital status and the benefits dependent thereon".
[86] *Splitting the Difference*, *supra* n 1, p 26. See also *Bellinger* v *Bellinger* EWCA Civ 1140, para 71.
[87] See n 77.
[88] *Goodwin*, para 101; *I* v *the United Kingdom*, para 81.
[89] Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, 588, para 56: (". . . domestic law cannot authorise states completely to deprive a person or category of

other cases finding that the essence of the right to marry of prisoners had been denied, and *F* v *Switzerland*.[90] It also mirrors the view of Judge van Dijk and others in *Sheffield and Horsham* v *the United Kingdom*.[91] In

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persons of the right to marry . . . Unless one is to treat Article 12 as ineffective and redundant, one must draw the conclusion that the domestic legislation may not completely deprive anybody of the freedom to exercise this right"), a view highlighted by Harris, O'Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995) p 436.

[90] In these cases reference is made to the "various substantive rules laid down by law in accordance with principles generally recognised in the European States: impediments due to close relationship, widows' temporary impediment, etc . . . " (Commission Report in *van Oosterwijck*, para 55) or to obstacles to marriage recognised in the public interest (*Sydney Draper* v *the United Kingdom*, Application no 8186/78, 24 DR 1981, paras 47-49: "As to the general question of interpretation it is clear that Article 12 guarantees a fundamental 'right to marry'. Whilst this is expressed as a 'right to marry . . . according to the national laws governing the exercise of this right', this does not mean that the scope afforded to national law is unlimited. If it were, Article 12 would be redundant. The role of national law, as the wording of the Article indicates, is to *govern the exercise* of the right. The Court has held that measures for the 'regulation' of the rights to education (Art 2 Protocol No.1) or access to court (Art. 6) 'must never injure the substance of the right' (*Belgian Linguistic Case*, Judgment of 23 July 1968, Series A, No 6, p 32, para 5; *Golder* Case, Judgment of 21 February 1975, Series A, No 18, pp 18-19, para 38). In the Commission's opinion this applies also to the national laws which govern the exercise of the right to marry. Such laws may thus lay down formal rules concerning matters such as notice, publicity and the formalities whereby marriage is solemnised. They may also lay down rules of substance based on generally recognised considerations of public interest. Examples are rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy . . . However in the Commission's opinion national law may not otherwise deprive a person or category of persons of full legal capacity of the right to marry. Nor may it substantially interfere with their exercise of the right."; similarly *Alan Stanley Hamer* v *United Kingdom*, Application no 7114/75, 24 DR 1981). See also *F* v *Switzerland*, *supra* n 81, para 40.

[91] *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, para 8 of his dissenting opinion: "It cannot be denied that the 'common ground' among the member States of the Council of Europe for recognition of marriages between post-operative transsexuals and partners of their previous sex is less apparent than for other aspects of legal recognition of gender reassignment. At first sight, that fact would seem to justify a rather broad margin of appreciation on the part of the individual States. However, denying post-operative transsexuals in absolute terms the right to marry a person of their previous sex while marrying a person of their newly acquired sex is no longer an acceptable option would amount to excluding them from any marriage. Since no restriction of a right or freedom laid down in the Convention may affect that right or freedom in its essence (see Article 17 of the Convention), it must be concluded that such an absolute denial falls outside the margin of appreciation. That margin only allows for a certain discretion as to the modalities and requirements of the marriage of transsexuals to avoid or remedy certain legal and practical problems which such a marriage may pose. Here, again, it is not for the Court to go into different options and modalities in the abstract. I am, therefore, of the opinion that Article 12 has also been violated in the two cases." See also Thune, Geus, Mucha, Lorenzen and Herndl, partly dissenting, *Sheffield* v *the United Kingdom*, Report of 21 January 1997, Annex to *Sheffield*

Goodwin and I v *the United Kingdom* the Court noted that in law the applicants, both post operative male to female transsexuals, could marry – but only a woman, a person of their "former opposite sex." It accepted the view that this was artificial, and that they only wished to marry a man. The fact that it found that the right to marry had been denied, despite an existing (if artificial) right to marry, shows how determined the Court was to find for the applicants.

The distinction between conditions of marriage and the denial of the "very essence" is difficult. The Court's assertion may seem tautologous, and arbitrary, as a similar claim was rejected in *Sheffield and Horsham* v *the United Kingdom*.[92] It was also arguably unnecessary if the UK recognised a change in birth certificates. Some would equate the bar to marriage of a transsexual as a condition perhaps akin to that of bigamy, polygamy, or more controversially after *Goodwin* and *I* v *the United Kingdom*, simply being of the opposite sex, [93] an issue avoided in these cases.[94]

(b) The separation of the right to marry from the right to found a family, procreation, and the Charter

Apart from the assertion that the essence of the right to marry had been infringed, other parts of the reasoning employ also a more liberal

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and Horsham v *the United Kingdom*, Reports of Judgments and Decisions 1998-V: "We would observe that a key principle under Article 12 is that, while the exercise of the right to marry is subject to the national laws of the Contracting States, the limitations introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (*Rees* . . . para 50, *Cossey* . . . para 43). It must be acknowledged that the lack of legal recognition of the applicant's change of gender effectively denies her the right to marry. Under domestic law, she is regarded as male and cannot marry a man. . . . we consider that it is incompatible with Article 12 to exclude transsexuals, such as the applicant in the present case, from effectively exercising the right to marry guaranteed to everyone under the Convention. No objections, apart from the requirements of national law, have been put forward by the Government. Having regard to the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom, we are of the opinion that no convincing or objective grounds exist for such exclusion. Accordingly, our conclusion is that there has been a violation of Article 12 of the Convention.".

92 *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, para 66; see *contra* the Commission Report in that case per Thune, Geus, Mucha, Lorenzen and Herndl, partly dissenting.

93 See *Hamer* and *Draper*, *supra* n 90, referring to rules concerning capacity, consent, prohibited degrees of consanguinity or the prevention of bigamy; Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, 585, paras 55-57, referring to "various substantive rules laid down by law in accordance with principles generally recognised in the European States: impediments due to close relationship, widows' temporary impediment, etc," and, though stating that "domestic law cannot authorise states completely to deprive a person or category of persons of the right to marry", also stating that: "It remains that apart from any specific substantive conditions imposed by any particular domestic legislation a marriage requires the existence of a relationship between two persons of the opposite sex." – though a violation of Article 12 was found.

94 See n 135.

interpretation. The European Court of Human Rights first reviewed previous case law where the right to marry was denied to transsexuals but emphasised that it was reviewing the situation in 2002 – the evolutive approach. It noted that the right to marry is separate from the right to found a family – clearing, in an evolutive manner, the way to the Court's abandonment of the ability to reproduce as the basis for marriage, and to the idea that the right to found a family is not tied to marriage.[95] The text of Article 12 suggests either one right, or two, but connected or interdependent rights – it refers to "this right" – and in any case that the right(s) belongs to married heterosexual couples. The *main* concern of Article 12 was marriage, also the basis of the family.[96] In *Rees*, *Cossey*, and *Sheffield and Horsham v the United Kingdom* the Court stated that Article 12 refers to the traditional marriage between persons of opposite biological sex, which appeared also from the wording of the Article that made it clear that it is mainly concerned to protect marriage "as the basis of the family".[97] It was arguable that Article 12 can be interpreted to take

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[95] The question arises whether the right to found a family is now to be regarded as having an existence independent of the marriage status of its claimants. Could a woman with fertility problems – married *or* unmarried – claim that her Article 12 right to found family is infringed by State restrictions on the availability of assisted conception? Could a gay couple assert Article 12 to challenge a law preventing them founding a family by adopting a child in their joint names? The Court has stated elsewhere that there is no Convention right as such to adopt (*Fretté* v *France*, Judgment of 26 February 2002, ECHR 2002-, para 32). But the Court's insistence on isolating the right to marry from the right to found a family in *Goodwin* and *I* v *the United Kingdom* may have implications for the nature and extent of *both* rights. *Cf Margarita* v *Sijakova and Others* v *The Former Yugoslav Republic of Macedonia*, Decision on Admissibility, App no. 67914/01, 6 March 2003, denying a right to procreation.

[96] See Jacobs and White, *The European Convention on Human Rights* (2002), p 226, contrasting the wording of the Charter; van Dijk and van Hoof, *Theory and Practice of the European Convention on Human Rights* (1998), p 613; Pannick and de la Mare, 'Right to marry and found a family', in Lester and Pannick, *supra* n 57, 4.12.2; Harris, O'Boyle, Warbrick, *Law of the European Convention on Human* Rights (1995) p 435; Clayton and Tomlinson, *The Law of Human Rights* (2000) para 13.74; Reed and Murdoch, *supra* n 24, para 6.02; Sumner, The Charter of Fundamental Rights of the EU and Sexual Orientation (2002) IFLJ 156 (LEXIS unpaginated version referred to). Some Commission cases treated the right to found a family differently from the right to marry in the special case of prisoners as the right to marry was denied altogether – see *Alan Stanley Hamer* v *United Kingdom*, and *Sydney Draper* v *the United Kingdom*, *supra* n 90; Cohen-Jonathan, Respect for Private and Family Life, in MacDonald, Matscher, Petzold (eds) *The European System for the protection of human rights* (1993), p 405, 430: "The Commission [in *Draper*] bases its decision on a definition of marriage which is separate from the right to found a family". In *W* v *the United Kingdom*, Application no 11095/84, 63 DR, 1989, Schermers, dissenting, referred to two interconnected rights.

[97] See *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, para 66; *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 43; van Dijk and van Hoof, *supra* n 96, 613; Lester and Pannick, *ibid*; see also *Philippe Frette c. la France*, Application no 36515/97, Decision on Admissibility, 12 June 2001: "La Cour rappelle que l'article 12 de la Convention se borne à garantir le droit de se marier à l'âge nubile à deux personnes de sexes biologiques différents et ni cet article ni l'article 14 ne garantissent le droit à l'adoption . . ."

account of changes in attitudes to marriage, so that a right to found a family does not presuppose marriage.[98] But Article 12 in the Court's view had, pre-*Goodwin*, seemed clear.

Nevertheless, as regards the right to found a family, McGlynn and Sumner point out that the Charter of Fundamental Rights more clearly refers to two separate rights.[99] Indeed, the Strasbourg Judge, Fischbach, referred, post-*Goodwin*, to the "greater protection" afforded under EU law by the Charter provision, for example, of "the right to found a family"[100] and to the importance of Article 9 in the *Goodwin* case.[101] McGlynn states that it is a deliberate and important change, appearing to herald a change from the ECHR, referring to the *Explanations* to the Charter.[102] She concludes: ". . . the right to found a family may be extended to those outside of the traditional married family", a broader scope than the ECHR.[103] In *Goodwin* and *I v the United Kingdom* the Court, as a Grand Chamber,[104] found that the right to

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[98] van Dijk and van Hoof, *supra* n 96, 613.

[99] Sumner, *supra* n 96, McGlynn, *supra* n 79, 593: the Charter refers to the right to marry *and* the right to found a family.

[100] *The European Convention on Human Rights and the European Union Charter of Fundamental Rights - complementary or competing?* The Council of Europe's European Convention on Human Rights and the European Union's Charter of Fundamental Rights: Judges' Symposium – Luxembourg – 16 September 2002, referring to the general possibility under the Charter of European Union law's affording greater protection than the Convention: < http://www.coe.Int/T/E/Communication_and_Research/Press/Events/6.-Other_events/2002/2002-09_Symposium_of_judges_-Luxembourg/Fischbach.asp>; see also n 214.

[101] Judge Marc Fischbach in, The Future Status of the EU Charter of Fundamental Rights, HL Paper 48, House of Lords Session 2002–03, 6th Report, Select Committee on the European Union: <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/48/48.pdf> Evidence, (published only in the paper version) p 45.

[102] The *Explanations* (see n 63) states: "This Article is based on Article 12 of the ECHR, which reads as follows: 'Men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercising of this right.' The wording of the Article has been modernised to cover cases in which national legislation recognises arrangements other than marriage for founding a family. This Article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. This right is thus similar to that afforded by the ECHR, but its scope may be wider when national legislation so provides."; the *Explanations* also state that as regards Article 52(3) of the Charter, Article 9 does not "correspond" to Article 12 of the European Convention on Human Rights, because its scope may be wider as regards national law on marriage – "Article 9 covers the same field as Article 12 of the ECHR, but its scope may be extended to other forms of marriage if these are established by national legislation."; see also n 155. The draft Constitution affirms that: ". . . the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter.": see the draft EU Constitution as of 18 July 2003: <http://european-convention.eu.int/docs/Treaty/cv00850.en03. pdf>

[103] McGlynn, *supra* n 79, at 593.

[104] *Goodwin*, para 98; *I* v *the United Kingdom*, para 78: "Reviewing the situation in 2002, the Court observes that Art 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child

found a family is separate from the right to marry. Very possibly the Charter of Fundamental Rights influenced them, as they did refer to it in another context, the expression in the Charter of the right to marry without reference to men or women. Judge Fischbach indeed stressed its significance.[105]

Separating the two rights cleared the way to the view that Article 12 may refer to "marriage" without the ability to reproduce, accepting the argument that the right to found a family is not tied to marriage. The Court thus referred in this context to ". . . the inability of any couple to conceive or parent a child" as not precluding the right to marry. It then turned its face from previous cases, including *Sheffield and Horsham* v *the United Kingdom*,[106] where the Court has emphasised that Article 12 refers to the traditional marriage between persons of opposite biological sex, a sufficient reason to adhere to biological criteria.[107] It stated *inter alia* that:

> "It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J in the case of *Corbett* v *Corbett* . . .) There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual." [108]

It did not explain what the "major social changes" are. It added that there is a medical acceptance of the condition of gender identity disorder and that treatment is available.

Further, the Court referred to Article 9 of the Charter of Fundamental Rights of the European Union,[109] noting that it, "no doubt deliberately" (the French "et cela ne peut être que délibéré" seems stronger), makes no reference to men or women.[110] Finally it noted a widespread acceptance of the marriage of transsexuals within Contracting States – though a lesser consensus than on the legal recognition of the change of gender. Liberty's survey, cited by the

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cannot be regarded as *per se* removing their right to enjoy the first limb of this provision."

105 See n 137.

106 *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V.

107 *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, paras 66-67.

108 *Goodwin*, para 100; *I* v *the United Kingdom*, para 80.

109 OJ 2000/C 364/01: Article 9: **Right to marry and right to found a family**. The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

110 *Goodwin*, para 100; *I* v *the United Kingdom*, para 80: "The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women."

Court, indicated that 54% of Contracting States permitted such marriage,[111] a relatively slender "consensus" upon which to base such a significant change in doctrine.

Much of the Court's reasoning – its reference to changed social attitudes, its simple assertion of the denial of the essence of the right to marry, the separation of the right to marry and the right to found a family, and the abandonment of the idea of reproduction, is peremptory, and its reference to the Charter is questionable in the light of the apparently clear intent behind Article 12. It suggests a strong predisposition by the Court to reach a desired conclusion.

4. The Implications Of Goodwin And I For Same Sex Marriage:

What are the implications for homosexual couples that wish to marry?

The situations of homosexuals and transsexuals have previously been linked by commentators, and indeed Taitz referred to "judicial fears that recognition of transsexuals' post-operative sex may be seen as judicial license for homosexuality".[112] Sharpe argued that behind the pre-*Goodwin* rulings on transsexual marriage claims was "homophobic anxiety".[113] Because the Court of Human Rights had determined that "marriage" means biologically opposite sex partners, it had been observed that Article 12 did not extend to transsexuals or homosexuals.[114]

In 1998 the prominent commentators van Dijk (formerly judge on the Strasbourg court) and van Hoof suggested that it was safe to assume that opposite sex relationships were envisaged by the drafters of Article 12, noting the view in *van Oosterwijck* that marriage requires opposite sex partners.[115] But the question seemed justified "whether a more flexible

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[111] *Goodwin*, para 57; *I* v *the United Kingdom*, para 40. However the legal position in 32% of Contracting States was unclear.

[112] Taitz, 'Judicial Determination of the Sexual Identity of Post-Operative Transsexuals: A New Form of Sex Discrimination' (1987) 13 *AmJL and Med* 53, 68. For a study of homophobia and transgender jurisprudence see Sharpe, *Transgender Jurisprudence: Dysphoric Bodies of Law* (2002), finding homophobia especially significant in the field of marriage (see p 89).

[113] Sharpe, *Transgender Jurisprudence*, *supra* n 112, 106, referring especially to dissents in *B* v *France*, judgment of 25 March 1992, Series A no 232-C, where Judge Pinheiro Farinha had stated: "After rectification of civil status, a transsexual will be able to marry a person of his true sex (original sex)" and Judge Valticos asked "And is there not thus a risk of encouraging such acts (and here it was even an operation performed without any supervision), and what is more, of seeing as a consequence half- feminised men claiming the right to marry normally constituted men, and then where would the line have to be drawn?"

[114] See n 97, and *e.g.* Clayton and Tomlinson, *The Law of Human Rights* (2000), para 13.78; but see now Clayton and Tomlinson, *The Law of Human Rights*, *Second Updating Supplement* (2003), para 13.86.

[115] While in *van Oosterwijck* the Commission had taken the position that States cannot completely deprive a person or category of persons of the right to marry, they also stated that marriage requires a relationship between two persons of the opposite sex – Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, 585, paras 56, 57, though a violation of Article 12 was found.

interpretation is not called for . . . under the influence of changing views in society". Indeed they stated the hope that the changing attitude to transsexuals shown in *B* v *France*[116] would lead to a change in its case law on Article 12.[117] Equally Lord Reed, referring to the intent of the ECHR invoked in *Rees* v *the United Kingdom*, noting the criticism that transsexualism was not an issue at the time of drafting, suggested that the evolutive approach could lead to greater flexibility at some time in interpreting Article 12.[118] The van Dijk and van Hoof view in particular pre-echoes perhaps the Court's view of "major social changes in the institution of marriage since the adoption of the Convention" relied on in *Goodwin* and *I v the United Kingdom*.

Further, van Dijk and van Hoof also argued that while the statement in *Rees* that the essence of the right to marry had not been infringed[119] was correct in the abstract sense, it was subject to serious doubt in the concrete situation[120] of homosexuals and transsexuals: "Indeed, what essence of the right to marry is left to them?". They stated the hope that the Court would revise its view on Article 12.[121]

In *Goodwin and I v the United Kingdom* the Court indeed abandoned exclusive reliance on the traditional biological definition, and gave prominence to the "essence of the right" argument. Does that mean that a similar approach will be taken as regards homosexuals? Probably not, though the question is worth considering.

The Court loosened reliance on biological criteria and stated that reproductive capacity is not essential for marriage. It is true also that the Court does not refer to a right of a man and woman to *marry each other* (thus

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116 *B* v *France*, judgment of 25 March 1992, Series A no 232-C.

117 van Dijk and van Hoof, *supra* n 97, 605, 609.

118 *Splitting the Difference*, *supra* n 1, p 31.

119 *Rees* v *the United Kingdom*, judgment of 17 October 1986, Series A no 106, para 50, reaffirmed in *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, para 43, and cited with approval in *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, para 66, stating briefly that: "Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind."

120 This perhaps mirrors the reference to artificiality in *Goodwin* and in *I* v *the United Kingdom* – see *Goodwin*, para 101; *I* v *the United Kingdom*, para 81: "The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed."

121 van Dijk and van Hoof, *supra* n 97, 607, 609.

excluding same-sex relationships), and equally Article 12 does not expressly make that explicit link[122] (probably because it was assumed). The Court also refers to "sexual identity" which is capable of a wider construction, though used here in relation to transsexuals' new or chosen identity. It stressed in addition, that Member States could not in this area apply an effective bar on any exercise of the right to marry, as opposed to the conditions of marriage; here the very essence of the right to marry was infringed.[123]

It can also be argued that the applicants were in fact being allowed to marry their own sex by the national law under challenge, though the Court made that argument legally irrelevant by use of the Charter.[124]

So does the loosening of a reliance on biological criteria, in particular chromosomes, the decoupling of marriage from reproduction, the distinction of the conditions of marriage and the right to marry at all, together with the language, and the evolutive approach used in referring to the "consensus" and the change in societal views, show a green light to homosexual marriage? Is there a "fundamental right" to marry open to all?[125] Probably not. It is also unlikely even if the notions of "autonomy" and "dignity" used in the context of Article 8 are invoked.[126] It seems more likely that these

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[122] Wintemute, 'Strasbourg to the Rescue? Same-Sex Partners and Parents Under the European Convention' in Wintemute and Andenæs (eds), *Legal Recognition of Same–Sex Partnerships: A Study of National, European and International Law* (2001), p 713, 728, points out that the text of Article 12 does not say in terms that a man can only marry a woman and *vice versa*, and asserts that it is likely that the Court will one day modify its "opposite sex only" interpretation of Article 12 in its case law on transsexuals' marriage so as to recognise an "emerging consensus" that restricting civil marriage to *opposite* or different sex partners is discriminatory. However he considered that it was extremely unlikely in 2001 that such an argument would succeed, given the lack of "European consensus". McCafferty, 'Gays, Transsexuals and the Right To Marry' (2002) *Fam Law* 362, 364-365, suggests that Article 12 can be read so that men and women have a right to marry, or have a right to marry each other, but that, arguably, this latter view implies words into the text, indeed amends it: she further suggests that courts, because of the cautious approach of the Strasbourg court, would take this latter approach, but interestingly, invokes the "evolutive approach" of the Strasbourg court; she also considers however that such an interpretation would only come about once gay marriage is accepted in a sufficient number of countries.

[123] *Goodwin*, paras 101, 103; *I* v *the United Kingdom*, para 81, 83; *cf Hamer* and *Draper*, *supra* n 90; Commission Report in *van Oosterwijck* (1981) 3 EHRR 557, 585, paras 55, 57: "They must also observe the various substantive rules laid down by law in accordance with principles generally recognised in the European States: impediments due to close relationship, widows' temporary impediment, etc. . . It remains that apart from any specific substantive conditions imposed by any particular domestic legislation a marriage requires the existence of a relationship between two persons of the opposite sex."

[124] See nn 135, 136.

[125] In *W* v *the United Kingdom*, Application no 11095/84, 63 DR, 1989, Schermers, dissenting, considered that the "fundamental human right" underlying Article 12 should also be granted to homosexual and lesbian couples, that they should not be denied the right to found a family without good reasons, and that the wording of the judgment in *Rees* left open the possibility of the marriage of persons of opposite psychological sex.

[126] But *cf* the view in Canada of LaForme J, cited *infra* n 165.

cases, *Goodwin* and *I* v *the United Kingdom*, must be confined to transsexuals. The ECJ took a similar approach in *Grant,*[127] confining *P* v *S* to its facts to avoid the conclusion that discrimination against homosexual persons was *sex* discrimination. Even Judge van Dijk – presumably an influential voice as the principal dissenter on Article 12 in *Sheffield and Horsham* v *the United Kingdom* – accepted the presumption that Article 12 refers to persons of the opposite sex in view of its wording, though the result was "unsatisfactory",[128] and Judge Martens – dissenting powerfully – in *Cossey* v *the United Kingdom* also accepted the "opposite sex" view – though not necessarily opposite biological sex.[129] But the former used the word "presumption" and recorded his view that it is unsatisfactory as regards homosexuals.

Those views do not rule out homosexual marriage but make it seem unlikely. In *Frette* v *France* (Admissibility) the Court again very recently also referred to two persons of the opposite biological sex,[130] though this has to be read in the light of the later *Goodwin* and *I* v *the United Kingdom* cases.

However there are two issues that cannot go away. One question remains whether the peremptory argument that the very *essence* of the right to marry has been denied, as it was to transsexuals, may be extended to homosexuals, and a question indeed put by van Dijk and van Hoof.[131] If the essence of the right is denied to transsexuals why not homosexuals, as the essence is no longer producing a family? Arguably the biology of two opposite sex partners remains of the "essence", since the Court only rejected assessing "gender by *purely* biological criteria". The Court of Human Rights has abandoned the view that marriage is between persons of the opposite sex only to the extent that it found that biological criteria were not *wholly* determinative in the specific context of transsexuals. Yet the rationale produced in earlier cases of marriage "as the basis of the family" has gone. And the essence of two opposite sex partners does not appear in the Charter. This leads to the second issue.

More significant perhaps, the Court of Human Rights', apparently subsidiary reference,[132] in the *Goodwin* and *I* cases, on the more open ended Article 9 of the Charter of Fundamental Rights raises more doubts. The Court of Human

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[127] Case C-249/96 Grant v South-West Trains Ltd [1998] ECR I-621.

[128] *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, dissent, para 8: ". . . if one starts from the presumption that Article 12 has to be considered to refer to marriages between persons of the opposite sex – a presumption which still seems to be justified in view of the clear wording of the provision, although it has the unsatisfactory consequence that it denies to, or at least makes illusive for, homosexuals a right laid down in the Convention. . . "; but see n 121.

[129] Judge Martens, dissenting, in *Cossey* v *the United Kingdom*, judgment of 27 September 1990, Series A no 184, at para 4.5.1; see also Judges Palm, Foighel, Pekkanen, dissenting, at para 5.

[130] *Philippe Frette c la France*, Application no 36515/97, Decision on Admissibility, 12 June 2001: "La Cour rappelle que l'article 12 de la Convention se borne à garantir le droit de se marier à l'âge nubile à deux personnes de sexes biologiques différents et ni cet article ni l'article 14 ne garantissent le droit à l'adoption. . . ".

[131] See n 121.

[132] But see n 214.

Rights expressly noted that Article 9 ". . .departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women . . ." .[133] (There is other evidence that the intention to remove the restriction of same-sex couples was indeed deliberate.[134])

Thus, as Lord Hope astutely observed, the Strasbourg court made largely irrelevant the argument that the applicants were still the "original" sex[135] – thus marrying their own sex. McCafferty also drew two things from the text of Article 9 of the Charter, with its removal of a reference to men and women. First, it separates the right to marry from the right to found a family. Second, it also allows the possibility of transsexuals' marriage – the marriage of a transsexual to a person of opposite sex to their own post-operative gender – because arguments that they are not the opposite sex are irrelevant. She considers that the Court of Human Rights accepted the second aspect in the *Goodwin* case.[136] But of note here also is Judge Fischbach's observation that the Charter was useful as it does not rule out *homosexual* marriage, and his express reference to the Charter right to found a family belonging to all.[137]

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[133] *Goodwin*, para 100; *I* v *the United Kingdom*, para 80. Art 37 of the Charter (the protection of the environment) was also referred to in the Separate Opinion of President Costa in *Hatton and Others* v *the United Kingdom*, judgment of 2 October 2001, ECHR 2001; see also the Joint Partly Dissenting Opinion of Bratza, Fuhrmann and Tulkens in *Fretté* v *France* (Merits), Judgment of 26 February 2002, ECHR 2002, referring to Art 21 of the Charter and going on to argue that it "may therefore be reasonably argued that a European consensus is now emerging in this area" of grounds of sexual orientation.

[134] See Rogers, 'From the Human Rights Act to the Charter: Not Another Human Rights Instrument to Consider' (2002) EHRLR 343, at n 9.

[135] Lord Hope of Craighead, in the HL in *Bellinger (FC) (Appellant)* v *Bellinger* [2003] UKHL 21, para 69, interpreted the Court of Human Rights thus: "Her problem would be solved if it were possible for a transsexual to marry a person of the same sex, which is indeed what the European Court of Human Rights has now held should be the position in Goodwin. The court noted in para 100 of its judgment that Article 9 of the Charter of Fundamental Rights of the European Union had departed 'no doubt deliberately' from the wording of Article 12 of the Convention in removing the reference to 'men and women of marriageable age.' Article 9 of the Charter states simply that 'the right to marry' shall be guaranteed. The note to Article 9 says that it neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. It appears that the European Court saw that article as opening up the possibility of transsexuals marrying persons of the opposite sex to their post-operative acquired gender, as it rendered arguments about whether they were in act [sic] of the opposite sex irrelevant. By this route, which bypasses the physical problems which are inherent in the notion of a complete sex change, legal recognition can be given to the acquired gender of post-operative transsexuals." (on this point of the irrelevance of the applicant's sex see also n 136).

[136] McCafferty, 'The Right to Marry – Recent Developments', *Human Rights*, December 2002, 219, 222.

[137] ". . . there is quite a difference between this provision of the Charter and the provision in the European Convention. The European Court referred to this provision in the Charter because it wanted to go a little bit further in its jurisprudence [in *Goodwin*]. . . The Court considered the Charter as a really good source of inspiration in that case, because the Charter does not rule out *homosexual* marriages. It is stated in the Charter that everybody has the right to

The strange result of these cases may be that if the UK birth certificate system is not properly changed transsexuals have two rights to marry, as male or female, depending on whether the original birth certificate is relied on, and if it is the relationship would in effect be homosexual.[138] Indeed, in the House of Lords in *Bellinger* v *Bellinger* Lord Hope referred to the petitioner thus:

> "Her problem would be solved if it were possible for a transsexual to marry a person of the same sex, which is indeed what the European Court of Human Rights has now held should be the position in Goodwin."[139]

One of the Strasbourg judges, Fischbach, also referred to *Goodwin* thus:

> "The Court considered the Charter as a really good source of inspiration in that case, because the Charter does not rule out *homosexual* marriages. It is stated in the Charter that everybody has the right found a family. That was for the Court one of the reasons which caused it to strengthen its case-law in this field."[140]

That remark is of course only by one Strasbourg judge but it is perhaps indicative of the "new" thinking.

This reference to the Charter is despite its legal status being at least questionable, being non-binding, though it has been referred to a "point of reference" or a "standard of comparison", or an expression of a "democratically established political consensus" on fundamental rights, by EU Advocates General,[141] and used as a source in England to reaffirm or

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found a family. That was for the Court one of the reasons which caused it to strengthen its case-law in this field." Judge Marc Fischbach in, The Future Status of the EU Charter of Fundamental Rights, HL Paper 48, House of Lords Session 2002–03, 6th Report, Select Committee on the European Union: http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/48/48.pdf, Evidence, (published only in the paper version) p 45, emphasis added.

138 McCafferty, 'The Right to Marry – Recent Developments', *Human Rights*, December 2002, 219, 223; see also McCafferty, 'Gays, Transsexuals and the Right To Marry' (2002) *Fam Law* 362, 366.

139 See *Bellinger (FC) (Appellant)* v *Bellinger* [2003] UKHL 21, para 69; see also n 135.

140 Judge Marc Fischbach in, *The Future Status of the EU Charter of Fundamental Rights*, HL Paper 48, House of Lords Session 2002–03, 6th Report, Select Committee on the European Union: <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/48/48.pdf>, Evidence, (published only in the paper version) p 45, emphasis added.

141 See nn 144, 209: Jacobs, 'Human Rights in the European Union: The Role of the Court of Justice', (2001) 26 *ELRev*, 331, 339: "The Charter provides a convenient point of reference, to identify what rights are fundamental, to give them a lapidary formulation, to set out, very succinctly, the permissible limitations. Of course it does not answer all the questions. But it provides a Bill of Rights for the Community (perhaps in some ways, and with some of the same advantages, as the Human Rights Act does for the United Kingdom). It is up to date, in a way which the Convention even with its Protocols cannot be."

elucidate the ECHR's content.[142] It contrasts – at the time of writing[143] – with the apparently reserved and conservative (non) use of the Charter by the ECJ (as opposed to the CFI),[144] though some argue that (given AG reference

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[142] See *The Queen (on the application of The Howard League For Penal Reform)* v *The Secretary of State for the Home Department and The Department of Health* [2002] EWHC 2497 (Admin), *per* Munby J, paras 51-52, and at para 68; *The Future Status of the EU Charter of Fundamental Rights*, House of Lords Session 2002–03, 6th Report, Select Committee on the European Union, HL Paper 48, 2003 <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/48 /48.pdf> para 33. In *A and others* v *East Sussex County Council and another* [2003] EWHC 167 (Admin) [2003] All ER (D) 233, Munby J stated, paras 73-74: "The Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. The Charter is not at present legally binding in our domestic law and is therefore not a source of law in the strict sense. But it can, in my judgment, properly be consulted insofar as it proclaims, reaffirms or elucidates the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the Convention. This approach is, I think, consistent with the approach adopted in relation to the Charter by Advocate General Jacobs in his opinion in *Case C-270/99P*, *Z* v *European Parliament* para [40], by Advocate General Tizzano in his opinion in *Case C-173/99, R (ota the Broadcasting, Entertainment, Cinematographic and Theatre Union)* v *Secretary of State for Trade and Industry* [2001] All ER (EC) 647, paras [27]-[28], and by Maurice Kay J in *R (ota Robertson)* v *City of Wakefield Metropolitan Council* [2001] EWHC Admin 915, para [38]. It is in fact the approach which I myself adopted in *R (ota Howard League for Penal Reform)* v *The Secretary of State for the Home Department* [2002] EWHC 2497 (Admin), [2003] 1 FLR xxx, para [52]." The use of the Charter was also referred to in the context of *Goodwin* v *the United Kingdom* by Lord Hope of Craighead, in the HL in *Bellinger (FC) (Appellant)* v *Bellinger* [2003] UKHL 21, para 69. In *Sepet* v *Secretary of State for the Home Department, Bulbul* v *Secretary of State for the Home Department*, [2003] UKHL 15, paras 15, 51, its status was regarded as undecided. Passing reference to the Charter was made in *Coppard* v *Customs and Excise Commissioners* [2003] EWCA Civ 511, para 38; *Regina (Robertson)* v *Wakefield Metropolitan District Council and another* [2001] EWHC Admin 915, para 38.

[143] June 2003; the Charter has been adopted by the Draft Treaty establishing a Constitution for Europe – see n 222.

[144] We wish to thank our colleague Carole Lyons for this observation. As regards the status of the Charter see n 142 and also, *inter alia*: Lyons, 'Human Rights Case law of the European Court of Justice', (2003) 3 *HRLRev* (2003) 157, 172. Weiler, *infra* n 209. The Charter in the European context A point of reference for the courts <http://europa.eu.int/comm/justice_home/unit/charte/en/ European-context-reference.html#top>. House of Lords Session 2002–03, 6th Report, Select Committee on the European Union, The Future Status of the EU Charter of Fundamental Rights, H.L. Paper 48, 2003 <http://www.parliament.the-stationery-office.co.uk/pa/ld200203/ldselect/ldeucom/48/48.pdf>, para 30f. Secretariat Discussion Paper, Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR, 18 June 2002, CONV 116/02 <http://register.consilium.eu.int/pdf/en/02/cv00/00116en2.pdf>. Beaumont, 'Human Rights: Some Recent Developments and Their Impact on Convergence and Divergence of Law in Europe', in Beaumont, Lyons, Walker (eds) Convergence and Divergence in European Public Law (2002), pp 151, 153. Jacobs, supra n 141. See also AG Opinions before the ECJ, especially AG Colomer in Case C-466/00 *Arben Kaba*

to the Charter) it plays a part in ECJ findings, or expect the ECJ to refer to it.[145] This use of the Charter could be described as appropriate as a makeweight[146] in a particular context. But it is also possible that it is a very deliberate – and perhaps questionable – attempt to "modernise" the ECHR and allow its use in other cases where an "evolutive" approach is attractive. It has been suggested that:

> "This important judgement shows that the Court of Human Rights is starting to use the EU Charter as a source for interpreting the European Convention."[147]

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v *Secretary of State for the Home Department*, 11 July 2002, at n 74: "As regards the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), which contains a more extensive and up-to-date list of rights and freedoms than the Convention, some Advocates General, within the Court of Justice and without ignoring the fact that the Charter does not have any *autonomous* binding effect, have nevertheless emphasised its clear purpose of serving as a substantive point of reference for all those involved in the Community context (Opinion of Advocate General Tizzano of 8 February 2001 in Case C-173/99 BECTU [2001] ECR I-4881, especially I-4883, point 28), point out that it has placed the rights which it recognises at the highest level of the hierarchy of values common to the Member States and necessarily constitutes a privileged instrument for identifying fundamental rights (Opinion of Advocate General Léger of 10 July 2001 in Case C-353/99 *Council* v *Hautala*, not yet published in the European Court Reports, points 82 and 83), or argue that it constitutes an invaluable source for the purposes of ascertaining the common denominator of the essential legal values prevailing in the Member States, from which the general principles of Community law in turn emanate (my Opinion of 4 December 2001 in Case C-208/00 Überseering, not yet published in the European Court Reports, point 59)."; AG Alber in Case C-63/01 *Samuel Sidney Evans* v *Secretary of State for the Environment, Transport and the Regions, and Motor Insurers' Bureau*, 24 October 2002, para. 80: "Reference should also be made to Article 47 of the Charter of Fundamental Rights, which, admittedly, does not yet have any binding legal effect. It can, however, be used as a standard of comparison, at least in so far as it addresses generally recognised principles of law."; AG Mischo in Joined Cases C-20/00 and C-64/00, *Booker Aquaculture Ltd* v *The Scottish Ministers*, 20 September 2001, para 126. As to the CFI see *inter alia* Joined Cases T-377/00, T-379/00, T-380/00, T-260/01 and T-272/01, *Philip Morris International, Inc, RJ Reynolds Tobacco Holdings, Inc, RJR Acquisition Corp, RJ Reynolds Tobacco Company, RJ Reynolds Tobacco International, Inc, Japan Tobacco, Inc* v *Commission of the European Communities*, 15 January 2003, para 122; Case T-211/02, *Tideland Signal Limited* v *Commission of the European Communities*, 27 September 2002, para 37; Case T-177/01, *Jégo-Quéré et Cie SA* v *Commission of the European Communities*, 3 May 2002, paras 42, 47.

145 Thus see: The Charter in the European context: A point of reference for the courts <http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-reference.html#top>; see also memorandum of the Bar European Group in, The Future Status of the EU Charter of Fundamental Rights, *supra* n 144, Evidence, (published only in the paper version) p 56; Rudolf, 'European Union' (2003) 1 International Journal of Constitutional law 135, 138 <http://www3.oup.co.uk/ijclaw/hdb/Volume_01/Issue_01/pdf/010135.pdf>.

146 But see n 214.

147 The Charter in the European context: A point of reference for the courts <http://europa.eu.int/comm/justice_home/unit/charte/en/european-context-reference.html#top>.

One view of these cases is that:

> ". . . the case of Goodwin, with its important ruling on Article 12, marks possibly the beginning of a wider approach to the definition of those able to assert their rights under the Convention. The result of the Court holding that transsexual people have a right to marry is likely to have far reaching consequences, particularly for groups previously excluded rights because of their sexual orientation. This ruling may open the way for same-sex partners to seek to demand that they too now have the right to marry, particularly in view of the fact that neither the ability to conceive nor the ability to parent a child were found to be necessary prerequisites to the right to marry."[148]

It has also been suggested that, following *Goodwin* and emphasising strands of its reasoning,[149] including the reference to major social changes in the institution of marriage since the adoption of the Convention:

> "The Court's reasoning [in the *Goodwin* case] clearly leaves the door open to a future interpretation of Article 12 as requiring, as a result of 'major social changes', not only that post-operative transsexual persons be permitted to contract 'chromosomally same-sex' civil marriages, but also that lesbian, gay and bisexual persons be permitted to contract civil marriages."[150]

In strong rebuttal of that it has been asserted however:

> "It is important. . . to recognize that never has legal recognition of same-sex 'marriage' been imposed through judicial action . . . the fact remains that no international human rights tribunal has required member states to extend legal recognition of same-sex unions. . . Further. . . it appears unlikely that the removal of the phrase 'men and women' from Article 9 of the. . . E.U. Charter of Fundamental Rights will have any impact on the definition of marriage. To assure this result, the Charter's explanatory notes explicitly indicate that '[the] article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex.'"[151]

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[148] Case Comment, Transsexuals: Lack Of Legal Recognition Of Transsexuals, (2002) EHRLR 796, 799.

[149] Its reference to the lack of need for reproduction, its statement that "There have been major social changes in the institution of marriage since the adoption of the Convention", its reference to the Charter, and its view that the essence of the right to marry was infringed.

[150] See Brief of Amici Curiae International Human Rights Organizations, *et al*: *Hillary Goodridge at al* v *Department of Public Health and Koh*, before the Commonwealth of Massachusetts Supreme Judicial Court, No SJC-08860. <http://www.glad.org/GLAD_Cases/International_Brief.pdf>

[151] Brief Amicus Curiae on Behalf of Professors and Advisors of Law: *Hillary Goodridge at al* v *Department of Public Health and Koh*, before the Commonwealth of Massachusetts Supreme Judicial Court, No SJC-08860 section

Rogers, however, focusing on the UK, wrote pre-*Goodwin* in a manner akin to the Strasbourg court's evolutive approach, and its use of the Charter:

> "Whilst a religious same sex marriage may yet be inconceivable, a challenge asserting the right to a civil marriage ceremony is not. The ECHR's confinement of this right (Art 12) to a man and a woman appears to be a final answer against same sex marriages. But, with the Charter as an interpretative influence through section 2 of the Human Rights Act, the argument is stronger. The Convention is a living instrument, society has progressed since it was drafted, it is in the interests of society to recognise all stable and loving relationships, and this was recognised by the Charter Convention in their updating of the ECHR right to reflect changed values – or so the argument would run. . ."[152]

As he points out, Dutheil de la Rochere took the view that Article 9 allowed for the possibility of same-sex marriage.[153]

Bessant also suggested that, after *Goodwin*, the court's invocation of the "living instrument" doctrine might have wider implications for non-conventional family forms.[154]

A different view is taken by those who emphasise the *Explanations* relating to the Charter which state that Article 9 neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex, that is, there is no grant of a right to same sex marriage, though the provision may permit recognition of national legislation giving such a right.[155] The

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IIIA, referring to Sumner, 'The Charter of Fundamental Rights of the EU and Sexual Orientation', (2002) *IFLJ* 156, 159.

[152] Rogers, *supra* n 134, at 354-355.

[153] Dutheil de la Rochere, Droits de l'Homme: La Charte des droits fondamentaux et au-dela, <http://www.jeanmonnetprogram.org/papers/01/013501.html> and in Setting the Agenda and Outlining the Options: EUROPE 2004 <http://europa.eu.int/comm/governance/whats_new/europe2004_en.pdf> "L'article 9 relatif au droit de se marier, par rapport à la CEDH introduit la possibilité d'unions entre personnes du même sexe."

[154] 'Transsexuals and Marriage after Goodwin v United Kingdom', (2003) 33 *Fam Law* 111, 116, referring to unmarried cohabitation.

[155] See the *Explanations*, *supra* n 102. The *Explanations* relating to Article 52(3) confirm that the scope of Article 9 (not its meaning) may be extended where *national legislation* extends to other forms of marriage. On Article 9 see also Europarl LIBE, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs: <http://www.europarl.eu.int/comparl/libe/elsj/charter/art09/default_en.htm #2> "The right to marry and the right to found a family are traditional fundamental liberties. The wording of these rights is in keeping with the traditional concept expressed in the Universal Declaration of Human Rights and in the International Covenant on Civil and Political Rights: 'The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.' Article 9 of the Charter refers to national legislation in order to take account of its diversity and cases in which these rights are more modern in scope: authorisation of marriage between persons of the same sex, founding of a family other than within marriage. This gives the article, where it is the case in national legislation, broader scope than the corresponding Article 12 of the European Convention on Human Rights." AG Mischo in Joined Cases C-

difficulty here is that in *Goodwin* and *I* v *the United Kingdom* national legislation did not allow transsexual marriage, yet nonetheless fell foul of the Convention, so the lack of national legislation on same-sex marriage is apparently not crucial in determining the extent of marriage rights.

Certainly the use of the Charter in these cases might be taken as a pointer to the future. At the same time, that use of the Charter was in the context of a certain consensus in Europe, which does not exist as regards same-sex marriage.[156] It has been suggested that the non reference to the Charter in *D* v *Sweden and Council*[157] was partly because ". . . the Court, concerned with the potential impact upon the legal status of the Charter, may not have wanted to use it in relation to such a sensitive issue."[158] The lack of European consensus on same-sex marriage seems important,[159] but, post-*Goodwin*, Wintemute wrote that:

> "Although a same-sex marriage case under Article 12 would still be premature (given that only one of 44 European Convention countries has opened up civil marriage to same-sex couples), the Court's new interpretation of Article 12 will prove extremely helpful when such a case is brought in the future."[160]

122/99 P and C-125/99 P, *D* v *Sweden and Council* [2001] ECR 5(B) I-4319, para 97, referred to Article 9 of the Charter same-sex partnership, and found, given that the clarifying *Explanations* state that Article 9 neither prohibits nor requires the grant of the status of marriage to relationships between persons of the same sex, that confirms the difference between marriage and same sex relationships; the Court did not refer to the Charter and indeed as Sumner *infra*, points out, the ECJ stated, para 34, that "It is not in question that, according to the definition generally accepted by the Member States, the term 'marriage' means a union between two persons of the opposite sex." See also McGlynn, *supra* n 79, 592-593; Sumner, *supra* n 96: ". . . if one takes this ECJ decision alongside the Charter's explanatory notes, which clearly state that the 'article neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex', then the chance of Art 9 being interpreted to include same-sex marriages is slim"; the Brief Amicus Curiae on Behalf of Professors and Advisers of Law, *supra* n 151, also refers to Sumner. Dutheil de la Rochere, *supra* n 153, refers to AG Mischo but states: "A vrai dire l'avocat général tire du texte de l'article 9 de la Charte et des 'explications' qui l'accompagnent des conclusions exactement contraires à l'esprit libéral qui inspirait les rédacteurs de la Charte; il omet par ailleurs de se référer à l'article 21 de la Charte qui interdit toute discrimination à raison de l'orientation sexuelle. C'est dire que le texte de la Charte peut faire l'objet d'interprétations divergentes."; McCafferty, *supra* n 136, at 219, takes the view that Art 9, in the context of the *Explanations*, does not, or does not necessarily, intend to pave the way for claims by homosexuals that Article 12 should be interpreted to grant the right to marry; Caracciolo di Torella and Reid, 'The Changing Shape of the "European family" and fundamental rights' (2002) 27 *ELRev* 80, 83, also criticise the lack of reference ("a remarkable lacuna") to Art 21 of the Charter.

156 See as regards the EU, n 78, and for comment, McGlynn, *supra* n 79, 593.

157 Joined Cases C-122/99 P and C-125/99 P, *D* v *Sweden and Council*, [2001] ECR 5(B) I-4319.

158 Caracciolo di Torella and Reid, *supra* n 155, 89.

159 See Wintemute, *supra* n 122.

160 <http://www.qrd.org/qrd/www/legal/lgln/09.2002.html>

There are views that there is a "broad trend towards equal treatment of different-sex and same-sex couples in at least 19 industrialized democracies outside the United States", but also a strong and well-supported view that there is no global trend toward recognition of same-sex "marriage."[161] Of some note is the fact that the Human Rights Committee of the International Covenant on Civil and Political Rights has found marriage laws restricted to heterosexual couples to be consistent with the right to marry provisions of the Covenant.[162] The Vatican has condemned same-sex marriage.[163] At the same time, Belgium has become the second Contracting State to allow same-sex marriage.[164] Further, the Court of Appeal for Ontario in *Halpern* v *Canada* has found the exclusion of same sex couples from the common law definition of marriage is a violation of the provision in the Canadian Charter of Rights and Freedoms concerning equality.[165]

The apparent certainty that Article 12 refers only to people of the opposite biological sex (in all respects) has been shattered at least for transsexuals, partly in view of social acceptance and medical acceptance as a medical condition. Will homosexual persons be next? The "medical condition" aspect of transsexuals was evident in the section of the judgement on Article 8 and homosexuals will find that part difficult. The transsexual is now recognised in the "new sex" and so the "opposite sex" assumption behind marriage is maintained from one angle (leaving aside the "original sex"), which is not the case with homosexuals. The wording of Article 12 seems also clear. But Wintemute's different (pre-*Goodwin*) analysis of Article 12 – interestingly anticipating first a change in attitude to Article 12 and transsexuals by the Court – should not be ignored. Of course, pre-*Goodwin* he focussed on both Article 12 and Article 14, and the Court's reasoning in

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[161] See Brief of Amici Curiae International Human Rights Organizations, *et al*; Brief Amicus Curiae on Behalf of Professors and Advisers of Law, *supra* nn 150, 151.

[162] *Joslin* v *New Zealand*, Communication No 902/1999: New Zealand. 30/07/2002, CCPR/C/75/D/902/1999. (Jurisprudence), available *via* <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/e44ccf85efc1669ac1256c37002b96c9?Opendocument> See also Quitter Attorney-General, High Court Auckland, [1996] NZFLR 481. The Brief of Amici Curiae International Human Rights Organizations, *supra* note 150, argues that the decision was not persuasive, as *inter alia*, Committee was unaware of the *Goodwin* case.

[163] See: <http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html>

[164] Marriage Watch: <http://www.marriagewatch.org/news/020303a.htm>

[165] See <http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm> ". . . it is our view that the dignity of persons in same-sex relationships is violated by the exclusion of same-sex couples from the institution of marriage. Accordingly, we conclude that the common-law definition of marriage as 'the voluntary union for life of one man and one woman to the exclusion of all others' violates s 15(1) of the Charter." See also the decision of the Court of Appeal of British Columbia in *Barbeau* v *British Columbia (Attorney General)*, 225 D.L.R. (4th) 472; <http://www.courts.gov.bc.ca/jdb-txt/ca/03/02/2003BCCA0251.htm>. LaForme J. in *Halpern* v *Canada (Attorney General*) 95 C.R.R. (2d) 1, Ontario Divisional Court, was cited by Prowse J. in *Barbeau*, para 130: "The restriction against same-sex marriage is an offence to the dignity of lesbians and gays because it limits the range of relationship options available to them. The result is they are denied the autonomy to choose whether they wish to marry."

these cases is not based on the same approach.[166] The argument under Article 14[167] will no doubt be subservient to that under Article 12. That argument is not considered in detail here. But it is of interest to note that in *Shackell* v *the United Kingdom*, the Court stated of the claim under Article 14 by an unmarried surviving cohabitee that:

> "The Court accepts that there may well now be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it . . . *marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under Article 12 of the Convention*."[168]

Yet that was before *Goodwin* and *I* v *the United Kingdom*, and Wintemute's semi-optimistic post-*Goodwin* analysis suggests that pro same-sex campaigners may yet succeed.[169] Judge Fischbach of the Strasbourg Court has referred to Article 9 of the Charter thus, in terms that seem to acknowledge the judicial activism practised in *Goodwin*:

> "The [Strasbourg] court is not bound by the Charter. . . However, it does not prevent the court from referring to the Charter as it refers also to other international instruments, a source of inspiration in the interpretation of the Convention. . . I think the most significant [recent] example is…the case of Christine Goodwin v. The United Kingdom. There the court made a reference precisely to Article 9 of the Charter, the Article which lays down the right to marry. You know that in Article 12 of the Convention it is held that a man and a woman have the right to marry. So there is quite a difference between this provision of the Charter and the provision in the European Convention. The European Court referred to this provision in the Charter because it wanted to go a little bit further in its jurisprudence. . . The Court considered the Charter as a really good source of inspiration in that case, because the Charter does not rule out *homosexual* marriages. It is stated in the Charter that everybody has the right to found a family. That was for the Court one of the reasons which caused it to strengthen its case-law in this field."[170]

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166 See n 122.

167 Article 14 brings in of course *Salgueiro da Silva Mouta* v *Portugal*, judgment of 21 December 1999, *Reports* 1999-IX, but compare *Fretté* v *France*, judgment of 26 February 2002, ECHR 2002; see also *Antonio Mendoza* v *Ahmad Jaja Ghaidan* (CA Civ Div) [2002] EWCA Civ 1533.

168 *Joanna Shackell* v *the United Kingdom*, Application no 45851/99, Decision on Admissibility, 27 April 2000, emphasis added.

169 See n 160.

170 *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, Evidence, (published only in the paper version) pp 40, 45, emphasis added.

Article 21 of the Charter on non-discrimination[171] may be invoked by those arguing for recognition of same-sex marriage.[172] It should be noted that Article 21 of the Charter, concerning non-discrimination on the grounds of sexual orientation, appears to be freestanding,[173] and that there may be a European consensus on that subject.[174] Reliance on it however might have the effect of introducing Protocol 12 indirectly by another route.[175] Also it is to be noted that EU Council Directive 2000/78 on discrimination, including the ground of sexual orientation, excludes marital status.[176]

5. The "Evolutive Approach"

The Court's enthusiasm for adjusting to change, and its express invocation of the imagery of the new century, is notable. The Court of Human Rights announced that while there are good reasons for it to follow its own case law:

> ". . . the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved . . . It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement . . ."[177]

The Court's president – Judge Wildhaber – in his speech opening the judicial year 2003 highlighted this aspect of the case.[178]

Hence, having also noted that it had repeatedly stressed the need to keep the need for appropriate legal measures in this area under review, it looked at present day conditions within and outside the Convention States. It noted that even in *Sheffield and Horsham* v *the United Kingdom*,[179] there was an "emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment" and relied also on a continuing *international* trend to towards legal recognition.[180] Here it

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171 See n 155.
172 See n 133, 155.
173 See Sumner, *supra* n 96; Lord Lester of Herne Hill, Evidence to: House of Lords Session 2002–03, 6th Report, Select Committee on the European Union, *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, published in paper version only, p 7.
174 See n 133.
175 See Lord Lester of Herne Hill, *supra* n 173.
176 See n 85.
177 *Goodwin*, para 74; *I* v *the United Kingdom*, para 54.
178 Solemn hearing of the European Court of Human Rights on the occasion of the opening of the judicial year, Thursday, 23 January 2003, Speech by Mr Luzius Wildhaber, President of the European Court of Human Rights, <http://www.echr.coe.int/eng/Speeches/SpeechWildhaber.htm>.
179 *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V.
180 *Goodwin*, para 85; *I* v *the United Kingdom*, para 65: "The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and

was strongly influenced by the observations submitted by the human rights campaign group "Liberty". The Court was relatively dismissive of a lack of a common approach to the legal *repercussions* for transsexuals in the Contracting States and on the complexity of the issues, which it had recently emphasised in *Sheffield and Horsham* v *the United Kingdom*, [181] being more interested in the international trend toward the social acceptance and legal recognition of the new sexual identity of transsexuals. It also seems to reply to the concerns expressed in that case as to the moral social and legal complexities involved, in stating later on that:

> "In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved." [182]

This striking and unequivocal declaration by the Court again seems to show a certain impatience by the Court,[183] but perhaps also its determination to adhere to an evolutive approach. The beginning of a new century is perhaps an appropriate time, in the Court's view, to resolve issues and to hasten processes of change that were left uncompleted at the end of the last. The Court is clear that there is a sufficient consensus within the community of developed legal orders, whether or not all signatories to the Convention, to support its decision to insist on these improvements in the legal status of transsexuals. The Court's decision not only identifies and endorses an international trend, but also reinforces the relevance to human rights jurisprudence of comparative assessments of guarantees of individual liberties. The boundaries of legal thinking governing the rights that the ECHR protects are not coterminous with those of the territories of its signatory States, because a reliance on an international trend is possible. This may reflect a view that human rights are universal.[184] This wide approach may be welcome as an interpretative technique, but one may indeed question whether a Pandora's box has been opened. [185]

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uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals."

181 See *Sheffield and Horsham* v *the United Kingdom* [GC], judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V, paras 57-58.

182 *Goodwin*, para 90; *I* v *the United Kingdom*, para 70.

183 See on the matter of impatience, Clare Dyer, 'Landmark ruling for transsexuals forces Britain to change law', *The Guardian*, July 12, 2002, <http://www .guardian.co.uk/uk_news/story/0,3604,753920,00.html>

184 See Contribution of Mr Fischbach and Mr Krűger, Council of Europe Observers, Draft Charter Of Fundamental Rights Of The European Union, 2000, Charte 4136/00, Contrib 29: "In order to ensure the requisite consonance between the ECHR and the Charter, it will be necessary first of all to ensure that a given right cannot be understood or construed differently, according to whether the instrument being applied is the ECHR or the Charter. That would create different standards and thus run counter to one of the cardinal features of fundamental rights: their universality."

185 Morawa, 'The "Common European Approach", "International Trends", and the Evolution of Human Rights Law. A Comment on Goodwin and *I* v *the United*

Equally, the concern of the Court to adjust to change is signalled by its use of the Charter, a more "up-to-date"[186] version of European human rights based partly on the ECHR, where indeed Article 9 "modernised" the right to found a family.[187] The Charter was referred to by Judge Fischbach of the Strasbourg Court as "a source of inspiration in the interpretation of the Convention", like other binding and non-binding international instruments or sources[188] – but with the difference that its legal status was very questionable. It is also a text with more potential immediacy, being both European and a more "up-to-date" European Convention on Human Rights.

Kingdom', GLJ Vol 3 No 8 – 1 August 2002 – European & International Law, paras 33-34: <http://www.germanlawjournal.com/past_issues.php?id= 172>
"The Court in Goodwinand [sic] I could not, or no longer, base its change in jurisprudence on a growing European consensus on how the law should treat transsexuals, since that had already emerged in the aftermath of the 1989 Parliamentary Assembly Recommendation and, as the evidence adduced in the course of the deliberations showed, there was no further development in Europe between the years 1998 (Sheffield and Horsham) and 2002. Instead, it relied heavily on an 'international trend'. . . With that, the Court displayed an attitude that should wholeheartedly be embraced, since it re-introduces – without, however, opening Pandora's box – the borrowing of concepts that permit an evolutive interpretation of the Convention in favor of the individual from non-European legal systems and, in the first place, from other regional and the universal systems of human rights protection. While the European Court of Human Rights has a well-advanced case-law in many areas and has long served as a source of guidance and inspiration for other human rights systems, in particular the Inter-American one, one should not assume that Europe holds the lead in every respect. The issue of protecting the rights of members of minority groups and indigenous peoples is a telling example: . . . This practice, if read with due regard to the differences in history, political realities, and legal approaches between Europe and the Americas, could nevertheless serve, at the very least, as a precious source of inspiration for the human rights bodies of the old continent.
Goodwin and *I* must in any event be welcomed as decisions which finally remedy a situation that has likely been left within the margin of appreciation of certain states for too long. Beyond that, they give new life to interpretative tools that have helped shape the Convention in the past. One should hope that the Court will rely on them more consistently."

186 See Jacobs, *supra* n 141; AG Ruiz-Jarabo Colomer, *supra* n 144; this phrase is also used and referred to by Arnull, Evidence (published only in the paper version) to *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, p 4-5.

187 See n 102; McGlynn, *supra* n 79, at 593.

188 See *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, para 34, and Evidence, (published only in the paper version) at pp 40, 45, and n 170 above; for cases referring to non ECHR sources see, *e.g.*, *Streletz, Kessler and Krenz* v *Germany* [GC], judgment of 22 March 2001, ECHR 2001-II, para 90 (principles of international law, particularly those relating to the international protection of human rights); *Al-Adsani* v *the United Kingdom* [GC], judgment of 21 November 2001, ECHR 2001-XI, paras 55, 60*f.* (Vienna Convention of 23 May 1969 on the Law of Treaties, and public international law on torture and State immunity in civil suit, with recognition of the (*jus co*gens) peremptory norm of a prohibition on torture); *Öcalan* v *Turkey*, judgment of 12 March 2003, ECHR 2003, para 203, referring to Art 5 of ECOSOC Resolution 1984/50, the decisions of the UN Human Rights Committee, and the Advisory Opinion OC-16/99 of 1 October 1999 of the Inter-American Court of Human Rights.

The Charter's usefulness to the *Goodwin* court lay principally in its express reference to it, but it may also have had in mind its declaration, in its pre-eminent provision in Article 1, that, "Human dignity is inviolable. It must be respected and protected." The *Explanations* to the Charter stresses its importance:

> "The dignity of the human person is not only a fundamental right in itself but constitutes the real basis of fundamental rights. The 1948 Universal Declaration of Human Rights enshrined this principle in its preamble: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' It results that none of the rights laid down in this Charter may be used to harm the dignity of another person, and that the dignity of the human person is part of the substance of the rights laid down in this Charter. It must therefore be respected, even where a right is restricted."[189]

Equally Munby J has stated in an English case:

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[189] *Explanations*, *supra* n 63. The Updated Explanations (see n 63) add: "*In its judgment of 9 October 2001 in case C-377/98 Netherlands* v *European Parliament and Council, 2001 ECR 7079, at grounds n° 70 - 77, the Court of Justice confirmed that a fundamental right to human dignity is part of Union law."* See also Europarl LIBE, Committee on Citizens' Freedoms and Rights, Justice and Home Affairs: <http://www.europarl.eu.int/comparl/libe/elsj/charter/art01/default_en.htm#2> "The principle of respect for human dignity is at the origin of any national or international text on the protection of fundamental rights. It is a conceptual principle which is present throughout the proclamation of such rights. The first article of the Charter enshrines this principle, although it is not generally included as such in other texts, where it is mentioned in the preamble, or as an objective which the rights set out or the measures provided for help to achieve. Human dignity is inviolable, there can be no exception, nor can any limit be imposed, even where law and order is concerned. It is difficult to define the outline of this principle in legal terms: is it possible for human dignity to be subject to a legal decision? Is it not the case that the violation of the majority of fundamental rights and freedoms also breaches the respect and protection of human dignity? The legal approach to this idea has changed. In many areas, it is now accepted that certain situations are liable to breach human dignity, yet legal protection may not always be available to the individuals concerned. This is the case in areas such as health (for example in terminal illness, or where the conditions for psychiatric internment are concerned), extreme poverty (for example the right to housing), the treatment of illegal aliens or of foreigners whose legal status has not yet been clarified, prison conditions (for example the mother and child relationship, the elderly, or the mentally handicapped). It is even more difficult to reach a legal definition of the idea of human dignity when dealing with the 'status' of embryos or euthanasia." AG Jacobs stated in Case C-377/98, *Kingdom of the Netherlands* v *European Parliament and Council of the European Union*, 14 June 2001, para 197: "The right to human dignity is perhaps the most fundamental right of all, and is now expressed in Article 1 of the Charter of Fundamental Rights of the European Union, which states that human dignity is inviolable and must be respected and protected."

> "The recognition and protection of human dignity is one of the core values - in truth the core value – of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. . . Not surprisingly, human dignity is extolled in article 1 of the Charter, just as it is in article 1 of the Universal Declaration."[190]

Article 1 of the Charter was not expressly referred to, and has not itself been "written into" the ECHR but the Court will have been conscious of its existence, and its hierarchical status, being placed first in the Charter. It may return to it, and indeed to other provisions of the Charter such as that on disabilities,[191] or the protection of the environment,[192] though the justiciability of some Charter provisions may be questionable.[193] The Court has already indicated that the notions of dignity and freedom may inform "quality of life".[194]

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[190] See n 195. See also Feldman, 'Human Dignity as a Legal Value', *supra* n 34, at 688*f*, for a discussion of dignity in international human rights law, making the point that the preamble to the ECHR refers to the U.N. Declaration on Human Rights.

[191] "The Union recognises and respects the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community." In *A and others* v *East Sussex County Council and another* [2003] EWHC 167 (Admin), [2003] All ER (D) 233 Munby J stated, paras 93, 103: "Moreover, the positive obligation of the State to take reasonable and appropriate measures to secure the rights of the disabled under article 8 of the Convention (and, I would add, under articles 1, 3(1), 7 and 26 of the Charter) and, in particular, the positive obligation of the State to secure their essential human dignity, calls for human empathy and humane concern as society, in Judge Greve's words, seeks to try to ameliorate and compensate for the disabilities faced by persons in A and B's situation (my emphasis). . . . The principle which one thus sees articulated in Botta is expressly recognised in article 26 of the Charter, with its reference to 'the rights of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'."

[192] See n 133.

[193] See HL Paper 48, *supra* n 142, para 8, 67*f*; see also Jacobs, 'EU Charter of Fundamental Rights – Are New Judicial Remedies needed?' (2003) 4 *Human Rights & UK Practice* 15, 17; Jacobs, *supra* n 141, 339*:* ". . . some of the rights formulated are not yet rights, but aspirations. They may be misleading. They may not be universally agreed"; see also n 198 *infra*.

[194] See *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 65: "The very essence of the Convention is respect for human dignity and human freedom. Without in any way negating the principle of sanctity of life protected under the Convention, the Court considers that it is under Article 8 that notions of the quality of life take on significance. In an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of advanced physical or mental decrepitude which conflict with strongly held ideas of self and personal identity." For comment see Pedain, 'The Human Rights Dimension of the Dianne Pretty case' [2003] CLJ 181, 191, making the point that "our conceptions of what amounts to a dignified life differ greatly."

6. CONCLUSION AND COMMENT:

The decisions of the Court are remarkable for the change they represent in Convention doctrine, for the fact that they are unanimous and were made only four years after the Court's last consideration of the issue, where on one issue – marriage – the majority the other way was 18-2. The "decisive tilt" of the Court, and its "21st century" outlook are striking. The sensitivity of the Court to transsexuals contrasts with the previous reluctance to find the UK to be in violation of the European Convention on Human Rights.

The Court's decisions in *Goodwin* v *the United Kingdom* and in *I* v *the United Kingdom* have substituted a concern for qualities and values common to all humans (dignity, autonomy) for their former conservatism. The creative way in which the decisions were arrived at is equally remarkable.

The reference to the notion of "autonomy" is intriguing. So too is the declaration that the very essence of the Convention is respect for human dignity and human freedom, notions not obviously listed in the Convention though the idea of dignity is obviously connected to Article 3 of the ECHR[195], and indeed a similar statement was made in *Pretty* v *the United Kingdom* in the context of Article 8.[196] (In *Pretty* it rejected however the application of Article 2 to "quality of life", or self-determination in the sense

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[195] See *Tyrer* v *the United Kingdom*, judgment of 25 April 1978, Series A no 26, para 33: ". . . it is one of the main purposes of Article 3 to protect . . . a person's dignity and physical integrity." The concept of dignity has also been referred to in several other cases involving Article 3 – *e.g.*, *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 52; *Selmouni* v *France* [GC], judgment of 28 July 1999, ECHR 1999-V, para 99; *Keenan* v *the United Kingdom*, judgment of 3 April 2001, ECHR 2001-III, para 112; *Poltoratskiy* v *Ukraine*, judgment of 29 April 2003, ECHR 2003, para 132. Feldman, 'Human Dignity as a Legal Value', *supra* n 34, 690*f*. considers the concept of dignity over several ECHR provisions, especially Arts 3 and 8. See also for a stress on the value of dignity generally, Munby J in *A and others* v *East Sussex County Council and another* [2003] EWHC 167 (Admin), [2003] All ER (D) 233 paras. 86, 87: "The first [concept] is human dignity. True it is that the phrase is not used in the Convention but it is surely immanent in art 8, indeed in almost every one of the Convention's provisions. The recognition and protection of human dignity is one of the core values – in truth the core value – of our society and, indeed, of all the societies which are part of the European family of nations and which have embraced the principles of the Convention. It is a core value of the common law, long pre-dating the Convention and the Charter. The invocation of the dignity of the patient in the form of declaration habitually used when the court is exercising its inherent declaratory jurisdiction in relation to the gravely ill or dying is not some meaningless incantation designed to comfort the living or to assuage the consciences of those involved in making life and death decisions: it is a solemn affirmation of the law's and of society's recognition of our humanity and of human dignity as something fundamental. Not surprisingly, human dignity is extolled in article 1 of the Charter, just as it is in Article 1 of the Universal Declaration. . . Dignity interests are also, of course, at the core of the rights protected by Article 3."

[196] *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 61.

of taking one's own life).[197] The fertile, but opaque,[198] notion of dignity may become more important, though it is not expressly articulated in the ECHR. It is however placed first as Article 1, in the Charter of Fundamental Rights: "Human dignity is inviolable. It must be respected and protected" and its importance has been noted.[199]

The Court's willingness to embrace and in a sense incorporate in the European Convention on Human Rights concepts like "autonomy" and "dignity" adds to the impression that the Court is only too willing to use expansive, perhaps "liberal" concepts and new, perhaps unexpected, sources to meet its challenges, "transitioning" the ECHR.

The apparent change of focus by the use of the concepts of "autonomy" and "dignity", and the emphasis on self-realisation may be welcome in this context, transsexualism, or assisted suicide, but not beyond.[200] The Court's reference to an international (rather than European[201]) trend and an emerging

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197 *Pretty* v *the United Kingdom*, judgment of 29 April 2002, ECHR 2002-III, para 39.

198 See Weiler, Conclusions, in: Setting the Agenda and Outlining the Options: EUROPE 2004 Le Grand Debat: <http://europa.eu.int/comm/governance/whats_new/europe2004_en.pdf> "Clarity was a second justification often invoked to justify the exercise. The current system of looking to the common constitutional traditions and to the ECHR as a source for the rights protected in the Union is, it is argued, unsatisfactory and should be replaced by a formal document listing such rights. But would clarity actually be added? Examine the [Charter] text. It is, appropriately drafted in the magisterial language characteristic of our constitutional traditions: Human Dignity is Inviolable etc. There is much to be said for this tradition, but clarity is not one of them. When it comes to the contours of the rights included in the Charter, I do not believe that that it adds much clarity to what exactly is protected and what is not." See also <http://www.europarl.eu.int/comparl/libe/elsj/charter/art01/default_en.htm#2> *supra* n 190; Smith, More Disagreement Over Human Dignity: Federal Constitutional Court's Most Recent Benetton Advertising Decision GLJ Vol 4 No 6 – 1 June 2003. <http://www.germanlawjournal.com/current_issue.php?id=278> "The success of the German legal construct of human dignity also is apparent from its influence on the European Union's Charter of Fundamental Rights. That document likewise begins with a provision nearly identical to the Basic Law's Art 1. Human dignity is also one of the most elusive concepts in German constitutional law. . . Elusive concepts offer judges great power because they are sufficiently malleable to mean many different things to well-meaning interpreters. The malleability of the Basic Law's human dignity concept has been prominently displayed in recent years."

199 See p 245.

200 See text to nn 58, 59. However the Court did refer to autonomy in the *Keenan* case – see n 18.

201 See n 180. But *cf* also *Appleby and Others* v *the United Kingdom*, judgment of 6 May 2003, ECHR 2003, para 46: "The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately-owned property open to the public, the US Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Article 10 of the Convention."

European consensus does not alleviate these concerns – and more so in the case of marriage in particular, where "widespread acceptance" was referred to.[202]

The express although apparently subsidiary and passing reference[203] to Article 9 of the Charter of Fundamental Rights in relation to marriage and Article 12 of the ECHR, in a case where the text of Article 12 of the ECHR seemed clear, is striking and adds a piquancy and authority to the Charter's provisions. Its use adds force to the view that the Charter has effect in the UK.[204]

Those who favour the need to adapt the ECHR will welcome this new "source". But the Court's determination to meet the challenges in these cases is not without criticism. Those who – with some good reason – disfavour so-called "judicial activism" – a concept well known to the judges[205] – would argue that this is unjustified, though the debate on the limits of the evolutive approach is not new.[206] The reference to the Charter adds a new dimension. The use of the EU Charter in particular, even just as an "inspiration",[207] is curious because of its legal status, and because of the apparently clear text of Article 12 of the ECHR. Further, the Charter is not just another international instrument, being regarded from one point of view as a more up-to-date,[208] "transitioning", ECHR, yet not officially accepted as such. But equally, its justification may also lie in that the Charter is, though

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[202] *Cf* the "Bulger" cases, *T* v *the United Kingdom* [GC], judgment of 16 November 1999, *Reports of Judgments and Decisions*, 1999-, para 75, and *v* v *the United Kingdom* [GC], judgment of 16 December 1999, *Reports of Judgments and Decisions*, 1999, para 77, referring to "an international tendency in favour of the protection of the privacy of juvenile defendants." but also stating that while this trend was "one factor was to be taken into account when assessing whether the treatment of the applicant can be regarded as acceptable under the other Articles of the Convention, it cannot be determinative of the question whether the trial in public amounted to ill-treatment attaining the minimum level of severity necessary to bring it within the scope of Article 3. . . "

[203] But see n 214.

[204] See Rogers, *supra* n 134, at Part V, and sources cited in n 144 above.

[205] *Cf* Wildhaber, 'Human Rights and Democracy', Paul Sieghart Memorial lecture 2001 London, 22 November 2001 <http://www.bihr.org/pdfs/lecture-transcripts /wildhaber%20transcript.pdf> "I do not want to enter a general debate on judicial activism versus judicial self-restraint, but I do have to react to the suggestion that human rights, at least as we understand that expression in Strasbourg and therefore as enshrined in the European Convention on Human Rights, are in some way dangerous for democracy. This is grossly to distort the purpose and effect of an instrument which came into being largely to protect democracy against the perceived totalitarian threat of the cold war years and which is founded upon the twin principles of democracy and the rule of law."

[206] See van Dijk and van Hoof, *supra* n 96, 77, para 2.4, at 79. See also on the evolutive approach Clayton and Tomlinson, *The Law of Human Rights* (2000), para 6.23*f* and Harris, O'Boyle, Warbrick, *Law of the European Convention on Human Rights* (1995), p 7*f*.

[207] See n 188.

[208] See n 186.

an EU document, on one level, democratic.[209] Notably the House of Lords Select Committee on European Union stated, before referring to *Goodwin*:

> "Very much as we predicted in our earlier Report an instrument prepared by such a body as the Charter Convention and endorsed at the highest political level in the Union cannot be overlooked. Weight will inevitably be attached to it."[210]

In *Goodwin* and *I* v *the United Kingdom* the Court used the Charter expressly in noting the lack of reference to men and women, and was perhaps[211] also influenced by it in "clarifying" that there is a separate right to marry and to found a family. The evolutive approach has, as McCafferty says, its own problems, in the extent to which the text can be ignored.[212] The interpretation, in particular, of an apparently clear text, Article 12, which effectively ignored the sex of the parties, with the use, while apparently subsidiary, of the Charter of Fundamental Rights suggests a result-oriented approach. This is also suggested indeed by the observation of Judge Fischbach, reflecting that the Court referred to the Charter "because it wanted to go a little bit further in its jurisprudence."[213] The use of the Charter to extend the relatively clear meaning of the ECHR is questionable. That use may be described as subsidiary or makeweight but the organisation "Liberty", reflecting on the *Goodwin* case, stated:

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[209] See AG Mischo in Joined Cases C-20/00 and C-64/00, *Booker Aquaculture Ltd* v *The Scottish Ministers*, 20 September 2001, para 126: "I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order." a remark emphasised by, *inter alios*, "Liberty": Written Evidence of Liberty (National Council for Civil Liberties) and the British Institute of Human Rights to the to H.L. European Union Committee Sub-Committee E (Law and Institutions), at p 6. <http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/oct-2002-eu-charter.pdf> (and published in Written Evidence to The Future Status of the EU Charter of Fundamental Rights, *supra* n 144, paper version only, p 82 at 84). See also The Charter in the European context: A point of reference for the courts: <http://europa.eu.int /comm/justice_home/unit/charte/en/european-context-reference.html#top>. But see Weiler, *supra* n 198: "Lawyers will point out with great excitement that the Court [ECJ/CFI] is already making reference to the Charter and that it may become 'incorporated' in the legal order by judicial activity. I am not at all sure whether this is a positive development, both from pragmatic and normative perspectives. I wonder if a stony silence by the Court or a defiant refusal to take note of the Charter would not, pragmatically, provide greater impetus to eventual political action. I also wonder, as indicated above, whether it is proper for the Court to go very far with judicial incorporation of the Charter given the fact that it was, let us not mince words, constitutionally rejected as an integral part of the Union legal order? One cannot chant odes to democracy and constitutionalism and then flout them when it does not suit one's human rights agenda."

[210] *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, para 34.

[211] See Fischbach, *supra* n 140.

[212] McCafferty, 'Gays, Transsexuals and the Right To Marry' (2002) *Fam Law* 362, 365.

[213] See n 170: "The European Court referred to this provision in the Charter because it wanted to go a little bit further in its jurisprudence" [in *Goodwin*].

> ". . . the Charter has. . . also had a decisive influence on the European Court of Human Rights". [214]

In any case, after all, the applicants did have a right to marry as men, even if they did not want to marry, and while the Court found that "artificial" it is legally correct: was a legal right to marry denied? The Court would not have overlooked the possibility, discussed above, of an argument concerning same-sex marriage being based on its remarks, and was, arguably, deliberate and even also disingenuous in its reasoning, especially in its use of the Charter. The views of van Dijk and van Hoof[215] may yet prevail on this important issue.

There are other aspects to the use of the Charter. Judge Fischbach of the Strasbourg Court has referred to the *Goodwin* case as exemplifying possible and attractive future developments:

> "The European Court of Human Rights, taking its line from the Charter, would have reason to increase protection of fundamental rights, as in its recent judgment in Christine Goodwin v. United Kingdom. That judgment, delivered on 11 July 2002, was concerned with an alleged breach of Article 12, which establishes the right to marry. The Court expressly referred to Article 9 of the European Union Charter of Fundamental Rights, noting that its wording diverged – and that can only be deliberate – from the wording of Article 12 of the Convention in that it left out the reference to men and women. This could be a foretaste of what might develop into an interactive relationship between the Convention and Charter on the one hand, and the Strasbourg Court and Luxembourg Court on the other, for the benefit of all. That said, although recent decisions of the Court of Justice indicate that it is tending to apply the Convention as if the Convention provisions were part of Community law, there remains a risk of the existence of two separate European instruments protecting fundamental rights – the European Convention on Human Rights and the European Union Charter of Fundamental Rights – causing growing case-law divergences."[216]

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[214] Written Evidence of Liberty (National Council for Civil Liberties) and the British Institute of Human Rights to the to H.L. European Union Committee Sub-Committee E (Law and Institutions), <http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/oct-2002-eu-charter.pdf>, at p 7, (and published in Written Evidence to *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, paper version only, p 82 at 84).

[215] See nn 117, 121.

[216] *Supra* n 100. See also *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, at 45, where he refers to the *Goodwin* case as a "good example of a possible interactive relationship between the Charter and the Convention, or between the Strasbourg court and the Luxembourg court."

The organisation "Liberty" stated that the *Goodwin* case, and *Mary Carpenter* v *Secretary of State for the Home Department*,[217] where the ECJ found a breach of Article 8 of the European Convention on Human Rights, had "put into practice what (some of) the judges of both Courts see as one of the main attractions of accession to the ECHR by the European Union." It referred[218] to the view of Fischbach, cited above,[219] and ECJ President Iglesias.[220]

Deliberately, disingenuously, or not, the Strasbourg Court forced the more up-to-date Charter onto the legal landscape and gave it some authority at the very time its status was lacking and its future was uncertain.[221] The Charter was placed even more at the forefront of debate, and the Court set the agenda for a document of some controversy.[222] Whether the potential problem of competing ideas of human rights by the ECJ and the Strasbourg court was part of that process is a matter, to a degree, of speculation.

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[217] Case C-60/00, *Mary Carpenter* v *Secretary of State for the Home Department*, 11 July 2002, stating, para 41: "The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter 'the Convention'), which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law."; see also for application of Art 8 of the ECHR, Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others*, 13 May 2003, para 73*f*.

[218] Written Evidence of Liberty (National Council for Civil Liberties) and the British Institute of Human Rights to the to H.L. European Union Committee Sub-Committee E (Law and Institutions), <http://www.liberty-human-rights.org.uk/resources/policy-papers/policy-papers-2002/pdf-documents/oct-2002-eu-charter.pdf>, at p 7, (and published in Written Evidence to *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144, paper version only, p 82 at 84).

[219] "This could be a foretaste of what might develop into an interactive relationship between the Convention and the Charter on the one hand, and the Strasbourg Court and Luxembourg Court on the other, for the benefit of all."

[220] President Iglesias of the ECJ: "Thus, rather than competing with each other and creating a schism in the protection of fundamental rights in Europe, the Convention and the Charter should serve to enrich one another." Mr Gil Carlos Rodrigues Iglesias, speech on the occasion of the opening of the judicial year, Strasbourg, 31 January 2002: The Council Of Europe's Contribution To The European Union's Acquis: <http://www.coe.int/T/E/Legal_Affairs/About_us/Cooperation/SdC_2002_6E.pdf.> The context of his remark was however that if, "at some point in future, the Charter is formally given normative or even constitutional validity, this could increase the risk of conflict between the case-law of the European Court of Human Rights and that of the Court of Justice" and he noted that "those drafting the Charter, conscious of the importance of the relationship between the Charter and the Convention, have inserted provisions catering for this."

[221] *Goodwin* was referred to the House of Lords Report, *The Future Status of the EU Charter of Fundamental Rights*, *supra* n 144.

[222] It is referred to in the draft EU Constitution as of 18 July 2003: <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>.

The adoption of the Charter in the Convention on the Future of Europe – and accession of the EU to the ECHR – are very real possibilities, but the contribution of the Strasbourg court should not be overlooked.

DEFENCES OF AUSTINIAN COMMANDS

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INTRODUCTION

The purpose of this article is to examine the extent to which defences of the concept of "command" in the classical, Austinian, theory of law can be made out.[1] As such, it does not purport to be an examination of Austin's definition of law as a whole (sometimes called "the command theory"), dependent as that would be on a satisfactory account of other notions, particularly sovereignty. Furthermore, neither does it include a detailed examination of the role of sanctions in his theory, even though Austin controversially included sanctions within his definition of "command" rather than as a separate consequence of a breach of a command. That has been explored often before,[2] and can be seen as one of the major discrete concepts in the theory that is best treated separately.

If a layperson (or perhaps even a lawyer) were asked what a law in its most pure, or obvious, form were like, a response would probably result that identified the following features. Laws on the whole give instructions about what to do and to refrain from doing. These instructions come from the highest political sources - the government through parliamentary processes - and are to be found in statutes. They are directed, in the main, towards the populace at large. In the event of non-compliance with these instructions, the courts are involved in imposing penalties on the malfeasant. However, such a picture of law would probably be one that most people would recognise does not cover the whole canvas of law. For example, there is a widespread understanding that the courts do have some form of law-making as well as adjudicative functions. Most citizens are also probably aware that government ministers individually may possess a law-making power of a limited nature, although fewer of them would naturally refer to this as delegated legislation or understand the difference between a statute and a statutory instrument. Despite these caveats, it is a fair assumption that this description is an accurate account if it refers to common understanding of a typical law, or to law in its paradigmatic form.

A particularly interesting feature of this picture is that it does not contain the word "command" or even "imperative", both at the core of classical positivist conceptions of law. But neither does it contain the words "rule" or "principle", both of which were at the centre of twentieth-century legal theory. The first aspect of the description above was that law paradigmatically consists of instructions. It is note-worthy that this concept is not one that has had any jurisprudential coinage. This is so, even though it perhaps seems to side-step some criticisms made of the Austinian approach. For example, despite the imperative connotation of the word, not all

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[1] Austin, *The Province of Jurisprudence Determined*. References will be *to Lectures on Jurisprudence* or *The Philosophy of Positive Law* (ed Murray, 5th ed, 1885) and will be cited as *Austin*.

[2] See particularly Tapper, "Austin on Sanctions" [1965] *CLJ* 271

instructions are in fact mandatory. No definitional distortion is committed by the use of the term in a non-mandatory sense. The instructions one receives with a model or a mechanical or electrical device, for example, are not mandatory. They are not imperatives with which one must comply, but are conditional and informative. They are conditional in that one has a choice whether to comply with them or not, either by engaging or not engaging in the activity to which they relate, or by engaging in that activity in a different way to that to which the instructions refer. They are termed instructions to reflect that, if one wishes to be successful in the enterprise to which they refer, the manner laid down must be followed in order to be successful. In this way they play much more of an informative function than a mandatory role. What this illustrates is that a recognisable description of law need not, for its accuracy, be dependent upon the use of particular terms. What is important is the concept behind the word, and understanding of the ideas involved. In considering the Austinian command what is essential, therefore, is the understanding of the conceptual aspects in point rather than terminological and lexicographical rectitude of usage.

Laws as Commands

Austin saw law as a command (incorporating a sanction for the event of non-compliance) of a sovereign. It would seem at first glance that this closely reflects our commonly-held understanding of law suggested above. However, it is important to establish from the beginning exactly what it was that Austin saw in terms of a command. To do this, it is necessary to consider his analysis of various usages of the term "law". He began his lectures by seeming to identify laws with commands. He says: "Laws proper, or properly so called, are commands; laws which are not commands, are laws improper or improperly so called."[3]

There are four kinds of laws, both proper and improper. There are, first, divine laws, set by God to humans. Then there are positive laws, which Austin terms laws simply and strictly so called. Thirdly, there is positive morality, and lastly laws which are laws only in a metaphorical or figurative sense. The first two types are the laws properly so called, and the last laws improper. Some of the third type, positive morality, are laws proper, and some laws improper. Not all the laws properly so called are the proper subject matter of jurisprudence, but only positive laws. Our concern, then, is with these. Laws properly so called are a species of command. Not all commands are laws, but all laws properly so called are commands.[4]

The notion of a command, for Austin, is thus the key to the sciences of jurisprudence and morals. He defines a command as an expression or intimation of a wish that another should do or forbear from some act which, in the event of non-compliance will be visited with an evil.[5] There are significations of desire other than commands, the differentiating factor being that, in the case of a command, the person commanding has the power to inflict an evil or a pain in the event of its being disregarded. For Austin, the

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[3] *Austin*, p 79.
[4] *Ibid*, p 88.
[5] *Ibid*, pp 88-89.

sanction is an integral part of the notion of a command, and not just a necessary adjunct to it. Being liable to the sanction gives rise to the duty to obey. Command and duty are thus for Austin correlative terms in the sense that where the one exists the other exists also. There are two types of commands. The first are laws, and the second are "occasional or particular commands". The difference between the two is that, with regard to laws, there is a general obligation to do or forbear, whereas with regard to occasional or particular commands there is no such generality. A command to one's servant to do an errand can thus be a command. However, as Austin recognises,[6] the two categories overlap.

Commands as Rules

It is important that Austin says that the general type of command may be termed a law or a rule.[7] He does this on more than one occasion.[8] But on the whole he uses the term "command". It is therefore crucial to understand whether he uses the term "command" here as a synonym for "rule", or in some other way. The answer would seem to be that his usage is not intended to connote a synonym for, it will be remembered, some rules (namely moral rules) are not laws strictly so called. That leaves the possibility that all laws are rules. It might be thought that Austin considered that not all laws are rules as some laws are occasional or particular commands. However, he does the opposite by insisting on the requirement of generality for laws.[9]

This requirement of generality is an important aspect of Austin's theory, for the following reason. One of the more famous criticisms of the notion of command is that it cannot adequately account for the difference between being obliged and being under an obligation. When one is under an obligation (or obligated) there is a duty. Sometimes – this is not universally accepted[10] – obligation and duty are treated as synonyms. The notion of being obliged, however, does not connote duty, but coercion. An order to do something, backed up with a threat cannot, contrary to what Austin suggested, be adequate to describe the basis of obligations. To be coerced is not to be thereby under an obligation. Hart (from whom this criticism derives) illustrated this distinction with an example. If a gunman were to hold up a bank, the cashier could be said to be obliged to hand over the money, but could not be said to be under an obligation so to do.[11] Although

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[6] *Ibid*, p 93.
[7] *Ibid*, p 92.
[8] See *e.g. ibid*, p 109.
[9] *Ibid*, p 92.
[10] This is because, for example, obligations can be voluntarily incurred, whereas it might be thought duties arise from position, status or role. Although Hart seemed to adhere to this view (see "Legal and Moral Obligation" in *Essays in Moral Philosophy* (ed Melden, 1958), p 82; "Are There Any Natural Rights?" (1955) 64 *Philosophical Review* 175) there is no indication that he retained this view in *The Concept of Law*. Further distinctions between duty and obligation may lie in that one 'does' or 'performs' duties, but 'discharges', 'meets' or 'fulfils' obligations – see Brandt, "The Concepts of Obligation and Duty", [1964] *Mind* 374. Although it is sometimes useful to draw this distinction for analytic purposes, it is not always necessary to do so – see *e.g.* Kramer, *In Defense of Legal Positivism* (1999), pp 80-81.
[11] Hart, *The Concept of Law* (2nd ed, 1994), p 19.

Hart described the command theory as the gunman situation writ large without qualification, it is noteworthy that the notion of generality was significant for him in understanding the nature of law. There must be generality in two ways, he said. First, there is the generality of a particular type of conduct, and secondly, that this applies to a general class of persons.[12] But Austin's requirement of generality is clear, and it is one that is plainly not characterised in the gunman model, which thus cannot reflect Austin's view of commands as laws. Austin's occasional and particular commands are closer to the gunman model than his general commands. As Austin said that occasional and particular commands were not laws, Hart's criticism, whilst highlighting an important distinction, thus fails as an attack on Austin's notion of a command.

The Psychological Aspect of Commands

Austin's insistence on the requirement of generality means that it is easier to see the command theory as a theory of laws as rules in that the requirement of generality would seem to be central to the concept of rule. However, the difficulty would seem to remain that Austin's command model does not seem to account for the Hartean internal point of view (or "critical reflective attitude") essential to the notion of rules.[13] In other words, deviation from the behaviour required by the rule will attract some form of criticism. It is therefore essential, in order to recognise the rule, to go further than be able to recognise externally congruent action. Austin does not do this.

Such is the argument, propounded most strongly, of course, again by Hart himself. But how accurate is it? In a much-cited passage from the first lecture, Austin gives some hint that he was not altogether oblivious to this point. He wrote:

> "A law, in the most general and comprehensive acceptation in which the term, in its literal meaning, is employed, may be said to be a rule laid down for the guidance of an intelligent being by an intelligent being having power over him."[14]

In other circumstances, where intelligence is lacking, Austin says that it is right only to speak of laws by metaphor. Kronman has argued that this insistence on the requirement of reason and intelligence for a rule to exist is not unlike the critical reflective attitude, or internal aspect, which Hart employs to distinguish rule-governed behaviour from habit.[15] This is an argument that may seem difficult to accept. There is a wide gulf between the requirement of intelligence or reason, through which desired action must be brought about and the internal point of view. The essence of the latter is more than that the minimum requirements for the command to be understood are met, but that the rule is accepted in the sense that deviation from the required behaviour under the rule would be the object of censure and criticism. Reason and intelligence are merely the requirements for

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[12] *Ibid*, p 21.
[13] *Ibid*, pp 56-57.
[14] *Ibid*, p 86.
[15] A.T. Kronman, "Hart, Austin and the Concept of a Legal System: The Primacy of Sanctions" (1974-5) 84 *Yale Law Journal* 584 at 602.

understanding, and commands that are not laws properly so called, or rules, require the same. In other words, reason and intelligence are the *sine qua non* of communication through language and cannot alone connote a notion like a critical reflective attitude.

The "psychological" aspect (if it may be so called) of commands, namely that a command is given of necessity by an intelligent being to another intelligent being, was considered by Kelsen.[16] He made the point that a command exists only when a particular individual sets and expresses an act of will. If either element (setting or expressing) is missing, then no act of commanding takes place. Say for example that the act of will is no longer present because the commanding individual has died then, even if the expression of the act of will is present in written form, the act of will is no longer present. Therefore, there can be no command if, as with some laws, the binding force of the "command" subsists after the will has gone. For example, a will is still valid even after the death of the testator – indeed, after all, it is intended to have legal effect only after death. Similarly in the case of a contract where one of the parties later changes his mind about what he wants to agree to. A contract remains valid even if the will of one of the parties no longer exists. Again, the binding force of a contract is of real significance only after one of the parties has changed his mind. For Kelsen, therefore, the command being so dependent upon its psychological aspects with regard to the form of words used meant that it could explain little about law. The problem is as acute when one considers statute law. Although it is a common matter to refer to the "intention" of Parliament in passing a Bill into law, every lawyer is aware that this is sometimes at best a fiction, and often meaningless. The difficulties associated with ascertaining the intention of a body of hundreds of persons are plain after even a moment's reflection. There are also corollary duties relating to the psychological requirements inherent in the nature of a command that are demanded in the addressee. It is problematic to envisage the correct usage of the word "command" when the addressee is not aware of the meaning of the words used, whether they apply to him, or even of their existence.[17]

The assumption underlying both Austin's and Kelsen's treatment of this issue is that a will, a desire, or a wish of some sort is necessary for there to be a command. Kelsen denied that the use of "command" was appropriate with regard to much law because the will does not operate with regard to law as it does with command, as we have just seen.

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[16] Kelsen, *General Theory of Law and State* (1945), pp 32-33.

[17] Kelsen has another argument against commands explaining statute law (*ibid*, p 33). He argues that a statute owing its existence to a parliamentary decision first exists after the decision has been willed by the members of the parliament, and their minds have gone on to other things. Commands are not like this, he implies. The argument does not seem convincing, not because the analysis of the process is wrong, but because commands surely can be like that. In effect, Kelsen's argument amounts to a denial that anything not given personally cannot be a command. But surely this is not so. The army officer dictating a memo containing instructions which, after typing, is placed on the notice board after his mind has turned to other things, can be said to be commanding just as much as if what he had said had been personally communicated.

But how far is it necessary for this type of notion to be present in order for a command to exist? Olivecrona doubted that it was. He argued that, whilst a wish is a common motive for issuing a command, it is by no means the only possible one.[18] It may be that a command is given (for example, in a hierarchical organisation) because there is an obligation or pressure so to do. This may be true, but it is doubtful that Olivecrona's example illustrates this well. He cites the case of the company commander in the First World War who had to order his men to "go over the top" to face machine guns, though he held the action to be senseless from a military point of view, and thus could be said to neither wish nor desire what he was commanding. However, there must be a distinction kept in mind between different orders of desire that may conflict. Indeed, the dilemma in many moral issues arises because of such conflicts. I may wish to eat ice cream, and I may wish to lose weight. I desire them both, but clearly the satisfaction of the one desire necessitates the defeat of the other. But it would be true to say, whatever course of action I take, that a desire is being fulfilled. Likewise with the officer, who commands as he does because of other motives.

The psychological aspect of commands throws up another telling criticism for commands as an explanation of the nature of law. This is that laws, unlike commands, can be self-referential – that is to say, laws may apply to the law-giver, but to use the word "command" in a similar manner would be to misuse the term. As Hart states,[19] it is of course possible that laws can be made to be exclusively other-regarding. An absolute monarch may be exempt from any of the laws that he makes. But with law this is a matter of interpretation and not a necessary fact about the nature of law. This is not the case with commands. It is not that they are paradigmatically other-regarding, but essentially so.

Commands and Authority

As mentioned above, the command model has often been described, to use Hart's phrase, as the gunman situation writ large, which cannot adequately account for the distinction between being under an obligation to act in a particular way, and being obliged, or being coerced, to do so. If this charge is true, the reason for the inadequacy of the command model might be thought to lie in the fact that in the gunman situation, authority is lacking but law's obligatory nature derives from the authority the person or body has who issues it. A command can never account for this authority. This may be true, but it does not seem to undermine the command model. That a command cannot account for authority does not also mean that it does not presuppose it. It is difficult to envisage a situation in which it could properly be said that a command is issued where there is not also the connotation that the person doing the commanding does not have the authority so to do. This is where Hart's notion of the gunman theory breaks down. For, even if it were true in 1961 that the term "oblige" would be correctly used to describe the gunman's actions, there is something archaic in this usage now in such circumstances. The term is used in more restrictive senses than that,

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[18] Olivecrona, *Law as Fact* (2nd ed, 1971), pp 122-123.
[19] Hart, *op cit*, pp 26, 41- 43.

connoting a non-physical form of coercion. Most particularly, it would seem to be used most where, although there is no moral *obligation* to do an act (or not to do it), there is pressure of one sort or another in that regard. Similarly with the notion of command in the gunman situation. It is perhaps doubtful even in 1961 that the word command would have been properly used in the gunman situation, and indeed Hart does not do so. Although coercive acts backed by threats would seem to parallel in particular Austin's model, the fact that the word "command" is used indicates, even if it does not account for it, that it is only orders from a person with authority to issue such orders that are to be implied. It is far from clear, of course, that this observation rescues Austin's model, because his failure to account for the authority connoted by "command" is an important weakness in his theory, even given that the defence of command just proffered were one that he would accept. But, nevertheless, it would seem to offer a possibility of rescuing the idea of command as a possible key to the explanation of law. In a nutshell, the use of the word "command" necessarily implies, without more ado, the authority to issue it.

Olivecrona disagrees. He admits that the idea is plausible in that some people do react negatively when given a command by somebody who does not have the authority to do so, but he comes up with what he describes as "weighty" reasons against it.[20] His first argument is that the authority to command (the "right" to command) could be of significance only if it were a mystical force compelling obedience. But that would be absurd, he says. All that is of importance is the idea in the mind of the addressee that there is authority. In that case, it is irrelevant whether such authority really does "exist", if that is a term that can be used in this context at all. However, it is not necessary to enter these mystical realms to explain the authority to command. All that may be meant by this is that a further law in the system recognises the commands the commander makes as ones which it will enforce. Ultimately this involves tracing back to a law which cannot derive its authority from a further rule, but that need only be a rule of recognition on the Hartean model.

Olivecrona's second argument is that, whilst it is true that the authority to command is often an important factor in causing the commanded person to obey, there are other reasons why people do obey commands, such as fear, habit, personal respect, pure suggestion, or a combination of such factors. Again, this may be true, but that does not damage the command thesis. All that is argued here is that the notion of command denotes that there are reasons for obeying a command (the authority to command) other than the coercion that may also be involved. That such coercion is sometimes the reason for obeying commands cannot affect the force of this argument.

One of Hart's objections to the command theory is that it involves a circularity in an explanation of law.[21] The word "command", he says, carries with it a very strong implication that there is a relatively stable hierarchical organisation of men, in which the commander occupies a position of pre-

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[20] Olivecrona, *op cit*, p 123f.

[21] It has to be said that the specific term "circularity" is not used by Hart, but that is his clear implication.

eminence.[22] But because authority is a notion that is closely linked to that of law, and command with authority, therefore a circularity would seem to be involved. But that, of course, makes the point. The command thesis is just this - that there is an inevitable linkage between laws and commands, to the point that laws are explained by them. The charge of circularity cannot be sustained because, however close the relationship between commands and law, there are clearly commands that do not derive their authority from law.

It seems, therefore, that the differences between Hart and Austin here are not ones of substance. Hart argues that the command theory is the gunman situation writ large. Orders backed by threats can exist in situations where there is no authority. Therefore, to use the term "command" in that situation is to misdescribe, because the notion of command necessarily connotes authority, and furthermore, law. The Austinian apologist would argue along the following lines, however. It is true that the command theory involves the idea of orders backed by threats. However, the notion of commanding is employed. Commanding denotes authority, and the gunman situation does not involve that. Therefore, a description of the command theory in terms of the gunman situation is false.

Laws Which Are Not Commands

The notion of command as understood by Austin described so far would tend to suggest that he viewed all law in terms of commands. However, there are some types of laws which are not commands, it might be thought. In what sense can a statute which repeals an earlier statute be a command? In what sense can a statute which provides a facility for citizens rather than laying down an obligatory course of conduct for them to follow be considered to be a command? In what sense can international law, based primarily on the practice of states, be considered to be a collection of commands? How can laws which have gained legal status through custom be commands? How can decisions of the courts, addressed to the parties involved, be considered to be binding on others, and therefore commands addressed to them? All these raise particular difficulties for Austin's notion of a command as it has so far been described, and he dealt with them in a variety of ways, and with varying degrees of thoroughness, conviction and success.

First of all, it must be acknowledged that Austin, having laid out clearly the differences between varied types of commands, and differing types of laws, in order to determine what are laws properly so called and what are not, and having done that, to define which of the laws properly so called can be called the proper subject matter of jurisprudence in that they are positive laws, in effect recognises that the picture he has painted is not only inadequate but inaccurate. He does this by, first of all, acknowledging that, although laws which are within the province of jurisprudence are commands (as well as other laws properly so called), and on the whole laws which are improperly

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[22] Hart, *op cit*, pp19-20. Olivecrona argues that Hart is inconsistent here as he recognises that, for example, Christ commanded his disciples, which was not a relationship which involved a hierarchical organisation (Olivecrona, *op cit*, pp 123-124). This is misguided, just because Hart does make it clear that "a body of disciples" is one of the ideas he had in mind.

so called are therefore outside the province of jurisprudence, there are in fact categories of laws which break this rather neat process of subdivision. There are laws of positive morality (being species of laws improperly so called) that are nevertheless within the province of jurisprudence, even though they are not commands. In this case, at best the command model can be only a description of a paradigm positive law and not a thorough account of the nature of all positive law. Austin wrote:

> ". . . the proposition 'that laws are commands' must be taken with limitations. Or rather, we must distinguish the various meanings of the term *laws*; and must restrict the proposition to that class of objects which is embraced by the largest signification that can be given to the term properly."[23]

The laws improperly so called that are within the province of jurisprudence are laws which explain laws, laws to repeal laws, and imperfect laws. By the first category, Austin means declaratory laws, being those which, as he put it, work no change in the actual duties of the governed. An alternative way he describes such laws (whilst pleading that they can scarcely be called laws) is that they are acts of "authentic interpretation". Repealing legislation does not consist of commands, Austin concedes, but revocations of commands. As he puts it: "They authorise or permit the parties, to whom the repeal extends, to do or to forbear from acts which they were commanded to forbear from or to do."[24] He also refers to these as permissive laws, or permissions. The third category, imperfect laws, or laws of imperfect obligation, are laws which lack a sanction. This means, for Austin, that the law is not binding. So, the simplest example would be a law which declared certain acts as crimes, but which did not specify a penalty in the event of an offence being committed.

It is important to note here just what it is that Austin is conceding. With regard to declaratory laws, he maintains that they are not law, saying they can scarcely be called law. However, with regard to the other two categories, repealing laws and laws of imperfect obligation, he concedes that they are exceptions to the proposition that laws are a species of commands. With regard to the concession in respect of declaratory laws, it hardly amounts to a concession at all. He maintains here that laws are commands necessarily, although jurisprudence is wide enough here to include within its province some matters which are not laws. As a statement about jurisprudence, this must be uncontroversial, unless it were to be argued, which Austin never does, that jurisprudence should be confined to the study of law alone. However, with regard to the remaining two categories of law, a statement about the province of jurisprudence is not being made, but an acknowledgement that, indeed, some laws are not commands. This must characterise Austin's analysis at best as an account of paradigmatic forms of law. But it need not have been the case. As Dias has pointed out, and Buckland earlier before him[25], no concession need have been made at all. Declaratory laws could be brought within the notion of command as being repetitions of earlier commands, and repealing statutes could be viewed as

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[23] *Austin*, p 98.
[24] *Ibid*.
[25] Buckland, *Some Reflections in Jurisprudence* (1949), p 4.

fresh commands cancelling earlier ones.[26] And Austin himself dealt with the idea that not all commands have sanctions attached, and therefore laws without sanctions need not be seen as fatal to the command analysis.

With regard to other laws that did not appear to be commands, Austin holds to his ground with the result that he is susceptible to the charge that he is prepared to stretch the notion of command too far. This is particularly true of his use of the idea of tacit commands. A command is an express command if it is signified by written or spoken words, but if it is signified by conduct, or by signs of desire other than in words, the command is said to be tacit.[27] This device is used by Austin particularly to explain how customary law could be law. For Austin, custom is not law unless and until it is turned into a legal rule by decisions of the courts, which in turn are then to be seen as tacit commands of the sovereign legislature. The state signifies its desire that these should be legal rules by failing to use its power to abolish them. In this way, customary law is just as much commanded as other forms of law. It is interesting to note that Austin at this point takes up a markedly different position to that of Bentham who did not see customary law as law at all.[28] Bentham had various objections:

> "A customary law is not expressed in words: now in what words should it present itself? It is one single indivisible act, capable of all manner of constructions. Under the customary law there can scarcely be said to be a right or wrong in any case. How should there? Right is the conformity to a rule, wrong the deviation from it: but here there is no rule established, no measure to discern by, no standard to appeal to: all is uncertainty, darkness and confusion."[29]

Therefore Austin is not driven to view customary law as law, and thereby forced to account for it in some way by his notion of tacit command. That he chose to do so may be the basis of criticism as to his understanding of customary law rather than as a fundamental flaw in looking at commands as an adequate explanation of law. Certainly, the idea that custom should not

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[26] See Dias, *Jurisprudence* (5th ed, 1985), p 346.

[27] *Austin*, p 102.

[28] Bentham, *Of Laws In General* (1964), Ch XV.

[29] *Ibid*, p 184. Consider, too, this argument of Kelsen's that customary law cannot be seen in terms of command (Kelsen, *General Theory of Law and State*, *op cit*, pp 34-35: "Suppose that, in a certain community, the following rule is considered valid: A debtor has to pay his creditor 5 per cent interest if there is no other agreement on this point. Suppose too that this rule has been established through custom; that over a long period of time creditors have in fact demanded 5 per cent interest and debtors have in fact paid that amount. Suppose also that they have done this in the opinion that such interest 'ought' to be paid. . . Whatever may be our theory about the law-creating facts with respect to customary law, we shall never be able to contend that it is the 'will' or 'command' of those people whose actual conduct constitutes the custom. . . In each particular case, neither the creditor nor the debtor has any will whatsoever concerning the conduct of other people. . . When, in a particular case, a court of the community condemns the debtor to pay 5 per cent interest, the court bases its judgment on the presumption that in matters of loan one has to act as members of the community have always acted. This presumption does not reflect the actual 'will' of any legislator."

be seen as law has been one readily accepted by a host of writers apart from Bentham.[30]

In any event, the notion of tacit command is a difficult one in explaining customary law. According to Hart,[31] it is not necessarily the case, as Austin said, that customary rules have no status in law until they are used in litigation. There is no reason why, as with statutes which are law before being applied by the courts, custom should not be viewed in the same way. The possibility, which undoubtedly exists, that a legal system could provide that custom were not to operate as law before being applied by the courts would be just that – a possibility – and not necessarily so. Again, this may merely seem to be a criticism of the way in which Austin viewed customary law, not on commands as explanatory of law. Leaving well alone can be an act of will and not a result of ignorance, and if this is how a custom exists, and is acknowledged to exist, it is difficult to see how this should not be seen as a form of command. There is nothing illogical in commanding that things remain as they are and securing that desire by failing to do a positive act.

There is a second difficulty for Austin, and that is that he defined laws as commands of a *sovereign*, and it is difficult to see how customary law, even if properly viewed in terms of tacit commands, can be viewed as being commanded by the sovereign.[32] The difficulty is that, in the absence of any act of commanding, it is rarely possible to ascribe the necessary mental element for a command we have already considered to the sovereign, however the sovereign is defined. For example, as Hart says, only rarely is the attention of the legislature turned to customary rules applied by the courts. Again, this may merely seem to be a criticism of the way in which Austin viewed customary law, not on commands as explanatory of law. Leaving alone can be an act of will and not a result of ignorance, and if a custom exists, and is acknowledged to exist, by such means, it is difficult to see how this could not be seen as a form of command. There is nothing illogical in commanding that things remain as they are and securing that desire by failing to do anything positive.

One further difficulty for Austin would seem to be that he puts more weight on the notion of tacit command than merely to explain the inclusion of customary law within law, which on the one hand is not universally accepted in any event, and on the other, is not of major importance considering the decline in significance of customary law in modern legal systems. In particular, Austin seeks to explain judicial decisions as sources of law in terms of tacit commands. He notices the view that judicial decisions can be seen as "purely the creature of the judges by who it is established immediately".[33] It needs but a moment's reflection, he says, to realise that this objection is groundless, and that all judge-made law is the creature of the sovereign state. However, apart from his analysis of customary law as commands, he does not expound on this further. In fact, of course, the argument is difficult to sustain. It is one thing to argue that judges derive

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[30] *Cf* Fuller, "Human Interaction and the Law'" (1969) 14 *AJJ* 1, where the neglect of customary law is described as doing great damage to our thinking about law.
[31] Hart, *op cit*, pp 45-46.
[32] *Ibid*, pp 46-47.
[33] *Austin*, p 101.

their authority to issue commands from the sovereign, or that they are indeed a part of the sovereign. But Austin's argument is not this. It is that the decisions of the judiciary are in some way tacitly commanded by the sovereign. As Rumble points out,[34] the rules that judges make may be contrary to the wishes or desires of the sovereign. At best, it may be, and probably usually will be, that the rules made will be about matters over which the sovereign has no discernible will. Neither is this only the case with development of common law rules, but applies, as every lawyer knows, to statutory interpretation as well when meaning has to be given to terms and phrases in statutes which the sovereign legislature plainly has not considered.

Cotterrell has argued that this objection betrays a misunderstanding of Austin's concept of the sovereign in his theory. The difficulty arises in seeing Austin's sovereign as a legal sovereign, an ultimate legislating institution. Cotterrell writes:

> ". . . the legal doctrine of parliamentary sovereignty in Britain - which recognises Parliament as the highest law-creating authority - does not, of course, entail that judges are delegates of Parliament. Austin's theory does not, however, suggest that they are. It claims merely that they must act as representatives of the constitutional order of which they are a part . . . Logically, it would seem to follow that delegation of sovereign power, insofar as it is accomplished by law, must itself be accomplished by means of the sovereign's commands – whether as specific requirements for action or prohibitions imposing limits on action, whether addressed to holders of an office or to those people who are to be subject to the power of the office-holder, and whether express or tacit."[35]

This must surely be right, but it misses the point. The Austinian line is not that delegation to the judiciary must of necessity be by the sovereign, but that the commands made in consequence of that delegation are somehow to be taken as commands of the sovereign. It may be that an argument could be made out for that on lines of agency,[36] but Cotterrell's attempted riposte to Austin's critics does not defend the target at which they were aiming.

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[34] Rumble, *The Thought of John Austin* (1985), p 112.

[35] Cotterrell, *The Politics of Jurisprudence* (1989), pp 75-76.

[36] An interesting complication here would be the suggestion sometimes made of the idea of the sovereign in the work of Hobbes (from whom Austin derived much of his thinking in this area, including the idea of tacit command – see *Leviathan* (ed Macpherson, 1968), Ch XXVI) that the sovereign obtains his authority only by the surrender or loan of power by the people. See *e.g.* Hampton, *Hobbes and the Social Contract Tradition* (1986), pp 122-123; but see for a contrary view, Gauthier in *Perspectives on Thomas Hobbes* (ed Rogers and Ryan, 1988), pp 148-151.

The Persistence of Law and Commands

A further problem with the idea of law as commands was also raised by Hart, namely the problem of the persistence of law which is not shared by commands. Hart wrote:

> "It is true there is a sense in which the gunman has an ascendancy or superiority over the bank clerk; it lies in his temporary ability to make a threat, which might well be sufficient to make the bank clerk do the particular thing he is told to do. There is no other form of relationship or superiority and inferiority between the two men except this short-lived coercive one. But for the gunman's purposes, this may be enough; for the simple face-to-face order 'Hand over those notes or I'll shoot' dies with the occasion. The gunman does not issue to the bank clerk *standing orders* to be followed time after time by classes of persons. Yet laws pre-eminently have this 'standing' or persistent characteristic. Hence if we are to use the notion of orders backed by threats as explaining what laws are, we must endeavour to reproduce this enduring character which laws have."[37]

This really is a very strange argument from Hart in that all it serves to show is the inadequacy of his characterisation of the Austinian position. Let us examine the various stages of this characterisation. First, laws are commands. Secondly, commands are orders backed by threats. Thirdly, an order backed by threats can be described by the gunman situation. Fourthly, an order backed by threats with regard to legislators and populace is the gunman situation writ large. But, says Hart, orders backed by threats are not persistent and enduring, whereas laws are. The fallacy of this argument is clear. All Hart has addressed here is the idea that laws are not orders backed by threats. But the Austinian apologist would not need to deny this, for reasons we have already seen – the notion of command connotes something different to naked orders backed by threats. Hart's target is a straw man.[38] In any event, as Hart himself acknowledges, orders (commands) which are not law *can* be persistent, for example, in the notion of a standing order.[39] He argues that it is difficult to account for the persistence of law in the same way, but it can be seen by this that his position perceptibly changes. On the one hand he suggests that laws are persistent whereas commands are not, and then also argues that the way the persistence of commands can be explained is different to that which can explain the persistence of laws.

The Promulgation of Laws and Commands

Hart was perhaps on firmer critical ground in pointing out that, whereas commands are usually addressed to people, it is wrong to think that laws are

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[37] Hart, *op cit*, pp 22-23.

[38] It is arguable that such a defence of the Austinian position could be found in Austin's work but, even if it is a position that could be taken up only by his apologists as a variation of his position, that is something that must be allowed in the same way that Hart's attack is on a target that differs from Austin's position at certain points (see Hart, *op cit*, p 18).

[39] Hart, *op cit*, p 23.

addressed, as Austin does.[40] To do so suggests a face-to-face situation which does not exist. A command does involve addressing, however, as do all forms of ordering. Although it may be desirable, Hart says, to make sure laws are brought to the attention of those to whom they apply, it is not essential that this is done. When one uses the term "address" in the context of law, what is usually meant is that the persons who are "addressed" are those to whom the law applies.

This point does have some substance, and is more than a terminological nicety. However, there are a number of points which could be made out for Austin in his defence here. The first is that the notion of addressing is not central to Austin's characterisation of a command. Although it must be admitted he does use the term, he does indicate at other points that he envisages something rather different. It will be remembered, for example, that when he introduces the idea of "command", he defines it in terms of a "signification" of a desire.[41] A signification, whilst connoting an addressee, has less overtone of a recipient than does the term "address". There is, however, a more substantive point, which defends the command idea. This is that there is an argument to be made out that a law does have to be addressed in order to be a law. Fuller famously made such a claim when he argued that law had to fulfil eight desiderata in order to be law. The term "desiderata" is, however, misleading, because a failure in any one of these will result, he says, in that law not being a law at all. He wrote this:

> "A total failure in any one of these eight directions does not simply result in a bad system of law; it results in something that is not properly called a legal system at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract."[42]

However, Fuller naturally does acknowledge that, not only is it not possible to educate all those to whom a law applies, but to do so would involve a price that would be too high to pay or, as he puts it, that the requirement of promulgation is subject to the principle of marginal utility.[43]

In fact, Fuller does not make it clear whether, in referring to a total failure to promulgate, he means a failure with regard to all law, or whether a single law which is totally not promulgated is not a law. The signs seem to indicate that he means the more acceptable idea that he is referring to law in general, because he says that failure results in there being no legal system, which clearly could not be the case with respect to an individual law.[44] But he does not say why, if he does so believe, the principle would apply to single laws. If total failure to promulgate all law means the collapse of a legal system, why is it not the case that an unpromulgated law is not a law?

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[40] Hart, *op cit*, p 21-22.
[41] *Austin*, p 89.
[42] Fuller, *The Morality of Law* (revised ed, 1969), p 39.
[43] *Ibid*, p 49. In fact, Fuller seems to claim that Bentham was willing to go further than he was in this regard.
[44] However, there are indications too that he may be considering laws in the individual as well as the general sense; see *e.g. ibid*, pp 51, 54.

A further interesting attack can be made arising from the requirement that commands be addressed, on these lines. Commands are addressed to those to whom they apply in the sense that it is the addressee whose conduct is the subject of the order. As Hart says,[45] when we speak of laws being addressed we pick up on this particular aspect of addressing. However, laws do not operate in the same way as commands because their addressees (insofar as they have them) are not those whose conduct is the subject matter of the law. Laws are directed at officials, not at the population at large. The conduct which is the subject matter of the law of murder is clearly that of those who may or may not commit it, namely everyone. However, the law which is said to prohibit murder in fact merely amounts to a direction to an official (a judge) as to what he should do in the event of a murder being committed, namely pass a particular sentence. A difficulty associated with this idea derives from the fact that Austin linked it with a requirement for sanctions. But that is not necessary. A direction to an official need not only be to apply a sanction in the event of transgression of a law, but can authorise the provision of a facility. For example, the Wills Act 1837 stipulates that two witnesses shall be required in order for a will to be legally valid. From this it may be said that one ought to have a testator's signature witnessed by two witnesses. But there is nothing in the Act that says that this is what a citizen ought to do. It provides the citizen with a facility which he may wish to take up. The command is placed upon officials, particularly judges, who are ordered where there are two witnesses to treat the will as a valid legal will.

There is a paradox here, for in this criticism to which the Austinian apologist would seem to have no reply, there lies the basis of a powerful defence. For the fact that it is possible to separate the relationship between the law (legislature/sovereign) and the citizen on the one hand, and the law and the official on the other, means that one can maintain both the idea that the rule may be power-conferring, and yet also that it imposes a duty by way of a command. The command imposes a duty on the officials to recognise the effect of a citizen taking up a facility which the law offers to him. So power-conferring rules (to use Hartean terminology) can be seen as always also duty-imposing too.

However, there is a sting in the tail for this defence. This is that the duty arising from the command does not in our example arise from the application of a sanction stipulated by that command. The sanction on the judge who fails to obey the command must come from quite another command. The law prohibiting murder is one that Austin would see as placing a duty on the citizen not to murder, and not on the official. The duty on the citizen, if it were nevertheless to derive from the command to the judge to sentence in the event of a murder, would necessitate a move for Austin away from his theory of duties. For Austin said that duties derive from commands addressed to those who have the duty,[46] and in our example a duty has arisen from a command directed at someone else. To rescue the idea of command from the clutches of power-conferring rules for the Austinian thus necessitates also in a shift on the basis of duties, and that may be too high a price to pay.

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[45] Hart, *op cit*, p 22.
[46] See *e.g. Austin*, p 89.

Alternatives to 'Command'

Bentham was unhappy with the word "command" and considered various alternatives.[47] His objection was threefold. First, the source of law (for Bentham, the sovereign) was not implied by the use of the word. Secondly, it did not include a countermand, and thirdly, it was a term which connoted a concept rather than a material object unlike, for example, "order" which can apply both to the idea and to the piece of paper on which it is written. But neither is "order" adequate, because that too does not connote the sovereign. Other alternatives that might appeal initially to the modern mind include "decree", but as Bentham said, this is wide enough to cover the resolution to issue a command as well as the command itself, and in any event could not cover the common or customary law well. Bentham considered many other possibilities – thirteen in all – and preferred, if preference had to be made, "mandate" to any other, although to that he also had objections.

Perhaps the most attractive alternative to command is "imperative". Sometimes the two words are used interchangeably, and the command theory is often referred to as the imperative theory. But it is possible to draw a distinction between the two ideas, and to the extent that imperatives differ from commands, some of the defects in command, insofar as characterising law is concerned, are perhaps avoided.

An imperative may be described as a grammatical form which contains the word "shall", or some such prescriptive equivalent (such as "must"), or which can be translated into such form. "Shut that door" is an imperative if its meaning is the same as "You shall shut that door". However, imperatives which have to be translated into the "shall" form are not necessarily recognisable as imperatives by their grammatical form alone. For example, "Shut that door" may, as well as being an imperative, be said by someone to mean something entirely different. It may be said as a response to a question as to how best to keep out a draught (to give advice), to remind someone of a particular comedian's catchphrase (to give information), in response to a question as to what one would like done (to request), or a host of other ideas. The "shall" form, however, does not have these alternative meanings. In the other form it is necessary to know the context in which what is said is said in order to determine whether or not it is an imperative.

An imperative can be contrasted with a command in that a command may be seen as a form of imperative about which it is essential to know certain circumstantial matters in order to determine whether it is a form of imperative that is a command. All commands are imperatives, but not all imperatives are commands. What seems to make some imperatives commands is that they are used in certain circumstances. For example, there is a commander and an addressee, one in a position of superiority (but not necessarily absolute) over the other. "Shut that door" said by a school student

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[47] *Of Laws In General*, p 10f; *cf* Cotterrell, *op cit*, p 59 who, whilst noting that Bentham prefers to talk of law as "an assemblage of signs declarative of a volition", argues that he essentially treats law as a species of commands. He writes: "the thrust of his conception turns out to be much the same as Austin's direct and straightforward characterisation."

to a head teacher is imperative, but not a command. Said by a head teacher to a student, it becomes a command.

With shall-statements, we can say that they are clearly imperatives, but not necessarily that they are commands. We need to know the circumstances in which such a statement is made in order to determine whether or not it is a command. With all non-shall imperatives, we need to know the circumstances in which they are made, both to tell whether they are imperatives at all (or requests, provision of information etc.), and also to tell whether they are imperatives which can also be commands. Part of this 'circumstantial evidence' is the wish-desire element. We do not know whether a non-shall statement is an imperative unless we know the purpose for which the statement is made. It is not possible to identify the character of statements like "shut that door" without such information. This may be determined only if we know the wishes or desires of the person making the expression. It therefore follows that, if the wish-desire element is, as we have argued above, not something that should be part of a characterisation of law, that law may perhaps better be seen as a non-command imperative. Certainly, by taking out the elements from command that we have mentioned is to remove the source of much that in that model necessitates some difficulties for a characterisation of law. In particular, the requirement of an addressee is removed, which squares with our conception of a law as being a law even before it is promulgated. Difficulties of laws applying to whole communities over a time-scale are also removed if the psychological element and the addressee element are removed. In addition, the idea that there is something in the grammatical form of laws that generates authority, is also removed. And because an imperative is a grammatical form requiring no empirical facts of superiority and inferiority, psychology, and a personal relationship, the notion of self-referential law can be accounted for. There is nothing logically difficult in stating an imperative which in fact applies to oneself.

We can illustrate the general point from another angle. R.M. Hare has argued that, as imperatives can be contrasted with indicatives, attempts to reduce imperatives to indicatives should be resisted as false.[48] He says that there are two ways that this has been attempted, one of which is of particular interest to us here. This is the idea that imperatives are described as representing the mind of the speaker. "A is right" therefore means "I approve of A" or "shut the door" means I want you to shut the door. Similarly, we may say this is represented in Austin's work on law, for he argues that "X is the law" means "X is desired by the sovereign that it be done". But the first example in each case is clearly prescriptive and cannot be explained by a description. As Hare says: "instructions for cooking omelets (Take four eggs, &c.) are instructions about eggs, not introspective analyses about the psyche of Mrs. Beeton."[49]

We can apply this line of argument clearly to the Austinian view of commands which confuses the descriptive and prescriptive by arguing that the prescriptive nature of law (the command) derives from a description of

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[48] Hare, *The Language of Morals* (1952), p 5f.
[49] *Ibid*, p 6.

what is the desire of the sovereign.[50] It should be kept clear, however, what is entailed in this argument. To say that imperatives are not descriptions of this type does not entail that to identify a form of imperative – the command – the circumstantial evidence is not required. Take away this circumstantial, psychological, element, however, and one is left at best with a pure non-command imperative. Therefore it is possible to agree with the objections to Austin's model of law on this basis, and yet retain an imperative model – but of necessity a non-command imperative model.

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[50] In that Austin argues that the existence of a command of the sovereign gives rise to a duty (see *Austin*, p 89), and that the command exists because of a fact (the desire of a sovereign), Austin attempts to derive an ought from an is here.

ADVERSE POSSESSION AND UNINCORPORATED ASSOCIATIONS

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It is trite law that an unincorporated association has no separate persona from those of its members, save for the purposes of taxation.[1] This causes well recognised difficulties which do not exist in the case of a corporation, as the corporation has a legal existence independent of its members.[2] One such is the ownership of property.[3] Since in the case of an unincorporated association there is no legal entity separate from its members, a transfer of property cannot logically be made to the association under its name.[4] Where an attempt to do so is made, if the disposition is not to fail, some means of explaining how the disposition takes effect has to be found. The problem can be avoided if proper consideration is given to the fact that the association has no persona capable of taking property. The usual means by which the problem is overcome is by transferring the property to trustees who hold it on behalf of the members of the association. That itself is not without its difficulties.[5] The purpose of this article is to consider one aspect of the holding of property by unincorporated associations which seems hitherto to have attracted little attention in the UK courts, but which would seem to have the potential to cause difficulties on a frequent basis. The question is to what extent the law of adverse possession can be prayed in aid of unincorporated associations in order to make title to land where, for some reason or other, documentary title cannot be relied on.

Dispositions To Unincorporated Associations

To begin with, we may note that use of the name of an unincorporated association as the donee or grantee of property does not necessarily mean the

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[1] See Glennon, "Questioning the legal status of unincorporated associations" (2000) 51 *NILQ* 120.

[2] The problems posed by unincorporated associations not having a legal persona separate from the members who make up the association are described in the Law Reform Advisory Committee for Northern Ireland's Disussion Paper No 9 *Unincorporated Associations* (2002).

[3] See Warburton, "The holding of property by unincorporated associations" [1985] *Conv* 318; Ford, *Unincorporated non-profit associations* (1959).

[4] So a lease cannot be made to an unincorporated association: *Jarrott* v *Ackerley* (1915) 113 LT 371; *London Borough of Camden* v *Shortlife Community Housing* (1993) 25 HLR 330. See also *Henderson* v *Toronto General Trusts Corp* [1928] 3 DLR 411; *Canada Morning News Co* v *Thompson et al* [1930] 3 DLR 833; *Freeman* v *McManus* [1958] VR 15.

[5] If the members of the association are beneficiaries under a trust, they have an equitable interest in the assets held in trust for them. Disposition of an equitable interest must be in writing to comply with s6 of the Statute of Frauds (Ir) 1695 (*cp* Law of Property Act 1925, s 53(1)(c)). How does the equitable interest of a member of the association pass on his resignation if the resignation is not made in writing?

disposition is of no effect. There is no shortage of authority upholding testamentary gifts where the testator has made a disposition of property to an unincorporated association. If the gift is upheld, it is on the basis that the gift creates a trust for the purposes of the association, but that those purposes being charitable, the gift is valid; or alternatively, that the gift is a gift to the members of the association at the time the gift takes effect,[6] so that the use of the association's name in effect dispenses with the need for the testator to include in his will a list of all such members. A refinement of this interpretation which seems best suited to meet the intention of the donor is that the gift is to the members, but subject to the contractual arrangements between them as association members. The position was explained by Cross J *in Neville Estates Ltd* v *Madden*:[7]

> "The position as I understand it is as follows: Such a gift may take effect in one or other of three quite different ways. In the first place it may on its true construction be a gift to the members of the association at the relevant date as joint tenants so that any member can sever his share and claim it, whether or not he continues to be a member of the association. Secondly, it may be a gift to the existing members not as joint tenants, but subject to their respective contractual rights and liabilities toward one another as members of the association. In such a case a member cannot sever his share. It will accrue to the other members on his death or resignation, even though such members include persons who became members after the gift took effect. If this is the effect of the gift, it will not be open to objection on the score of perpetuity or uncertainty unless there is something in its terms or circumstances or in the rules of the association which preclude members at any given time from dividing the subject of the gift between them on the

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[6] See for example *Cocks* v *Manners* (1871) LR 12 Eq 574, where a gift to the Sisters of the Charity of St Paul at Selley Oak was upheld as a charitable gift, whereas a gift to the Dominican Convent at Carisbrook was upheld as a gift to the members of the Convent. Similarly a gift to an institution known as the Franciscan Friars of Clevedon was upheld as a gift to the members of the institution in *In re Smith* [1914] 1 Ch 937, Joyce J refusing to follow several Irish authorities in which similar gifts had been held void, on the ground that the cases were "far from satisfactory". A disposition to the committee of an association, rather than to the association itself, was upheld on the same basis in *In re Clarke* [1901] 2 Ch 110. If the disposition is to be upheld as a disposition to the members of the association at the time of the gift, it is essential that there is nothing in the disposition to prevent the members disposing of the property should they so wish, as the extract quoted in the text from the judgment in *Neville Estates Ltd* v *Madden* [1962] 1 Ch 832 shows. If the intention of the grantor was that the property should be held in trust for present and future members of the association, so that the present members could not dispose of the property, the disposition will fail for perpetuity. There is no failure however merely because the disposition is to trustees for the members of the association or to a committee of the members, so long as the members, trustees or committee can dispose of the property. See *In re Clarke* [1901] 2 Ch 110; *In re Drummon*d [1914] 2 Ch 90. For a useful discussion, see Widdows, "Trusts in favour of associations and societies" (1977) 41 *Conv* (NS) 179.

[7] [1962] 1 Ch 832. See also *Re Cain* [1950] VLR 382; *Leahy* v A-*G for New South Wales* [1959] AC 457; *Re Goodson, deceased* [1971] VR 801.

> footing that they are solely entitled to it in Equity. Thirdly, the terms or circumstances of the gift or the rules of the association may show that the property in question is not to be at the disposal of the members for the time being, but is to be held in trust for and applied for the purposes of the association as a quasi-corporate entity. In this case the gift will fail, unless the association is a charitable body."

Whether an *inter vivos* disposition of land in which the grantee is an unincorporated association would be held to be an assurance to the members of the association at the date of the grant is unclear.[8] On the one hand the situation would seem to be similar to that in *Wray* v *Wray*,[9] where an assurance of land in which the name of the grantee was the trading name of a partnership was held to be a transfer of the land to the members of the partnership at the time of the deed.[10] Against that, in *Jarrott* v *Ackerley*[11] Eve J rejected an argument that a lease to an unincorporated association was a lease to the members of the association at the date of the lease, holding the contention that the lease operated to render each member of the association liable on the lessee's covenants "wholly untenable".[12] The cases are certainly distinguishable: in *Wray* v *Wray* the unincorporated body to which the grant was made was a trading partnership, whereas in *Jarrott* v *Ackerley* the lease had been made to a non-commercial association, a members' club. Again, in *Wray* v *Wray* the grant was a conveyance in fee simple, whereas in *Jarrott* v *Ackerley* the disposition was a lease imposing obligations on the lessee, and the potential liability of the members of the association under the covenants in the lease was a matter of some concern to Eve J. No such issue arose in *Wray* v *Wray*. A third way to distinguish the two cases is simply by reference to the number of members of the bodies in question. In *Wray* v

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[8] There are US authorities where courts have held assurances to unincorporated associations to be dispositions to the members of the association: see Ford, *op cit*, p5, citing *Byam* v *Bickford* 140 Mass 31 (1885); *Popovich* v *Yugoslav National Home Society Inc* 106 Ind App 195 (1939); *The Golden Rod* 197 F 837 (1912). The possibility that a lease to an association might be construed as a lease to the members of the association is acknowledged in *Henderson* v *Toronto General Trusts Corporation* [1928] 3 DLR 411 and *London Borough of Camden* v *Shortlife Community Housing* (1993) 25 HLR 330.

[9] [1905] 2 Ch 349.

[10] See also *Chartered Bank (Malaya) Trustee Ltd* v *Abu Bakar* 1957-1 MLJ 40. In *Alagappa Chettiar* v *Coliseum Café* 1962-1 MLJ 111 a landlord sought possession of premises which had been let to a firm on a monthly tenancy 38 years earlier. During that time there had been various changes in the partnership and the landlord argued that the estate vested in the original partners as tenants could not have passed to the present members of the partnership without proper instruments of transfer. Hill J considered that the argument might be sound had some evidence been adduced by the landlord to prove the case. In the absence of such, Hill J concluded that the landlord had acquiesced in and possibly approved changes in the partnership. In the US a different view has been taken: see *Arthur* v *Weston* 22 Mo 378 (1856), discussed in Ford, *op cit*, p 4.

[11] (1915) 113 LT 371.

[12] An argument that a lease could take effect as a disposition to the individuals who executed the counterpart, as trustees for the association, was rejected by Millett J with similar forthrightness in *London Borough of Camden* v *Shortlife Community Housing* (1993) 25 HLR 330.

Wray there were four partners at the date of the grant: in *Jarrott* v *Ackerley*, to have held the lease valid as a lease to the members would have resulted in a tenancy held by the 2,000 members of the association.[13] Notwithstanding these differences however, the similarity remains that in each case under the terms of the disposition land was assured to a grantee which had no existence in law independent of the members of the body in question.

The problems of holding that a disposition to an association is a grant to the members of the association are particularly acute where the subject-matter of the disposition is land. The problems are succinctly described by Faulkner J (dissenting) in the American case of *Murphy* v *Traylor*[14]:

> "In most jurisdictions which permit unincorporated associations to hold title to real property, the title is vested in the members thereof jointly. Under that theory in our State each and every member and his or her spouse would have to join in the execution of a deed or mortgage. But, what happen when a member leaves or dies? Do his or her heirs and next of kin have to be tracked down to get their signatures? And, suppose a member flatly refused to sign, could good and merchantable title be conveyed by the remaining members?"[15]

The same problems arise if the disposition is construed as a grant to the members subject to the contract between them. It is hard to see how the interest of any individual member can be divested otherwise than by instrument sufficient to assure that interest or by operation of law. The rules of the association may provide that on his resignation any interest he has in the assets of the association shall cease, but where there has been no assurance by an outgoing member of his interest in land owned by the members, it would seem that the only way that the title of the other members will be good is by adverse possession.

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[13] *Cp London Borough of Camden* v *Shortlife Community Housing* (1993) 25 HLR 330, where Millett J speaking of the argument that the lease could be construed as a grant to the members of the association said that "[s]uch a construction would lead to such manifest absurdity in the present case that no-one had the courage to advance it."

[14] 292 Ala 78 (1974).

[15] In the case the Supreme Court of Alabama held by a majority that a devise of realty to an unincorporated church was valid where the church was subsequently incorporated even though this took place after the death of the testator. Merrill J, giving the opinion of the majority of the court, held that title to the property passed under the will to the incorporated church regardless of whether it was held in trust by the trustees of the church, individual members of the unincorporated church, or the next of kin of the testator, and passed to the church when it was incorporated. Heflin J, concurring in the result, held that an unincorporated religious society did have the capacity to acquire property by devise, and would have overruled *McLean* v *Church of God* 254 Ala 134 (1950) in which the court had held that a gift of land by will to an unincorporated church failed, on the ground that as an unincorporated association the church could not hold title to land. The gift in that case could not be upheld as a charitable purpose trust as there was no evidence that the testator intended to create a trust of the property. There is however no discussion in the case of the possibility that the gift could have been construed as a gift to the members of the church individually.

Equally, the question whether the members of the association can establish a title by long possession of the property will be relevant where there has been no disposition of property to the members of the association. Typically, the problem arises not because at some date in the past members of the association took possession of property unlawfully, but rather because at some date in the past a landowner allowed the association to enter on property and the association has been there ever since, without paper title. The difficulty arises commonly where the association in question is the congregation of a church and many years ago a founder member allowed his land to be used as the site for construction of the church building, but the same situation can exist in the case of any other association where land was provided for use of the association. Can the association rely on the Limitation Order to establish title to the land it possesses?

There appears to be no UK or Irish authority and only one Commonwealth authority on the matter. In the United States the question has arisen in a number of cases whether churches can rely on the Statute of Limitations in circumstances where a disposition of the land to trustees for the benefit of the church has failed. No clear picture emerges from the decisions. On the one hand there are cases which take the view that as the church, being an unincorporated association, has no persona, it cannot acquire title by adverse possession, it being said to be a requirement that for adverse possession to take place, there must be someone who can hold a legal estate in land. On the other hand, some decisions have allowed claims based on adverse possession, either on the basis that members of the association in their individual capacity, or alternatively, officers of the association either in their individual capacity or as such officers can run a title. There are problems however with such solutions: if the members of the association are now not the same as those who were in possession when title was extinguished against the landowner, how does title pass to the present members of the association? If the present members of the association have not each been in possession for 12 years, do past members have claims which are not barred? Can the trustees of the church be taken to have a title by the possession of the members of the association? The purpose of this article is to examine the various issues involved.

Adverse Possession

A detailed explanation of the nature of the doctrine of adverse possession is both outside the scope of this article and unnecessary for the present discussion.[16] Nonetheless, a brief summary may be helpful as a starting point for an examination of whether an unincorporated association can rely on the doctrine to assert a title to land. The essence of the doctrine is that a person wishing to bring an action to recover possession of land must do so within the time limited for such actions under the Statute of Limitations. Article 21 of the Limitation (NI) Order 1989 provides that no action may be brought to recover land after the expiration of 12 years from the date on which the right of action accrued.[17] Once the limitation period has expired

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[16] For a recent discussion of the doctrine see *J A Pye (Oxford) Ltd* v *Graham* [2002] 3 All ER 865.

[17] Other time limits apply in certain cases.

without the plaintiff having brought proceedings, the title of the plaintiff to the land is extinguished.[18] The Order says nothing about the rights of the person in possession once the limitation period has expired, and the position is that the plaintiff's title having been extinguished, the person in possession has a better right to the land than anyone else.[19] Difficult questions arise as to the precise nature of the rights of the person in possession, which need not be addressed here:[20] for present purposes the question is whether an unincorporated association can rely on the provisions of the legislation to assert a title to land, whatever the precise nature of that title may be.

Possession Originally Lawful

One problem standing in the way of an association trying assert that the title of the paper owner has been extinguished is that if the association is in possession of the property by permission of the person in whom the land is vested, the possession of the association is not adverse for the purposes of the Limitation Order. Time does not run against a landowner who has permitted someone to have possession of the land. Were it otherwise, time would be running in favour of a tenant who was occupying under a lease granted by the landowner. Similarly, time does not run in favour of a licensee of the land against the owner who granted the licence.[21] If therefore, in the case in question, the owner of the land granted permission to the association to use the land, time cannot be running in favour of the association.

All may not however be lost. If the arrangement was a tenancy at will or a bare licence, the arrangement will have come to an end on the death of the lessor[22] or the licensor,[23] so that possession by the association for twelve years from the death will mean that the association should be safe. Safety is not guaranteed however, as although the doctrine of implied licence has been abolished,[24] there is nothing to prevent the courts from finding that in the circumstances of the case the person who succeeded to the paper title on the death of the original owner granted a new licence by implication from the facts.[25] If such a finding is made, then the association's possession remains by permission and time will not be running. If the original landowner was a founder member of the association, and his successor is also a member of the

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[18] Limitation (NI) Order 1989, art 26.

[19] Problems arise where the plaintiff was other than an owner in fee simple, *e.g*, a life tenant or a lessee. For the position as to reversioners and remaindermen, see Limitation (NI) Order 1989, art 22. For the position where the plaintiff is a lessee, see discussion in *Fairweather* v *St Marylebone Property Co Ltd* [1962] 2 All ER 288.

[20] On this see Omotola, "The nature of interest acquired by adverse possession of land under the Limitation Act 1939" (1973) 37 *Conv* (*NS*) 85; Curwen, "The squatter's interest at common law" [2000] *Conv* 528.

[21] See *Hughes* v *Griffin* [1969] 1 WLR 23; *Powell* v *McFarlane* (1977) 38 P & CR 452; *BP Properties Ltd* v *Buckler* (1987) 55 P & CR 337; *Buckinghamshire CC* v *Moran* [1989] 2 All ER 225; *Onyx (UK) Ltd* v *Beard* (14 March 1996, unrep).

[22] *James* v *Dean* (1808) 11 Ves Jr 383.

[23] *Terunnanse* v *Terunnanse* [1968] AC 1086.

[24] Limitation (NI) Order 1989, sch 1 para 8(5).

[25] *Ibid*, para 8(6). See Jourdan, *Adverse Possession* (2003) para 35-16 *ff* and authorities there discussed; *cp Terunnanse* v *Terunnanse* [1968] AC 1086.

association, it may be that the court would have little difficulty in implying a new licence in the circumstances. Apart from that, if the successor is a member of the association, it is arguable that his own occupation of the land should prevent the joint occupation of the others being adverse possession by them, on the basis that where more than one person is in occupation, possession will be attributed to the person with lawful title.[26] Such an argument did not however prevent the court in *Churcher* v *Martin*[27] holding that trustees had established title by adverse possession even though one of the trustees was for most of the relevant period the paper owner of the land, Kekewich J saying that the joint possession of the trustees excluded that of any one of the joint possessors on his own behalf, and that the accident of the trustee's beneficial interest did not operate to defeat the title of the trustees which he intended to preserve.

Ability To Hold Estate In Land

Although *Churcher* v *Martin* may assist the association to overcome the difficulty where the paper owner is one of the members, there may be a more fundamental problem facing the association in trying to establish a title to land by adverse possession. Several of the cases in which claims have been advanced on behalf of unincorporated associations have failed on the ground that the lack of legal personality prevents the association being able to hold title, and accordingly prevents it from acquiring title by possession. In *Heiskell* v *Trout*[28] land was conveyed to trustees for the purposes of building a house to be used by the minister of a church. The trusts were declared void by the court and the question arose whether the church could claim the land by adverse possession as against the various persons who had contributed the purchase money for the land, and who were entitled to the land under a resulting trust on failure of the declared trusts. The Supreme Court of Appeals of West Virginia held that no lapse of time, however long, could confer on the church any title, legal or equitable. The opinion of the court was delivered by Snyder J who said:

> "In order to obtain a title by adverse possession or the lapse of time, the adverse claimant must be capable of a legal ownership of the property. Here the church, the alleged claimant, is incapable of holding the property under its claim, and therefore no possession or adverse claim by it could by the lapse of time or under the Statute of Limitations confer upon it any title or defeat the claims of the rightful owners."

Similarly, in *The Afton band of Indians* v *A-G of Nova Scotia*[29] a claim to land was made by a band of Indians on the basis of adverse possession. It was not in doubt that the land in question had been occupied by the Band for very many years. Notwithstanding possession for more than the limitation period however, Jones J held that the claim of the Band could not succeed. The Band, being an association not having corporate status, could not acquire

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[26] See Jourdan, *op cit*, para 7-76 citing *Littleton*, s 701 and *Jones* v *Chapman* (1847) 2 Ex 803.
[27] (1889) 42 Ch D 312.
[28] 31 W Va 810 (1888).
[29] (1978) 85 DLR (3d) 454.

real property and consequently could not acquire a title to the land by possession.[30]

A Person In Whose Favour Time Can Run

In *Stewart* v *White*[31] Sharpe J based his view that an unincorporated church could not acquire title by adverse possession on an analogy between adverse possession and prescription, and the inability of an unincorporated association to take a grant of property in its own name:

> "By the theory of prescription and likewise of title by adverse possession, a grant is presumed from long acquiescence of the landowner in the exercise of asserted rights which are inconsistent with his own. As in the case of an actual deed there must be some person, either natural or artificial, who can take title. The church society collectively, being unincorporated, was without capacity to acquire or hold title."

The analogy between prescription and adverse possession is not valid in England and Wales, or in Northern Ireland.[32] Prescription operates to confer a title to an easement or profit on the basis of a grant being presumed from long usage. The Limitation Order on the other hand operates simply to destroy the title of the paper owner. The Order does not transfer the title which is extinguished to the person whose possession of the land has brought that extinguishment about.[33] Hence the inability of the grantee to hold a title to land does not logically prevent the Order operating to destroy the title of the paper owner.[34] On the other hand, the requirement in the Order that there be a person in whose favour time can run for a cause of action to accrue[35] may have the same result. As by definition an unincorporated association has no persona of its own, is it a person in whose favour time can run?[36] If it is not, then the position would seem to be the same as that described in *Heiskell* v *Trout*, *viz*, that no lapse of time will defeat the title of the paper owner. In *The Afton band of Indians* v *A-G of Nova Scotia*[37] one question was whether the Band, as an unincorporated association, was a "person" for

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[30] The court recognised however that members of the band as individuals could acquire title by possession: see discussion below, p 284.

[31] 128 Ala 202 (1900).

[32] See *Buckinghamshire CC* v *Moran* [1989] 2 All ER 225; Gray, *Elements of Land Law* (3rd edn, 2001) p 250; Megarry & Wade, *The Law of Real Property* (6th edn, 2000) para 21-002.

[33] *Tichborne* v *Weir* (1892) 67 LT 735.

[34] *Cp* the situation in England where a minor is unable to hold a legal estate in land (Law of Property Act 1925, s 1(6)). Notwithstanding such incapacity, it appears that possession by a minor would operate to extinguish the title of the paper owner: see *Powell* v *McFarlane* (1977) 38 P & CR 452; Jourdan, *op cit*, para 20-40.

[35] Limitation (NI) Order 1989, sch 1 para 8(1).

[36] *Cp The Reformed Church of Gallupville* v *Schoolcraft* 65 NY 134 (1875) (Dwight J (diss)): "It is of the essence of adverse possession that the rightful owner should be kept out of possession by some person claiming title, and against whom he could bring an action to regain possession. . . Whom could the [paper owner] have sued in the present case? Not the unincorporated association, which for this reason cannot claim the benefit of the Statute of Limitations."

[37] (1978) 85 DLR (3d) 454.

the purposes of the Quieting Titles Act 1967 (Nova Scotia) which allowed a person claiming a property right in land to apply to court for a certificate. The court held that it was not, and the litigation had to proceed as a representative action by the members of the Band acting through the chief of the Band. On the other hand, and in contrast to the corresponding Canadian legislation applicable in the *Afton band* case, the Interpretation Act 1978 provides that unless a contrary intention appears, the word "person" where it appears in legislation includes a body of persons corporate or unincorporate.[38] There seems to be nothing in the Limitation Order to indicate a contrary intention requiring "some person in whose favour the limitation period can run" to be read as excluding a body unincorporate. If an unincorporated association *is* a person in whose favour time can run under the Limitation Order, then after the limitation period has run the title of the paper owner will have been extinguished. That being so, what is the position then? In ordinary cases, the person whose possession has brought about the extinguishment of the title of the paper owner has a better claim to the land than anyone else; he has in other words a possessory title which he can transfer to a third party. That cannot be the position where an unincorporated association is concerned unless inclusion of an unincorporated association in the term "person" in the Limitation Order means also that the association has acquired a persona so as to enable it to acquire such a title. That would seem unlikely, as it begs the question, how could the association execute a transfer of its rights in the land to a third party? The result therefore would seem to be that if an unincorporated association is a person in whose favour time can run for the purpose of the Limitation Order, the title of the paper owner will be extinguished after the limitation period has expired, but the association, for want of a persona, is unable to assert whatever rights follow from the fact of possession.

Where Trustees Exist

If the fact that an unincorporated association lacks personality separate from its members prevents the association from asserting title by adverse possession, is the problem avoided where the association has trustees who have been appointed to hold property on its behalf? Where this is the case, the difficulties of there being no-one who can hold an estate in land, or in whose favour time can run, seem to be overcome.[39] And if the trustees of the association can extinguish the title of the paper owner, will the position be that succession to the office of trusteeship means that the rights based on the Limitation Order pass to successors in office under the appointments provisions of the Trustee Act without conveyance?[40] If this analysis is

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[38] Interpretation Act 1978, s 5 and sch 1, applicable to NI legislation by s 24. For examples of an unincorporated association being a "person" in other contexts, see *Davey* v *Shawcroft* [1948] 1 All ER 827 and *Frampton and anor (Trustees of Worthing RFC)* v *IRC* [1987] 1 WLR 1057.

[39] See *The Reformed Church of Gallupville* v *Schoolcraft* 65 NY 134 (1875).

[40] See Trustee Act (NI) 1958, s39. Where land is acquired by bodies associated for religious purposes and is vested in trustees, the land vests also in the trustees' successors in office without conveyance: see Trustee Appointment Act 1850, s 1; also Trustee Appointment Act 1869 and Trustees Appointment Act 1890. This provision is unlikely however to be of assistance where land is acquired by

possible, it gets over also the problem of the fragmentation of title which may follow from saying that it is the members of the association whose possession has barred the title of the paper owner, and accordingly it is they who have acquired title by possession.[41]

That trustees can acquire title by possession is established. *Churcher* v *Martin*[42] has already been noted. In *Re Ingleton Charity*[43] the vicar and churchwardens of a parish were trustees of land which was used as a school. On closure of the school in 1929 the title of the trustees came to an end under the reverter provisions of the School Sites Act 1841. The trustees remained in possession of the land however and were held to have acquired title by possession after the limitation period had run. Two points are of interest for present purposes: first, the vicar and churchwardens had not been the same persons throughout, various changes in the offices having taken place; and secondly, the present vicar and churchwardens held the land on the trusts originally declared.

A number of American decisions exist in which courts have held that trustees of an unincorporated association can acquire title by adverse possession. In *Bridges* v *Henson*[44] for example, a petition was brought by the trustees of an unincorporated church claiming title to land by adverse possession. The petitioners were not the original trustees who had taken possession of the land, but were successors in office, the petition stating the original trustees to have vacated office "by death, removal from the community or other causes" and the petitioners having become trustees by being "appointed, elected, and qualified according to the rules of discipline governing their organisation." The court held that the petitioners were entitled to judgment in an action to prevent the erection of a fence by the defendants on the land claimed by the petitioners. Likewise, in *Burton* v *Smith*[45] and *Booth* v *Mason*[46] trustees of a church were held entitled to land by adverse possession. In *Salem Church of the United Brethren in Christ in Baltimore County* v *Numsen*[47] however the Court of Appeals of Maryland held that trustees of an unincorporated church could not acquire title by adverse possession to land where a grant of the land had failed to transfer paper title. While the court referred to various authorities including *Heiskell* v *Trout* and *Stewart* v *White*, noted earlier, its conclusion that "[t]he weight of authority therefore seems to hold that the trustees of this unincorporated religious association, never having been incorporated, do not acquire title by adverse possession" is unfortunately brief.[48]

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adverse possession, as the section refers to land acquired by conveyance, assignment or other assurance.

41 See discussion below, p 284.

42 (1889) 42 Ch D 312.

43 [1956] Ch 585.

44 216 Ga 423 (1960).

45 226 Ark 641 (1956).

46 241 Ark 144 (1966).

47 191 Md 43 (1947). See also *Jackson et al* v *Shaw* 193 Md 578 (1949).

48 In reaching that conclusion the court distinguished two earlier decisions, *Baltimore Life Insurance Co* v *Trustees of the Woodberry Avenue M. E. Church* 148 Md 129 (1925) and *Mayfield* v *Safe Deposit and Trust Company* 150 Md 157 (1926), in both of which titles based on adverse possession by churches had been

Salem Church v *Numsen* was considered in *O.K.C. Corporation* v *Allen*.[49] There again trustees of an unincorporated church sought to establish title to land by adverse possession. The trial judge held that the trustees' predecessors in office had established possession and barred the title of the paper owner. This judgment was later reversed and judgment rendered that the trustees had no title to the land. From this the trustees appealed. By a majority, the Court of Civil Appeals of Texas held that the decision of the trial judge had been right. The majority view was given by Hutchinson J, who explained:

> "It is true that an unincorporated association may not acquire title in its associational name, but it may acquire, hold and dispose of real property through elected trustees and their successors. Likewise, an unincorporated association which adversely occupies and possesses land in the required manner and for the proper length of time may acquire title by limitation by and though its trustees. The possession of the members for associational purposes is constructively the possession of the trustees who represent the association. . . Public policy also supports this view. The adverse possession statutes were primarily designed to repose land titles and to afford protection against the loose methods of conveyancing which obtained in the early days of our State. If individuals may take advantage of those statutes, there appears to be no good reason why other individuals, when joined together in an association and acting thought duly elected trustees, may not also."[50]

It is thought that this represents the better view, and that accordingly, where an association has trustees who are appointed to hold property on behalf of the association, there is no reason why the title of the paper owner should not be extinguished after the limitation period has run. If the trustees have themselves been in possession of the land, the requirement in the Limitation Order that there be some person in whose favour time can run seems to be met. Even if the trustees have not themselves been in possession, the view in *O.K.C. Corporation* v *Allen* that possession by other members of the association is constructively[51] the possession of the trustees seems satisfactory and would for example mean that where an association has a number of branches, but only one body of trustees for all the association's property, the possession of property by members of one branch will enable the trustees to claim title, even though the trustees have not personally been

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upheld, on the ground that in each of the cases the church, although initially an unincorporated association, had subsequently been incorporated. It is arguable however that the decision in each case would have been the same even if the church had not been incorporated. What seems to have been important in each case is that, from the outset, possession taken by the trustees of the then unincorporated church was adverse to the claims of the persons entitled on the failure of the trusts.

49 574 S W 2d 809 (1978).

50 Authorites referred to in judgment not reproduced.

51 "vicariously" may be a more accurate term in this context: see Jourdan, *op cit*, paras 7-05 and 7-80.

in possession at that branch. Certainly in other contexts claimants have been able to rely on the occupation of others to assert possession by themselves in claims against the paper owner.[52] So claimants have been able to assert adverse possession though the land has been occupied by their tenants.[53] The position was recently reconsidered in *Tang Tak Hong* v *Cheung Yat Fuk*[54] where the Court of Appeal in Hong Kong held that if a squatter lets land to a tenant the squatter remains in possession by the tenant through the receipt of rent. If the tenant fails to pay rent, the squatter can turn him out and the tenant cannot deny the landlord's title. That, the court considered, gives the squatter-landlord sufficient factual possession for the purposes of adverse possession. Similarly, claims based on adverse possession have been successful although the land has been in the occupation of a licensee of the claimant. In the last appeal to come to the Privy Council from Hong Kong, *Sze To Chun Keung* v *Kung Kwok Wai David*,[55] the relevant facts were that in 1955 the defendant went into possession of land. In 1961 the Crown granted the defendant a permit to occupy the land, not realising at the time that it in 1905 it had made a grant of the land to the plaintiff's predecessor in title. When the grant came to light, the Crown revoked its permit. In an action for possession brought in 1990 the question for the court was the effect of the permit granted by the Crown. Delivering the opinion of the Privy Council Lord Hoffmann explained that for the purposes of limitation, from 1961 possession had to be regarded as being in the Crown, which possessed through its licensee, and this possession was adverse to the plaintiff, so that the plaintiff's title had been extinguished.

Whether the situation of a trustee claiming adverse possession by relying on the occupation of his beneficiary, and thus whether the trustees of an unincorporated association can rely on the occupation of the property by its members, is the same as those of claimants relying on the occupation of their tenants or licensees remains to be determined. There is authority that where a trustee lets his beneficiary into possession of the trust property the beneficiary is tenant at will of the trustee,[56] which would seem to make the situation analogous to those considered above. *Haigh* v *West*[57] also supports the view that trustees can rely on occupation of the land by the beneficiaries to assert adverse possession. There the churchwardens and overseers of a parish were successful in a claim to land based on adverse possession, where the land had been occupied by the vestry of the parish, which had granted tenancies of the land to the persons in occupation. Not only could the occupation of the land by the tenants be relied on by the vestry, the vestry's enjoyment of the land was attributable to the churchwardens and overseers of the parish, who were empowered by statute to hold land on behalf of the parish.[58]

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[52] See Jourdan, *op cit*, para 7-80 *ff*.
[53] *Smith* v *Stocks* (1869) 17 WR 1135; *Seddon* v *Smith* (1877) 36 LT 168; *Haigh* v *West* [1893] 2 QB 19.
[54] [2002] 1249 HKCU 1. See also *Tang Kwan Tai* v *Tang Koon Lam* [2002] 1 HKCU 1329.
[55] [1997] 1 WLR 1232.
[56] *Garrard* v *Tuck* (1849) 8 CB 231; *Melling* v *Leak* (1855) 16 CB 652.
[57] [1893] 2 QB 19.
[58] The parish, being a fluctuating body of individuals, was unable to hold property.

Title In The Members Of The Association

If however the views that an unincorporated association cannot establish title by adverse possession as it is incapable of holding title, or that it is not a person in whose favour time can run, and that the trustees of the association are in no better position, are correct, or the case is one where the association has no trustees for the purposes of holding property, it can still be argued that time runs against the paper owner as the individual members of the association are in possession.[59] So much indeed was recognised in *The Afton band of Indians* v *A-G of Nova Scotia* and the other cases in which the association's lack of personality has prevented a claim based on adverse possession succeeding. The situation is analogous to the validation of a grant of property to an unincorporated association under the association's name by holding the grant to be a grant to the members of the association at the date of the grant. Where it is possible to identify who the members of the association were when adverse possession began, and so long as there have been no changes in the membership to date, the position is straightforward. The members of the association have been in possession for the length of time required to extinguish the title of the paper owner, and those members now have the title acquired by someone who has barred the title of the paper owner. In this situation membership of the association is of little relevance: the members have acquired title in their capacity as individuals, the association merely explaining their common interest. Problems arise however where the members of the association at the time adverse possession began are not the same as the present members of the association. In such a case the problem will be to show how the rights acquired after the limitation period has run have become vested in the present members of the association.[60] In some cases it may be that the present members of the association have been in possession for a sufficient time to bar the rights of former members, but this will not always be the case, and at the very least will present evidential difficulties in tracing the history of the membership. Where the facts show that rights based on adverse possession were acquired by a member and those rights have not themselves been extinguished by adverse possession of the current members, then by definition the present members cannot show they have title to the land.

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[59] There may however be difficulties if the pleadings do not show reliance on possession as individuals rather than as office holders of the association. In *Stewart* v *White* 128 Ala 202 (1900) the court found difficulties with attempts to base a claim brought by the deacons of a church on the possession of the claimants and other members of the church as individuals, the bill instituting the claim not showing that any particular person had acquired title, and not being framed on the theory of individual ownership. Again, in *O.K.C. Corporation* v *Allen* 574 S W 2d 809 (1978) Ray J (dissenting), while prepared to allow that the original trustees of the church could as individuals acquire title by adverse possession, held that the proceedings did not show that the claimants (the present trustees) had brought the suit claiming to be heirs or grantees of those individuals, and no attempt had been made to prove title in the present trustees as individuals.

[60] This was one of the difficulties in *The Afton band of Indians* v *A-G for Nova Scotia*. Jones J was prepared to hold that title had vested by long possession in members of the Band. The problem was that there was no evidence to show who those members were, nor was it possible to conclude that title was vested in the present members of the Band.

Gribble v *Call*[61] is a case where such difficulties did not prevent the court holding that the paper owner was prevented from recovering possession. The case involved land on which a memorial to the Confederacy had been erected. The land had been included in a conveyance made in 1907, by which the grantor purported to assure the land to the "General Dick Taylor Camp No. 1265, U.C.V., . . . and the R. E. Lee Chapter of the U.D.C." both of which were unincorporated associations. In the event the deed was of no effect, as the grantors did not have title to make the assurance. Following the deed however members of each association took possession of the land and built the memorial. In 1933 the surviving members of the Chapter of the UDC conveyed their interest in the land to the City of Jefferson, and in 1937 a similar deed was executed by various parties claiming to be heirs at law of the last surviving members of the Dick Taylor Camp. The defendant derived title from an assurance by the City. The plaintiff contended that as both the UDC and UCV were unincorporated associations, they were incapable of acquiring title by adverse possession. Notwithstanding the acceptance by the court that an unincorporated association cannot hold land, the court went on to hold that the paper owner could not succeed in his action to recover the land. The analysis of the situation was that following the deed of 1907 various individuals known as Confederate Veterans and others known as the Daughters of the Confederacy had gone into possession of the land. Leslie CJ said:

> "We see no reason why the individuals of a group acting in concert with each other may not thus mature title to the real estate under the 10 years Statute of Limitations. Certainly the rightful owners of the lots, whoever they were, had a remedy against the individuals from the moment of appropriation by them back in 1907. Such owners did not sue them in trespass, eject them from the property, or otherwise vindicate their right of title and possession until long after the Statute of Limitations conferred an absolute title upon these individuals. It is the duty of the court to recognise such a title in them, the same as if it were a good record title."

Although referred to in *Salem Church* v *Numsen* as the strongest case to support the argument of the church there, the court did not discuss *Gribble* v *Call* further, saying merely that the weight of authority was against the church. The case was however referred to in *The Afton band of Indians* v *A-G of Nova Scotia* where Jones J refused to follow it because of what he described as the hiatus in the chain of the possessory title in the earlier case. It is however doubtful whether *Gribble* v *Call* posed any difficulty in the *Afton band* case. It is important to distinguish between the question whether the title of the paper owner has been extinguished after the limitation period, on the one hand, and the question whether the persons currently in possession have good title to the land, on the other.[62] In *The Afton band of Indians* v *A-G of Nova Scotia* it was the latter question which was relevant, the present members of the Band seeking a certificate of title. Their failure to obtain the certificate was attributable not to the fact that the title of the

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[61] 123 S W 2d 711 (1938).

[62] See *Sze To Chun Keung* v *Kung Kwok Wai David* [1997] 1 WLR 1232; *Tang Kwan Tai* v *Tang Koon Lam* [2002] 1 HKCU 1329.

paper owner was sound, but rather to the fact that it had not been shown that the title acquired as a result of adverse possession had passed to the present members of the Band. In contrast, in *Gribble* v *Call*, the question was whether the title of the paper owner had been extinguished. Whether the title of the defendant, as successor to the members of the associations who had taken possession, was sound, did not fall for consideration.

Joint Tenants Or Tenants In Common?

Assuming that members of the association took possession under circumstances sufficient to bar the title of the paper owner, what form of co-ownership exists between them? Are they joint tenants or tenants in common? The same question arises if the possessory title is in trustees rather than in the members of the association. Clearly a joint tenancy would make life simpler as time goes by: the interest of a member will accrue by survivorship to the others on that member's death.[63] Basing his decision on a passage in Coke,[64] Lord Hatherley LC held in *Ward* v *Ward*[65] that where two persons took unlawful possession of land they would hold as joint tenants, their title having arisen at the same time and they holding by the same right and having done nothing to sever their tenancy. Would the same principles apply in the case of possession by the individuals of an unincorporated association? In *The Afton band of Indians* v *A-G of Nova Scotia* Jones J thought that members of the Band who had taken possession of the land held as tenants in common, relying on a passage in *Halsbury* that joint possession results in a joint tenancy at law, but may give rise to a tenancy in common in equity.[66] The question of how the members hold would seem to involve application of the presumptions applicable in ordinary cases of co-ownership of land.[67]

A Different Approach?

The issues discussed above clearly pose problems for an unincorporated association which has been in possession of land without title to it. The fact that the association has been in possession for a period long in excess of the limitation period may not, it would seem, mean that the title of the paper owner is extinguished. There may however be a different way to look at the problem. The courts have always been willing to find a title where possession has been enjoyed for a long period of time. As Fry LJ put it:[68]

> "That possession is nine points of the law is a very common but very true saying, and it summarises a very considerable body of legal doctrine. One of the ways in which that doctrine

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63 The right of survivorship in a joint tenancy will also avoid difficulties in passing a deceased member's interest to the other members of the association which would exist in a tenancy in common where the deceased member has not made a disposition of his interest in a manner complying with formalities for testamentary dispositions.

64 *Co Litt* 181a.

65 (1871) LR 6 Ch 789.

66 24 *Halsbury's Laws of England* (3rd edn) p 260. See now 28 *ibid* (4th edn (1979)) para 788.

67 See further Ford, *op cit* p 7.

68 *Halliday* v *Phillips* (1889) 23 QBD 48.

> appears is this, that the Courts are under an obligation, which has been insisted upon over and over again, wherever they can, to clothe with legal right long continued and undisputed enjoyment; and in my judgment that obligation rests upon the Court although enjoyment may be shown to have had de facto an invalid or illegal or insufficient origin. I think where there has been long usage, long possession, or long enjoyment, even though there may be an original infirmity in the de facto commencement, the Court is bound to presume, if it can, that that illegal origin has been altered by something which has occurred in the course of time."

In *A-G* v *Lord Hotham*[69] it is noted that very senior judges have said that they would presume anything in favour of a long enjoyment and uninterrupted possession. The question is whether a presumption could assist an unincorporated association which has been in possession of land for a long period of time, and if so, whether the difficulty that the association is unincorporated can be overcome.

Some assistance may come from *Haigh* v *West.*[70] There the vestry of a parish had from 1774 let the pasturage of a road to tenants. There was no evidence as to who owned the road prior to 1774, and no grant of the road was proved to exist. In an action by the lord of the manor following damage caused by one of the tenants of the vestry, the Court of Appeal held that the plaintiff could not succeed. Two grounds may be mentioned for the decision. First, the court held that the occupation of the land by the vestry of the parish was possession by the churchwardens and overseers of the parish, who had thereby acquired a title to the road by adverse possession.[71] The other ground for the decision however was that it could be presumed that a grant of the land had been made to trustees on behalf of the parish.[72] Charles J, whose decision was confirmed by the Court of Appeal, said:

> "it seems to me that I ought to presume, if it be possible, a person competent to make and a person competent to take a grant. Here it is clear there is a possible grantor. The lord of the manor at the time of the inclosure might have granted the right to a trustee for the benefit of the parish if he had thought fit. That indicates the possible grantee that I think I ought to presume – a trustee for the benefit of the parish. If the corporation of Saltash could take a several fishery clothed with a trust for an indeterminate body of inhabitants, why may not I assume that a possible grantor, such as the lord of the manor would be, could grant the land for an indeterminate body through the intervention, be it of the churchwardens or overseers or anybody who could hold for the benefit of the parish?"

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69 (1823) T & R 209.
70 [1893] 2 QB 19.
71 See discussion above, p 280.
72 *Cp Brocklebank* v *Thompson* [1903] 2 Ch 344 where the court was prepared to presume a custom in favour of the inhabitants of a parish, as being an unincorporated body, they could not take title by grant.

A similar exercise of the court's imagination would solve the difficulties facing an unincorporated association which has been in possession of land without title for a period sufficient to afford a presumption that possession had a lawful origin.

Even if the presumption of a grant to trustees for the benefit of the members of the association is not possible, there is always proprietary estoppel.[73] Ironically, the difficulty for the association here may be proportional to the length of time the association has been in possession of the land. To succeed in a claim based on estoppel, the claimant must show some representation by the owner of the land, on which the claimant relied, that the claimant would acquire some right or interest in the land.[74] The longer ago that representation was made, the more difficult it may be to prove. The inability to explain what took place when possession began is on the other hand the very basis upon which the court acts when presuming a grant or other means of clothing that possession with title.

CONCLUSION

The problems discussed above provide another illustration of the difficulty posed by the lack of separate personality of an unincorporated association. While the absence of UK and Commonwealth authority does provide a basis for arguing that the law must be working tolerably well in practice whatever the theoretical difficulties might be, it would seem from the existence of a significant body of US decisions that the problem is nonetheless a real one. It may be that the existence of trustees of an association may mean that the problem can be solved without the need for a more radical approach, but that is not beyond doubt, and in any event will not assist in cases where land is in the possession of an association whose rules do not provide for ownership of property through trustees. If the correct analysis is that the members of the association acquire as individuals a possessory title after the limitation period has run, the fragmentation of title which follows may well cause problems at a later date if the association decides to sell the property. A more attractive solution is required to the problem. The introduction of legislation to give unincorporated associations an existence independent of their members is one suggestion for reform which the Law Reform Advisory Committee has said may be an attractive and relatively simple solution to the problems which presently exist so far as unincorporated associations are concerned.[75] Such a measure, based on US legislation,[76] would allow an unincorporated association to acquire and hold land. It should also solve the problems with regard to adverse possession by such associations discussed in this article.

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[73] For proprietary estoppel, see Pawlowski, *The Doctrine of Proprietary Estoppel* (1996); Cooke, *The Modern Law of Estoppel* (2000); Spence, *Protecting Reliance* (1999).

[74] For the requirement in relation to the representation in detail, see Pawlowski, *op cit* p 21 *ff*.

[75] See the Committee's Discussion Paper No 9, *Unincorporated Associations*, para 5.12.

[76] Uniform Unincorporated Non-profit Association Act, adopted in various States: see Law Reform Advisory Committee, *op cit*, ch 5.

EMPLOYERS' LIABILITIES FOR WORK-RELATED STRESS

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1. INTRODUCTION

This article explores the forces that are currently shaping employers' liabilities in respect of work-related stress. It is argued that work-related stress is an area where regulation is tightening. Consequently, more will be expected of employers in order to fulfil their general duties under the Health and Safety at Work Act 1974 and the Management of Health and Safety at Work Regulations 1999[1] in respect of work-related stress. Thus, the law in this respect looks set to become more burdensome to employers. In contrast, the recent Court of Appeal decision in *Sutherland v Hatton*[2] has been seen as setting limits on employers' civil liability for work-related psychiatric illness. However, this article suggests that, because *Sutherland* is in certain respects based on the "state of the art", and this is itself still developing, the limits as expressed in *Sutherland* are not as certain as they may at first appear.

2. BACKGROUND

During the last decade stress at work has emerged as a key area for those concerned with health and safety issues. By the early 1990s two basic ideas about stress at work had been articulated. Firstly, three levels of intervention had been identified: "primary or job and organisational stressor reduction; secondary or stress management training and tertiary or health promotion, counselling and employee assistance programme activities."[3] Secondly, the rather obvious idea that prevention is better than cure had been applied to stress-related illness. Cooper stated:

> "Rather than focusing exclusively on what the organisation can provide for the employees to help them cope with stress more effectively, organisations would be well advised to consider what the organisation can do to eliminate or reduce workplace stressors."[4]

By the mid-nineteen nineties the Health and Safety Executive (HSE) had indicated that, insofar as workplace stress could make employees ill, it was covered by section 2(1) of the Health and Safety at Work Act 1974 and regulation 3(1)(a) of the Management of Health and Safety at Work

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[1] SI 1999/3242. The Northern Ireland equivalent regulations are in the Management of Health and Safety at Work Regulations (NI) 2000, SI 2000/388. The Northern Ireland equivalent of the 1974 Act is the Health and Safety at Work (NI) Order 1978.

[2] [2002] 2 All ER 1, 2002 WL 45314 (CA).

[3] Murphey, "Workplace Interventions for Stress Reduction and Prevention" in Cooper and Payne (eds.), *Causes and Consequences of Stress at Work* (1988).

[4] Cooper, "Identifying Workplace Stress: Costs, Benefits and the Way Forward" in *European Conference on Stress at Work a Call for Action: Proceedings* (1993).

Regulations 1992[5] (now 1999). Also, the landmark case of *Walker* v *Northumberland County Council*[6] had established that employers have a duty of care to employees in respect of reasonably foreseeable psychological injury.

This article traces the development of employers' liabilities (both criminal and civil) for work-related stress. In section 3 the costs of stress are discussed in order to demonstrate their magnitude and significance. Criminal liabilities are discussed in section 4. The development of employers' criminal liabilities begins with the formal recognition of the application of the existing general health and safety duties to workplace stress. Further development has taken the form of consultation with a view to introducing more specific regulation. The article highlights the gap between the Health and Safety Commission's (HSC's) vision and the current practice of many employers. Employers have reached the stage of paying lip service to the idea of stress as a costly problem that they need to think about. However, the vision is that stress can be dealt with as part of a positive health culture at work, which means moving to the use of primary rather than secondary and tertiary interventions. In section 5 employers' civil liabilities are discussed. This analysis covers the groundbreaking cases and subsequent developments including the important Court of Appeal ruling in *Sutherland* v *Hatton*.[7]

3. THE COSTS OF STRESS AT WORK

The costs of stress at work are hard to quantify, but some attempts have been made to estimate the costs to industry. In this section three types of costs are described; human, operational, and litigation.

A. Human costs

The human costs of stress can be extreme and dramatic:

> "One morning last August [*i.e.* in 1999], Sarah Howard sat behind her desk at Allstate Insurance Co.'s claims office on North Eagle Creek in Lexington, pointed a pistol at her head, and pulled the trigger. Her suicide note was addressed to Allstate management and included the words: Don't even think I am the only one you have pushed this far. You kill people in many ways."[8]

It is not only in the U.S.A that stress has been blamed for dramatic events. For instance: three employees of the Registers of Scotland (a government agency) committed suicide within five days in November 1998. Conditions at the Registers of Scotland office in Edinburgh were criticised following the suicides, with an independent report revealing a workforce struggling to cope with high levels of stress, intimidation and poor relations with management.[9] In *Walker* it was found that the plaintiff had: "in effect been severely mentally wounded." It was said that in consequence he was rendered quite

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[5] SI 1992/2051.
[6] [1995] ICR 702.
[7] [2002] 2 All ER 1, 2002 WL 45314 (CA).
[8] Reported in the *Lexington Herald* 3 June 2000.
[9] *The Scotsman* 8 March 2000.

incapable of ever returning to the kind of social services work which for 20 years had been his career and indeed of taking on ever again work which involved the shouldering of significant responsibilities. These examples are included to illustrate that it is not only statistics on quantity that are important when evaluating the human costs of stress at work. In fact, if the human costs were only to be measured in money terms there would be some obvious double-counting in the three cost categories above. The human cost to Mr Walker in money terms has been measured in the damages he received which will be mentioned under heading C below. The examples indicate the quality of the human costs in terms of lives that can never be brought back or fully repaired.

Teaching is a profession where stress-related illness has been increasing and over the years 2000 and 2001, 200,000 teachers in England and Wales reported suffering stress due to an excessive workload.[10] The human costs to teachers and their families are startling with the inquests into the deaths of three primary school teachers over the same period implicating stress and Ofsted inspections: Janet Watson (33) of Northwich (Cheshire), Jenny Knibb (47) of Exeter, and James Patton (29) of Birmingham. Also in 2000, Pamela Relf, a teacher of 36 years experience took her life after an Ofsted inspector criticised her teaching. She left a note saying "I am now finding the stress of my job too much. The pace of work and the long days are more than I can do." Stress has ended the lives of some teachers and the careers of others. Following the out of court settlement of her case in 1999, teacher Muriel Benson said: "I feel bereaved at the loss of my career."[11]

B. Operational costs

In 1999 it was reported that stress had overtaken the common cold as the number one reason for sickness absence.[12] A CBI report in 1999 put the cost of stress-related employee absence at £530 per employee in small businesses, and up to £545 per employee in organisations of over 500 employees on average. This type of estimate is very difficult and results are usually sensitive to the underlying assumptions. Costs of stress related illness do not only fall on employers and some estimates are for the costs to the UK economy as a whole. For instance, the CBI estimate for 1996 was £3.7billion[13] and for 1999 was £12billion. An Institute of Management report in 1996 suggested a cost of £7billion to industry, the NHS (presumably treatment costs) and taxpayers (presumably statutory sick pay).[14] Two types of cost may be missing from these estimates: the loss of productivity and profitability resulting from low morale in a stressed workforce and the costs of accidents caused by over-stressed workers.

C. Litigation costs

Under this heading are included legal costs, damages awarded by the courts and damages paid in out of court settlements. The amounts associated with

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[10] BBC Online <http://news6.thdo.bbc.co.uk>.
[11] <www.successunlimited.co.uk>.
[12] *Absence, an audit of cost reduction methods*, (Gee publishing).
[13] *The Scotsman* 4 October 1996.
[14] <www.sodexho.co.uk>.

individual legal cases can be large. *Johnstone*, a junior doctor, settled for £5,600 compensation, but the associated legal costs were about £150,000. *Walker* received £175,000. In *Lancaster* v *Birmingham City Council*[15] the employee developed a severe anxiety state with depression and was awarded a total of £67,041 which included sums for future wage loss and vulnerability on the labour market and pension loss. In an out-of-court settlement, Randy Ingram, the warden at a gypsy site, was paid £203,432 for prolonged stress after being shot at and physically and verbally abused by the occupants of the site.[16] This was a record figure until May 2000 when a 45-year old Shropshire teacher accepted £300,000 compensation for a career wrecked by the bullying of a new headteacher.[17]

4. CRIMINAL LIABILITIES

A. The Application of General Health and Safety Duties to Stress at Work

Any discussion of the regulation of health and safety in the UK naturally begins with section 2(1) of the Health and Safety at Work Act 1974:

> "It shall be the duty of every employer to ensure, as far as reasonably practicable, the health, safety and welfare at work of all his employees."

This is a long-standing, and very broadly drafted duty, but it makes no specific reference to mental health. The Management of Health and Safety at Work Regulations 1992 (now 1999) introduced the concept of risk assessment into UK Health and Safety Law. Regulation 3(1) states:

> "Every employer shall make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed whilst they are at work."

Again there is no specific reference to mental health or stress at work. However, by 1994 "stress, both physical and mental" had been included in the European Commission's fourth action programme on health and safety, and by 1995 the Health and Safety Executive (HSE) had published *Stress at Work: A guide for Employers*. In 1996 the European Commission published guidance on risk assessments at work in which psychological factors were described as "requiring risk assessment".[18] The HSE followed up its 1995 publication, which was intended for large employers, with *Help on Work-related Stress: A Short Guide*, published in 1998 and intended for smaller employers. Whilst following the guidance is not compulsory, both guides indicate that by doing so employers will normally comply with the law. Also, when health and safety inspectors seek to secure compliance with the law, they may refer to the guidance as illustrating good practice. The guides

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[15] (1999) 6 Q.R. 4.

[16] BBC Online <http://news6.thdo.bbc.co.uk>.

[17] *A* v *Shropshire County Council*, reported by <www.successunlimited.co.uk/news>.

[18] European Commission, *Guidance on Risk Assessment at Work*, (1996, Directorate-General V; Employment, Industrial Relations and Social Affairs, Public Health and Safety at Work Directorate).

also make two explicit statements: firstly, they state that it is an employer's duty to ensure that employees are not made ill by their work, and that stress can make employees ill. This appears to be the Health and Safety Executive's application of section 2(1) of the Health and Safety at Work Act 1974 to stress at work. Secondly, they state that where stress caused by, or made worse by, work could lead to ill health, employers must assess the risk. This appears to be the Health and Safety Executive's application of regulation 3(1)(a) of the Management of Health and Safety at Work Regulations 1992 (now 1999) to stress at work.

To summarise: with the making of the Management of Health and Safety at Work Regulations 1992, employers were required for the first time to conduct risk assessments. As no specific reference is made to mental health or psychological factors in the UK regulations, employers may have omitted this area of employees' health in the early stages of implementation. By 1995 however there is clear guidance from the UK's Health and Safety Executive on stress at work as a health and safety issue in its own right.

B. The Further Development of Stress as a Major Health and Safety Issue

Another development of the mid nineteen nineties was the establishment of the European Agency for Safety and Health at Work. The Agency published its first research report in 1997. The report was based on a survey of all member states and entitled *Priorities and strategies in occupational safety and health policy in the member states of the European Union*. Stress at work was only one of many occupational health and safety issues tackled by the survey, however the following results are significant as they demonstrate Europe-wide thinking. The survey showed that stress at work was an area of risk paid particular attention in the last 10 years, *i.e.* the 10 years ending in 1996. Survey responses also predicted stress at work to be a main area of risk in the future, i.e. beyond 1997. The survey results also suggest that organisation and management issues were expected to receive increasing attention.

These predictions are being fulfilled in the UK where the latest developments have been in the form of a discussion document published by the Health and Safety Commission (HSC) in 1999, and the announcement on 15 June 2000 of a programme of work to tackle occupational stress. The discussion document, *Managing Stress at Work*, was published in April 1999 and comments were received until the autumn of that year.[19] The questions posed in the discussion document fell into four distinct groups. The first group asked "what is stress and is it a problem?" The second group asked whether stress at work should be a health and safety issue. The third group asked for comments on a variety of possible measures that could be recommended by the HSE. The final set of questions was concerned with what the discussion document described as "an alternative approach". The proposed alternative to the traditional regulatory approach was a more holistic treatment of the problem of stress involving more partnership.

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[19] The deadline stated in the document was 30 July 1999 but comments were apparently received until 30 September 1999.

The options open to the HSC were listed as:

> "(a) asking HSE to commission more research to help answer some of the outstanding questions about stress, for example to provide illustrations of organisations where stress has been tackled successfully;
>
> (b) asking HSE and its Advisory Committees to issue additional ordinary guidance, perhaps in specific sectors of employment;
>
> (c) issuing an Approved Code of Practice; or
>
> (d) recommending that the Secretary of State makes regulations about work-related stress or any combination of these."

The HSC's preferred option was to do "more than just issue guidance" because "the existing guidance does not appear to have had the effect of persuading people to do something". An Approved Code of Practice (ACoP) is one step up from guidance in regulatory terms. The HSC proposal was for some aspects of stress at work to be given ACoP status within a document that mostly has the status of ordinary guidance. Thus the proposal was a combination of (b) and (c). The alternative approach suggested in the discussion document was that of partnership between the HSE and, for instance, government departments, representatives of employers and employees, academics, occupational physicians and nurses, professional bodies and the voluntary sector with a view to promoting a positive health culture at work. If properly implemented this would include access to appropriate counselling (tertiary level intervention), provision of stress management training (secondary level intervention) and the consideration of stress reduction over the organisation as a whole and for individual jobs (primary level intervention).

Based on the responses to the discussion document and the results of the Health and Safety Executive's research programme, the HSC concluded in June 2000 that: "(i) work-related stress is a serious problem; (ii) work-related stress is a health and safety issue; and (iii) it can be tackled in part through the application of health and safety legislation." However, at that time there did not exist agreed standards of management practice against which an employer's performance in managing a range of stressors, such as the way work is structured, could be measured. Without such standards, the HSC stated, an ACoP – a sort of health and safety "highway code" – would be unenforceable. Therefore the first theme of its new strategy on stress is "to develop clear, agreed standards of good management practice for a range of stressors." In May 2002, the Health and Safety Commission/Executive announced that it was developing "management standards" for workplace stress, and:

> "These standards will provide a clear yardstick against which to measure an employer's management performance in preventing stress. The first pilot phase of the standards will occur in 2003, with the final phase occurring in 2005."[20]

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[20] HSE press release 15 May 2002, <www.hse.gov.uk/press/2002/e02086.htm>.

In June 2003 the HSE published "Draft Management Standards on Work-related Stress: Pilot Project". A total of 24 organisations have been involved in developing draft standards and the formal pilot study is due to finish in Autumn 2003. The HSE states that: "The processes and practices here [in the June 2003 document] do not represent a finished product." It also states:

> "This is a real opportunity for all sizes and types of business to have a go and influence the ongoing development of the process by broadening the pilot exercise and feeding back results."[21]

The draft standards cover the 6 main factors which can lead to work-related stress: demands, control, support, relationships, rules and changes. The first three specify that:

> "at least 85% of employees indicate that they
>
> - are able to cope with the demands of their jobs
> - are able to have a say about the way they do their work
> - receive adequate information and support from their colleagues and superiors"

The second three specify that:

> "at least 65% of employees indicate that
>
> - they are not subjected to unacceptable behaviours (eg bullying) at work
> - they understand their role and responsibilities
> - the organisation engages them frequently when undergoing an organisational change"

All six standards also demand that "systems are in place locally to respond to any individual concerns." The obvious problem with the standards as currently expressed is that up to 35% of employees could indicate that they are subjected to bullying at work and the organisation could nevertheless claim to have achieved the standard.

The HSE obviously hopes that employers will "have a go" with the draft processes. This would involve getting commitment from the organisation, a first pass to define the current position, a second pass defining problems in more detail, consultation with employees on possible action, putting "interventions" in place, and reviewing the results of the project. Although the HSE has managed to recruit 24 organisations into the formal pilot study, commitment from employers more generally may be a significant problem. There are two comments in the discussion document that provide a sharp contrast. The comment that "existing guidance does not appear to have had the effect of persuading people to do something" suggests that it is extremely hard to convince employers on this issue. In contrast, one of the advantages of the partnership approach was that "it could be part of promoting a positive health culture at work", which suggests some willingness on the part of

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[21] <http://www.hse.gov.uk/stress/stresspilot/> accessed 21.7.03

employers to engage in the endeavour. A union view is that employers are not doing enough:

> "Linda Sohawon, the head of the legal department at the white collar trade union MSF. . . emphasises the need for employers to take responsibility . . . She says: They should not put the onus on employees to try to resolve stress by sending them on time management courses. How is someone supposed to manage a job when it is, in fact, not manageable?"[22]

Evidence from employers themselves and from independent researchers also indicates a gap between the ideal and actual stress safety cultures. In February 2000 an article about how law firms are dealing with employee stress suggested that the current solution to the problem was a stress management programme. One London firm was quoted as having a programme called "Managing the Pace" that lasts only three hours, but in the context of law firms this is seen as leading the way.[23] In October 1999 it was reported that research by the Institute of Occupational Medicine in Edinburgh found that many organisations in Scotland were failing to address workers' stress problems because of a macho organisational culture which viewed stress as a weakness.[24] Perhaps employers have reached the stage of at least paying lip service to the idea of stress as a costly problem that they need to think about. It seems however that most organisations are a very long way from the ideal of dealing with stress as part of a positive health culture at work.[25] In this context it may only be the fear of criminal or civil liabilities for the consequences of work-related stress that can provide the impetus for significant organisational change.

C. The Possible Criminal Liabilities of Employers

Breach of the general duty under section 2(1) of the Health and Safety at Work Act 1974 is an offence. It has already been argued that this general duty applies to psychological illnesses as well as physical illnesses. However, there have so far been no reported prosecutions in situations where stress at work has caused psychological illness in an employee. Another way in which workplace stress could bring about the employer's criminal liability is where a stressed employee causes an accident. The most obvious examples are where the stress is caused by work overload, long hours or unpredictable working hours. The employer could be liable under section 2(1) of the 1974 Act if a stressed employee harms themselves or other employees in an accident. If others, *i.e.* those who are not employees, are harmed the employer may be liable under section 3(1) of the 1974 Act which provides that an employer has a duty:

> "to conduct his undertaking in such a way as to ensure, so far as reasonably practicable, that persons not in his employment

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[22] *Gazette* 3 February 2000.
[23] *Gazette* 17 February 2000.
[24] <http://news6.thdo.bbc.co.uk>.
[25] It was concern about local employers' neglect of stress at work that prompted the Dundee City Council and the Tayside Health Promotion Centre to organise the conference where much of the material in this article was first presented.

> who may be affected thereby are not thereby exposed to risks to their health or safety."

However, not all incidents are investigated. Trotter (2000) reports that at present the HSE fails to investigate 88% of major injuries in the workplace.[26] This may largely be a problem of grossly inadequate resources, but it also goes some way towards explaining the lack of reported prosecutions where workplace stress can be seen as the cause of an accident resulting in harm short of death.

When a work-related death occurs there are two differences; firstly an investigation will take place; and secondly the employer may be liable under health and safety regulations or for manslaughter. Investigations are usually conducted by the HSE. Between April 1996 and April 1998 only 18.8% of deaths to workers resulted in a prosecution, of any sort.[27] From April 1992 to March 1998, 59 cases investigated by the HSE were referred to the Crown Prosecution Service (CPS) for possible manslaughter charges. The CPS felt able to prosecute in only 18 cases and only 4 were successful.[28] However, the case of *R* v *the DPP and others, ex parte Timothy Jones*[29] appears to be the first successful judicial review of a decision by the CPS not to prosecute for manslaughter over a workplace death. Also there is now a Protocol for Liaison agreed between the HSE, the Association of Chief Police Officers and the CPS aimed at securing the full investigation of workplace killings and the careful consideration of the decision whether to prosecute.[30] According to the government's latest proposals for reforming the law on involuntary manslaughter (paragraph 3.1.5):

> "The low numbers of manslaughter cases in relation to deaths at work brought before the courts do not reflect any unwillingness on the part of the health and safety enforcing authorities to refer such cases to the CPS and the police, but result principally from shortcomings in the existing law on corporate manslaughter."

Paragraph 3.1.3 of the proposals states the current position:

> "The governing principle in English law on the criminal liability of companies is that those who control or manage the affairs of a company are regarded as embodying the company itself. Before a company can be convicted of manslaughter, an individual who can be "identified as the embodiment of the company itself" must first be shown himself to have been guilty of manslaughter. Only if the individual who is the embodiment of the company is found guilty can the company be convicted. Where there is insufficient evidence to convict

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[26] Trotter, "Corporate Manslaughter" (2000) 150 *NLJ*, 455.

[27] Centre for Corporate Accountability statistics, www.corporateaccountability.org.

[28] *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (Home Office Communication Directorate, 2000), para 3.1.5 n 4. The proposals were followed by the Corporate Homicide Bill 2000 which the government remains committed to introducing when parliamentary time allows.

[29] (24 March 2000, unreported).

[30] HSE/ACPO/CPS, *Work Related Deaths: A Protocol for Liaison* (1998).

> the individual, any prosecution of the company must fail. This principle is often referred to as the 'identification' doctrine."

The fact that application of the current law has meant that there have been no manslaughter convictions in respect of a number of disasters has led to the introduction of government proposals for reform in May 2000. These proposals are based on the Law Commission Report No 237, *Legislating the Criminal Code: Involuntary Manslaughter*, published in 1996.[31] The government proposes that there should be a special offence of corporate killing committed where the corporation's conduct in causing death fell far below what could reasonably be expected. Also, a death should be regarded as having been caused by the conduct of the corporation if it is caused by a "management failure", so that the way in which its activities are managed or organised fails to ensure the health and safety of persons employed in or affected by its activities. The inquiry into the Clapham junction railway accident in December 1988 found that: "work teams were assembled in a haphazard way" and "The electrician involved had worked 7 days a week for the 13 weeks immediately before committing the error which caused the accident." Barrett has argued that stress at work caused this accident.[32] There was no prosecution of the employers for manslaughter, but a re-run of the events, which caused 35 deaths, could well result in a prosecution for the proposed offence of corporate killing. After the Southall rail crash in September 1997 it was found that Great Western Trains (GWT) had encouraged a culture where drivers were expected to depart on time even if their safety warning devices were not working. This pressure to depart on time no matter what could also be seen as stressful to the train drivers. GWT pleaded guilty to contravening section 3(1) of the 1974 Act and were fined a record £1.5million. GWT were also prosecuted unsuccessfully for manslaughter[33] but a re-run could, it is submitted, result in a successful prosecution for corporate killing. It should be noted that "corporate killing" is a misnomer as the government's proposals extend the list of potential defendants to all "undertakings", the term used in the 1974 Act.

The fact that in the Clapham junction incident (1988), "The electrician involved had worked 7 days a week for the 13 weeks immediately before committing the error which caused the accident" is also worthy of comment.

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[31] The Report was made by the Law Commission of England and Wales and the government proposals are correspondingly for England and Wales only. Scots criminal law includes the offence of culpable homicide rather than involuntary manslaughter. The Procurator Fiscal investigating the death of a family of four in a gas explosion in Larkhall announced in February 2002 that the supply company Transco was to be prosecuted for culpable homicide. This is the first Scottish prosecution of a company for culpable homicide and the case is ongoing. The Scottish Executive currently has no plans to legislate on corporate killing, but should the Transco prosecution fail there may be calls for legislative action in Scotland.

[32] Barrett, "Stress and the Public Liability of Employers" (1996) 25 *ILJ* 53.

[33] Following the unsuccessful prosecution, the Attorney General sought the opinion of the Court of Appeal under s 36 of the Criminal Justice Act 1972; *Attorney General's Reference (No 2 of 1999)* [2000] 3 All ER 182. The court in this case confirmed that the identification principle remained the only basis in common law for corporate liability for gross negligence manslaughter.

The Working Time Directive[34]implemented in the UK by the Working Time Regulations 1998[35] as amended by the Working Time Regulations 1999[36] entitles workers to an uninterrupted weekly rest period of not less than 24 hours in each seven day period. The Working Time Directive is itself a health and safety measure adopted under Article 118a (now 138) of the Treaty of Rome. However, the rail transport sector was excluded from the UK's 1998 Regulations. Cover is currently being extended to the sectors that were originally excluded, but the blanket exclusion will be replaced with regulations allowing for derogations. Thus, the general rules on the amount of rest required for health and safety reasons will not apply in full to railways. However, following the Clapham junction incident, health and safety standards on fatigue have been devised specifically for railways. Regulation 4 of the Railways (Safety Critical Work) Regulations 1994[37] requires employers to ensure that employees carrying out safety critical work do not work hours which would be likely to cause fatigue which could endanger safety. This regulation is supported by an Approved Code of Practice (L50) giving further guidance.

The potential criminal liabilities of employers will now be summarised. Firstly, section 2(1) of the Health and Safety at Work Act 1974, the general duty to ensure health safety and welfare of employees, applies to psychological illness as well as to physical illness. There is therefore the potential for employers to be prosecuted where workplace stress causes psychological illness to an employee. However, 88% of major (physical) workplace injuries are not investigated by the HSE, and the HSC has yet to develop standards of good management practice concerning workplace stressors beyond the pilot stage. Overall it seems that, although there have been no prosecutions so far, regulation is currently in the process of tightening and prosecutions are likely to occur at some time in the future. Secondly, to the extent that stress at work is associated with long hours, prosecution under the Working Time Regulations,[38] or in the case of railways under industry specific fatigue regulations, are possibilities. Thirdly, where a stressed employee makes a mistake that causes an accident there is the potential for the employer to be prosecuted under section 2(1) or section 3(1) of the 1974 Act. Finally, where a stressed employee makes a mistake that causes an accident in which someone dies there may, in the near future, be the potential for the employer to be prosecuted for the new offence of corporate killing. As the whole point of introducing the new offence is to make more organisations criminally liable when they cause death, more employers are likely to face prosecution and conviction for work-related deaths in the future.

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[34] Directive 93/104 EC.
[35] SI 1998/1833.
[36] SI 1999/3372.
[37] SI 1994/299.
[38] There have been over 50 improvement notices issued by the HSE for breaches of the Working Time Regulations. The vast majority of these have been in respect of the record-keeping aspects of the Regulations.

5. CIVIL LIABILITIES

In respect of civil liabilities, this article takes as its starting point an employee who is well, becomes unwell due to stress at work, and seeks damages. An employee who is already disabled, as defined by the Disability Discrimination Act 1995, and this can include a mental disability, will be covered by that Act. If such an employee can show that the employer has treated them less favourably, or failed to make reasonable adjustments to accommodate them, they may have a claim under the Act. However, their action will be founded on the employer's response to the disability, not on the employer as the source of the disability.

A. The Ground-breaking Cases

In the first half of the 1990s there were four legal decisions developing the law on the employer's liability to individual employees for psychiatric harm. Three are well-known and one unreported: *Johnstone* v *Bloomsbury Health Authority*,[39] *Francis Aston* v *Imperial Chemical Industries Group*,[40] *Petch* v *Customs and Excise Commissioners*,[41] and *Walker* v *Northumberland County Council*.[42]

Johnstone concerned a junior doctor who became ill (physically and psychologically) due to overwork. He was employed by the health authority under an employment contract requiring him to work a 40-hour week and to be available for overtime of a further 48 hours per week on average. He claimed that he had been required to work intolerable hours with such deprivation of sleep that his health has been damaged and the safety of patients put at risk, that he suffered from stress and depression, had been physically sick from exhaustion and had felt suicidal. This is therefore a case concerning both physical and psychiatric illnesses. It is important because it can be read as establishing an overriding employer's duty to take reasonable care not to injure an employee's health. It is a difficult case because the Court of Appeal ruled only 2:1 in favour of Johnstone and with differences between the two favourable judgments. It is important in the context of stress at work because Johnstone's claim was founded at least in part on the fact that he suffered stress and depression. It is also of interest that the judgment of Stuart-Smith LJ states:

> "It must be remembered that the duty of care is owed to the individual employee and different employees may have different stamina. If the authority in this case knew or ought to have known that by requiring him to work the hours they did, they exposed him to risk of injury to his health, then they should not have required him to work in excess of those hours that he safely could have done . . . In *Paris* v *Stepney B.C.* [1951] 1 All ER 42, [1951] AC 367 the employer owes a duty to take greater care of a one-eyed man than a normal man in respect of injuries to the eyes. If employers know or ought to

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[39] [1991] 2 All ER 293 (CA).
[40] (Unreported, 21st May 1992).
[41] [1993] ICR 789 (CA).
[42] [1995] ICR 702 (QBD).

> know that a workman has a vulnerable back they are in breach of duty in requiring him to lift and move weights which are likely to cause him injury even if a normal man can carry them without risk."[43]

In the second case, that of *Francis Aston* v *Imperial Chemical Industries Group*,[44] Aston was exposed to carcinogenic fumes in his workplace. He suffered a depressive illness as a result of anxiety about his health following the exposure. The fumes could cause angiosarcoma of the liver, which the plaintiff was told has a latency period of about 15 years, but is usually fatal within six months of the symptoms appearing. The employers were held liable because:

> "The employer whose system of work negligently induces psychiatric injury without any physical injury by, for example, excessive noise or flickering lights or psychological pressures is just as liable as one who causes physical injury because the duty of care exists and the necessary proximity exists by reason of the master and servant relationship."

The case is important in the context of stress at work because it establishes that an employer can be liable where the injury or illness is psychiatric only, and not consequential on physical illness.

Petch and *Walker* were both cases of nervous breakdown where the amount of work and level of responsibility were causes. In *Petch* the employers' response to the first, unforeseeable, breakdown was held to be that of a reasonable employer and they were not liable for the first or second breakdown. In *Walker* the employers' response to the first, again unforeseeable, breakdown was seen as inadequate and they were liable for the second, foreseeable, breakdown. Walker received damages of £175,000.

Petch was a civil servant. He joined in 1961 and by 1973 had been rapidly promoted; he was considered a high flyer and was by then an assistant secretary (one grade below the highest). In 1974 he suffered a mental breakdown. In 1975, after his return to work, he was transferred from Customs and Excise to the Department of Health and Social Security. In 1983 he fell ill again but was able to return to work until 1986, when he was retired from the Civil Service on medical grounds. It was held that, unless senior management in Petch's department were aware or ought to have been aware that he was showing signs of impending breakdown, or were aware or ought to have been aware that his workload carried a real risk that he would have a breakdown, then the employers were not negligent in failing to avert the breakdown of 1974. The case can be distinguished from *Johnstone* where the employers had been informed of Johnstone's health problems. Employees in positions of managerial responsibility may inevitably be exposed to a (high) degree of stress as part of their work. *Petch* suggests that an employer would probably not be acting unreasonably merely by placing substantial demands upon such employees. When Petch returned to work in 1975 the employer's duty extended to taking reasonable care to ensure that the duties allocated to him did not bring about a repetition of his mental

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[43] [1991] 2 All E.R. 293 at 299.
[44] (Unreported, 21st May 1992).

breakdown of October 1974. The judgment in *Petch* indicates that when Petch returned to work in 1975 his employers experienced major problems concerning his role, his behaviour and his relationships with other staff in his department. The judgment states: "In the circumstances, the transfer of the plaintiff [Petch] to another department . . . which was tactfully handled, was the obvious solution." Also, the conduct of Petch's seniors was commended.

Walker was employed by the council as an area social services officer, responsible for four teams of field workers in an area in which during the 1980s child abuse references were particularly prevalent. During that period the volume of work rose considerably without any increase in staff. In November 1986 Walker suffered a nervous breakdown. He received medical advice that he should not go back to the same level of work and responsibility as before. In March 1987 he returned to work on the understanding that he would receive assistance with his duties. In April 1987 even the limited support he in fact received was withdrawn. In September 1987 he suffered a second mental breakdown. He had 'in effect been severely mentally wounded'. It was said that in consequence he was rendered quite incapable of ever returning to the kind of social services work which for 20 years had been his career and indeed of taking on ever again work which involved the shouldering of significant responsibilities. It was held that, generally, it is the employer's duty to provide a reasonably safe system of work and take steps to protect employees from risks that are reasonably foreseeable. In 1985 (before Walker's first breakdown) it was not reasonably foreseeable that Walker's workload gave rise to a risk of stress induced mental illness materially higher than that which would ordinarily affect a social services manager with a really heavy workload. There was no liability for the first breakdown. In 1987 (when Walker returned to work after the first breakdown) the council ought to have appreciated that he was distinctly more vulnerable to psychiatric damage than he had appeared to be in 1986 and that, when the support was withdrawn, there was a significantly greater risk of injury to his health unless his workload could be substantially reduced. In failing to provide assistance the council was in breach of its duty of care. The employers were liable for the second breakdown. This is a landmark case establishing liability for psychiatric illness resulting from mismanagement and a failure to provide a safe system of work. *Aston* makes a similar point, but begins with an industrial accident, which *Walker* does not.

B. Recent Developments

The most significant recent development in the law on liability for work related psychiatric illness is the Court of Appeal's decision in *Sutherland* v *Hatton*.[45] The judgment includes a long discussion of the legal principles to be applied in such cases and ends with a summary in the form of 16 practical propositions. What is notable is that, despite the fact that liability for psychiatric harm has been seen as both a special and difficult area of the law, the principles to be applied are, for the most part, familiar and well known. Indeed the opening proposition of the summary in *Sutherland* v *Hatton* is

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[45] 2002 WL 45314 (CA), [2002] 2 All ER 1, [2002] 1 CR 613, [2002] 1RLR 263.

that: "The ordinary principles of employer's liability apply."[46] The rules applying to "nervous shock" are not mentioned in the summary, but are discussed earlier in the judgment.[47] It has been a recurring theme of "stress at work" cases that that the more onerous rules for establishing liability for nervous shock have been put before the courts by counsel for the employers. The courts have consistently rejected these arguments. The case of *Aston* was referred to in the Law Commission's analysis of the law on nervous shock in order to make a clear distinction between cases where employees suffer psychiatric harm due to a breach of a duty arising out of the employment relationship and other "nervous shock" scenarios. In *Cross* v *HIE*[48] the court held that it is right in principle to treat the risk of psychiatric injury in the same way as the risk of physical injury and cases involving nervous shock to secondary victims were distinguished. This approach can also be seen in *Fraser* v *State Hospitals Board for Scotland*.[49] The judgment in *Sutherland* v *Hatton* quotes Lord Hoffmann's view in *Walker*[50] that the employee was in no sense a secondary victim.[51] The remainder of this section consists of a marrying of "the ordinary principles of employer's liability" with some of the 16 propositions made in *Sutherland* v *Hatton* and illustrations of specific stress at work scenarios that have been put before the courts.

Foreseeability: the nature of the job

The summary in *Sutherland* v *Hatton* states that "there are no occupations which should be regarded as intrinsically dangerous to mental health."[52] It has already been argued from *Petch* that an employer would not be acting unreasonably merely by placing substantial (highly stressful) demands upon some employees, *e.g.* those in positions of managerial responsibility. The case of *Panting* v *Whitbread plc*[53] also supports this argument. Panting was employed as a pub manager by Whitbread. He claimed that he and his wife and staff were subjected to violence, threats, theft, burglary, attempted burglary and other offensive conduct which caused him to suffer permanent psychiatric illness. A key finding of the court was that it was reasonable for Whitbread to ask Panting to run the pub, despite its difficulties. Whitbread had in place a comprehensive set of arrangements aimed at protecting managers suffering as Panting was, and Panting was aware of Whitbread's employee assistance programme. However, he had not put his concerns in writing at any time during his employment.

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46 *Ibid*, para 43 (1).
47 *Ibid*, para 19.
48 See n 61 below.
49 2001 SLT 1051.
50 Expressed in *Frost* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455, at 506.
51 2002 WL 45314 (CA), para 20.
52 *Ibid*, para 43 (4). It can be noted that this proposition does not sit well with the question posed by the Trade Unionist quoted above in section 4: "How is someone supposed to manage a job when it is, in fact, not manageable?"
53 November 24, 1998 (Gloucester CC), a claim for breach of contract.

Foreseeability: personal characteristics of the employee

The summary in *Sutherland* v *Hatton* states that "An employer is usually entitled to assume that the employee can withstand the normal pressures of the job unless he knows of some particular problem or vulnerability."[54] However, once an employer is aware that an employee is particularly vulnerable there is a duty to take greater care in respect of that vulnerability. In *Johnstone* the general principle that greater care must be taken of a one-eyed man than a normal man in respect of injuries to the eyes had already been applied to a situation where the vulnerability was not merely physical.

Ward v *Scotrail Railways Ltd*,[55] is another case involving a particularly vulnerable employee. The case concerns the sexual harassment of one employee by another. It therefore represents an addition to the list of possible causes of stress for which an employer may be held liable.[56] An opinion has been given by Lord Reed in a preliminary hearing and the parties are being allowed a proof before answer. Ward has been employed by Scotrail since 1990 as a ticket inspector on trains and is based at Dalmuir station. In 1995 she received a letter having "sexual content" from a male clerk, Kelly, also employed at Dalmuir station. From this time Kelly's behaviour included regularly staring at Ward, swapping shifts so as to be in the booking office with her and making efforts to show her that he knew where she was during her working day. Ward made an official claim of sexual harassment. This resulted in the offer, by Scotrail, of counselling and the presence of a supervisor at the start and end of shifts so she would not be alone with Kelly. The employer failed to provide the supervisor as agreed. Ward then went off sick and suffered prolonged illness and a number of absences from work. She received medical treatment for nervous illness that has included counselling and drugs.

Lord Reed's opinion refers to the fact that, if the employers were aware that Ward was unusually sensitive and was being placed under severe stress by matters which a more robust individual might have shrugged off, these circumstances should feed into consideration of the question of what would constitute the response of a reasonable employer. These comments are in line with the judgment of Stuart-Smith LJ in *Johnstone* referred to above and with the reference to knowledge of "some particular problem or vulnerability" made in *Sutherland* v *Hatton*.

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[54] 2002 WL 45314 (CA), para 43 (3)

[55] 1999 SC 255, 27th November 1998, Court of Session.

[56] Poor lighting, overcrowding, dangerous substances, excessive noise, heat or cold, career uncertainty/insecurity, lack of control of pace of work, work overload, unpredictable working hours, overbearing critical superiors, intimidation or harassment, personality clashes unresolved, and "bullying"at work, have all been cited as potential causes of stress. See McIlroy "Stress at Work Claims" *SCOLAG Journal* September 1999, 129. In addition it was held in *R* v *Metropolitan Police ex p Stunt* (Queen's Bench Division, 4.5.00) that when a police officer became ill with a depressive illness during an investigation following a complaint against him, this was an "injury received in the execution of his duty as a constable". Thus, a complaints procedure / investigation can cause stress for which an employer can be liable.

Foreseeability: what the employer is (and is not) told by the employee

The summary in *Sutherland* v *Hatton* states that "[T]he employer is generally entitled to take what he is told by his employee at face value, unless be has good reason to think to the contrary."[57] *Pratley* v *Surrey County Council*[58] involved a social worker with a heavy case load. The employee had "very high standards" and was "incredibly hard working and very conscientious and well organised . . . she was a perfectionist." This caused her to work unpaid overtime, often at home, in order to complete her work. She became stressed by this, but made every effort to conceal this fact from her employers, including asking her GP not to record "stress at work" on a sick note, he in fact recording neuralgia. Finally she did disclose worries about her health in a regular supervision meeting. But there was nothing at that time to alert the employers to the real extent of the risk. The employers were held not liable.

Foreseeability: what the employer knew or ought reasonably to have known

The summary in *Sutherland* v *Hatton* states that: "To trigger a duty to take steps, the indications of impending harm to health arising from stress at work must be plain enough for any reasonable employer to realise that he should do something about it."[59]

One of the main themes of the early cases that has been reinforced in later cases is the need for illness or injury to be reasonably foreseeable. In *Lancaster* v *Birmingham City Council*,[60] the employee was transferred to work of a very different character, involving demanding contact with the general public, and promises of training and support were not fulfilled. Lancaster's story involved (like Walker's) two periods of ill health. The employer admitted liability for injury, loss or damage suffered after a date between the two periods of ill health, *i.e.* from a date when (without training and support) injury to Lancaster became reasonably foreseeable. As liability was admitted the issue of foreseeability was not argued in court, but the outcome is in line with Walker.

The issue of reasonable foreseeability was an important point in *Cross* v *HIE*.[61] The pursuers averred that the death of James Cross was caused or materially contributed to by fault and negligence on the part of HIE as his employers. Cross was employed by Highlands and Islands Enterprise (HIE) as a senior training manager. He had an office in Balivanich on the island of Benbecula and worked there alone. His colleagues worked in offices in Stornoway on the island of Lewis and Cross had to travel there for board meetings. The job commenced in April 1991. In December 1991 a friend sharing a hill walking holiday noticed that something was "not right". Cross

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[57] 2002 WL 45314 (CA), para 43 (6).
[58] [2002] EWHC 1608.
[59] 2002 WL 45314 (CA), para 43 (7).
[60] (1999) 6 Q.R. 4.
[61] *Cross* v *Highlands and Islands Enterprise and Another*, 2001 SLT 1060, [2001] IRLR 336, Outer House, Court of Session, 5 December 2000.

looked thin and was worried about his work. On 10 February 1992 Cross's mother died of multiple sclerosis, but this was not unexpected. On 26 April 1992 Cross saw his GP and was signed off sick with "stress" for a month. He was prescribed diazepam that he did not take. On 26 May 1992 he saw the GP again and was signed off for a further month. He was offered a psychiatric referral which he refused. In early June Cross told a friend that everything at work was not right, that it was never going to get better, that he had lost his confidence and was not looking forward to returning to work. When asked if there were other problems he said: "No, the only thing making me the way I am is my work." On 15 June he visited a manager of HIE in Inverness who put him in touch with a "freelance health promotion, research and training consultant". Cross visited this consultant on the same day. The GP certified that Cross was fit to return to work on 28 June and that certificate was not qualified in any way. On 28 June Cross returned to work and spent the day in conversation with his immediate boss. On 15 August 1992 Cross committed suicide by putting the muzzle of his shotgun in his mouth and discharging it.

Lord MacFadyen stated:

> "In judging whether harm to the employee is within the reasonable foresight of the employer, therefore, it is necessary to bear in mind . . . the actual knowledge of the employer of any special susceptibility to harm possessed by the employee, and any such susceptibility of which the employer (if not actually aware) ought reasonably to have been aware."[62]

The actual knowledge of the employers at the material date amounted to:

> "a certain level of general knowledge of the existence of the phenomenon of stress at work, and of the fact that such stress could harm the health, including the mental health of employees. I am also prepared to hold that the defenders were aware, in a general way, that if a person who had been made ill by stress at work returned to the same stressful working conditions, there was a likelihood of his illness being made worse or reactivated."[63]

As to the employer's actual knowledge of James Cross, the court found that when Cross returned to work, his boss quickly appreciated that he had not fully recovered.[64] However, it was also decided that: "What they knew was that he had been ill enough to be off work for two months, but that, according to his doctor, he was at the end of that period well enough to return to work."[65] So:

> "What they as reasonable employers in my view required to do was to find out what James Cross perceived to be the pressures at work that had precipitated his illness, and to apply their

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62 2001 SLT 1060, at 1078, para 68.
63 *Ibid*, at 1079, para 72.
64 *Ibid*, para. 71.
65 *Ibid*, para. 79.

> mind to those factors and to what might be done to improve the situation"[66]

and they had not failed in this duty.

Practicability of precautions

The summary in *Sutherland* v *Hatton* states that breach will depend, amongst other things on: "the gravity of the harm which may occur, the costs and practicability of preventing it."[67] Another theme from the earlier cases is the practicability of precautions. In *Petch* the employers took the precaution of transferring the employee to a department where work was less stressful and they were not liable. In *Panting* the employers had precautions in place for all pub managers in the shape of an employee assistance programme and, again, the employers were not liable In *Walker*, the employee returned to work on the understanding that the employers were taking the precaution of providing him with assistance. When they failed to do so they were liable for the employee's second breakdown. Similarly, in *Ward* v *Scotrail Railways Ltd*,[68] the employers offered a precaution and then failed to fulfil their offer. In both *Walker* and *Ward* there could be no argument as to the practicability of the precautions because they were offered by the employers who then failed to put them in place as agreed.

Apportionment

The summary in *Sutherland* v *Hatton* states that: "It is for the defendant to raise the question of apportionment."[69] In the context of the *Sutherland* judgment "apportionment" is used to refer to the apportioning of blame and, therefore, damages. Employers may be able to argue that they should bear only a proportion of the responsibility for the damage sustained by the employee. The usual way in which such an argument is framed is in terms of contributory negligence. However, in *Young* v *The Post Office*[70] it was stated that:

> "Although, as the case of *Sutherland* indicates, in many circumstances an employer may not be expected to know that an employee who does not speak up is vulnerable, an employee who is known to be vulnerable is not necessarily to be regarded as responsible for a recurrent psychiatric illness if he fails to tell his employers that his job is again becoming too much for him. A finding of contributory negligence in a case of psychiatric illness, although no doubt theoretically possible in other circumstances, does not in my view sit happily with the facts of this case."[71]

After *Young's* first illness his employers had made adjustments to his way of working, but left it to the employee to indicate if the job was again becoming stressful. The employers argued unsuccessfully that, in so far as *Young*

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66 *Ibid.*
67 2002 WL 45314 (CA), para 43 (8).
68 1999 SC 255, 27th November 1998, Court of Session.
69 2002 WL 45314 (CA), para 43 (15).
70 [2002] IRLR 660.
71 *Ibid*, 663.

failed to give them any such indication, there was contributory negligence on his part.

Emotional distress and psychiatric illness distinguished

The summary in *Sutherland* v *Hatton* distinguishes an injury to health from "occupational stress". Cases in Scotland have distinguished emotional distress and psychiatric illness. In *Ward* Lord Reed held that the averments of injury appeared to go beyond emotional distress and to include psychiatric illness. This distinction was also a key element in *Rorrison* v *West Lothian College*,[72] another opinion of Lord Reed. Rorrison was a qualified nurse employed as a welfare auxiliary at West Lothian College. Over a period of time she experienced many incidents in which she was upset and/or confused by a personnel manager's words, actions and attitude to her. In the latter part of 1993 Rorrison experienced palpitations, sweating, over-breathing and feelings of panic. Her doctor prescribed a beta-blocker. These symptoms continued with increasing severity during 1994 and on 29 March 1994 she felt dizzy and unwell at work. She was taken to her health centre and diagnosed as having stress and anxiety. She has not worked since this 'nervous breakdown'. The case was dismissed at the preliminary hearing on two grounds. Firstly, there was nothing in Rorrison's pleadings, which if proved would establish that the employers ought to have foreseen that Rorrison was under a material risk of sustaining a psychiatric disorder in consequence of their behaviour towards her. Secondly, Rorrison's pleadings did not refer to a recognised psychiatric illness. Lord Reed's opinion included the following:

> ". . . the pursuer had not pleaded any disorder which was recognised in DSM-IV; and there was no suggestion that the position was any different in relation to ICD-10.[73] I appreciate that what constitutes a recognised disorder is a matter for expert evidence, and I am prepared to proceed on the basis that the classifications given in ICD-10 and DSM-IV are not necessarily conclusive. . . Nevertheless, the pursuer's pleadings must give fair notice that it is her intention to lead evidence that she has suffered a recognised psychiatric disorder, and they should specify what that disorder is. In my view that has not been done in the present case."[74]

In both *Ward* and *Rorrison* two points appear to be of major importance. Firstly, pleading a psychiatric disorder, not just for instance a nervous breakdown or anxiety, is vital. Secondly, there is the point already discussed above that employers will only be liable for their response to what they knew or ought to have known.

What sort of claim?

Recent cases have also had various procedural issues to deal with. Firstly, there is the question of suing in contract or tort (delict in Scotland). Where

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[72] 2000 SCLR 245, 21 July 1999, Outer House, Court of Session.

[73] DSM-IV and ICD-10 are diagnostic manuals of mental disorders used by psychiatrists and approved by various professional bodies.

[74] 2000 SCLR 245, at 251.

the employee's claim is based on breach of the employer's duty to take reasonable care not to injure health, the claim can be made either as an action for breach of contract or as an action in negligence.[75] It may also be possible to bring an action in contract based on the breach of an express term in the particular contract. *Logan* v *Falkirk and District Royal Infirmary NHS Trust*[76] is an example of such an action, albeit an unsuccessful one. Another procedural issue concerns the possible overlap of actions in contract and tort with claims of sex or racial discrimination, for instance, where an employee is psychologically injured due to sexually or racially motivated bullying by fellow employees. Again, it appears that a properly framed action can be brought either way. An Employment Tribunal does have jurisdiction to award damages for personal injury caused by the statutory tort of discrimination.[77]

Out of court settlements

Following the landmark cases in which employees were successful in court, there have been a number of out-of-court settlements. In June 1996 Scotland's first stress at work case was settled out of court. Mrs Ballantyne had worked as a manager in an old people's home for 14 years. She claimed that in 1992 her boss, a younger woman, became outspoken and abrasive, confronting her in front of residents and sometimes reducing her to tears. She took the matter to a senior level but her pleas for help were ignored by her employers. Due to stress at work she experienced panic attacks while driving and was put on medication. She thought about committing suicide. Eventually she suffered a major panic attack at work. A spokesperson for South Lanarkshire Council stated that they decided to settle out of court for £66,000 because: "we felt there had been shortcomings in the way this woman was managed".[78] Other examples of out-of-court settlements include the cases of Randy Ingram (see section 2 above) and of Mrs Cath Noonan, a former employee of Liverpool City Council, who received £84,000 in 1999. Also in 1999, the court was left only the task assessing damages in the case of *Lancaster* v *Birmingham City Council*,[79] when the employers admitted liability at the door of the court.

6. CONCLUSION

Over the last decade, stress at work has progressed from the stage of being identified as a problem for some employers towards being recognised as an area of health and safety needing consideration by all employers. However, it appears that, for many employers, the consideration given to stress at work involves only secondary and tertiary interventions and not primary inventions that aim to reduce job and organisational stressors. Employers' civil liabilities for stress-related illness have been acknowledged in the ground-breaking cases of *Johnstone* and *Walker* and more recently the legal

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[75] *Panting* was an action for breach of contract; *Walker* was an action in negligence; *Johnstone* and *Ward* were actions in both contract and negligence.

[76] 1999 GWD 30-1431, 3 August 1999, Outer House, Court of Session.

[77] *Sheriff* v *Klyne Tugs (Lowestoft) Ltd*, [1999] IRLR 481, 24 June 1999, Court of Appeal.

[78] *The Scotsman.*, 12 June 1996.

[79] (1999) 6 Q.R. 4.

framework for such claims has been set out by the Court of Appeal in *Sutherland* v *Hatton*.

This article has described developments in the way stress at work is regulated that appear to be independent of the parallel developments in case law. However, the second conclusion to be drawn from the analysis is that in the future these two strands may become more entangled. Regulatory developments look set to demand more of employers in terms of how they assess the risks concerning stress at work and how they organise employees' tasks and responsibilities with a view to health promotion. The level of knowledge that an employer ought to have about the causes of stress, about possibilities of reducing workplace stressors and about appropriate monitoring of individual employees is likely to increase as stress at work becomes more regulated. Compliance with the draft management standards will require employers to have detailed knowledge of both general and specific stressors operating in their organisations. It has already been demonstrated that, in individual actions for damages, the test of what the employer knew or ought to have known is an important element in establishing liability. If, in the fullness of time, regulations are made in line with the draft standards an employer's failure to comply with them could also be cited as prima facie, if not conclusive, evidence of a breach of the duty of care.[80]

The article has also exposed certain tensions that may have to be addressed in the future. Firstly there is the tension between the union view that some jobs are "simply not manageable" and the ruling in *Sutherland* v *Hatton* that "there are no occupations which should be regarded as intrinsically dangerous to mental health." Secondly, there is the tension between the ideal approach to stress at work that the HSE is striving towards, an approach that clearly includes not only access to appropriate counselling (tertiary level intervention) and the provision of stress management training (secondary level intervention) but also the consideration of stress reduction over the organisation as a whole and for individual jobs (primary level intervention), and the current practice of many employers. Thirdly, there is the tension between the HSE's ideal approach and parts of the ruling in *Sutherland* v *Hatton*. The ideal approach includes primary level intervention, whereas the judgment in *Sutherland* v *Hatton* appears to stop at the tertiary level stating that:

> "An employer who offers a confidential advice service with referral to appropriate counselling or treatment service is unlikely to be found in breach of duty."[81]

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[80] 'Failure to conform to a standard imposed by a statute. . . is not in itself conclusive evidence of negligence; it may, however, sometimes be *prima facie* evidence.' M Brazier and J Murphy, *Street on Torts* (10th edition, 1999) p 245.

[81] 2002 WL 45314 (CA), para 43 (11).

COMMENTS AND NOTES

THE COURT OF APPEAL DEFINES EMBRYO 'SUITABILITY'.

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INTRODUCTION

The Court of Appeal's decision, *R (on the application of Quintavalle)* v *Human Fertilisation and Embryology Authority*,[1] allowed the appeal by the Human Fertilisation and Embryology Authority (HFEA) and declared lawful the licence, issued in February 2002, for the selective implantation of an embryo following *in-vitro* fertilisation (IVF) for Mr & Mrs Hashmi. The licence allowed an embryo to be selected for implantation that was free from the genetic disease *beta-thalassaemia,* as well as being a tissue-match for an existing sibling. Mr & Mrs Hashmi sought the licence, which would permit the IVF treatment, because their son, Zain, was born with a blood disorder known as *beta-thalassaemia* major. This is a serious and life-threatening, genetic disorder. Zain had been the recipient of all available treatment for the disease, except a bone marrow transplant. A bone marrow transplant is possible only when a donor with matching tissue is found, and none existed. If a child were born whose tissue type was the exact match for Zain it would be possible to transplant stem cells from the child's umbilical cord, or extract and transplant bone marrow, thus offering a cure for Zain. Clearly, it was the intention also to ensure that the IVF child was free from the debilitating genetic disorder. On its own this genetic testing requirement would have been non-contentious. It was the addition of the further test, the selection of an embryo to assist in the treatment of an existing sibling that was novel, and, the subject matter of the legal challenge. The selection of embryos to avoid the risk of inheriting a serious genetic disease had been licensed previously by the HFEA.

The case is interesting in two respects. First, the court declared that the HFEA had power to grant the licence sought. Secondly, the purposive interpretation given to the applicable legislation may have considerable importance in view of recent (and continuing) scientific developments and future licensing requests.

Lord Phillips MR gave the leading judgment. He noted that Maurice Kay J in the High Court, "did not consider it necessary to resort to background material when interpreting"[2] the relevant legislation, the Human Fertilisation and Embryology Act 1990 (Act). Furthermore, the decision in the High

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[1] [2002] EWCA Civ 667.
[2] *Ibid*, at [25].

Court[3] implied that the licensing of preimplantation genetic diagnosis (PGD), when there was a known hereditary risk, might fall outside the licensing authority of the HFEA as well. The examination of a single cell removed by biopsy from the developing embryo is the process used to detect both a genetic disease and to establish the tissue type of the embryo. Consequently, the granting of all licences for preimplantation embryo selection might be unlawful. In contrast, Lord Phillips considered an analysis of the background material was "a helpful exercise because that history bears closely on the issue of construction that we have to resolve."[4] As a result, the judgment relied heavily on references to the Committee of Inquiry report,[5] the subsequent White Paper,[6] and discussions arising during the Act's passage through Parliament.[7] Using this written public/parliamentary debate as a basis, the Court of Appeal invoked the tools of statutory interpretation legitimised in *Pepper* v *Hart*[8] and *Royal College of Nursing of the United Kingdom* v *Department of Health and Social Security*,[9] to define the relevant sections of the 1990 Act in a 2003 setting.

The judgment confirmed that Parliament had delegated to the HFEA the task of issuing licences of the type under review. Furthermore, in their legal analysis it was concluded that the power of the HFEA could extend further, to embryo selection on the basis of tissue matching when there was no risk to the embryo of inheriting a genetic disorder, and, in certain circumstances, selection on the basis of sex.[10] The Court of Appeal were clear that this did not imply that embryo selection would be permitted for purely social reasons, confirming that the PGD requested was related to "the health of a sibling and the well-being of the whole family."[11] This inclusive interpretation proffered by the Court of Appeal avoided a distinction between the screening *out* of an undesirable characteristic (a hereditary genetic disease), and the screening *in* of desirable ones (for example, tissue typing or gender). It is schedule 2 of the Act which details activities for which licences may be granted, and included within this list at paragraph 1(1)(d) are "practices designed to secure that embryos are in a suitable condition to be placed in a woman or to determine whether embryos are suitable for that purpose." As will be discussed, the Court's definition of 'suitable' is broad enough in law to include the selection of embryos on the basis of desirable characteristics, hitherto considered by some to be outside the scope of the licensing authority. It is suggested that by reaffirming legal confidence in the licensing role of the HFEA and emphasising the welfare context of the individual woman seeking assistance, the Court of Appeal's decision marks a

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[3] *R (on the application of Quintavalle)* v *Human Fertilisation and Embryology Authority* [2002] EWHC 2785 (Admin).

[4] See n 1 *supra* at [25].

[5] *Committee of Inquiry into Human Fertilisation and Embryology (The Warnock Report)*, Cm 9314 (1984).

[6] Cm 259 (1987).

[7] See n 1 *supra*, at [25 - 36].

[8] *Pepper* v *Hart* [1993] AC 593. In the course of Parliamentary Debate the Secretary of State made "an express statement to Parliament upon the very issue of construction under consideration." (Lord Phillips MR, at [41]).

[9] [1981] AC 800, 822. (Mance LJ, at [109]).

[10] See n 1 *supra*, at [135] and [140].

[11] *Ibid*, at [135].

shift from the public to the private sphere in matters of reproductive choice and assisted reproductive technology.

Background To Court Of Appeal Decision

On 22 February 2002 the HFEA granted the licence to Mr and Mrs Hashmi. This followed a statement of principle released on 13 December 2001 indicating that in certain circumstances the HFEA would consider the selection of embryos on the basis of tissue typing. The licence permitted PGD of embryos created subsequent to IVF for "*beta thalassaemia* in conjunction with HLA typing for patients known as Mr and Mrs H." HLA typing involves the examination of proteins known as human leukocyte antigens, and is known more commonly as 'tissue typing'. In order to offer the Hashmis' son Zain the best chance of a cure a tissue-matched individual was needed. Mr & Mrs Hashmi sought the licence to undergo IVF treatment and embryo selection with the hope that it would lead to the birth of a child free from the genetic disease and also produce a tissue match for Zain. On initial granting of the desired licence by the HFEA Mrs Hashmi underwent two attempts at IVF. At the first attempt only one embryo proved to be a tissue match for Zain, but it carried the *beta thalassaemia* disorder and consequently no implantation followed. At the second attempt an embryo meeting these dual requirements was implanted but did not result in a successful pregnancy.[12]

Any further IVF attempts were prevented by the action for judicial review brought by Josephine Quintavalle, (acting on behalf of CORE[13]), who claimed that the HFEA had acted *ultra vires* the Act with reference to the issuing of this particular licence. An absolute respect for the human embryo is a principal tenet of CORE. As a member of a pressure group Mrs Quintavalle had a 'sufficient interest' in the matter to be granted standing to bring the judicial review action.[14] When an issue is of considerable public interest, as is the case with PGD testing during IVF treatment, the necessary standing to bring the challenge is likely to be afforded.[15] The challenge was focussed on this particular licence "on the ground that the HFEA had no power to issue a licence that permitted the use of HLA typing to select between healthy embryos."[16] The argument presented was that the testing of embryos in the very early stage of development carries an unknown, but presumed, risk. In the case of testing for a genetic disease any such risk could be weighed against the benefits of giving birth to a child without the disease. However, once the embryos are tested, and known to be free of the

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[12] The scientific technology necessary to carry out the PGD to exclude the genetic disorder and to determine tissue typing by HLA testing on the embryo biopsy is available at the Reproductive Genetics Institute in Chicago, USA. Approximately 3 days after *in vitro* fertilisation, when the embryo has sub-divided into 8 cells, one of these cells is removed by a biopsy. The cell biopsy was transported from Nottingham to Chicago for the PGD testing, including HLA typing, and the embryos were frozen pending the results of the tests.

[13] Committee on Reproductive Ethics.

[14] See for example *R* v *Secretary of State, ex parte Greenpeace* (1998) Envir LR 415.

[15] J Alder, *Constitutional and Administrative Law*, (4th ed, 2002, Palgrave Law Masters), p. 409.

[16] See n 1 *supra*, at [10].

disease, the further selection for tissue typing was a selection between equally healthy embryos. The HFEA concurred that embryo testing carried an unknown risk to the embryo because of the need to remove a single cell from the developing embryo. However, in this particular case, PGD was being carried out in order to avoid *beta thalassaemia* and, because HLA testing would be carried out on the same single cell biopsy, there was no additional risk associated with the HLA testing.

In more general terms, and with a view to future licensing applications, the judicial review challenge by CORE invited an analysis of the lawful scope of the power of the HFEA. Quintavalle was successful in December 2002 when the High Court declared the HFEA licence for Mr & Mrs Hashmi unlawful. Leave to appeal was granted by the High Court and the Secretary of State obtained permission to intervene in support of the HFEA because of the wider implications of the High Court decision. Of particular concern was the doubt cast upon the legitimacy of PGD screening of embryos *per se*, a practice that had been licensed for serious genetic diseases previously.

The Relevant Law

The provisions and purposes of the 1990 Act were discussed at length in the judgment, together with the activities it governs, the establishment of the HFEA, and the scope and conditions pertaining to licences granted by it.[17] Lord Phillips provided a helpful précis of the relevant provisions of the Act applicable to the case:

> "For the present purposes it is important to note the following scheme of the Act. Section 3 prohibits the creation or use of an embryo except in pursuance of a licence. Section 11 restricts the power of the Authority to grant licences by reference to the provisions of Schedule 2. Schedule 2 sets out lists of activities that may be authorised by a licence and makes provision for adding to these by regulations. So far as treatment is concerned, the Authority is, however, subject to the overriding restriction that it cannot authorise any activity unless it appears necessary or desirable for the purpose of providing 'treatment services'."[18]

In the course of supplying 'treatment services', the HFEA are permitted to issue licences for, *inter alia*, "practices designed to secure that embryos are in *a suitable condition* to be placed in a woman or to determine whether *embryos are suitable for that purpose*."[19]

In the High Court, Maurice Kay J was of the opinion that the purpose of IVF, as regulated by the Act, was to enable a woman, who might otherwise be denied the opportunity, to become pregnant and carry a child to term. On this analysis, he concluded, it was necessary to use medical intervention *only* to create an embryo, implant it, and await natural developments:

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[17] *Ibid*, at [12 - 13] and [59 - 76].
[18] *Ibid*, at [14].
[19] HFEA 1990, sch 2, para 1(1)(d). Emphasis added.

> "To take the example of the unfortunate family whose problems have given rise to this case – it is not suggested that those problems arise from an impaired ability to conceive or to carry a child through pregnancy to full term and birth."[20]

Having concluded that tissue typing an embryo was unrelated to the legislative objective of assisting the woman to have a child his Lordship declared that it could not come within the definition of 'treatment services' provided in section 2(1) of the Act. Maurice Kay J did not "find it appropriate" to address the issue of PGD screening of embryos for hereditary diseases.[21] Hence, his narrow interpretation of 'treatment services' gave rise to the implication that all preimplantation genetic diagnosis might be unlawful.

The Court of Appeal proceeded on a different analytical basis. It considered that if it was established that the screening of embryos for a serious genetic disease came within the ambit of the Act, because this screening was "designed to secure that the embryo is suitable for the purpose of being placed in a woman", then the further question of whether tissue typing came within the definition of 'suitable', would be answered inevitably in the affirmative.

'Treatment services' … for the purpose of assisting women to bear children

After a detailed analysis of the relevant background material leading to the passing of the Act, Lord Phillips concluded that schedule 2 paragraph 3(2)(b) specifically permitted the licensing of research aimed at increasing our understanding of genetic and chromosomal abnormalities in embryos prior to their implantation. It would be illogical to suggest that, having obtained this knowledge, the Act prohibited its beneficial use:

> "Parliament chose to permit the licensing of research. It makes little sense for Parliament, at the same time, to prohibit reaping the benefit of that research, even under licence."[22]

Whilst acknowledging the 'ordinary meaning' approach of Maurice Kay J to the phrase "assisting women to carry children", Lord Phillips noted that issues other than infertility might act as a barrier to a woman's ability to bear children. Such a barrier, he stated, might be the knowledge that there was a high risk (one in four), that the child would carry a hereditary disease. In this case 'assistance' embraced also clinical efforts to eliminate this risk. He concluded that in order to offer 'treatment services' to a woman, as envisaged by the Act, "PGD is thus designed to secure that the embryo is suitable for this purpose."[23] The embryo selected, the 'suitable' embryo, is the embryo with these desired characteristics. PGD selects an embryo free from the genetic defect. The characteristic of the 'suitable' embryo to assist Mrs Hashmi to carry a child is one free from the genetic defect and a tissue match for Zain. Lord Phillips concluded that the dual nature of the desired

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[20] See n 4 *supra*, at [17].
[21] See n 1 *supra*, at [37].
[22] *Ibid*, at [40].
[23] *Ibid*, at [44].

characteristics did not distinguish this type of preimplantation selection from PGD alone and therefore it too came within the meaning of "treatment for the purpose of assisting women to bear children."[24]

A 'suitable' embryo and a particular woman

Treatment services within the Act went further than offering assistance to enable the physical processes of pregnancy and birth, and embraced the option of ensuring that the embryo selected had characteristics that the individual woman, and the HFEA, considered both 'necessary and desirable'. Thus defined, treatment services could overcome specific, contextual, barriers to natural conception and birth, not just infertility. If specific genetic characteristics were within the definition of 'suitable' so, too, were other embryo characteristics, such as HLA typing, and, sex selection. In all cases the embryo was selected because it possessed desirable characteristics, whether that was being free from a defective gene, being a specific tissue match, or, a particular gender.

In adopting this broad definition the Court of Appeal shifted the emphasis away from a notion of objective legal parameters, or an HFEA checklist, applicable in every licensing request and focussed on the particular licence-seeking woman. They concluded that whether or not an embryo was 'suitable' for the purpose of being placed in a woman "falls to be determined having regard to its context."[25]

Mance LJ expressed unequivocally the need to consider the individual case, rather than seek a taxonomy of 'suitable' embryo characteristics, resulting in a one-size fits all legal interpretation. The text of the Act pertaining to embryo suitability, he concluded, was linked inextricably with a particular woman. The wording of the Act was, he opined, drafted as both "abstract and impersonal" because it applied to licences that would be granted to clinics "for classes of activity in relation to women who have not yet been ascertained." When an individual presented herself the meaning of 'suitable' would be refined from the general to the specific:

> "It does not follow from this formulation that the suitability of an embryo for implantation is to be assessed objectively without reference to the particular woman in whom it is to be placed. That would make no sense. The compatibility of the particular embryo with the particular mother must, at least, be a fundamental consideration."[26]

There is the suggestion here that this desired compatibility might be of overriding significance. If another statutory regime regulating reproductive choice, that of abortion, were compared, it would be strange indeed if the law required a woman to carry to term a foetus, which, for lawful health or welfare reasons, she considered unsuitable.[27] The Court of Appeal agreed that licences granted or refused by the HFEA could impact directly on a woman's decision to have a child at all. The granting of a licence was linked

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[24] *Ibid*, at [48].
[25] *Ibid*, at [49].
[26] *Ibid*, at [127].
[27] Abortion Act 1967.

to the reproductive process because it "would assist some women, who would otherwise refrain from conception or abort either spontaneously or deliberately, to carry a child."[28] Mrs Hashmi, subsequent to Zain's birth, became pregnant naturally twice. The first foetus was aborted because it tested positive for the genetic defect and the second resulted in a live birth but no tissue match for Zain. If a reliable, safe and effective early foetal HLA typing test was available would it be acceptable for a woman to continue to conceive naturally, undergo testing, and request a series of lawful abortions until a foetus, both free from the hereditary disease and a required tissue match was conceived? It seems unlikely.[29]

Mance LJ pointed out that "neither Warnock nor the White Paper recommended any absolute prohibition in relation to embryonic testing, or, in relation to sex selection for reasons unrelated to the child-to-be-born's medical condition."[30] However, he confirmed that, bearing in mind the special protection offered by the Act to the embryo, if embryo testing was extended, it was the HFEA, through the granting of licences, that would control its scope. The Warnock report, he noted, considered that the question of sex selection should be "kept under review", and that the proper forum for review should be the body established by the Act, the HFEA.[31]

Lord Phillips stated that preimplantation embryo screening offered novel choices to parents considering reproduction. Discussions between the HFEA, the clinic requesting the licence, and the individuals involved, should in each case determine whether a licence should be granted:

> "IVF treatment can help women to bear children when they are unable to do so by the normal process of fertilisation. Screening of embryos before implantation enables a choice to be made as to the characteristics of the child to be born with the assistance of the treatment. Whether and for what purposes such a choice should be permitted raises difficult ethical questions. My conclusion is that Parliament has placed that choice in the hands of the HFEA."[32]

The issuing of the challenged licence in February 2002 was followed in August 2002 by the HFEA decision to refuse a licence to the Whitaker family for HLA typing when the sibling's needs, although similar medically, did not arise because of a hereditary genetic disease. These two licensing decisions were distinguished on the basis that the HFEA guidelines for the granting of the licence to the Hashmis were subject to eight conditions, the second of which was that the embryos should themselves be at risk of the condition affecting the child. As stated by the HFEA the removal of a single cell from the developing embryo for the purpose of PGD carries an unknown risk to the unborn child. In the case of the Whitakers they were not seeking a licence for PGD to determine whether an embryo carried a genetic disorder as well as to carry out an HLA test. The HFEA concluded that the risk of

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[28] *Ibid*, at [89].
[29] See further Stephen R. Munzer, "Conditional Intention and Abortion" (2002) 41 *The Pelican Record* 58.
[30] See n 1 *supra*, at [139]
[31] *Ibid*, at [124].
[32] *Ibid*, at [50].

PGD for HLA testing alone outweighed any benefits accruing to the embryo by the mere fact of assisting a sibling, and consequently the licence for the Whitakers was refused. In view of the Court of Appeal's broad definition of 'suitable' the refusal to issue a licence for HLA typing alone may be challenged through the courts at a later date. A general requirement by the HFEA that there needs to be a risk of passing to the embryo a serious genetic disorder in order to issue a licence for *any* PGD testing was questioned by the Court of Appeal. Mance LJ stated that when a licence was sought for a combination of preimplantation testing, each test must be considered separately by the HFEA and each must be separately lawful under the Act.[33] A test, which is to be used as a basis for embryo selection, is not lawful merely because it is to be carried out together with another test for which licences are granted routinely, such as in the case under review PGD with HLA typing. The HLA typing, or any other available tests, must be lawful in its own right. The removal of the cell for biopsy, and the concomitant risks attaching to the unborn child, must be linked to activities permitted by the Act.

Responding to Public Concerns

Josephine Quintavalle, on behalf of CORE, was granted standing to bring this action for judicial review and the issues attracted considerable media interest and public discussion. Prior to the granting of the licence to Mr and Mrs Hashmi there had been significant public consultation by the HFEA and others, resulting in recommendations and guidelines for licensing. In response to perceived public concern about PGD, the HFEA, together with the Human Genetic Commission[34] launched a joint public consultation document in November 1999.[35] These two commissioning bodies formed a Joint Working Party (JWP), and the results of their discussions, taking into account responses from the public consultation, were published in November 2001.[36] The outcome of the public consultation suggested that there was support in the community for the controlled use of PGD.

It is of particular interest to note that the JWP recommended "that PGD should only be available where there is a significant risk of a serious genetic condition being present in the embryo."[37] The JWP concluded that 'ethical difficulties' meant that this recommendation ruled out, by implication, the selection of embryos subsequent to HLA typing. A later report of the House of Commons Select Committee on Science and Technology was critical of the HFEA's approach to HLA typing, and the granting of the licence in the

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[33] S 2(1) and schedule 2 para 1(1)(d).

[34] The Human Genetic Commission was formed in December 1999 and replaced the Advisory Committee on Genetic Testing in the UK.

[35] Organisations that responded to the consultation on PGD are listed under the headings: Clinical/Scientific (9); Bioethical/Social Science (6); Consumer Groups (8); Disability (10); Religious or Pro-Life (13).

[36] *Outcome of the Public Consultation on Preimplantation Genetic Diagnosis*. Copies of the documents are available on the HFEA and Human Genetics Commission websites <www.hfea.gov.uk and www.hgc.gov.uk/business_ publications.htm> respectively).

[37] Report Recommendation 11.

Hashmi case, saying that it "went beyond the scope of its own public consultation."[38]

That may be so. However, this decision of the Court of Appeal confirmed that the HFEA has the statutory authority to issue licences without the need to consult widely. Licences could be granted lawfully for PGD, HLA typing, and even sex selection, in certain circumstances. According to the Court of Appeal this interpretation of the relevant provisions of the 1990 Act springs from the wording of the Act itself. The granting of licences for PGD is lawful because, by applying Lord Wilberforce's dictum in *Royal College of Nursing of the United Kingdom* v *Department of Health and Social Security*, "they fall within the same genus of facts as those to which the expressed policy has been formulated."[39] Parliament, stated the Court of Appeal, supplied the answer to the questions raised in this action in its initial, and substantial, deliberations when the Act was being passed.

CONCLUSIONS

Artificial reproductive technologies, including IVF treatments, aim to overcome barriers to reproduction. The Court of Appeal has confirmed that, although the main barriers to conception and reproduction are associated with the physical condition of the persons seeking assistance, there are other obstacles to achieving the desired outcome. One such barrier is the fear of passing on a serious genetic disorder. These barriers are linked to the individuals seeking assistance and must be considered in the context of those individuals within the ambit of the 1990 Act. The selection of an embryo suitable for implantation in an individual case, and the technologies employed to test embryo suitability, must be considered on a case-by-case basis. The Authority created by the Act, the HFEA, was given the task of deliberating on the social, ethical and practical consequences of issuing or refusing licences after considering the welfare of the prospective child and the welfare of the family unit into which it will be born. The consultative processes carried out by the HFEA have the effect of maintaining its legitimacy within the wider community. The Court of Appeal has reiterated that the HFEA is the appropriate body, with the appropriate expertise, to issue clinical licences in this environment of rapidly developing scientific knowledge. This decision has interpreted the Act in the context of its purpose, to protect and facilitate, in matters associated with IVF. Legal capacity in respect of the issuing of licences for PGD during IVF treatment is placed firmly in the hands of the HFEA.

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[38] 18 July 2002.
[39] *Supra*, n 9.

THE CONDITION OF ABORTION LAW IN NORTHERN IRELAND[1]

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Abortion law is markedly different in Northern Ireland than in the rest of the United Kingdom. The Abortion Act 1967 does not apply in this jurisdiction and the law operating here is derived from the same sources as applied in Great Britain prior to the 1967 Act.[2] What is the condition of that law as it applies in Northern Ireland today? Does it provide clear guidance to women undergoing unwanted or difficult pregnancies and to doctors charged with responsibility for providing medical assistance to them? This and other questions were considered by Kerr J in *In the matter of an application by the Family Planning Association of Northern Ireland for judicial review*.[3] In this comment only the clarity of the law will be considered in any depth.

The Application

The Family Planning Association for Northern Ireland (hereafter the applicant) sought a declaration that the Minister for Health had acted unlawfully in failing to provide advice and guidance to women and physicians in Northern Ireland on the availability and provision of services for the termination of pregnancy. Underlying this application was the argument that abortion law in Northern Ireland was so unclear that the Minister was obliged to provide this guidance so that persons affected by unwanted or difficult pregnancies understood their rights. An ancillary order of mandamus was also sought to compel the Minister to issue this guidance.

The Law in Northern Ireland

Kerr J's judgment began as follows. "Abortion is legal in Northern Ireland – in certain circumstances. It has been said that there is a widespread belief that abortion here is always illegal. If there is such a belief, there is no justification for it. It is wrong and after this case there is no reason why it should persist."[4] What are the circumstances in which abortion is legal in Northern Ireland?

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[1] Many thanks are due to Rachel Rebouche of the Queen's Human Rights Centre who read and commented upon an earlier draft of this article. Her efforts have ensured considerable improvement to the article but the author remains solely responsible for any remaining errors.

[2] The Abortion Act 1967 does not actually replace the pre-existing law but operates as a graft upon it.

[3] [2003] NIQB 48 (judgment delivered 7th July 2003).

[4] *Ibid*, para 1. The applicant's director, Ms Audrey Simpson, stressed this point when interviewed on television news shortly after judgment was handed down. In truth it is the only crumb of comfort in a judgment which was otherwise a total defeat for the applicant's objectives in launching the litigation. The applicant, however, could also derive some satisfaction from Kerr J's surprising statement, made only when delivering his judgment, that he hoped that the Department would issue guidance to clinicians notwithstanding his refusal to compel it to.

The starting point is section 58 of the Offences Against the Person Act 1861. Essentially this makes it a criminal offence for a pregnant woman or for any other person (in the present context usually clinicians) *unlawfully* to attempt to procure her miscarriage. That section is supplemented by section 25(1) of the Criminal Justice Act (Northern Ireland) 1945 which makes it an offence to cause the death of a child capable of being born alive before it has an existence independent of its mother. Under section 25(1) the prosecution must prove that the act causing the death of the child was "not done in good faith for the purpose only of protecting the life of the mother." Section 25(1) seems intended to deal mainly with late term abortions not taking the form of procuring a miscarriage.

The crucial questions are when procuring a miscarriage is *unlawful* within the meaning of section 58 and when it cannot be shown that the act alleged to violate section 25(1) was "not done in good faith for the purpose only of protecting the life of the mother." According to the seminal case of *R* v *Bourne*[5] these are essentially similar and an accused person seems only to have to put in issue the question whether he or she acted to protect the life of the mother. Once that is done the prosecution must then prove, to the requisite criminal standard of proof, that the defendant did not act for this purpose, otherwise there has to be an acquittal.

Again, according to *Bourne*, it seems to be unnecessary to show that a clinician honestly believed that the pregnant woman would inevitably or even probably die if the pregnancy were not aborted. MacNaughten J's direction to the jury in that case contained the following elaboration upon the meaning of the words "preserving the life of the mother":-

> ". . . those words ought to be construed in a reasonable sense, and, if the doctor is of opinion, on reasonable grounds and with adequate knowledge, that the probable consequence of the continuance of the pregnancy will be to make the woman *a physical or mental wreck*, the jury are quite entitled to take the view that the doctor who, under those circumstances and in that honest belief, operates, is operating for the purpose of preserving the life of the mother."[6]

This approach was followed in Northern Ireland in *Northern Health and Social Services Board* v *F and G*.[7] In that case a minor was made a ward of court when she was found to be 13 weeks pregnant. Uncontradicted psychiatric and other medical evidence before the court indicated that the ward had repeatedly stated she would kill herself or the unborn child if she could not have the pregnancy terminated. Sheil J held that the law in Northern Ireland was that an abortion could be lawfully carried out where it was performed in good faith for the purpose of preserving the life or health

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[5] [1939] 1 KB 687.

[6] Quoted at [2003] NIQB 48, para 32. (Emphasis added). In passing it might be worth observing that MacNaughten J did not direct the jury that they were *obliged* to acquit in those circumstances, a direction which might be expected in respect of a legal provision having the clarity usual in the criminal law.

[7] [1993] NI 268. For comment on this case and the case of *A*, *infra* n 9 see T. McGleenan, "*Bourne* Again? Abortion Law in Northern Ireland after *Re K* and *Re A*" (1994) 45 *NILQ* 389.

of the mother. Health included mental health and it would be lawful to carry out an abortion in the circumstances of that case. Since, notwithstanding the ruling of the court, no obstetrician could be found in Northern Ireland willing to perform the operation, Sheil J granted an order permitting the procedure to be carried out in England.[8]

The subsequent case of *Northern Health and Social Services Board* v *A and others*[9] added more detail to the meaning to be attributed to the defence of "for the purpose only of preserving the life of the mother." MacDermott LJ, in granting a declaration that it would be lawful to terminate the pregnancy of a severely mentally handicapped woman of 23 years, stated that the defence does not relate solely to some life threatening situation. "Life in this context means the physical and mental health or well being of the mother and the doctor's act is lawful where the continuance of the pregnancy would adversely affect the mental or physical health of the mother."[10] His Lordship went on to say that the adverse effect had to be "real and serious" and that "it will always be a question of fact and degree whether the perceived effect of non-termination is sufficiently grave to warrant terminating the unborn child."[11] Finally it is worth mentioning that MacDermott LJ made reference to the "unsatisfactory and uncertain" state of the law. Kerr J thought this only meant that there were uncertainties in making the clinical judgment that the facts fitted the relevant legal principles, not that there were uncertainties as to those principles themselves.[12] It will be argued below that there are uncertainties about each of these matters.

A final case which must be mentioned at this stage is *Western Health and Social Services Board* v *CMB and the Official Solicitor*.[13] There Pringle J granted a declaration that the termination of the pregnancy of a mentally handicapped 17 year old was lawful. In the course of his judgment Pringle J stated that the words "or well being" appearing in the judgment of MacDermott LJ in *A* added nothing to physical and mental health and could be omitted without altering the sense of the judgment. His Lordship went on to deal with two further questions relating to physical and mental health. First, he said that the problem had to be permanent or long term and that this was what MacDermott LJ had meant by "real and serious" adverse effects. Secondly, Pringle J indicated that the more serious the potential consequences of non-termination the less likely those consequences would have to be before abortion became justifiable. In most cases the adverse effect would need to be a probable risk but a possible risk might be sufficient if the imminent death of the mother were the risk in question.

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[8] Apparently there was still a perception that any obstetrician carrying out the procedure risked prosecution.

[9] [1994] NIJB 1. This application was brought by the obstetrician, indicating that clinicians had acquired a little more confidence in the legality of abortion in Northern Ireland in certain circumstances.

[10] *Ibid*.

[11] *Ibid*.

[12] [2003] NIQB 48, para 35.

[13] (1995) unreported.

From the above authorities Kerr J, on the suggestion of counsel for the respondent and with the consent of counsel for the applicant, distilled the following principles:-

- Operations in Northern Ireland for the termination of pregnancies are unlawful unless performed in good faith for the purpose of preserving the life of the mother;
- The "life" of the mother in this context has been interpreted by the courts as including her physical and mental health;
- A termination will therefore be lawful where the continuance of the pregnancy threatens the life of the mother, or would adversely affect her mental or physical health;
- The adverse effect on her mental or physical health must be a "real and serious" one, and must also be "permanent or long term";
- In most cases the risk of the adverse effect occurring would need to be a probability, but a possibility might be regarded as sufficient if the imminent death of the mother was the potentially adverse effect;
- It will always be a question of fact and degree whether the perceived effect of a non-termination is sufficiently grave to warrant terminating the pregnancy in a particular case.[14]

Since abortions for foetal abnormality are omitted from the above list one can only conclude that these sorts of abortions are not permitted in Northern Ireland. Exceptionally a case may be made that a woman carrying such a child could become a physical or mental wreck were she denied a termination but this would not be abortion on the ground of foetal abnormality.

The judgment in the *Family Planning Association* case is extremely helpful in elucidating the law in Northern Ireland more clearly than it had been before. Kerr J stated his belief that the legal principles were clear and that any difficulties surrounding them were confined to deciding whether the facts of a particular case can be accommodated within them.[15] This, however, may be doubted. Language such as "real and serious", "permanent or long term", "probability", "possibility", and "question of fact and degree" has an inherent vagueness to it. It is difficult to imagine that doctors would feel that the question they had to address was solely one of fitting the clinical judgment to a fixed and certain legal test. In addition to the clinical judgment as to how "real and serious", "long term" or "probable" certain risks are, there is also the threshold question of how "real and serious", "long term" or "probable" the risks *need to be*. With illegal abortion being a crime there would be further protection in the requirement for the prosecution to prove beyond all reasonable doubt that these principles were *not* satisfied.[16]

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[14] [2003] NIQB 48, para 37.

[15] *Ibid*, para 39.

[16] Civil suits do not seem to present a problem. The pregnant woman is only going to sue for a "botched" abortion. Parents and persons in *loco parentis* would appear to lack standing and would have enormous difficulty in proving identifiable loss.

But the ultimate decision would rest with a jury, which would probably take at least something away from the sense of security conferred by this requirement. It is likely that doctors will make applications to the High Court for declarations that abortions would be lawful in particularly difficult cases and that women will continue to make the emotionally shattering, frequently lonely, and financially costly journey to Great Britain to access services more widely available there. When the legal position in Great Britain is compared to that of Northern Ireland the difficulties with the Northern Ireland principles become even more apparent.

The Law in Great Britain

Section 1(1) of the Abortion Act 1967, as amended by the Human Fertilisation and Embryology Act 1990, provides a complete defence for a registered medical practitioner who performs an abortion where two registered medical practitioners[17] in good faith make one or other of the following four clinical judgments:-

- The pregnancy has not exceeded its twenty-fourth week and continuing it would involve greater risk to the physical or mental health of the pregnant woman or any existing children of her family than terminating it (section 1(1)(a));
- Termination of the pregnancy is necessary to prevent grave permanent injury to the physical or mental health of the pregnant woman (section 1(1)(b));
- Continuance of the pregnancy would involve greater risk to the life of the pregnant woman than termination (section 1(1)(c));
- There is a substantial risk that if the child were born it would suffer from such physical or mental abnormalities as to be seriously handicapped (section 1(1)(d)).

Kerr J held that the substantive law on abortion in Northern Ireland approximated to sections 1(1)(b) and (c) of the 1967 Act.[18] As the Abortion Act operates as a graft upon the pre-existing legal provisions there is a degree of plausibility to this. Section 1(1)(a) could be seen as the general provision on abortion accommodating all cases falling within sections 1(1)(b) and (c) save those beyond the twenty-fourth week of pregnancy. Section 1(1)(d) is a specific provision on foetal abnormality and has no parallel in Northern Ireland. However Lord Lester's argument for the applicant cannot be dismissed too easily. Pointing out that sections 1(1)(b) and (c) exist mainly to deal with late term abortions Lord Lester suggested that "grave permanent injury" may be a higher threshold than "real and serious". If so Kerr J's judgment potentially narrows the scope for legal abortions in Northern Ireland by asserting that the tests laid down in previous Northern Ireland cases are synonymous with grounds in the 1967 Act.

It is less easy to accept Kerr J's apparent belief that the exposition above shows the legal principles in Northern Ireland to be clear. His Lordship

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[17] The Act does not state that these have to be two different medical practitioners.
[18] [2003] NIQB 48, paras 41-43.

referred to a letter sent by the Director of the Office for National Statistics to Crispin Blunt MP in response to a parliamentary question he asked about the number of abortions performed in England and Wales on women from Northern Ireland.[19] The statistics indicated that between 1993 and 1997 exactly 8,000 women[20] from Northern Ireland underwent abortions in England and Wales. Of these only 4 (0.05%) were performed on the grounds set out in sections 1(1)(b) and (c) of the 1967 Act. Kerr J stated that it followed from this that "the vast majority of women who travelled to England for abortions could not have had those abortions lawfully in Northern Ireland"[21] and "that only an inconsequentially small percentage of women who would be entitled to termination of pregnancy in Northern Ireland travel to England to have an abortion."[22] The first of these quoted statements is almost certainly literally true but the second is seriously disputable. The statistics quoted do not tell us how many abortions were carried out under section 1(1)(a) because they clearly fell within the wide words of that provision but only arguably fell within sections 1(1)(b) or (c). Neither do they tell us whether any of the 4 abortions affirmatively carried out under sections 1(1)(b) or (c) were late term abortions beyond the twenty-fourth week of pregnancy. There remains the distinct possibility that a small but more than inconsequential number of abortions are carried out on women from Northern Ireland under section 1(1)(a) because of legal doubt as to whether they fall under section 1(1)(b) or (c). If the threshold is higher under sections 1(1)(b) and (c) than under the Northern Ireland cases prior to *Family Planning Association* this becomes an even greater possibility.

Commentary

The judgment is valuable because it elucidates the principles of abortion law in Northern Ireland more clearly than ever before. There is room, however, for serious dispute as to whether those principles are anything like as clear as the learned judge stated they were. Since Kerr J was of opinion that the law was clear there was no point in issuing any orders to the Department to provide more detailed guidance for the benefit of doctors. But even if the judge had been of opinion that the law was unclear it would probably have been wise to deny the applicant's request for relief. It may be doubted whether delegation of the task of producing clarifying guidance to civil servants would have been particularly productive. The Department might have issued extremely cautious guidance giving the impression that abortion was available only in very restrictive circumstances, *e.g.* instances of rape and incest. Had the judge given a very detailed steer to the Department this might have approximated too much to an advisory opinion. Had this steer opened up the circumstances in which abortion was available to any large extent it could also have amounted to judicial legislation.[23] In the light of this it is surprising that, as reported to the author, the judge encouraged the

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[19] *Ibid*, para 42.
[20] This number may not be correct if, as is widely believed, many women give false names and addresses when travelling to England to have abortions.
[21] [2003] NIQB 48, para 42.
[22] *Ibid*, para 55.
[23] The decision of the United States Supreme Court in *Roe* v *Wade* (1973) 410 U.S. 113 is widely (but not exclusively) regarded as judicial legislation.

Department to issue guidance to doctors when he delivered his judgment in open court. This encouragement does not appear in the judgment.

Although the applicant expressly disavowed any intention to change the law by instituting these proceedings it is difficult not to suspect that this was its underlying agenda. The judge may well have suspected this too because in referring to a letter written by the applicant's Director to the Minister of Health prior to the initiation of proceedings, he stated that its true nature was "a complaint that women in Northern Ireland do not have access to abortion as readily as do women in England."[24] There is plausibility in the thought that the applicant would not have been too upset had the judge pronounced the law in Northern Ireland to be a mess beyond the power of courts to clear up satisfactorily. That may have put the heat back on the legislature to come up with a clarifying statute which might serve the incidental purpose of extending the circumstances in which abortion were available.[25]

It is here where Kerr J may well have faced a considerable dilemma and where the solution he arrived at (unsatisfactory though this was) may prove to be the best realistically achievable at the present time. In abortion law it is extremely difficult to achieve clarity without also having width. Even very narrow and specific guidance is likely to give rise to fine points of interpretation and sufficient room for doubt that a risk averse medical profession may not derive much assistance from it. In contrast section 1(1)(a) of the Abortion Act 1967 provides an extremely clear test for doctors in deciding whether they can lawfully perform an abortion. In most cases they only have to ask themselves whether going ahead with the pregnancy would involve greater risk to the health of the pregnant woman than termination. Given the relatively simple nature of abortion procedures in the early stages of pregnancy it is not usually a problem answering this question and answering it in the affirmative.[26] This results in a considerable number of abortions and can quite justifiably be characterised as "abortion on demand". Abortion is one of the very few social and political issues that unites political parties and churches in Northern Ireland. A relatively recent Assembly debate on abortion clearly shows how difficult it will be to achieve any kind of clear (and liberal) abortion law in this jurisdiction.[27] The late Professor Sir John Smith, who engaged in a lifelong crusade for a more modern law of crimes to the person than the Offences Against the Person Act 1861, might deplore it; others might castigate it as taking refuge in a jurisprudence of doubt,[28] but it is extremely difficult to see any alternative to the *status quo* in the current climate.

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[24] [2003] NIQB 48, para 12.

[25] Another possibility is that the applicant was just seeking enforcement of the Department's European Convention obligation to provide its statutory health care services fairly, consistently and with due regard to the best interests of the women concerned. To the extent that this was the applicant's objective it failed because Kerr J held it was not a "victim" within the meaning of s 7 of the Human Rights Act 1998. See [2003] NIQB 48, para 66.

[26] "Social circumstances" abortions, where the effect on other children the pregnant woman has, are clearly more difficult but these are not the usual types of case.

[27] See <www.ni-assembly.gov.uk/record/reports/000620.htm#2>.

[28] See M. Fox and T. Murphy, "Irish abortion: Seeking refuge in a jurisprudence of doubt and delegation" (1992) 19 *Journal of Law and Society* 454.

SHAMOON V *CHIEF CONSTABLE OF THE RUC* – WHAT IT SAYS ABOUT THE CONTEMPORARY LEGAL POSITION OF UNLAWFUL SEX DISCRIMINATION

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In February of this year, the House of Lords passed judgment, in favour of the respondent, on the sex discrimination case *Shamoon* v *Chief Constable of the Royal Ulster Constabulary*.[1] In December 1997, the appellant, Chief Inspector Shamoon, lodged an application with the Industrial Tribunal for Northern Ireland, alleging that she had been unlawfully discriminated against on the ground of her sex, contrary to article 3 of the Sex Discrimination (Northern Ireland) Order 1976.[2] The House of Lords' judgment, almost thirty years since the enactment of the legislation, highlights the still continuing statutory and evidential difficulties in proving an alleged case of direct discrimination, and the importance of understanding and satisfying the basic principles of the Order .

The Facts

The key facts of the case were as follows. The appellant, at the time of her complaint, had been a serving member of the RUC for twenty-two years, and a Chief Inspector since 1995. She was employed in Urban Traffic, one of three RUC Traffic Branches, and in 1997, Superintendent Laird, the alleged discriminator,[3] became her immediate superior officer. The RUC operated a Staff Appraisal Scheme and by 1997 it had become established practice throughout the Force for Chief Inspectors to carry out such appraisals for lower ranking officers, even though clause 3.2 of the Scheme provided that Superintendents should perform the task.

In April 1997 a constable made a complaint to Superintendent Laird regarding how Chief Inspector Shamoon had conducted her appraisal. He upheld the complaint. In September 1997 another constable, Constable Currie, made a second complaint about the appellant's appraisals. He was dissatisfied with an analogy the appellant had made about his unwillingness to discuss problems and an unadmittent alcoholic. After a discussion with the Superintendent, who was aware of what the comments referred to, the appellant reluctantly agreed to delete the analogy from her report. The Constable however, took his complaint to the Police Federation, and on 6 October a meeting was held between representatives of the Police Federation and Superintendent Laird to discuss staff appraisals.[4] During the meeting the

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[1] [2003] UKHL 11.

[2] The Northern Ireland equivalent to the Sex Discrimination Act 1975.

[3] The Chief Constable of the RUC was the named respondent by virtue of vicarious responsibility as provided for in article 42(1) of the Order.

[4] In his evidence given at the hearing, Superintendent Laird claimed that it was a general meeting, not directly related to the appellant and Constable Currie, and that the latter were merely briefly referred to. The tribunal was highly sceptical about this given the result of the meeting.

Federation brought clause 3.2 to the Superintendent's attention, whereupon he agreed that he should follow the strict letter of the scheme. Important to this outcome was the fact that it was common knowledge that from December 1997 the policy would be changed, with the result that appraisals would thus forth be carried out formally by Chief Inspectors.

When the appellant was informed about the outcome of the meeting, she immediately expressed her dissatisfaction at what she viewed as Superintendent Laird's failure to stand-up to the Federation on her behalf and resist their demands, pointing out that the male Chief Inspectors in the North and South divisions of Traffic Control were still doing appraisals. The Superintendent responded that he was only concerned with what happened in Urban Traffic Control, and that he felt it important to keep on the right side of the Federation. The appellant told him that she felt discriminated against, that her position had been undermined and that she wished to evoke the grievance procedure. This she did not formally do, but instead lodged the above mentioned complaint.

The Legislation

To establish a case of direct discrimination based on sex, the following provisions of the Order must be satisfied. Article 3(1) provides:

> "A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Order if –
>
> (a) on the ground of her sex he treats her less favourably than he treats or would treat a man. . ."

Article 7, entitled "Basis of comparison", provides:

> "A comparison of the cases of persons of different sex or marital status under article 3(1) or 5(1) must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

The relevant provision dealing with discrimination in the employment field is article 8(2):

> "It is unlawful for a person, in the case of a woman employed by him at an establishment in Northern Ireland, to discriminate against her -
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> (a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or
>
> (b) by dismissing her, or subjecting her to any other detriment."

The Industrial Tribunal found in favour of Chief Inspector Shamoon. The respondent then appealed to the Court of Appeal, which upheld the appeal on the basis that none of the questions of law had been satisfied. Chief Inspector Shamoon then appealed to the House of Lords who found some, but not all, of the criteria satisfied, thus dismissing her appeal.

What Must Be Proven?

In light of the above provisions, two questions must be answered satisfactorily to show unlawful direct discrimination. Firstly, was the appellant subjected to a 'detriment' within the meaning of article 8(2)(b) when Superintendent Laird stopped her from carrying out staff appraisals? Secondly, under articles 3(1)(a) and 7, in the relevant circumstances and on the ground of her sex, had Superintendent Laird treated her less favourably than he treated or would have treated a man in the same or not materially different circumstances?

Detriment

The tribunal seems to have assumed detriment under article 8(2)(b) when Superintendent Laird 'removed' the appellant from her right to continue to do appraisals on constables.[5] However, the question of article 8(2)(b) was not raised at the hearing by way of evidence, cross-examination or submissions by either party, and was in fact not expressly dealt with in the Tribunal's decision.

The Court of Appeal took a particularly narrow definition of detriment under article 8(2)(b), and failed to find it in the appellant's case. Approving the Employment Appeal Tribunal's meaning of the word in *Lord Chancellor* v *Coker and Osamor*,[6] they held that it had to be interpreted in accordance with the word 'dismissing' in the same paragraph, thus there had to be some physical or economic consequence. This, said Carswell LCJ, was in accordance with the decision of the Court of Appeal in *Barclays Bank plc* v *Kapur and others (No 2)*[7] that an unjustified sense of grievance cannot amount to detriment. He said the appellant was unjustified in her grievance, because she had in fact no 'right' to carry out the appraisals, and suffered no loss of rank or no financial consequence when the position was removed from her.

By the date the appeal came to the House of Lords, the respondent had to concede, given the House of Lords' decision in *Chief Constable of the West Yorkshire Police* v *Khan*,[8] that the Court of Appeal's decision on this point could not stand. This case affirmed previous cases[9] - which predated the Court of Appeal's decision, but had not been mentioned in the judgment - that gave detriment a wide construction, far beyond financial loss. Lord Hope said that essentially, the appellant had to show that her disadvantage was a detriment within the employment field by virtue of article 8(2)(b), by showing that by reason of the act or acts complained of, a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work.[10] He also drew attention to Lord Hoffmann's point that an industrial/employment tribunal has

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[5] Para 10, tribunal report.
[6] [2001] IRLR 116.
[7] [1995] IRLR 87.
[8] [2001] UKHL 48; [2001] 1 WLR 1947.
[9] *Ministry of Defence* v *Jeremiah* [1980] QB 87, 104B; *De Souza* v *Automobile Association* [1986] ICR 514, 522G; *Barclays Bank plc* v *Kapur* [1989] IRLR 387.
[10] Para 34, in accordance with May LJ in *De Souza* v *Automobile Association, ibid*.

jurisdiction to award compensation for injury to feelings, the relief the appellant was actually seeking. This provided a further reason to give detriment a broad definition, beyond its literal context within the other comprehensive employment terms in article 8(2).[11] The only other limitation, said Lord Hope, was that of materiality - was it a justified sense of grievance or detriment given all the circumstances?

Despite the tribunal not making an express finding on this issue, the House unanimously found material in the evidence from which the appellant was entitled to a finding that she had suffered a detriment within the meaning of article 8(2)(b). It was currently 'endemic' throughout the force for Chief Inspectors to carry out appraisals, and this would become a formal procedure in three months time. In light of this, once it became known that these responsibilities had been taken away from her, the effect was likely to reduce the appellant's standing among her colleagues. A reasonable worker, in the view of the House, would be entitled to feel that she was being demeaned over those whom she had authority, and thus suffering a 'detriment'.

Less Favourable Treatment by Way of Sex

Our second question focuses upon articles 3(1)(a) and 7. Although asking a single question, article 3(1)(a) has normally been divided by tribunals and courts into two legislatively required parts. Firstly, did the claimant, given the relevant circumstances, receive less favourable treatment compared to how her employer treated or would have treated a man? Secondly, was the reason for this less favourable treatment based on the prohibited grounds of sex? It has been accepted that the legislation calls for a comparison between the claimant and a male comparator. For the purposes of article 3, a choice must be made as to what circumstances are relevant or irrelevant in respect of both the comparison for determining less favourable treatment, and in deducing the reason for it. Article 7 delineates the test for the application of this rule:

> "[the comparison] must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."

The Tribunal's Reasoning

The tribunal proceeded on the basis that the two male Chief Inspectors in the North and South branches were suitable comparators, as their work was not materially different from the appellant's. The appellant's counsel, relying on Lord Nicholls' approach to comparators in the victimization case *Chief Constable of the West Yorkshire Police* v *Khan*,[12] argued that the complaints and representations, which were unique to the appellant, were not relevant circumstances in establishing a comparator for 'less favourable treatment', but were instead only 'reason why' points. The tribunal essentially accepted this approach and were sceptical about the respondent's reasons for removing appraisals from the appellant. Constable Currie's report had been

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[11] Not just by analogy with the word 'dismissal' in article 8(2)(b), as the Court of Appeal had suggested.

[12] See n 8 above.

amended by the time of the meeting with the Federation, and the Federation had not made any further representations about the appropriateness of Chief Inspectors carrying out appraisals. A majority of the tribunal was thus satisfied that this aspect of the legislation had been satisfied.[13]

The Court of Appeal's Ruling

The Court of Appeal opinion was in direct contrast to the tribunal. They ruled that the appellant had failed to show less favourable treatment by use of a valid comparator, and consequently that such treatment was based on sex. Applying *Chief Constable of the RUC* v *A*,[14] which held that those circumstances on which a reasonable person would place some weight in determining how to treat another were to be taken into account, Carswell LCJ ruled that the complaints made against the appellant regarding appraisals, and the subsequent representations made by the Federation, were circumstances which a reasonable person could not ignore in comparing the applicant with the other male Chief Inspectors. The Court of Appeal thus ruled that the claimant had failed to establish a valid comparator, and that subsequently her claim could not be evidenced. They did, however, proceed to discuss the 'reason why' issue, concluding that while the tribunal was entitled to entertain the possibility that such an assumed difference of treatment could be based on sex and look to the employer for an explanation,[15] they were satisfied by the explanation given by the respondent that the removal of appraisals was because of the complaints and the Federation representations and not the appellant's sex.

The House of Lords' Judgment

The House of Lords agreed with the Court of Appeal that the tribunal misdirected itself that the male Chief Inspectors were valid comparators. They rejected the appellant's argument regarding comparators because the test propounded in *Chief Constable of the West Yorkshire Police* v *Khan*[16] applied only to victimization and not direct discrimination. They said that while the same principle of comparing 'like with like' applied to both situations, the test for the 'relevant circumstances' is different. Article 6, dealing with victimization, lays down a test naturally falling into two parts. Article 7 however, which provides the test to be applied to direct sex discrimination in article 3(1), is a single test that must be applied to the article as a whole.[17] Therefore, circumstances that apply to one part cannot be ignored for the other, even if the two issues are considered separately.[18] Lord Rodger described the relevant circumstances in article 7 as those which the alleged discriminator takes into account, or fails to take into account,

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[13] Para 3.13 of the tribunal's decision. There was one person in the minority.
[14] [2000] NI 261, at 271.
[15] See the approach in *King* v *Great Britain China Centre* [1992] ICR 516, 528-529; *Zafar* v *Glasgow City Council* [1998] IRLR 36, 38-39.
[16] See n 8 above.
[17] The heading of the article, 'Basis of comparison', is confusing in that it could lead one to believe that it applied only to the comparative 'less favourable treatment' issue, and not the 'reason why' issue.
[18] *Per* Lord Hope, paras 47-49.

when deciding to treat the woman as he does, compared to how he treats or would treat a man.[19]

On this basis, the House ruled that the complaints made against her, the representations from the Federation and the fact that it was Superintendent Laird who was her superior and not another Superintendent, were relevant circumstances which made the appellant's situation 'materially different' from the male Chief Inspectors. However, they also ruled that for the Court of Appeal to say that the failure to find an actual comparator was detrimental to her claim, was wrong, defeated the point of the legislation and was contrary to the wording 'or would treat' a man.[20] When an appropriate male comparator cannot be found, the legislation, in accordance with *Chief Constable of West Yorkshire* v *Vento*,[21] allows for a hypothetical comparator.

The Lords' opinions on this issue all serve to highlight that the need for a comparator has been one of the most limiting and divisive aspects in sex discrimination cases, and indeed discrimination cases in general.[22] Choices as to what are the relevant circumstances and characteristics of the comparator are often singly determinative of the outcome of the case.[23] It was recognised that comparators will generally be hypothetical and, in contrast to the Court of Appeal, little restriction on relevant evidence from which discrimination inferences could be drawn was encouraged where no actual comparator could be found.[24] The House also highlighted that while actual comparators may not be statutory article 7 comparators, the former may still have an evidential role in drawing inferences. The evidential strength of such would depend on 'material differences', and in the present case were thought to render the male Chief Inspectors of insufficient evidential value.[25] Indeed, Lord Nicholls said that it may be beneficial for tribunals, if they are to divide the question, to attempt to answer the 'reason why' issue as their initial threshold, rather than get into complicated questions posed by finding a suitable comparator for the 'less favourable treatment' issue which is currently the more usual initial threshold. He emphasised that the issues were often so intertwined, especially in the present case, and that by answering 'why' the appellant had the duty of appraisals taken from her, the issue of 'less favourable treatment' may consequentially be answered. As well as that the question of what factual differences, such as the complaints and representations were in fact 'material differences', could be answered more clearly.[26]

In the third issue we must examine the reason why the appellant had the duty of appraisals taken away from her. It was on this issue that the opaque

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[19] *Per* Lord Rodger, paras 134-136.

[20] In paragraph 83 Lord Hutton said that he believed the Court of Appeal did not fail to consider a possible hypothetical male comparator, quoting Carswell LCJ at page 11. However this passage does not make the comparison particularly clear.

[21] [2001] IRLR 124.

[22] See further Sandra Fredman, *Women and the Law* (Clarence Press, Oxford, 1997).

[23] See *Advocate General* v *McDonald* [2001] SCI; *Pearce* v *Governing Body of Mayfield School* [2001] EWCA Civ 1347, [2002] ICR 198; Case C-249197 *Gruber* v *Silhouette International Schmied GmbH & Co.KG* [1999] ECR 1-4799.

[24] *Per* Lord Rodger, paras 142-143.

[25] *Per* Lord Scott, paras 109-114.

[26] *Per* Lord Nicholls, paras 9-11.

judgement of the tribunal guaranteed the dismissal of the appeal by the Lords. The Lords rightly recognised the subtlety of sex discrimination, and that in fact people may not even be aware that they're doing it, let alone admit to it, or there be direct evidence of it. Therefore, the finding of unlawful sex discrimination usually depends on what inferences are drawn by the tribunal on hearing the evidence first hand. They urged appellate courts to be aware of this advantage that tribunals have, and of the conditions that tribunals operate in - their judgments will not be that of a High Court judge, so should not be as rigorously analysed. However, they also acknowledged that, in accordance with *Meek* v *City of Birmingham District Council*,[27] a tribunal must state the reasons which led them to reach their conclusions, especially when, as in this case there is both a majority and a minority opinion.

In the light of paragraphs 3.8 and 3.11-13 of the tribunal's reasoning, the House believed that the tribunal may have drawn the following inference – Superintendent Laird may not have given in so easily to the Federation's demands, and acted so hastily, if Chief Inspector Shamoon had been a man. Thus, the appellant received less favourable treatment because of her sex. The tribunal pointed out that the only result of the meeting (according to Superintendent Laird's evidence this was not directly about the appellant or Constable Currie's report, which he maintained had already been amended to omit the offending analogy)[28] was that Chief Inspector Shamoon had the duty of appraisals removed from her, despite the forthcoming procedural change. Superintendent Laird must have been aware of the fact that this was not the case for the other Traffic Branch male chief inspectors, and that the appellant had been singled out. The tribunal went on to suggest several other options which Superintendent Laird could have taken. He could have asked if the Federation were proposing to take the issue of appraisals up with the Force generally; whether, given the impending December rule change it was really necessary to follow the strict letter of the scheme; sought further guidance from the Federation; checked what other regions were doing; or discussed it at the monthly meeting of senior officers.

However, the House concluded that the above could only be an assumption as the tribunal had failed to state such or produce conclusive factual evidence of it. They concluded that the tribunal, proceeding on the incorrect assumption that the male chief inspectors in the North and South Branches were suitable comparators, established only that the appellant had been treated differently from the other male chief inspectors, not the actual reason why she had been treated differently. Lord Nicholls entertained the possibility that a well-reasoned argument by the tribunal might have succeeded, and was the only member of the House to consider the possibility of a re-hearing on the basis of insufficiency of reasons. However, as the other Lords all believed there to be insufficient evidence on which a properly directed tribunal could have upheld the claimant's application, he declined to

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[27] [1987] IRLR 250, at 251.

[28] The tribunal was noticeably sceptical about Superintendent Laird's evidence here. They concluded that the appellant and Constable Currie's report were the reasons for the meeting and had to be discussed directly, and found that in fact Constable Currie's report was not amended until after the meeting.

dissent on this point.[29] Such evidence, when the case relies on a hypothetical comparator, could be findings on how Superintendent Laird treated male officers in other, not wholly dissimilar circumstances.[30] Lord Scott noted that other supporting evidence could be discriminatory comments from the accused, unconvincing denials of discriminatory intent or assertions of other reasons for the alleged discriminatory decision.[31] In the absence of any such facts, the House dismissed the appeal and rejected the possibility of a re-hearing.

Comment

Sex discrimination is a particularly subtle form of discrimination. The deep permeation of gender differentiation in society and, despite contemporary denials of it by both men and women, female subordination and patriarchy, continue to blight modern lifestyles. By no means should 'The Law' be seen in isolation as the key to changing such values or stopping wrongful sex discrimination – the fact that the Order is still being frequently used after almost thirty years is fact enough alone to establish that much. However, law does have an important practical and symbolic role to play, and the judiciary, as the interpreter of our legislation, holds the task of setting society's legal standards and consequentially some ethical standard of what is acceptable.

Given the importance of vanquishing gender inequality, and the often-elusive nature of evidence demonstrating unlawful sex discrimination, the courts should take great care when deciding such cases to ensure that discrimination is recognised and taken seriously as legally wrongful conduct.

In the present case, several things can be criticised from a gender-orientated perspective. Firstly, the tribunal, whilst ruling in Chief Inspector Shamoon's favour, actually ensured the final dismissal of her case by their misunderstanding of what the law required. Lack of resources, time and training may more than anything account for such errors, but this does not help true victims establish already hard-to-prove cases. The Court of Appeal's perspective on what could be termed a 'detriment' within the employment field was particularly narrow. The male judges sitting in that court failed to appreciate that there is more than financial loss affecting one's standing in a job. They also displayed a poor understanding of the law in relation to comparators, which were already established by the case law and easily allowed for by the wording of the Order.

Finally, the House of Lords, by comprehensively explaining the law and reasoning the case, went some way to recognising the possibility of unlawful sex discrimination in the circumstances of the case. However it was regrettable that having found the tribunal misdirecting itself in law, on a very subtle and difficult legal question, the House did not give the appellant a chance to put the right questions to the tribunal at a rehearing.

A feminist critique of anti-sex discrimination laws would require a whole new article which space does not here provide for. However, maybe a fitting

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[29] At paras 14-15.
[30] *Per* Lord Rodger at paras 140-143, 147.
[31] At para 116.

conclusion could be this. This comment on the *Shamoon* case has hopefully emphasised what a difficult area of law this is, and that the Order is less about preventing a person from being discriminated against than dealing afterwards with proven cases of inequality. It hopefully highlights the need for law and broader social policies to be more positive in nature, to help *ensure* gender equality, rather than merely *dealing* with the inequalities.

BOOK REVIEW

EUROPEAN CONVENTION ON HUMAN RIGHTS. By C. Ovey and R. White [Oxford, OUP, 2002. Hardback (with appendix and index) 506 pp].

This well written and presented work is, as the title makes clear, a book about the European Convention on Human Rights (ECHR). The publication of this third edition is very timely as it takes into account all the changes which have taken place since the second edition in 1996; namely the revised restructuring of the ECHR machinery as a result of Protocol No.11, merging the part-time European Commission of Human Rights (the Commission) and the European Court of Human Rights (the Court) into a new permanent Court and the joining of Central Eastern and European countries to the ECHR. With the enactment of the Human Rights Act 1998, incorporating the ECHR into UK domestic law on the 2 October 2000, for the first time there is a code of legally enforceable human rights in UK law and concomitantly there is now a strong focus on the ECHR. However, the principal aim of the authors, as declared in the preface is not to provide an account of the implementation of the ECHR in a particular State, but an analysis of both the procedure and the substance of the Strasbourg undertaking, its underlying principles and its supervisory machinery. This is achieved by adhering to the canonical and traditional manner adopted by previous editions, an article by article analysis of the ECHR itself.

The first chapter provides the historical background to the ECHR, beginning with the formation of the Council of Europe in 1949 and the drafting and signing of the ECHR in 1950 by its Members States. The ECHR deals with the protection of rights which are for the most part civil and political rights. Thus to take a few examples at random, the right to life, liberty and security; freedom from inhuman or degrading treatment; freedom from slavery, servitude and forced labour; the right to a fair trial; freedom of conscience, of speech and of assembly. These and other rights contained within the ECHR can be split into two categories: unqualified and qualified rights. Unqualified rights are described by the authors as the right to life, subject to the exceptions listed in Article 2; the prohibition of torture, inhuman and degrading treatment in Article 3; the prohibition of slavery and forced labour in Article 4; the right to liberty and security in Article 5; the right to a fair trial in Article 6; the prohibition on punishment without law in Article 7; the right to marry in Article 12; the right to an effective remedy in Article 13; the prohibition of discrimination in Article 14; the right to education and the right to free elections in Protocol 1; and the prohibition of the death penalty (except in time of war or an emergency) in Protocol 6. Some of these rights (Articles 2, 3, 4, and 7 and Article 4 of Protocol 7) are absolute in that they cannot be derogated from. The second group, "qualified rights", refers to those rights where a balance has to be struck between the rights of the individual on the one hand and the rights of the public on the other. These are Articles 8, 9, 10 and 11 (right to privacy, freedom of thought, conscience and religion, freedom of expression and association respectively).

The remainder of chapter 1 deals with the institutions of the ECHR, namely the Commission and the Court. The former is referred to in the book as the "old" system of protection as it was abolished in November 1998 and the latter the "new" system of protection as a result of the amendments of Protocol No. 11. Though the focus of the book is on the "new" system, reference is also made to the "old" system of protection as the decisions of the Commission continue to have an influence on the development of the ECHR. The next two chapters concentrate on the scope of the ECHR and highlight some of the key concepts and underlying principles, such as the positive and negative obligations, principle of effectiveness, the doctrine of proportionality and the margin of appreciation.

These and other emerging themes are masterly explained and developed in the following chapters as they deal with the substantive rights of the ECHR. Some of the substantive rights attract longer coverage than others, for example Article 6 is divided into two chapters. Chapter 8 provides an overview of some of the important and interesting aspects of the right to a fair trial, such as the nature of criminal charges and civil rights and obligations, and focuses on some of the specific features which have emerged from the case law as essential ingredients of a fair trial. Chapter 9 focuses on particular issues relating to the fairness of criminal trials in addition in dealing with Article 7. Chapter 11, dealing with the right to privacy, is also very lengthy, reflecting the very broad range of circumstances covered by Article 8. The substantial body of case law under this Article and also Article 3 shows the operation of the ECHR as a "living instrument" able to respond to the changing and developing attitudes and values of the Contracting States. Throughout these chapters, the authors adopt a similar and straightforward, yet effective approach: an articulation of the Convention right followed by reference to case law to help define and clarify the content and the scope of the rights protected and concluding with a very helpful summary. This is no dry narrative, as the authors are not chary to criticise the Court's approach to illuminate inconsistencies in their judgments; for example the State's positive obligations, where a deprivation of liberty is effected by a private person, is unclear and unsatisfactory. The authors opine that in this field and others (Article 8) there is scope for improvement to develop and protect the rights afforded by the ECHR.

Before the concluding chapter, chapters 24 and 25 provide factual information explaining the procedural aspects of bringing a case to Strasbourg (taking account of the changes contained in Protocol No. 11) and the role of the Committee of Ministers in supervising the execution of the Court's judgments. The book concludes with a summary of the main achievements of the ECHR and the prospects that lie ahead. Though the Convention has established a formal system of legal protection available to individuals covering a range of civil and political rights, it is now over 50 years old. As the content of the ECHR and the Protocols reflect the agenda of civil and political rights in the 1950s, the authors opine and conclude that there is a need to extend the catalogue of rights to include stronger protection for other rights such as socio-economic rights and women's rights, where the ECHR is very weak or does not even touch upon.

All in all, the text offers a highly readable yet scholarly analysis of both the procedure and the substance of the ECHR. Completely up to date and replete with immensely detailed and useful footnotes, this revised edition

provides an in-depth understanding of an increasingly important area of law suitable for both students and practitioners or those interested in understanding the work of the ECHR.

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