NORTHERN IRELAND LEGAL QUARTERLY

Vol. 55, No. 3 Autumn 2004

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

ISSN 0029-3105

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Vol. 55 No. 3 **Autumn 2004**

IN MEMORIAM

Stephen Livingstone
1961 – 2004

B.A.(Law) Clare College, Cambridge
LL.M., Harvard Law School

Professor of Human Rights Law
Queen's University Belfast

PROFESSOR STEPHEN LIVINGSTONE

Text of an address given by Professor John Morison, successor to Stephen Livingstone as Head of the School of Law and a friend of 20 years standing on Saturday 11th September 2004 as part of a Service of Thanksgiving and Celebration for the life of Stephen Livingstone.

TRIBUTE

I have been given the very difficult task of saying a few words about Stephen as a scholar, a colleague and a friend – difficult not just because his loss still seems so immediate but also because there is so much contained within the forty three years of his life.

I first met Stephen in 1984 when he arrived just a few months after me as a lecturer in the Faculty of Law. We had offices in College Green, away from the main building in University Square and where we fancied the more rebellious, "theory-based" colleagues were exiled.

My first recollection of Stephen is of his peculiar Belfast / East coast US drawl that was a legacy of his recent stay in Harvard Law School where he had taken a John F Kennedy Scholarship to study for his LLM.

I think this time in Harvard was a defining time for Stephen in ways that lasted much longer than the mid-Atlantic twang. Indeed I think it was perhaps even more important for him intellectually than the three years he spent as an undergraduate in Clare College Cambridge. I suspect that the personality he was to inhabit, and the intellectual concerns that were to shape the later part of his life, took up their more definitive form after the year in Harvard.

Of course I have no direct experience of Stephen's early life at Robert Bell Primary school and later Orangefield Primary in East Belfast and then Inst (Royal Belfast Academical Institution) located in the centre of Belfast. But our colleague David Capper who has known Stephen since boyhood has told me how some of the qualities of determination and self-reliance that so characterise Stephen came out during his school days. All the references Stephen made to his early life feature very warm recollections of his relationship with his parents Max and Flo with his sister Allison. And in exactly the same way, I know he felt totally supported and cared for by Karen later. But there is perhaps a sense of Stephen at school as somehow creating and developing the outstanding person he was to become. Stephen's formidable ability to work at the very highest levels of concentration and intensity, and most of all, his huge qualities of self-reliance were, I suspect, forged during an adolescence where not everyone in a large and sports-fixated school would have immediately recognised his very special talents and potential. I think this element of Stephen creating the character that he was to become through the efforts of his formidably strong will is important, and is not picked up simply by looking at a glittering c.v. featuring Cambridge, Harvard Law School, a lectureship at Queen's, a visiting

position in Detroit Law School, a Readership in Nottingham and appointment to a Chair of Human Rights Law by the age of thirty seven.

I believe that Harvard too was the seedbed for many of the interests that were to preoccupy Stephen's professional life – as well as the place where he picked up the habit of using those distinctive US yellow legal pads which he used to cover with his almost indecipherable handwriting.

And if Harvard influenced Stephen, then the effect was not simply one-way: Professor Henry Steiner of the Harvard Human Rights Programme has contacted the Law School here to say that: "Harvard Law School is understandably proud of its many distinguished alumni. Stephen Livingstone was amongst our finest. I remember Stephen as a bright, engaging and stimulating personality. Harvard human rights alumni are among the many groups made the poorer by his death."

It was at Harvard in classes taught by internationally renowned figures such as Roberto Unger that Stephen developed and deepened his interest in human rights. I remember him talking of taking trips to the southern states and indeed working in an advice clinic in Alabama where he had the sort of practical engagement with issues of social justice that were to preoccupy him throughout his career.

Indeed this theme of engaging with real issues is a particular feature of Stephen's very distinguished career. He was no ivory tower academic but always deeply committed to using law to make a difference. Others will be talking later about his role with the Committee on the Administration of Justice and on the Equality Commission where he sought to put into practice the ideas that he had worked out with the fullest academic rigour.

However, Professor Kevin Boyle of the Essex Human Rights Centre (a great mentor of Stephen and a veteran rights campaigner) wrote to me a few days ago to say:

> ". . . [Although unavoidably in New York] I do very much want to be associated with the memorial for my friend and much missed colleague . . . This is an event to remember Stephen and celebrate his achievements and I remember Stephen as a person who was deeply committed to respect for human rights as part of a settlement of the Northern Ireland conflict and as essential for a peaceful and just world order. We debated both the home front and the world many times together in Belfast, Galway, Nottingham, Strasbourg and elsewhere.
>
> We also pursued dreams into practice, such as launching a British Irish Human Rights Centre Network. He was convinced that there was too little intellectual traffic between these islands and we cooperated in joint conferences to change things where we could. I was always taken aback in admiration at the scale and quality of his scholarly achievements . . . he was an innovative thinker and activist and a scholar of international reputation who had much, much more to contribute and to give".

I would agree with all this, and with the former Dean of Fordham Law School, John Feerick, who told me simply that Stephen was "one of the finest and most decent persons I ever met". Certainly in addition to the qualities of decency that Stephen brought to his work there can be no doubting the international nature of Stephen's scholarship. This relates both to its quality and indeed to its scope. Perhaps it was Harvard also where Stephen developed an interest in world affairs and the role of law and justice across the world.

Certainly there was nothing Stephen enjoyed more than the prospect of going somewhere unknown on an early plane the next morning.

I remember often how he would give a little smile as he announced he was off to eastern Europe – Ukraine was a recent and particular interest – or somewhere in Africa and he had a fund of (often self-depreciating) stories. One of his favourites involved being grounded in the airport of some far-away state in the former Soviet Union, no doubt ending in "– stan" on a dodgy airline, where the passengers had to have a whip round to get sufficient money for the crew to fuel the plane to leave. On another occasion he deeply impressed a group of us at a conference in Cape Town by having a detailed knowledge of the local restaurants and moreover by being able to find them. At a time when academic research both in law and at Queen's was striving to become more international, Stephen was at the forefront in getting out into the world.

Of course although he loved encountering new countries and new people he remained very centred in his life in Northern Ireland. No doubt this was in large measure because of the love and support of his family and the very great happiness he had in living with Karen. Stephen was proud of being from Belfast and indeed from East Belfast in particular. I remember how on one occasion, after he had invested heavily in a series of rather adventurous, ethnic collarless suits in Nigeria, he regretted that before buying quite so extensively he had not applied what he described as the "Newtownwards Road test" – i.e how comfortable would he feel walking down the Newtownards Road dressed in the latest fashion from Lagos. (I don't believe that he ever wore the suits – although he did always do a great line in hats.)

Certainly Stephen's list of international contacts was phenomenal. Amongst those sending messages of sympathy when Stephen was first reported to be missing was President Mary McAleese and a whole range of colleagues from the US and, particularly, South Africa, including the well-known human rights activist and now Minister of Education Kadar Ashmal.

Indeed South Africa and the inspiring struggle there to transcend a legacy of oppression and mistrust by using the framework provided by the constitution and by human rights was a particular interest in Stephen's life.

Hugh Corder, Professor and Dean of Law in the University of Cape Town contacted me earlier in the week. He writes of how,

> "The productive links which exist between the Faculties of Law of Queen's University, Belfast and the University of Cape Town are in large measure due to the initiative, commitment and warm humanity of Stephen Livingstone. The formal British Council – sponsored exchange agreement provided for

> an exchange of ideas and knowledge between two societies with many challenges in common. Stephen was the link co-ordinator on the Belfast side, and a keen participant, last visiting at Easter 2003. His enthusiasm, understanding and quiet humility impressed all whom he met, as did his intellectual sharpness and creativity."

Another South African colleague, the former Dean of UCT's Law Faculty, Dirk van Zyl Smit adds:

> "I got to know Stephen through our joint interest in prisons in the early 1990s. When his book on the area came out it defined a field to which British scholars had not paid much attention. The judgments that it makes about the law are compassionate but measured, as was Stephen himself. As a prison lawyer I learnt a great deal from his wider knowledge of human rights law. As a colleague and friend I benefited from his warmth and kindliness. I shall miss him greatly."

Indeed Stephen made a big impact in South Africa. Saras Jagwanth also of Law Faculty in Cape Town writes of how "Stephen always appeared to be one step ahead, had a boundless curiosity and was full of innovative and pioneering ideas. . . . It was an honour for me to have worked with him and I shall always remember him for his special combination of intellect, sharp wit, generosity and humility."

Professor Corder continues . . .

> "I know that these sentiments about Stephen the person and his work are shared by all my Cape Town colleagues who were privileged to have met and worked with him over the past ten years or so. I certainly benefited greatly from his insights, clarity of purpose and breadth of intellect. Yet my abiding memory of him is his keen acceptance of a ticket to a day of cricket at Newlands; and his determination, on one of his visits, to climb Table Mountain – [which he did!]."

Indeed we all have memories of Stephen's many and varied enthusiasms. John Morgan from the University of Nottingham has written to me not only to send his thoughts to everyone here but to reminisce about discussions with Stephen on Irish history, Nigeria and rugby. Indeed many of Stephen's football playing colleagues on the Law School five-a-side team remember with awe Stephen's seemingly encyclopaedic knowledge covering, for instance, the Italian third division football league or the lower batting order in the Western Australia cricket side.

Stephen certainly had a huge hinterland of sporting interest and culture. Unlike many modern academics he was truly interested and informed beyond the narrow confines of his discipline. He was interested in music, cinema, literature and theatre – and he knew a lot about it. He enjoyed Mahler, Shostakovich, jazz and the Blind Boys of Alabama. He would quote Woody Allen as readily as the great American realist jurisprudent Felix Cohen (on whom he always threatened to write an intellectual biography). He always claimed that he was like the fifth Beatle in so far as he had been one of the original 'Hole in the Wall Gang'.

Working with Stephen was always fun – whether as a colleague, as the Director of the Human Rights Centre at Queen's or when he was Head of School carrying out a role which he discharged with characteristic courage and all around general decency. Stephen brought a real and fresh energy to his role as Head of the Law School. He took a pride in ensuring that he took every colleague out to lunch and always tried to offer solutions instead of only identifying problems. He was an enormously fair person both in his thinking and, more significantly, in his actions.

Stephen and I collaborated together academically, in editing a book and writing another – *Reshaping Public Power* – which was to be a significant work for both of us. We were in the process of writing a textbook together. We continually bickered and griped at each in a comfortable and friendly sort of way but I always knew that I was working with someone of very great talent at the very forefront of the field. Indeed only a couple of months or so ago, I was writing up a delayed report for the ESRC who had funded a project on constitutional litigation that we had carried out together. It was a strange experience working through Stephen's notes and the various conference papers that we had delivered earlier. I could hear his voice quite clearly as I read his words. Also I was continually struck by just how much insight and power there was in his analysis and how much he had to contribute.

I have probably exceeded my time, although there is so much more that I could say. I would however like to finish by referring to a letter from one of Stephen's postgraduate students that Karen showed me. This student had come from overseas to work on human rights issues under Stephen's direction. He wrote about how much he will miss Stephen's advice and guidance, and how he was now even more committed to the human rights field as a way of honouring Stephen's memory.

His letter concluded by saying how proud he was to be have been one of his students.

I think everyone here can say that they too are proud of having known Stephen in some way or other, and of having had their lives touched by his.

I know that I am.

LEGAL AND POLITICAL SOURCES OF THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE

Jo Shaw, Professor and Jean Monnet Chair of European Law, University of Manchester, Senior Research Fellow at the Federal Trust for Education and Research, London[1]

INTRODUCTION

The focus of this paper is the draft Treaty establishing a Constitution for Europe, prepared by the Convention on the Future of Europe between the end of February 2002 and the middle of July 2003,[2] and the subsequent work done by the Intergovernmental Conference (IGC) convened in October 2003

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[1] This paper builds upon my previous work on the development of a European Constitution, especially a paper published as 'What's in a Convention', in J. Shaw, P. Magnette, L. Hoffmann and A. Vergés Bausili, *The Convention on the Future of the Union: Working Towards an EU Constitution*, London: Federal Trust/Kogan Page, (2003). I would like to acknowledge the comments of a number of people, including some quite 'close' to the Convention's core, who should in all conscience remain anonymous, but who saved me from a number of misunderstandings of the workings of the Convention, but I remain, of course, responsible for any errors contained herein. I am grateful to the many people who made comments on various papers which I have drafted or presented on the Convention and the Constitutional Treaty, and for the assistance of the members of the EU Constitution team at the Federal Trust.

[2] OJ 2003 C169/01. For commentary on the draft Constitutional Treaty see: I. Pernice and M.P. Maduro (eds), A Constitution for the European Union: First Comments on the 2003-Draft of the European Convention, 2004; A. Arnull, 'Member States of the European Union and Giscard's Blueprint for its Future', (2004) 27 *Fordham International Law Journal* 503; J. Temple Lang, 'The main issues after the Convention on the Constitutional Treaty for Europe', (2004) 27 *Fordham International Law Journal* 544; P. Birkinshaw, 'A Constitution for the European Union? – A Letter from Home', (2004) 10 *European Public Law* 57; P. Craig, 'Competence: clarity, conferral, containment and consideration', (2004) 29 *European Law Review* 323; A. Dashwood, 'The Draft EU Constitution - First Impressions', (2002-2003) 5 *Cambridge Yearbook of European Legal Studies* 419; M. Dougan, 'The Convention's draft Constitutional Treaty: bringing Europe closer to its lawyers?', (2003) 28 *European Law Review* 763; J. Dutheil de la Rochère, 'The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty', (2004) 41 *Common Market Law Review* 345; J. Klabbers and P. Leino, 'Death by Constitution? The Treaty establishing a Constitution for Europe', (2003) 4 *German Law Journal* 1293 <www.germanlawjournal.com>; J. Kokott and A. Ruth, 'The European Convention and Its Draft Treaty Establishing a Constitution for Europe: Appropriate Answers to the Laeken Questions?', (2003) 40 *Common Market Law Review* 1315; J. Ziller, *La nouvelle Constitution europeénne*, 2004; P. Craig, 'What Constitution does Europe need? The House that Giscard built: Constitutional Rooms with a View,' *Federal Trust Online Constitutional Essay*, 26/2003 <www.fedtrust.co.uk/eu_constitution>; M. Dougan, 'The Convention's Draft Constitutional Treaty: A 'Tidying-Up Exercise' That Needs Some Tidying-Up Of Its Own', *Federal Trust Online Constitutional Essay*, 27/2003 <www.fedtrust.co.uk/eu_constitution>.

to prepare a final version of this Treaty. This work culminated in political agreement amongst the Heads of State and Government of the Member States at the meeting of the European Council in Brussels in June 2004 on a Treaty, due for signature on 29 October 2004 in Rome.[3] This text will in turn be placed before the Member States for ratification in accordance with their respective constitutional requirements.[4] If the so-called Constitutional Treaty (CT)[5] is ratified by all the Member States and enters into force, it will replace the existing EU and EC Treaties, and associated protocols and annexes, as well as giving legal force to the declaratory Charter of Fundamental Rights, agreed in 2000.[6]

The broad objective is to place these various texts in a wider constitutional context. That is to say, the paper works from the premise that the EU has been engaged for some time, in particular but not solely through the Convention and IGC processes, in a constitution-building project. This constitution-building process can itself be broken down into a number of interdependent but partially separate elements. The particular focus of this paper is the work undertaken by the Convention in elaborating the initial draft, which the IGC then worked on to produce the final text. The Convention was a novel element superimposed onto the existing EU Treaty amendment procedure as a result of the Laeken Declaration of the European Council in December 2001.[7] The text produced by the Convention was in turn essentially informal in nature and has been altered in many significant respects by the ensuing IGC, even though strenuous efforts were made within the Convention context by leading figures such as the President Valéry Giscard d'Estaing to ensure that the product of the Convention would be something which was already acceptable to the Member States. This has

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[3] See the final agreed (and renumbered) text: CIG 87/04, 6 August 2004. Until this final version, each separate Part (I-IV) of the Constitutional Treaty had been numbered from 1. This gave rise to numbering such as Article I-1; Article II-1; Article III-1, etc. In the final version, a small number of provisions were reassigned (*e.g.* the provision on symbols, flag and motto, originally included in Part IV by the Convention was moved to Part I). The whole Constitutional Treaty is now numbered Articles 1-448, but the location of different articles in different Parts of the Treaty is designated by the prefix of a roman numeral. Thus Article II-1, in the old version, is now Article II-61. The impact of this is greatest upon Part II, which is the Charter of Fundamental Rights, of which some articles were already quite well known. It will be quite confusing initially that Articles 51-54 of the Charter – the so-called horizontal clauses concerned with the effects of the Charter – are being renumbered Articles II-111-114 CT.

[4] Art 48 of the Treaty on European Union.

[5] For initial comment on the final text of the Constitutional Treaty, see J. Emmanoulidis, *Historically Unique, Unfinished in Detail – An Evaluation of the Constitution*, Bertelsmann Foundation Paper on EU Reform, 2004/03 <www.eu-reform.de>; Centre for European Reform, *The CER Guide to the EU's Constitutional Treaty*, Policy Brief, July 2004 <www.cer.org.uk>. D. Phinnemore, *The Treaty Establishing a Constitution for Europe: An Overview*, RIIA EP BN 04-01 <www.chathamhouse.org.uk>.

[6] OJ 2000 C364/01.

[7] *Annexes to the Presidency conclusions – Laeken, 14 and 15 December 2001*, SN 300/01 ADD 1, ANNEX I, Laeken Declaration on the Future of the European Union <http://european-convention.eu.int/pdf/LKNEN.pdf>.

been described as 'bargaining in the shadow of the IGC'.[8] However, as regards the specific issues of substance discussed in this paper, the IGC made no major changes to the materials prepared by the Convention.

The debate about a putative European Constitution did not emerge suddenly during the Convention. On the contrary, it has been widely argued, especially by legal academics and those working within the European Union institutions, that the EU has long had a type of 'unwritten' and composite constitution, based on the principles of the EU legal order developed by the Court of Justice, and supplemented by key aspects of the Treaty framework. This has often been described as the Court of Justice's 'constitutionalisation' of the Treaties, and a particular focus is placed upon the principles of supremacy and direct effect, the development of concepts of competence, and the articulation of a doctrine of fundamental rights. The Court of Justice did announce in the 1986 case of *Les Verts*[9] that the EC Treaty can be characterised as the Community's 'constitutional charter'.[10]

Thus the Convention did not operate against the background of a constitutional *tabula rasa* in relation to either the process of constitution-building or the substantive constitutional 'choices' which it made when it prepared the different parts of its draft of the Constitutional Treaty. But constitution-building in the EU since the inception of the first treaties has always comprised a set of complex interactions and tensions between the Treaty texts and other formal and even informal institutional documents (*e.g.* the Charter of Fundamental Rights, 2000), on the one hand, and their interpretation by key actors, notably the Court of Justice, but also the national courts, and the other non-judicial EU institutions, on the other. This has been characterised as a distinction between the 'formal' and 'real' constitutions of the EU,[11] and as a form of 'low intensity' constitutionalism.[12]

This complex patchwork of constitutional norms and practices maps onto both the procedural and substantive dimensions of the Convention's work. The core of the argument is that the *acquis* is a key political and legal source

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8 See P. Magnette and K. Nicolaïdes, 'The European Convention: Bargaining in the shadow of rhetoric', (2004) 27 *West European Politics* 381.

9 Case 294/86 *Parti Ecologiste 'Les Verts'* v *Parliament* [1986] ECR 1339. It repeated the point in Opinion 1/91 *Draft Agreement on a European Economic Area (EEA)* [1991] ECR I-6079. It is sometimes remarked upon that the Court has not repeated this point since the European Union famously ran aground on the sands of the legitimacy question, in the wake of the Maastricht ratification debacle.

10 Some commentators caution that since the inception of the EU – *i.e.* the entry into force of the Treaty of Maastricht in 1993 – the Court of Justice has avoided 'constitutional' language, and has certainly not characterised the overall 'pillar framework' introduced by the Treaty on European Union as the EU's constitutional charter, as it did for the EC Treaty in *Les Verts*.

11 G. de Búrca, 'The Institutional Development of the EU: A Constitutional Analysis', in P. Craig and G. de Búrca (eds.), *The Evolution of EU Law,* 1999.

12 M.P. Maduro, 'How Constitutional Can the European Union Be? Reconciling Intergovernmentalism with Constitutionalism in European Constitutionalism', Paper presented at *Altneuland*: *The Constitution of Europe in an American Perspective*, NYU-Princeton Conference, April 2004 <http://www.jeanmonnetprogram.org/>.

of the draft Constitutional Treaty drawn up by the Convention.[13] For example, in relation to procedural questions such as 'how, when and where does constitutional development of the EU take place?', it is clear that constitutional development occurs in a number of overlapping forums, such as IGCs, national ratification processes for new treaties (which have included some key national constitutional court judgments[14]), and subsequent interpretations and applications of the treaties by the Court of Justice and other institutional actors. The question which this paper considers is how the Convention has added to the process of the development of the *acquis* through its working methods and through the management of the process by key actors such as President Giscard d'Estaing.

In relation to the substantive content of the Constitutional Treaty, this paper looks at the use of the composite constitutional *acquis* of the EU in the context of the development of the text of a Constitutional Treaty. It examines the ways in which the Convention's work on matters of substance was structured by the complex heritage of the Union's constitutional *acquis*. The paper shows that the Convention has begun to force political actors at the national and European levels to confront more directly than ever before some key questions about what European constitutionalism already is, especially in legal terms. In other words, there are key political questions about the management and deployment of the legal sources of EU constitutionalism as it exists under the current dispensation. Political actors must face questions about the extent to which they might wish the realities of European constitutionalism (such as the principle of the supremacy of EU law) to remain hidden from public view in the future as in many respects they have done hitherto. Can the delicate balance of the national and the supranational dimensions of European integration (not to mention the subnational and international inputs which it experiences) survive the sometimes harsh scrutiny to which it was subjected within the confines of the Convention process?

To set the scene for this discussion, it is important to reiterate some basic premises about the evolution of the EU constitutional framework from the inception of the first treaties until the present time. Even though it was not until the Laeken Declaration in December 2001 that the European Council first formally acknowledged the possibility of a 'Constitution' for the European Union, the idea of analysing European integration in constitutionalist terms has been well-established for decades. While the practice has been particularly common amongst lawyers, it has also extended to both students and practitioners of politics.[15] At the same time, however,

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[13] On the role of the *acquis communautaire* in relation to the governance of the EU see A. Wiener, 'The Embedded Acquis Communautaire: Transmission Belt and Prism of New Governance', (1998) 4 *European Law Journal* 294.

[14] Most famously the German Federal Constitutional Court on the Treaty of Maastricht and the German constitution: *Brunner* [1994] 1 CMLR 57.

[15] *E.g.* B. Kohler-Koch, 'A Constitution for Europe?, Working Paper of the Mannheim Centre for European Social Research, 8/1999; C. Church and D. Phinnemore, *The Penguin Guide to the European Treaties,* 2002 at p.15; W. Wessels, 'Der Verfassungsvertrag in im Integrationstrend: Zusammenschau der zentralen Ergebnisse', (2003) 26 *Integration* 284 ; J. Fischer, *From Confederation*

the constitutional question remains highly contested in relation to the innumerable sub-questions which it encapsulates, including the very purpose and scope of a constitution for an entity such as the EU which is not formally a state in the Westphalian sense, albeit that it is a polity which wields many instruments and undertakes many tasks of a state-like nature. On the contrary, it operates in some sort of ambiguous liminal space between states and international organisations according to the conventional definitions of national and international law, and it is widely regarded as deserving of analysis above all as a *sui generis* entity which cannot easily be assimilated to other known forms of political organisation. Above all, however, the very ethic of European constitutionalism remains contested.[16]

It is equally important to develop principled reference points for viewing both the evolution of the Convention process and the substantive outcomes which the Convention adopts. Elsewhere I have argued for the importance of a critical assessment of the Convention process, in the light of principles of responsible and inclusive constitutionalism.[17] This paper has a separate but related objective to link the tensions which frame the procedural dimension of the Convention to some of the key elements of its substantive debate. With that objective in mind, the paper looks explicitly at the constitutional *acquis* as the backdrop to the constitution-building process, as well as contributing to reflection upon the novelty and *sui generis* nature of the Convention process. That paradox of the rootedness of the Convention's discussions in the constitutional *acquis* at the same time as it proposes sometimes innovative solutions to apparently intractable problems will remain, in my view, one of the most enduring features of the Convention experience.

What is clear, therefore, is that constitution-building is both a *legal* and a *political* process. This lies behind the preoccupation in this paper with identifying and analysing the legal and political sources of the draft European Constitutional Treaty.

The Procedural Dimension of Convention-Watching: The 'Building' of the Convention '*acquis*'

The Convention on the Future of Europe comprised a body of 105 members, plus the same number of alternates, including representatives of the national governments, national parliaments, the European Parliament, and the European Commission, plus sundry observers.[18] Representatives came from both the fifteen Member States at the time, and the thirteen candidate countries at the time (the ten states which acceded in May 2004, plus Bulgaria, Romania and Turkey). It was led by a three person Presidency, comprising Giscard d'Estaing, plus two Vice-Presidents (former Italian

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to Federation – Thoughts on the Finality of European Integration, Speech given at the Humboldt University, Berlin, Germany, 12 May 2000.

[16] J. Shaw, 'Postnational constitutionalism in the European Union' (1999) 6 *Journal of European Public Policy* 579.

[17] J. Shaw, 'Process, Responsibility and Inclusion in EU Constitutionalism', (2003) 9 *European Law Journal* 45.

[18] For an outline presentation of the Convention, see B. Crum, 'Politics and Power in the European Convention', (2004) 24 *Politics* 1.

Prime Minister Giuliano Amato and former Belgian Prime Minister Jean-Luc Dehaene), plus a so-called Praesidium, comprising representatives of each of the component groups of the Convention, which was charged with taking a leading role in drafting. Secretariat services were ensured by a group led by Lord Kerr of Kinlochard, a former British diplomat (then Sir John Kerr), with members seconded from both the EU institutions, and some of the national civil services. At the very beginning, it was not wholly clear from the so-called Laeken mandate what the role of the Convention was going to be. This was somewhat ambivalent about what the Convention should produce. Should it be merely a statement of the differences between the negotiating parties, as occurred with the Reflection Group which preceded the 1996-97 IGC and the Treaty of Amsterdam? Or should it be a group or or even a single text responding to the needs of simplification and legitimation articulated above all in the Laeken Declaration. Most agree that the Laeken Declaration was sufficiently vague to produce a blank canvas on which to paint a number of competing visions about both the purpose of the Convention and the nature of the European integration process.[19]

President Giscard d'Estaing's first speech to the opening session of the Convention on 28 February 2002 asserted very clearly his belief in the constitutive power and capacity of the Convention. It seems very likely that he did not at the time anticipate that the Convention would conclude as it did – with a 'full' draft Constitutional Treaty for the European Union – but that did not stop him articulating ideas in his first speech in 'constitutional' terms. Mentioning the word 'constitution' three times, he then concluded with a powerful attempt to pre-empt much debate by declaring the aim of the Convention thus:[20]

> "The Laeken Declaration leaves the Convention free to choose between submitting options or making a single recommendation. It would be contrary to the logic of our approach to choose now. However, there is no doubt that, in the eyes of the public, our recommendation would carry considerable weight and authority <u>if we could manage to achieve broad consensus on a single proposal which we could all present</u>. If we were to reach consensus on this point, <u>we would thus open the way towards a Constitution for Europe</u>. In order to avoid any disagreement over semantics, let us agree now to call it: a "constitutional treaty for Europe"." (emphasis in the original)

This is a powerful presentation of the historical opportunity which Giscard saw the Convention as presenting – an opportunity which he might have seen in a certain sense as being for himself as an individual, but which he effectively portrayed to the new Convention as a collective opportunity. This sense of opportunity in turn spoke eloquently to the federalist majority amongst the Convention members. Thus the constitutionalist endeavour

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[19] P. Craig, 'Constitutional Process and Reform in the EU: Nice, Laeken, the Convention and the IGC', FCE 3/04 <www.whi-berlin.de>.

[20] V. Giscard d'Estaing, 'Introductory Speech to the Convention on the Future of Europe', SN 1565/02, Brussels, 26 February 2002 (delivered 28 February 2002), at p.11.

became Giscard's main 'gift' to the Convention, which meant that despite subsequent tensions, his leadership still retained a substantial element of goodwill amongst the ordinary Convention members. It was from this point on, however, that the Convention engaged in a form of constitution-building. This section examines the procedural dimension of this constitutional construction in terms of its political and legal sources.

Commentaries on the Convention have frequently pointed out that the Convention was clearly more open, more transparent and more inclusive than an IGC, that it 'decided' by 'consensus' and did not incorporate a set of formal veto arrangements, and that it involved a wider range of elites, giving an institutionalised voice to the European Parliament and to national parliaments in the process.[21] Procedural perspectives on the Convention have focused on the ways in which the Convention has supplemented the existing constitutionalisation processes of the European Union, for example, by adding a 'pre-contractual' phase to the process whereby Member States presently agree upon changes to the international treaties which remain the formal construct of European integration[22] and by introducing the notion of consensus amongst elites as the basis for 'agreeing' a new constitutional settlement. At the very least, the constitutional dialogues which shape the EU have been immeasurably enriched by the complex constellations of interest intermediation which the Convention comprised in its plenary debates, working groups, and discussion circles, and in its draft texts and amendments. Furthermore, in more or less open ways, the Convention and its members remained in constant dialogue with external interests, such as national parliaments, other European institutions, civil society and even academia. The Convention experience has offered as a minimum a suggestion of the promise of deliberation, and perhaps a great deal more than that.[23]

In fact, formal constitution-building in the European Union has long been a complex, multi-staged process, already involving an ever increasing range of actors.[24] While the first significant set of amendments to the EEC Treaty – the Single European Act of 1986 – might have occurred away from the glare of all but the most Europe-focussed publicity, subsequent cases of Treaty amendment, although often not front-page affairs, have attracted much more substantial media coverage, not least because of the referendum affairs in

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[21] See generally C. Closa, 'The Convention method and the transformation of EU constitutional politics', in E.O. Eriksen, J.E. Fossum and A.J. Menéndez (eds.), *Developing a Constitution for Europe*, 2004; L. Hoffmann, 'The Convention on the Future of Europe: Thoughts on the Convention-Model', in J. Shaw, P. Magnette, L. Hoffmann and A. Verges, *The Convention on the Future of Europe: Working towards an EU Constitution*, 2003; L. Hoffmann and A. Vergés Bausili, 'The reform of Treaty revision procedures: the Convention on the Future of Europe', in T. Börzel and R. Cichowski (eds.), *State of the European Union, Volume 6: Law, Politics and Society,* 2003.

[22] B. de Witte, 'The Closest Thing to a Constitutional Conversation in Europe: the Semi-Permanent Treaty Revision Process', in P. Beaumont, C. Lyons and N. Walker (eds), *Convergence and Divergence in European Public Law,* 2003, pp.39-57.

[23] P. Magnette, 'Deliberation or bargaining? Coping with constitutional conflicts in the Convention on the Future of Europe', in Eriksen *et al*, above n.21.

[24] Closa, above n.21.

Denmark (Maastricht), France (Maastricht) and Ireland (Nice). As things stand, the Convention has added a further pre-contractual stage to the process; the convening of a Convention does not – and cannot, at least until the rules of the game are themselves formally changed by Treaty amendment – formally pre-empt or replace the Intergovernmental Conference as the site within which formal commitments are made between the Member States. The latter remain the legal 'Masters of the Treaty', and are likely to do so for the foreseeable future.

On the other hand, so far as the Member States were required by the Convention to engage in the endeavour to find compromise and consensus positions on key questions about the missions, functions, values and operating procedures and practices of the European Union which have historically been fudged or swept to the sidelines as posing insoluble problems, they did so in a very different framework to that of an intergovernmental conference. It is significant that in some measure at least, the Convention constituted a shift from the exchange of concessions and compromises to the exchange of reasons amongst participants.[25] To a certain extent, the Member States found themselves 'locked in' by their participation in the Convention process. In part, they reacted to that by seeking to make the Convention more like an IGC, as more and more states nominated foreign ministers or other cabinet rank ministers to be their representatives on the Convention as its work progressed. On the other hand, the change in the environment partially enabled the Convention – and the Member States in particular – to break away from certain taboos which have constrained state behaviour within IGCs when discussing historical blocking points such as institutional reform and the question of the future of the institutional system designed in the 1950s for a 'Community' of Six, rather than a twenty-first century 'Union' of Twenty-Five+.

One clearly important innovation, for example, which created a very different feel to the Convention as compared to the IGC was the presence of national opposition parties through the medium of national parliamentary representatives and European parliamentary representatives, sitting in the same debating chamber and round the same negotiating table as national governmental representatives. This in some respects broke down the sense of the unitary 'national' interest as represented by national governments which had often stifled the development of intergovernmental negotiations and ensured that they have predictably remained bargaining rather than deliberation scenarios. Indeed, this change seemed to offer the promise of deliberation – if not yet quite the reality, or so the consensus of reports from professional Convention-watchers generally has seemed to indicate.[26] In

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[25] See F. Deloche-Gaudez, 'Le Secretariat de la Convention Européenne: un acteur influent', (2004) *Politique Européenne*, no. 13, Spring 2004, 43 at p.44.

[26] Attempts to capture more of this promise of deliberation are evident in mid-stream changes to how the Convention works introduced by the Praesidium, such as the innovation of more frequent plenary meetings, the reduction in speaking time, and the decision to allow spontaneous interventions through the raising of 'blue cards', all designed to reduce the tendency of plenary to be a sequence of 'soap-box' speeches: see 'Convention faces change of philosophy test', 27 February 2003 <www.euobserver.com>. See also generally P. Norman, *The Accidental*

truth, over the years many competing stories will be written about how and why the Convention reached the conclusions that it did.

From the perspective of legal analysis, it is important to stick quite closely to the available documentation, in order to ground the discussion. One of the most important frameworks for 'knowing' about the Convention was its website.[27] From the perspective of wider communication with publics, this website was wholly inadequate. Within a very few months of the Convention's inception, there was already an overwhelming body of written material on its website. This effectively precluded the casual visitor to the site from gaining anything more than a very superficial review of what the Convention was and did from the very brief and relatively uninformative introductory materials which the website provided. The website did not explain for the general user how and why the Convention was in fact working towards a new Constitutional Treaty, making reference briefly to some of the questions in the Laeken Declaration, but omitting any form of articulation of how the Convention agenda and approach shifted in its early months into the constitutional register.[28] During the lifetime of the Convention, clicking on the heading 'Draft Constitutional Treaty' on the website merely brought up the highly impenetrable skeleton put forward by the Praesidium in October 2002,[29] the rafts of draft articles which followed after January 2003, and the multitudes of amendments put forward by Convention members.[30] These were followed, as the texts were gradually put together, by successive Praesidium re-drafts, such that by the end of the hectic few final weeks it would only have been clear to a close observer of the events and of changes on the website exactly what was the final text of the four parts of the Constitutional Treaty 'approved' in Plenary on 13 June and 18 July 2003.[31] That is the negative side of the Convention and its website, which was quickly turned into a tool which would be useful only to those staying very close to the Convention debate. The positive side of the website lies in that very same mass of material which is impenetrable to the casual visitor, but which can in fact reveal to those who have followed the process from the beginning much of the complexity and richness of the constitution-building process, and the different elements of which it is composed.

Constitution. The Story of the European Convention, 2003; A. Dauvergne, *L'Europe en Otage? Histoire secrète de la Convention*, 2004.

27 <http://european-convention.eu.int/>.

28 Those with a more casual or occasional interest would have needed to turn to websites such as the Federal Trust EU Constitution Project <www.fedtrust.co.uk/eu_constitution> which observed the Convention from the outside.

29 CONV 369/02 of 28 October 2002.

30 See <http://european-convention.eu.int/amendemTrait.asp?lang=EN>.

31 The most important documents were CONV 797/1/03 REV 1, *Text of Part I and Part II of the Constitution*, 12 June 2003, CONV 802/03, *Draft Constitution. Volume II*, 12 June 2003 and finally, after the July reconvening of the Convention, CONV 850/03, 18 July 2003.

This process has involved the creation and deployment for developmental purposes of the Convention's own *acquis*,[32] based on deliberations in working groups and plenary, the prefatory, summative and drafting work of the Secretariat including the preparation of working documents and questionnaires, reports, summaries of meetings and draft articles, and the discussions and resolutions of the Praesidium. Not all of these processes and outcomes were equally public. Notably the Praesidium always deliberated behind closed doors, and – notwithstanding objections[33] – did not publish minutes of its meetings, at least not until after the conclusion of the Convention.[34] Moreover, these 'minutes' were deliberately drafted in order not to be revelatory. It was obvious from the beginning of the Convention's work that notwithstanding their non-publication that they were in practice being 'circulated' by Praesidium members to their 'composants' (*i.e.* the groups they worked within, such as the group of MEPs, or national members of Parliament, or representatives of national governments) as well as to political family colleagues. The deliberately bland nature of the minutes as drafted was chosen in order to 'safeguard Praesidium decision-making capability',[35] and indeed it was apparent that the European Ombudsman sympathised with this political imperative when the refusal to publish the minutes during the course of the Convention's work was referred to him in early 2003.[36]

Working Group meetings, furthermore, were generally not open to public observation, whereas plenary meetings were not only public and televised/webcast (and fully linguistically accessible because of simultaneous interpretation), but were also recorded *verbatim* in transcripts on the European Parliament website, initially in the original language of each statement, but ultimately to be made available in all official languages.

The analysis of Secretariat documentation – much of which was passed via the Praesidium for approval and adopted as Praesidium documentation, sometimes with, and sometimes without amendment – is perhaps the most illuminating exercise in excavating the emergence of the Convention's *acquis*.[37] Theoretically, the Secretariat could have provided the bridge between the Convention and some of the most effective institutional players in the EU, namely the secretariats and legal services of the Council and the

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32 A term used by Convention Vice-Chairman Jean-Luc Dehaene, as quoted in B. Crum, 'Towards Finality: A Preliminary Assessment of the Achievements of the European Convention', ARENA Working Paper WP 03/4 <www.arena.uio.no>.

33 Objections have come notably from Convention members in political factions which are not represented in the Praesidium, such as the Green/EFA working collaboration on the Convention and the GUE/NGL group. In May 2003 the Praesidium decided that after the conclusion of the Convention's work, its documents should be made publicly available via the website.

34 'Praesidium documents' at <http://european-convention.eu.int>.

35 Private communication from a senior official within the Secretariat.

36 Decision of the European Ombudsman on complaint 1795/2002/IJH as it relates to the European Convention at<http://www.euro-ombudsman.eu.int>.

37 See generally on the Secretariat as an 'influential actor', Deloche-Gaudez, above n.25. Providing a methodology for the study of Secretariats, especially those within IGCs, see generally D. Beach, 'The unseen hand in treaty reform negotiations: the role and influence of the Council Secretariat', (2004) 11 *Journal of European Public Policy* 408.

Commission, which have an unparalleled expertise in understanding the present state of EU law as well as a background as repeat players in IGCs over the years. This was certainly true so far as many of members of the Convention Secretariat were drawn from the services of the Council and the Commission, as well as that of the European Parliament and a number of national diplomatic services. In practice, the Convention Secretariat acted in large measure in isolation. Such an independent and autonomous Secretariat was not foreseen in the Laeken Declaration, but in practice the Council Secretariat wanted to keep itself rather separate, in view of the fact that it would later be providing secretarial services to the IGC. In addition, President Giscard d'Estaing wanted to reinforce the autonomy of the Convention and sought an autonomous Secretariat, with many handpicked members given his personal seal of approval.[38] The Commission's interventions in the Convention's work were, as a general rule, hamstrung greatly by the lack of an effective political engagement on the part of the Commission with the Convention. This meant, for example, that neither the Commission Legal Service, nor any of the other expert teams working on the Convention, such as those assisting Commission President Prodi, or Convention members Commissioners Barnier and Vitorino were able to make the first move in presenting key proposals to the Convention. They were restricted to the reactive role of commentator, and this reflected back once again on the general political weakness of the Commission at the present time. It goes without saying that the public relations debacle of the presentation of the so-called Penelope project, intended to demonstrate the legal feasibility of the Commission's political project for the EU,[39] greatly harmed the effectiveness of the Commission as an influential actor within the Convention.

The Convention Secretariat was certainly no mere 'administrator' of the Convention. It played an essential role in setting out the richness and variety of the EU's existing constitutional *acquis* by preparing and issuing documentation notes on issues such as the present system of competence distribution and allocation, the legal instruments of the EU, the nature of the open method of coordination, the state of play in external action and justice and home affairs, the role of national parliaments and the institutions of the EU, and on the regional and local dimension of EU governance. While largely descriptive, these papers had the capacity also to shape debate because of their effective command of the current status quo. Allied to this, the Secretariat more directly shaped debate by preparing papers on questions such as the possibilities of simplification as envisaged by the Declaration on the Future of the Union and the Laeken Declaration.[40] In that sense, the

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[38] Deloche-Gaudez, above n.25 at p.45 *et seq*.

[39] European Commission, 'Feasibility Study: Contribution to a Preliminary Draft Constitution of the Europena Union', 4 December 2002 (presented on 5 December 2002), Working Document <http://europa.eu.int/futurum/docinstcomm_2002_en.htm>.

[40] See CONV 250/02 Simplification of the Treaties and Drawing up of a Constitutional Treaty, 10 September 2002. It was unsurprising that the Secretariat had expertise on the specific question of simplification, because amongst its members was Hervé Bribosia, whose previous work included acting as Rapporteur on the European University Institute's much quoted pre-Nice project on simplification of the treaties, which was sponsored by the European Commission:

Secretariat contributed directly to innovation as well as to explaining the relevance of the EU's constitutional *acquis* to the Convention's own work. Interestingly, the method chosen by the Secretary General Sir John Kerr for the elaboration of these papers, which involved both small teams of drafters and roundrobin brainstorming sessions at which the entire Secretariat was able to make an input into papers, strengthened the cohesiveness of that organisation, which became more and more influential as the Convention drew to a close. Kerr's team-building skills surprised many people, who were not – in contrast – surprised by his quick mastery of the many complex substantive dossiers involved in the Convention project, even though he had not been directly involved in European affairs since 1995.[41]

Inevitably, of course, the Secretariat provided the background expertise for the preparation of crucial documents such as the mandates of the working groups and (in almost all cases) the working group draft reports, under the political control of the Praesidium and the Chairs of the respective working groups who were in turn drawn from the Praesidium. Florence Deloche-Gaudez cites its expertise as one of its key resources.[42] Likewise, the Secretariat provided substantial input for crucial documents such as the October skeleton for a new Constitutional Treaty[43] and the subsequent tranches of draft articles and successive redrafts.[44] There can be little doubt that the Secretariat was crucial to the drafting of all key documents, with the exception of the draft Preamble which Giscard is thought to have worked on alone. Other documents, such as the initial skeleton published in October 2002,[45] were probably largely produced by Giscard and the Secretary General, working together. The lack of wider consultation might explain a curiosity such as the idea of dual citizenship (European/national) which was not a derivation from the existing treaties, which mysteriously appeared in the October 2002 draft, but which disappeared from a later February 2003 draft in favour of a return to a text which reproduced the existing EC/EU Treaties.[46] What was clear was the Secretariat's role in preparing reports on reactions to the draft articles and beginning the task of collating the huge number of amendments proposed, especially to the initial foundational articles of the draft Treaty, a daunting exercise in the management of information.

The Secretariat was also responsible for preparing summaries of plenary meetings and working group meetings, although these were apparently

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Robert Schuman Centre, 2000. For commentary, see K. Feus (ed), *A Simplified Treaty for the European Union?,* London.

41 Deloche-Gaudez, above n.25 at p.61 and p.63. After service as the UK's Permanent Representative in Brussels, up to 1995, he was subsequently UK Ambassador to the United States of America and then finally Permanent Under-Secretary of State at the Foreign and Commonwealth Office before taking retirement.

42 Deloche-Gaudez, above n.25 at pp.61-62.

43 See above n.29.

44 These documents are too many to list separately. For guidance on how the separate tranches of articles built up into the final conclusions of the Convention see <http://www.fedtrust.co.uk/constit_draftconsttreaty.htm>.

45 CONV 369/02, above n.29, Article 5.

46 CONV 528/03, 16 February 2003 (Articles 1-16), Article 7.

drawn up under the sole authority of the Secretary General, rather than the Praesidium, as it was not felt desirable politically by the majority of the Praesidium to have such records. These latter summaries did not always receive unanimous support from 'embedded' Convention watchers as faithfully representing the debate. From time to time, the 'watchers' would have seen a particular point receiving very strong support from individual Convention members, where the meeting summary represented this as merely involving 'a number of Convention members'. However, there is nothing surprising in this, as the role of the minute taker in a meeting has since time immemorial offered the opportunity to control the agenda as well as to present the outcomes of deliberations in a particular light.

That comment leads directly to the final aspect of process which needs to be highlighted in this section of the paper, namely the management of the whole process of constitution-building. When the Member States agreed, in the Laeken Declaration, to the establishment of the Convention, one of the 'checks' which they placed upon its capacity to produce unintended, and perhaps unwanted, outcomes was the nomination of ex-French president Giscard d'Estaing to chair the Convention, bearing in mind that he was a man known to have a capacity for strong leadership, a reputation for independence, but perhaps most crucially a proven background of support for a view of European integration which preserved a strong role for the states.[47] Doubtless many were surprised when Giscard so quickly seized the opportunity to make his distinctive mark by expressing his immediate preference for the option of producing a single report from the Convention, not a series of options, a report which would take the form of a Constitutional Treaty. Moreover, Giscard showed himself to be markedly undeterred by the complexity problem – namely that the choice for a Constitutional Treaty itself begged the question of 'fit' and coherence with what needs to be carried over from the old Treaties in terms of institutional provisions, legal bases, and policy frameworks, and what needs to be decided new from scratch.[48] To that end, he instituted the group of legal experts from the European Union institutions, which was charged with leading the way towards the drafting of what eventually became Part III of the Constitutional Treaty.[49] Indeed, one could surmise that the impact and effect of Giscard

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[47] See, for example, his advocacy of a cautious approach to enlargement, in the post-euro era: V. Giscard d'Estaing and H. Schmidt, 'Time to Slow Down and Consolidate Around "Euro-Europe"', *International Herald Tribune,* 11 April 2000.

[48] It could be argued, indeed, that Giscard kept the members of the Convention busy with the constitution-building aspects of its work in order to distract them from spending sixteen months discussing (falling out over?) the revisions to the institutional set-up inherited from the Treaty of Rome and tinkered with repeatedly in successive treaties, which were always going to be the most intractable problems facing the Convention and the ones least likely to be solved by the application of the deliberative aspects of the Convention-method. In fact, of course, there were many discussions of the institutional questions – but they were largely kept off the official agendas of the Working Groups, Discussion Circles and Plenary meetings. This was doubtless not an accident.

[49] CONV 529/03 of 6 February 2003 Remit of the group of experts nominated by the Legal Services. The group's work very substantially influenced the provisions of Part III of the Treaty when it was first issued: CONV 725/03, 27 May 2003.

within the Convention and its work could be said to be one of the unintended and unexpected consequences of the process, rather than one of the checking factors serving the interests of Member States, presumed at the outset to be unwilling to countenance too dramatic a shift from the status quo. At the same time, Giscard showed himself to be sensitive to the core concerns of the Member States, ensuring key national representation in the Secretariat (especially in the person of the British Secretary General, Sir John Kerr), and engaging in some controversial bilateral contacts with national capitals.

Giscard showed himself to be simultaneously both controlling and flexible in relation to the process of compiling the Treaty.[50] A form of dirigisme was probably the *leitmotiv* of Giscard's overall orientation towards the Convention. Control stemmed above all from the insistence on issuing separate tranches of articles as these were approved by the Praesidium. This made it more difficult for those Convention members who were not on the Praesidium and who therefore had relatively little sense of the overall enterprise to address their comments to what they anticipated might be the final structure of the Constitutional Treaty, other than by relying on the original framework issued in October 2002. Furthermore, to the considerable disadvantage of national parliamentary members of the Convention who found it particularly difficult to fulfil their mandate to stay in touch with the views of their constituencies, very short deadlines were consistently given for submitting amendments and reactions to each fresh tranche of draft articles.

There is also evidence from plenary debates that Giscard did try to control some of the most influential voices on the Convention – that is, those who were on the Praesidium and who were therefore privy to the early drafts of Treaty articles and to the Praesidium's own discussions about the direction the new Constitutional Treaty should take – by using some form of collective 'cabinet responsibility' to muzzle those who had argued their case for a different view, but who had lost out, in the Praesidium's private meetings. Thus, at least up to the point when the Praesidium began to assert its independent authority in relation to the question of institutions,[51] there was no substantial evidence of Praesidium debates being replayed in public in the plenary. Those who had lost the debate in the Praesidium found it harder although not impossible to bring the same arguments before the plenary. In fact, only the other two members of the three person Presidency, Vice Presidents Jean-Luc Dehaene and Guiliano Amato, along with Klaus Hänsch of the European Parliament, showed much inclination to stick very closely to collective 'cabinet responsibility'. On the hand, the Commission, with its numerically small representation (both full members are also members of the Praesidium), always found it a little difficult to be really effective in both Praesidium *and* Plenary, since its alternate members were not politicians of stature but rather senior officials.

Furthermore, control manifested itself in Giscard's own oral summaries of plenary debates at the conclusion of individual Convention sessions and in

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[50] For a sustained narrative of the Convention 'story', which builds in the key role of Giscard throughout the process, see generally Norman, above n.26.

[51] See the original draft on institutions, Title IV of Part I, CONV 691/03, 23 April 2003.

his presentations from time to time of the next steps which the Convention should take to advance its mandate, as well as in the way in which he acted politically *outside* the confines of the Convention, especially by engaging in a bilateral way with certain key Member States, thus sending out certain strong political messages about who *matters* and who *does not*.

As to flexibility, this was demonstrated by the willingness to countenance the creation of new sub-groups of Convention members to deal with problems and issues as they arose, whether the Working Group on Social Europe which was set up right at the end of the Working Group phase in response to a bottom-up movement of Convention members, or the discussion circles on specific matters such as the Court of Justice,[52] budgetary matters and latterly the question of taxation. It was also evident from Giscard's responsiveness to changing political contexts, such as his willingness to 'pull' the periodic report which he had hitherto delivered to each European Council meeting, when faced with the risk of being almost completely squeezed out of the agenda at the Spring 2003 European Council in the wake of the UN Security Council debacle and the launch of the US/UK military action in Iraq. At the same time, this potential 'loss of face' was quickly counterbalanced by an attempt to persuade the Greek Presidency to implement a plan for the European Council to meet specifically to deal with Convention matters on 30 June 2003. Eventually that plan came to naught. However, Giscard sought successfully to place the Convention on the agenda of the European Council meeting in Athens in April 2003, which had been convened for the specific purpose of signing the Accession Treaties for the new Member States. This gave Giscard a visible and public role on this historic occasion.

What was particularly clear throughout the whole process was that there remained a signal lack of clarity about what the final product would look like. Literally hundreds of amendments were proposed by ordinary Convention members to each set of draft provisions put forward by the Praesidium, and only a proportion of these could be discussed at each plenary meeting. Thereafter, the Praesidium would 'think again', but the mass of Convention members were left largely in the dark as to what this might involve. Furthermore, the release of the draft provisions on the institutions was delayed to such an extent – they finally appeared to a great furore on 23 April 2003 – that it was hard to say how the whole product could be seen as positioned on the traditional inter-governmental/supranational continuum, which is so often measured in terms

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[52] The approach to the Court of Justice taken in the Convention could be – and doubtless will be – severely criticised for its failure to take seriously fundamental questions about judicial architecture and judicial resources. So far as the Court – institutionally – would be affected by the changes proposed in the draft Constitution, this concerns largely mere tinkering at the margins. On the other hand, it is conceivable that the changes – if and when instrumentalised in a new Treaty entering into force upon ratification – could lead to additional demands upon the Court, especially in relation to fundamental rights, following the incorporation of the Charter of Fundamental Rights into the Constitution, as Part II. Speculation to that effect can be found in a rather sensationalised article in the *Economist*, 27 January 2004, entitled 'Government by Judges?'. It quotes Irish Court of Justice Fidelma Macken as saying it would be 'foolish' to assume that the Charter will have no impact on the Court's case law.

of certain key questions about institutional powers and interinstitutional relationships. This tended to fuel the conspiracy theorists who suggested that the final proposed Constitutional Treaty would magically appear in large measure from Giscard's back pocket, or indeed from his top hat, in the manner of the magician's proverbial rabbit, although in the event that fear was largely unfounded. Alternatively, of course, a number suggested that the magic might be provided by Sir John Kerr, the Secretary General. However, a number of changes to the provisions introduced in the last hectic days and hours of the Convention did not appear to have come in any meaningful way out of the Convention's deliberations, such as the principle of 'citizens' initiatives', tacked onto what was finally agreed by the IGC as Article I-47(4) CT. Article I-47 deals with the principle of participatory democracy.

Furthermore, some of those involved in the Convention regularly expressed displeasure at finding what they believed to be unwarranted departures in the articles issued by the Praesidium from what *they* perceived to be the 'results' of the Convention's work so far, embodied in its plenary discussions and its working group reports especially.[53] But so much was said within the Convention, with so many different meanings and purposes, that gleaning a *single* consensus from these expressions of view was inevitably a judgemental exercise. To that extent, one person's consensus is another's dissensus, as the contested summaries of Convention meetings made clear. For the purposes of the argument in this paper what is most important is that lack of clarity about the overall output can lead to competing and contesting positions being advanced about the extent to which the final product will or will not be innovatory compared to the current state of European constitutional law. For example, Jean-Luc Dehaene, Vice-President of the Convention, called it 'evolution not revolution',[54] stressing that there will be much that is familiar to *cognoscenti* of the existing Treaties in whatever is eventually proposed by the Convention. UK Government representative Peter Hain called it a 'tidying up' exercise. Usefully, for observers of the Convention, the reports on the separate tranches of articles and key Working Group Reports which were produced in quick succession in Spring 2003 by the UK House of Lords Select Committee on the European Union[55] stressed in each case 'what was new' and 'what was old', and above all what was omitted in the new text from what was old. An example of this is the reference to 'ever closer union amongst the peoples of Europe' which was dropped from the Praesidium's draft of what were then Articles 1-16 of the draft Constitutional Treaty.[56]

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[53] *E.g.* P. Hain, 'The Future of Europe: A Union of Sovereign States', Speech, Adjournment Debate, Westminster Hall, London, 20 March 2003; see also the interventions by Alain Lamassoure and others at the discussion of the Report of Working Group on Complementary Competences at the plenary of 7-8 November 2002 <http://european-convention.eu.int>.

[54] J.L. Dehaene, 'Towards a Constitutional Treaty for the European Union', Speech to Kings College London, Centre for European Law, 11 February 2003, at p.6.

[55] See the numerous reports available at <http://www.parliament.the-stationery-office.co.uk/pa/ld/ldeucom.htm>.

[56] CONV 528/03, above n.46. The term 'ever closer union' originated in the Preamble to the EEC Treaty, and was taken up in Article 1 of the Treaty on European Union. The preamble to the Constitutional Treaty picks this phrase up in

It is this focus on the new/old combination of constitutional *acquis* refracted into the new Constitutional Treaty via the prism of the Convention's deliberations, and the creation of the sense of an autonomous Convention *acquis*, which leads from the focus on the Convention as process into a reflection upon questions of constitutional substance. This combination of new and old reflected legal and political choices alike. The shift to a focus on substance is the last step in this paper's endeavour to provide a close description of how the Convention is simultaneously both rooted in the 'old' constitutional framework of the EU, as well as constantly toying with innovations and new ideas. This section will concentrate upon just a small number of substantive issues which taxed the Convention, namely the treatment of fundamental rights in the Constitutional Treaty, the issues of sovereignty and supremacy in relations between EU law and national law and between the EU and the Member States, and the questions of competence division and exercise.

The Substantive Dimension of Convention-Watching: Working Towards a European Constitution?

Rights; supremacy/sovereignty; competences. These are three key issues which underpin the most sensitive normative aspects of the draft Constitutional Treaty agreed upon by the Convention in June and July 2003. They are issues which go to the heart of the question: what is the European Union and what functions ought it to serve? Each is examined in turn, the point being less to critique the approach taken by the Convention itself, but rather to show how the Convention had to face up to the delicate task of blending innovation and *acquis*, especially in so far as it could not (or should not) ignore the considerable extent to which the EU as it stands, at least as a proto-constitutional order, is a judicial creation. They also go to the heart of the fear that a formal constitutional settlement risks disturbing the delicate balance which underpins the current constitutional framework.[57] However, the blending of the past and the future is not an innovation of the Convention and the IGC in relation to treaty reform. Historically the use of so-called *rendez-vous* and *passerelle* clauses in successive treaty amendments has linked the past and the future. A *rendez-vous* clause is one which explicitly picks up on an area where reform is acknowledged to be incomplete. This was clearly the case in relation to the Treaty of Amsterdam and institutional reform aimed at enlargement. A *rendez-vous* clause calls for the reconvening of an IGC to carry on the work of reform, hoping that perhaps at a later stage political conditions will be more conducive to agreement.[58] A *passerelle* clause, of which there are a number in the Constitutional Treaty, especially in relation to shifts from unanimity to qualified majority voting, allow in

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some respects by referring the peoples of Europe being 'united ever more closely': CIG 87/04, above n.3

[57] See J.H.H. Weiler (2002), 'A Constitution for Europe? Some Hard Choices', *Journal of Common Market Studies,* 40/4, pp563-580; for a reply, reluctantly accepting the value of a formal written Constitution, see M.P. Maduro, 'Is There Europe for a Constitution?' in J.HH. Weiler, I. Begg and J. Peterson (eds.), *Integration in an Expanding European Union: Reassessing the Fundamentals*, 2003.

[58] *E.g.* Protocol on Enlargement attached to the Treaty of Amsterdam.

effect a lighter weight process for reforming the EU decision-making processes, by allowing the Council to decide, by unanimity, for example, to move to qualified majority voting. In practice, no *passerelle* clauses have ever been used, but they are important symbolic elements of the continuous process of treaty reform.

a) Bill of Rights

It is hard to imagine a modern liberal polity with constitutional pretensions without some form of (binding) bill of rights as a definitive statement of social and civic values (as opposed to *ad hoc* protection of fundamental rights via the more elastic concept of general principles of law which is the status quo under EU law at present).[59] How should the Constitutional Treaty take up this challenge? In that context, what should be done with the pre-existing but currently non-binding Charter of Fundamental Rights for the EU?

Given the United Kingdom's signal awkwardness in the context of the drafting of the Charter during the course of 2000, and its double insistence on both the inclusion of certain 'horizontal' clauses which would limit the scope and effect of the Charter if it were legally binding and the apparently unconditional rejection of the possibility of the Charter as drafted ever being adopted as a legally binding instrument, the position taken by the UK in the course of the deliberations of the Working Group on the legal status of the Charter was widely thought of as an important breakthrough.[60] While insisting again on the further strengthening of the horizontal clauses, the UK representatives did not as such dissent from a 'consensus' view that the Charter ought to be incorporated as legally binding into the Constitutional Treaty, a view which was widely shared in plenary debates on this question. In the event, that was the approach adopted by the Convention,[61] and likewise although the UK continued to formally reserve its position on this question until the very end, the IGC settled upon incorporating the Charter as Part II of the Constitutional Treaty. Far from settling all the relevant issues, however, the effect of this changed political determination on the part of a previously dissenting Member State was to open more questions than it answered, and indeed not all of the questions can be answered just by

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[59] This does not appear to be the view of the UK Government, as demonstrated by its response to the 6th Report of the House of Lords Select Committee on the European Union, Session 2002-2003, which considered *The Future Status of the EU Charter of Fundamental Rights*. In response to the Committee's comment that 'any new constitution for the Union should be accompanied by a bill of rights', the Government responded that it 'does not accept that any new constitution has to have a bill of rights', preferring instead – it would appear – the 'respectable argument' that the status quo system of fundamental rights protection was sufficient (House of Lords Select Committee on the European Union, 27th Report, Session 2002-2003). In the end, the UK did not or perhaps could not prevent the Charter being formally included in the draft Constitutional Treaty approved by the Convention, although that does not finally settle the question, given that the matter then went before the IGC.

[60] Final Report of the Working Group, CONV 354/02, 22 October 2002.

[61] See CONV 726/03, 26 June 2003, *Draft of Part II with comments.*

looking at the texts finally approved by the Convention in June 2003, and adopted in large measure in the same form by the IGC.[62]

A first line of enquiry concerned the nature of the invocation of the Charter as a legally binding part of the new constitutional framework. Was it best to incorporate the Charter 'by reference', while leaving it in a separate document indirectly given legal force? Or should it be incorporated as an integral and explicit part of the text of the Constitutional Treaty? Once the latter solution was adopted, a further question arose: where in the Constitutional Treaty did it belong? At the beginning, before the general principles of the Union itself are articulated? Somewhere in the middle of Part I of the Constitutional Treaty, which sets out the constitutional framework of the Union? In a separate Part II or Part III of the Treaty, where its separateness would not break up the flow of the rest of the constitutional text? Or in an Annex or Protocol to the Constitutional Treaty, where it risked looking somehow downgraded in relation to the rest of the constitutional documentation. One factor was very important to the location debate. While the Charter was drafted on an 'as if' presumption, which reflected an intention to draft a text which was capable of being given legal force without further alteration, it was also drafted on the assumption that it was a separate text to the Union treaties. Thus its final provisions or horizontal clauses not only contained the infamous attempts to ensure that the Charter could not be interpreted as extending the scope of Union competence and that its effects *vis-à-vis* the Member States would be limited (see especially Article 51 of the Charter as currently drafted[63]), but also provisions which protected the integrity of legal fundamental rights protection under national law, Union law and international law, for the benefit of individuals (see especially Article 53 of the Charter). Once the Convention resolved to incorporate the Charter as part of the Constitutional Treaty largely unamended, so that the problem of overlap would be bound to continue with the other provisions of the Constitutional Treaty, then it needed certainly to address the issues which framed the intentions of those who drafted the Charter of Rights before it decided upon the question of location.

However, even once it was resolved that the Charter should be formally incorporated as Part II of the Constitutional Treaty, there remained some key questions about the relationship between the Charter and other sources of fundamental rights.[64] The distinctive character of the Union's hitherto judge-

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[62] See generally de G. de Búrca, 'Fundamental Rights and Citizenship', in B. de Witte, 2003, *Ten Reflections on the Constitutional Treaty for Europe,* 2003, pp11-44; M. Brand (2003), 'Towards the Definitive Status of the Charter of Fundamental Rights of the European Union: Political Document or Legally Binding Text?' (2003) 4 *German Law Journal* 395 <www.germanlawjournal.com>; E. Vranes, 'The Final Clauses of the Charter of Fundamental Rights – Stumbling Blocks for the First and Second Convention', *European Integration OnLine Papers,* 2003-007 <http://eiop.or.at/eiop/texte/2003-007a.htm>; Dutheil de la Rochère, above n.2.

[63] OJ 2000 C364/1.

[64] See generally, I. Pernice, 'Integrating the Charter of Fundamental Rights into the Constitution of the European Union: Practical and Theoretical Propositions', (2003) 10 *Columbia Journal of European Law* 5; I. Pernice and R. Kanitz,

led system of enforcement of fundamental rights, which has been based on Article 220 EC ('the Court shall ensure that the law is observed') and Article 6(2) TEU has been its dynamic and fluid character. This case law involves the Court referring as necessary to a substantial variety of possible sources of 'Community fundamental rights', including national constitutional traditions and different international law instruments, including but not confined to the European Convention on Human Rights and Fundamental Freedoms ('ECHR'). The Court has frequently referred to other fundamental rights sources such as the International Covenant of Civil and Political Rights and the European Social Charter in its case law. That *acquis* is to be carried forward into the post-Constitution era, as the Charter will not become an *exclusive* source of the Union's fundamental rights, although the privileged position of the ECHR will continue for a number of reasons. First, the reference to the ECHR is preserved in what will be Article I-9(3) CT, which effectively transcribes the old Article 6(2) TEU into the Constitutional Treaty. In the longer term, the Court of Justice may have to consider any possible dissonances between the legal force of the Charter of *Fundamental Rights* and the continuing recognition of fundamental rights as *general principles of law* within the EU legal order (Article I-9(3) CT). Second, Article II-112(3) CT contains the unchanged text of Article 52(3) of the Charter and this requires the meaning and scope of Charter rights which correspond to rights guaranteed by the ECHR to be 'the same as those laid down by the' ECHR. Finally, considerable complexity regarding the legal structures of rights protection in the future, should the Union succeed in the project promised in Article I-9(2) CT that it 'shall seek' accession to the ECHR. This is a proposal long supported by the influential House of Lords Select Committee on the European Union, amongst other voices.[65] Overall, Article I-9 CT could be said to convey an enthusiasm of purpose, aiming at the protection of fundamental rights, rather than an economy of expression.

Finally, there is the sticky question of the content of the Charter and its relationship to the rest of EU law. There are substantial areas of overlap between the Charter and other provisions of EU law that have been included in the Constitutional Treaty, whether in Part I on general principles and constitutional structure, or in Part III on policies. Adjustment of the two sets of provisions to each other could have assisted the project of ensuring harmony of interpretation, but fell foul, in essence, of the desire not to disturb the text of the Charter.[66] Article II-112(2) CT, picking up *verbatim* Article 52(2) of the Charter, recognises the overlap issue, by requiring that rights recognised by the Charter which are based on EU law are exercised in accordance with the conditions of the EU treaties. This seems to suggest that two sets of provisions could co-exist comfortably. Even so, there is likely to be a substantial task for the Court of Justice to determine the scope and effects of rights provisions especially where there is overlap between the

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'Fundamental Rights and Multilevel Constitutionalism in Europe', *WHI Paper* 7/04 <http://www.rewi.hu-berlin.de/WHI/english/>.

[65] This was the view taken by the HL Selection Committee in its report on the Charter: *EU Charter of Fundamental Rights*, 8th Report, 1999-2000, HL Paper 67. It repeats the view in a more recent report: *The Future Status of the EU Charter of Fundamental Rights*, 6th Report, 2002-2003, HL Paper 48.

[66] de Búrca, above n.62, at p.29 *et seq*.

Charter and the other sections of the Constitutional Treaty. Its task here will be to create synergies between the wider and already embedded *acquis* which it has developed in concordance with the existing treaties, and the *acquis* of the Convention and the new constitutional settlement. In a trenchant critique of problems raised by the juxtaposition of the Charter and the rest of the Constitutional Treaty, Erich Vranes has argued that 'existing doubts are reinforced as to whether the much-discussed "Convention method" really allows an appropriate treatment of fundamental, albeit technically intricate problems.' As he remarked,

> "it may be comparatively easy to formulate the substantive fundamental rights provisions of a fundamental rights catalogue, as these necessarily consist of "open", i.e. indeterminate legal notions which have to be concretized on a case by case basis in years of jurisprudence. However, it is arguably disproportionately more difficult to embed such a catalogue into the multilevel EU and national legal orders and their interlinked fundamental rights systems – the results of which are particularly disputed and which are also interlaced with other European and international human rights instruments – in a manner which does not only avoid new but satisfactorily resolves future legal problems ex ante."[67]

b) Sovereignty and Supremacy

We turn now to the questions of sovereignty and supremacy. The EU is a post-national polity, suspended between national polities and international regimes. The challenges of ensuring legitimate and effective governance will necessarily give rise to some difficult questions about how to articulate both the longstanding (judicial) principle of the supremacy of the law of the EU and the gradual consequential transformation of the traditionally singular sovereignty of Westphalian states into the shared sovereignty of a multi-level governance structure. The question arose as to how each of these judicial principles should be reflected in the Constitutional Treaty. For the UK, it was logical to object to the expression used in Article 1 of the Praesidium's first draft of the Treaty to the effect that 'this Constitution establishes the Union',[68] since the clear derivation from the international law nature of the Union is that the Member States *establish the Union* and that the powers of the Union *flow from* the Member States, so that the Constitutional Treaty has only a derived and not an original status. The language of the Praesidium's draft subtly crossed the bridge between regime and polity, and challenged concepts of Westphalian sovereignty. The explicit reference to the primacy of EU law in Article 9(1) of the Praesidium's first draft also riled the UK. However, the statement that 'the Constitution, and law adopted by the Union Institutions in exercising competences conferred on it by the Constitution, shall have primacy over the law of the Member States', as adopted in the final version of Article I-6 CT by the IGC, is – as many commented in the plenary debate on 5 March 2003 – quite unexceptionable in view of the position under EU law as it stands. Take the Court's statement in 1964, in *Costa* v *ENEL* that,

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[67] Vranes, above n.62 at p.15.
[68] CONV 528/03, above n.46.

> "The transfer by the States from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail."[69]

Quite apart from what that statement asserts about the nature of what was then 'Community law', one of the most controversial statements concerned the so-called 'permanent' limitation of sovereign rights. We will return to this in a moment. Staying with the supremacy question, for the moment, it is still worth considering whether or not it is indeed quite unproblematic to insert a supremacy clause into the Constitutional Treaty, on the grounds of the fact that this is already a facet of the Union's constitutional order.[70] What the insertion could signal would be an important step towards the merging of the 'judicial constitution' and the formal legal constitution being worked on by the Convention. It could be said that this is in the spirit of Article 6(2) TEU, referred to above, which codifies some aspects of the Court's case law on fundamental rights. Pursuing the analogy with Article 6(2) TEU and the utility or effectiveness of codification, however, it is equally clear that this simple provision does not refer in full to the complex case law in which, for example, the Court has addressed the question of the extent to which Member States are bound by the Union's fundamental rights guarantees when they are acting in some way in implementation of, or within the scope of, EU law. One thing is for sure, that case law does not speak with a single voice, and what is more, its interpretation is highly controversial amongst legal academics. It is interesting to note that partly to preserve the integrity of EU law as a system, the Council Legal Service was heavily involved during the negotiations of the Fundamental Rights Charter in 2000 in seeking to bridge the gap between the Court's case law and the text of the Charter itself, including its restrictive horizontal clauses. This was achieved through the drafting of the 'explanations' published alongside the Charter in October 2000.[71] These explanations referred to the Court's existing case law on the effects of the Union's fundamental rights *vis-à-vis* the Member States as a *statement of the present law*, and the importance of these explanations has been buttressed by an amendment to the Preamble to the Charter of Fundamental Rights as it has been incorporated in Part II of the draft Constitutional Treaty, to the effect 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.'

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[69] Case 6/64 *Costa* v *ENEL* [1964] ECR 585 at p.594.

[70] See the cautionary comments in M. Dougan, 'Some Comments on the Praesidium's "Draft Treaty Establishing a Constitution for Europe"', *Federal Trust Online Constitutionalism Essay*, 7/2003, at pp.5-6, <www.fedtrust.co.uk/eu_constitution>.

[71] Note from the Praesidium, Draft Charter of Fundamental Rights of the European Union, *Text of the Explanations of the complete text of the Charter as set out in CHARTE 4487/00, CONVENT 50,* CHARTE 4473/00, CONVENT 49, 11 October 2000, <http://www.europarl.eu.int/charter/convent49_en.htm>.

What emerges from this saga about fundamental rights and the Court's case law so far as concerns the question of the 'codification' of the principle of supremacy is, of course, that codification or consolidation[72] of the 'judicial constitution' will never be entirely unproblematic. Dougan's analysis makes clear that problems will arise in the case of supremacy,[73] just as Vranes has done likewise in relation to fundamental rights.[74]

One area of debate is the precise meaning of the supremacy principle, whether as general principle of hierarchy or as specific conflicts-resolution tool. That point is not insuperable, if one accepts that any constitutional provision on supremacy would in turn require substantial judicial elaboration over a period of time, and into that elaboration would be built the different macro- and micro-level functions of the existing principle and associated legal doctrine, with the Court of Justice drawing upon the rich judicial *acquis* since *Van Gend en Loos*[75] and *Costa* v *ENEL* and perhaps adapting it to the changed circumstances generated by the Convention and the IGC. Furthermore, the argument that to include the supremacy principle is to draw attention to a facet of EU law best left hidden and visible only to legal experts and other elites is constitutionally disreputable. On the other hand, there have been problems with the apparent generality of the principle as set out in the Constitutional Treaty, in so far as it does indeed purport to apply to the whole of the Union as a single legal edifice, including the old second and third pillars. Even if the Union becomes a single legal entity, the now 'subterranean pillars'[76] will continue to have legal and political effects, especially in terms of the differing types of competences given to the institutions and the varying effects of the instruments in relation to different areas of Union activity. A distinction will continue to be drawn between 'first pillar' matters, to which the principle of supremacy is currently limited, perhaps now joined by the third pillar, if the developing trend towards 'communitarisation' of all aspects of justice and home affairs policy continues, and the area of Common Foreign and Security Policy. A principle of supremacy drawn from the case law of the Court of Justice on the EC Treaty might be thought simply inappropriate to this latter field of Union activity. Above all, though, the inclusion of the supremacy principle – like the reference to the foundational nature of the Constitutional Treaty in the Praesidium's early but later superceded draft of Article 1 of Part I – draws attention to the possibility that the Union is bridging the gap between regime and polity. It does so despite the fact that the final version in Article I-6 CT does not refer to the supremacy of the EU constitution over the *national constitutions*. Even so, the formal assertion of supremacy in this way

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[72] Consolidation is the term used by the House of Lords Select Committee on the European Union in a report on Articles 1-16: *The Future of Europe: Constitutional Treaty – Draft Articles 1-16*, 9th Report, 2002-2003, HL Paper 61, p.17.

[73] See Dougan, above n.70.

[74] Vranes, above n.62. For a more positive view on the 'fit' of international, supranational and national fundamental rights sources in a multilevel constitutional system, see Pernice and Kanitz, above n.64.

[75] Case 26/62 *Van Gend en Loos* [1963] ECR 1.

[76] The disappearance of the Maastricht pillars 'underground' is an expressive point made by Kalypso Nicolaïdes in a presentation to the Federal Trust/UACES Study Group on the Convention, 7 March 2003, European Parliament Offices, Queen Anne's Gate, London.

heightens the tension between the EU legal order and the national legal orders by reinforcing the fact that in many respects, as things stand at present, the various systems make incommensurable claims, especially about so-called 'competence-competence' (the power to determine the legitimate scope of competence), and that serious conflicts are generally avoided by judicial interpretation of these incommensurable claims, not by the intractable pursuit of fundamentally incompatible principles such as the supremacy of EU law or the sovereignty of the Member States under international law. To assert as much in the Constitutional Treaty may be to scratch at the evident sensibilities of many national constitutional courts, many of which prefer to rationalise the supremacy of EU law by reference to their own constitutional systems rather than the logic supplied by the Court of Justice, not to mention public opinion in a number of Member States. Of course, that may be the intended or unintended effect, but there is no doubt that crossing that particular rubicon will still require something akin to a constitutional revolution in Europe and in the Member States.

It is worth dwelling for a moment upon the story of how the supremacy principle has been moved around Part I of the Constitutional Treaty in its various versions before the Convention and then the IGC. In Spring 2003 intermediate versions of Title I of Part I of the Constitutional Treaty put before the Praesidium but not published to the Plenary, the supremacy principle was not included in the section on competences, but was slated for inclusion as part of a provision which subsequently became Article I-5 in the final version as prepared by the Convention, on relations between the Member States and the Union.[77] This contains the so-called loyalty principle, a version of what is presently set out in Article 10 of the EC Treaty, which is as far as the Treaty texts currently in force go towards formally recognising the supremacy of EU law.[78] However, by the time a full draft of Part I went back to the Plenary at the end of May 2003, the supremacy principle was (back) in – appearing as Article I-10.[79] The Praesidium 'explanations' were terse in the extreme on this question: 'The reference to the principle of primacy has been accepted, as it is a basic principle of the Union legal system which has to be laid down in the Constitution.'[80] After the end of the Convention, the provision moved once more. During the early part of the IGC, a group of legal experts chaired by Jean-Claude Piris, Director General of the Legal Service of the Council, moved the provision again, repositioning it back in the general foundational provisions of the Union, away from the competence provisions.[81] This was done in truth without explanation in the interests of 'consistency'. There it stayed throughout the IGC, so that it now appears as Article I-6 CT.

Returning to the question of the 'permanent' effects of joining the EU, the reference to 'permanent limitation' in *Costa* v *ENEL* seemed to some to suggest that a Member State could not secede from the EC/EU – a point

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[77] See Praesidium document dated 19 May 2003.

[78] J. Shaw, *Law of the European Union*, London, Palgrave, 2000, 3rd ed, at p.297 *et seq*.

[79] CONV 724/03, 26 May 2003, *Draft Constitution Volume I, Revised Text of Part One*.

[80] CONV 724/03, above n.79 at p.64.

[81] See IGC 50/03 and IGC 51/03 of 25 November 2003.

flatly contradicted in 1981 when Greenland seceded (as part of the untangling of its relations with Denmark). One way in which the old will blend with the new in interesting ways in the 'new' Union concerns the inclusion of a secession or voluntary withdrawal clause.[82] The approach taken in the Constitutional Treaty (Article I-60) seems to imply a slightly different emphasis to the position elaborated for Canada and the case of (potential) Quebec secession by the Canadian Supreme Court.[83] The Court introduced a clear duty on the part of all concerned to negotiate in good faith should a majority of the people of Quebec decide that they wished to secede from the Canadian federation. Article I-60 of the Constitutional Treaty is premised on the 'decision to withdraw', which is a unilateral act taken in accordance with the constitutional requirements of each Member State. Thereafter, the assumption is withdrawal will indeed occur, with the Union negotiating and concluding an agreement for withdrawal based on guidelines drawn up by the European Council, and the seceding Member State is excluded from the discussions in the Council and the European Council on the withdrawal agreement. Withdrawal can also take effect automatically after notification of the decision to withdraw, notwithstanding the absence of an agreement, unless the European Council decides otherwise. The framework thus assumes an immediate reinstitution of the arm's length relationship between members and non-members, a point buttressed by the insistence in Article I-60(4) that a state having once withdrawn must apply to rejoin via the normal route laid down in Article I-58. There is to be no halfway house associate membership or automatic right to rejoin. This aspect of the provision is tougher in the final version than in the original draft.[84] Interestingly, in contrast to Canada, where much important constitutional doctrine, such as on the twin principles of constitutionalism and democracy, has been judicially elaborated in the context of the whole issue of Quebec's potential secession and ongoing 'difference' from the rest of Canada, there have been no judicial interventions thus far on this issue.[85]

c) Competences

Turning, finally, to the issue of competences, it is widely thought – wrongly, quite probably – that there has been an unstoppable 'competence creep' in which the EU and its institutions have gradually encroached upon the (protected, sovereign) spheres of the Member States.[86] Even if the argument is largely wrongheaded, and is based on a perverted view of the politics of law-making in the EU context as a politics of winners and losers,[87] one of the

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[82] CONV 648/03, 2 April 2003, Art. 46.

[83] *Reference by the Governor in Council, pursuant to s 53 of the Supreme Court Act, concerning the secession of Quebec from Canada* [1998] 2 SCR 217.

[84] CONV 648/03, above n.82.

[85] For argument about the potential applicability of this approach to constitutional flexibility in the EU, see J. Shaw, 'Relating Constitutionalism and flexibility in the EU', in G. de Búrca and J. Scott (eds), *Constitutional Change in the EU: From Uniformity to Flexibility?,* 2000.

[86] See, in contrast, the much more sophisticated diagnosis of the 'problem' of the competence system offered in Section 1 of A. Vergés Bausili, 'Rethinking the methods of dividing and exercising powers in the EU: Reforming Subsidiarity, National Parliaments and Legitimacy', in Shaw *et al*, above n.21.

[87] S. Weatherill, 'Competence', in de Witte above n.62, 45 at p.46.

greatest challenges for the Convention concerned how it should react to the argument bearing in mind that the existing system governing competence attribution, exercise and control is hardly a paragon of clarity in the EU and could certainly benefit from an overhaul. Moreover, as Franz Mayer has made clear, the discussion of competences is itself a cypher for other questions about the nature of European integration.[88] However, once the choice was made for some sort of systematisation of types of competence and areas of competence, there could be little assistance from the Court's case law. Notwithstanding its usage of the terms exclusive and shared competence in the external relations sphere, the way in which the Court has approached the question has simply not been rationalised in terms of *types* or *categories* of competence. On the contrary, it *has* used the principle of attribution, which has unsurprisingly been preserved in Article I-11(2). Attribution has been widely used by the Court as the basis for establishing and testing the limits of competence by examining the scope and context of *each individual legal basis* to ensure that measures adopted on that basis correspond not only to the specific terms of that legal basis, but also to the wider *ethos* of EU law. That was the clear implication of the Court's rather contested judgment in the *Tobacco Advertising Directive Case*,[89] in which it declared in quite trenchant terms the outer limits of the forms which the exercise of EU competence could legitimately take in respect of the regulation of cross-border advertising of tobacco products. This operates both in relation to the regulation of the internal market as a functional competence and also in relation to the question of the protection of public health as a substantive (complementary) competence. Indeed, in terms of the existence of competence, attribution is the only general principle that can be found in the Treaties as they are presently drafted, along with a vast number of legal bases, some of which are more carefully delineated than others, and of which Article 308 EC giving an implied power to regulate matters falling within the scope of the objectives of the Treaty is the most controversial. In addition, the Court has also evolved additional judicial principles such as the preemption of national legislative competence in certain circumstances and the doctrine of implied powers to buttress the attribution principle from the point of view of the efficacy of EU governance. Other principles, such as subsidiarity and proportionality, govern only the *exercise* of competence.

The original draft provisions on categories of competence prepared by the Praesidium were exceptionally inelegantly drafted.[90] Drafting style is a resolvable difficulty, and the final versions (Title III of Part I) were a considerable improvement, and also contain a more reasonable resolution of the division between exclusive and shared competence, especially in relation to the internal market. It remains a lingering difficulty, however, that the attempt to introduce a 'categories' approach drawn from the experience of other (national) federations does not appear to fit well with the existing approach to competences which constitutes the *acquis communautaire* in this

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[88] F. Mayer, 'Competences – Reloaded? The vertical division of powers in the EU after the new European constitution', Paper presented at *Altneuland: The Constitution of Europe in an American Perspective*, NYU-Princeton University Conference, April 2004 <http://www.jeanmonnetprogram.org/>.

[89] Case C-376/98 *Germany* v *Council and Parliament* [2000] ECR I-8419.

[90] See CONV 528/03, above n.46.

area. One can anticipate, therefore, that a move in this direction could precipitate considerable uncertainty as the institutions, and especially the Court, adjust to the new approach, assuming the Constitutional Treaty is adopted by the IGC and ratified at national level in due course.

In the meantime, the key questions about the scope and nature of competences are largely resolved not by Part I of the draft Constitutional Treaty, over which the Convention laboured so long and so hard, but rather by Part III, which in contrast received much less attention and is, of course, largely a codification and recapitulation of what is contained in the EC Treaty with regard to specific legal bases and powers, and so on. Furthermore, since these provisions do not provide answers to many of the previously uncertain and open questions – and indeed how could they? – it seems likely that the debate about competences will continue to rage in the EU context.

CONCLUSIONS

Many questions about the Convention, the Intergovernmental Conference and the Constitutional Treaty are left to one side by this paper. This is not a paper shaped by the normative elements of the so-called Laeken mandate from the Laeken Declaration, which indicated that the Convention should be concerned primarily with making the European Union's core framework more accessible and legible to citizens, as well as more effective, in particular in view of the substantial 2004 Enlargement. We are not concerned here with whether or not the Convention and its draft Constitutional Treaty constitute a European 'constitutional moment',[91] or with the competing internal and external rationales for the construction of a formal constitutional edifice at this precise stage of the EU's historical development.[92] Instead, it looks at the Convention's draft Constitutional Treaty as a constitution-building process rooted in a largely analytically based conception of the EU as an evolving non-state polity.

Moreover, this is not a paper trying to show what theory of integration applies best to the Convention, or a paper seeking to judge whether a 'Convention plus IGC' configuration is fundamentally different in terms of the amendment of the treaties to an 'old-style' IGC. In other words, it is not trying to figure out whether the Convention has produced different outcomes. In the main, the work in this paper is descriptive and analytical, trying to work out questions of fit between the old and the new.

Thus, this paper has offered a close examination of some key aspects of the emergent 'new' European Constitution, concentrating particularly upon the work of the Convention up to July 2003. The predominant focus is upon the questions of process and substance which shaped the work of the Convention

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[91] N. Walker, 'After the Constitutional Moment', in Pernice and Maduro, above n.2. See also N. Walker, 'Europe's Constitutional Momentum and the Question of Polity Legitimacy', <www.jeanmonnetprogram.org>; and N. Walker, 'The EU as a Constitutional Project', *Federal Trust Online Constitutional Essay*, 19/2004 <www.fedtrust.co.uk/eu_constitution>.

[92] See G. de Búrca, 'The drafting of a Constitution for the European Union: Europe's Madisonian Moment or a Moment of Madness?', (2004) 61 *Washington & Lee Law Review* 555.

on the Future of the Union. The paper had a set of very modest objectives, namely to link debates about the Convention process to the substance of constitution-building and to show the influence of both the old Union *acquis* and the new mixed *acquis* of the Convention itself on the shaping of an anticipated new constitutional settlement for the EU. It has not been an attempt to provide an interim assessment of the results of the Convention, in terms of either process or substance. It is clear that in some cases the fit between the two is quite unsatisfactory, and this will generate legal and perhaps political uncertainty for a substantial period of time. Above all, in this context, simplification – that old mantra – can by no means be guaranteed. Throughout, the Convention's work has undoubtedly provoked quite strong reactions, ranging from fierce optimism to rather depressed pessimism, even amongst those who share the view that constitutionalism can *and should*, if pursued effectively as a set of premises about legitimate rule, offer some sort of legitimacy surplus to the presently much maligned EU. Balance is clearly a key issue: balancing the interests of the various constituencies with a stake in the Convention to ensure maximum acceptability of its final product; balancing growing scepticism amongst publics about political institutions with the evident sense of goodwill towards European institutions frequently charted in Euro-barometer polls which indicate that Europe ought to be given a decent chance to establish itself; finally, and perhaps most crucially, balancing the new and the old in the Constitutional Treaty, and re-engaging with one of the oldest conundrums of legitimacy, namely balancing the responsiveness of institutions including guarantees of participation, with the need for effective governance and leadership in an ever more uncertain world.

REASONABLENESS AND THE COMMON LAW

The Right Honourable Lord Hutton

The MacDermott Lecture 2004

It is a great honour for me to give the MacDermott lecture this evening. When I was called to the Bar of Northern Ireland in 1954 Lord MacDermott was the Lord Chief Justice and it was an invaluable experience for me and other young barristers to appear before a judge of such great distinction who was always exacting but always fair. Listening to Lord MacDermott hearing a case, whether at first instance or in the Court of Appeal, and to his questions to counsel, I used to think that his mind was like the needle of a compass, as the opposing arguments were advanced and he listened to and considered the submissions. At first, his mind would swing a little from side to side but in due course his mind would settle steadily and inexorably on north, on the correct and just answer in law.

Lord MacDermott was a master of every branch of the law, but some of his finest judgments related to the law of negligence and it is on that subject that I would like to speak this evening and in particular on the subject of reasonableness.

Every law student knows the famous judgment of Lord Atkin in *Donaghue* v *Stevenson in 1932*, in which he stated the fundamental principle of the law of negligence:

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question."

This principle has subsequently been applied in thousands of cases determined by the courts, but one of the fundamental questions relating to the principle, which has arisen in different forms, is whether a claimant is always entitled to recover damages if he can prove that the defendant should have reasonably foreseen that his acts or omissions would be likely to injure him. *Donaghue* v *Stevenson* related to a case where, a manufacturer of a product sold the product, a bottle of ginger beer, to a consumer who claimed she was injured by it, because there was a decomposed snail in the bottle, or so it was pleaded; and in *Donaghue* v *Stevenson* it was held that the manufacturer owed a duty of care to the consumer and at the end of his judgment Lord Atkin stated that that was a proposition which no ordinary citizen would doubt because if was in accordance with sound common sense.

But the statement of principle by Lord Atkin was relied on by plaintiffs in cases far removed from the sale of a product to a consumer, and therefore the question arose whether Lord Atkin's statement was one of general application or was subject to qualifications. This question was addressed by Lord MacDermott in *Gallagher* v *McDowell Ltd* [1961] NI 26 which was a

case where he held in the Court of Appeal that a building contractor could be liable in negligence to the wife of the tenant of a house who was injured by a defective floor which the contractor had constructed. Lord Lowry, who appeared as counsel for the building contractor, gave an amusing description of Lord MacDermott's conduct of the case in an address which he delivered in 1996 to the Irish Legal History Society:

> "At the trial, supported by some reasonably strong authority, the defendants succeeded in getting the case withdrawn from the jury on the grounds of no duty owed. In the Court of Appeal, the Lord Chief Justice took up the ball and spread-eagled our defences. It reminded me of Jack Kyle's try at Ravenhill against the French. Our full-back was *Cavalier* v *Pope*, but to the cry of *Donaghue* v *Stevenson*, the chief swerved effortlessly past. When a new trial had been ordered, I turned to the defendants' experienced and enterprising solicitor, saying, "Harry, that could mean the House of Lords". He replied, "I'm not so sure. It all sounded horribly right to me.""

In his judgment, Lord MacDermott said at page 31:

> "While *Donaghue* v *Stevenson* was meant to lay down a broad principle, its test of legal duty is linked to what is reasonable, and I doubt if Lord Atkin was prepared to adopt, as a matter of law, a standard of reasonableness in this connection which would open the door that had just been unlocked to its fullest extent. Apart, however, from this sort of limitation, which is inherent in the passage I have quoted, the better view is, I think, that the principle it enshrines was not meant to be applied so literally or widely as to preclude all exceptions."

This was a prescient statement which subsequent decisions have shown to be entirely sound. In *Yuen Koon Yeu* v *Attorney General of Hong Kong*, [1998] 1 AC 175, 191H Lord Keith of Kinkel said that:

> "foreseeability does not of itself, and automatically, lead to a duty of care"

and in *Caparo* v *Dickman* [1990] 2 AC 605, 617H Lord Bridge of Harwich said:

> "in addition to the foreseeability of damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of given scope upon the one party for the benefit of the other."

One of the important fields in which the courts have had to consider whether a duty of care arises under the principle stated by Lord Atkin, is where a local or public authority, or a person employed by such an authority, has a duty or power to take action which may affect the welfare of others. A serious of decisions have related to claims brought by persons who allege that they have suffered psychological or psychiatric harm because of the

negligent way in which the local authority or one of its servants has performed a duty or exercised a power given to it by statute. A local authority which takes a child into care has a duty imposed on it by statute to look after such a child and to safeguard and promote the child's welfare, and there have been cases where the local authority has placed a child with foster parents and the foster father has sexually abused the child causing great psychological or psychiatric harm. There has been considerable debate whether a child so injured can recover damages for negligence at common law, where he can prove that the local authority was careless in placing him with such foster parents. The debate has been whether the child can recover damages at common law because the courts have held in cases such as *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633, that there is no right to sue the local authority for breach of its statutory duty itself – if the child is to succeed it must be under the common law principle of negligence.

This debate has given rise to a number of separate points. The first point is whether the neighbour relationship giving rise to the duty of care can arise where the defendant is exercising a statutory power. On this point the law has been clear for many years. It is well established that in exercising a statutory power a government department or a public or local authority may place itself in such a position to another person that it creates the relationship of neighbour giving rise to a duty to take reasonable care. The law was succinctly stated by Mason J in the High Court of Australia in *Sutherland Shire Council* v *Heymen* (1985) 157 CLR 424, 459:

> "it has been generally accepted that, unless the statute manifests a contrary intention, a public authority which enters upon an exercise of statutory power may place itself in a relationship to members of the public which imports a common law duty to take care."

This point is illustrated in the judgment of the House of Lords in *Dorset Yacht Co Ltd* v *Home Office* [1970] AC 1004. In that case Borstal boys detained under statutory powers had been taken to an island under the control of supervision of three Borstal officers. The boys escaped and sought to leave the island by stealing a yacht which they so mishandled as to damage the plaintiff's yacht which was at anchor nearby. It was alleged that the three officers were negligent in failing to control the Borstal boys and that the Home Office was vicariously responsible for their actions. The House of Lords rejected an application by the Home Office to strike out the claim. In his judgment Lord Pearson said at page 1056D:

> "Be it assumed that the defendants' officers were acting in pursuance of statutory powers (or statutory duties which must include powers) in bringing the Borstal boys to Brownsea Island to work there under the supervision and control of the defendants' officers. No complaint could be made of the defendants' officers doing that. But in doing that they had a duty to the plaintiffs as 'neighbours' to make proper exercise of the powers of supervision and control for the purpose of preventing damage to the plaintiffs as 'neighbours'."

However, the exercise of a statutory power often involves the exercise of a discretion and there has been considerable debate in the courts as to whether a claimant can sue a public or local authority for negligence in the exercise

of a statutory discretion. This debate has involved consideration of the extent to which the principle governing judicial review of the exercise of a statutory discretion by a public or local authority is applicable to actions for negligence. In the well known case of *Associated Provincial Picturehouses Ltd* v *Wednesbury Corporation* (1948) 1 KB 223 Lord Greene MR stated the principle, which has been constantly applied, that a court should not intervene to set aside a decision to exercise a statutory discretion in a particular way unless the decision was so unreasonable that no reasonable authority could ever have come to it. Lord Greene made clear that when a public authority is given a discretion by Parliament it is for the authority to decide how to exercise the discretion and not the court. Leaving aside issues as to unfairness the power of the court to interfere is not as an appellate authority to override a decision of the authority, but as a judicial authority which is concerned, and concerned only, to see whether the authority has contravened the law by acting in excess of the powers which Parliament has conferred on it.

In the *Dorset Yacht* case, as I have stated, the House of Lords held that the Home Office could be liable for the negligence of its servants, the prison officers, notwithstanding that they had brought the boys to the island in exercise of a statutory power, but the House of Lords pointed out that in supervising the boys in the defective manner which they did, the prison officers were not acting in exercise of a discretion , to the contrary, they had been ordered to keep the boys in custody and under control but they negligently failed to carry out their orders.

However, there is a passage in the judgment of Lord Reid, although it is *obiter*, and a passage in the judgment of Lord Diplock, which were understood in some subsequent cases to state that there could not be an action for negligence if the act by the public authority alleged to be negligent was carried out in exercise of a statutory discretion. Lord Reid stated at page 1031A:

> "Where Parliament confers a discretion . . . there may, and almost certainly will, be errors of judgment in exercising such a discretion and Parliament cannot have intended that members of the public should be entitled to sue in respect of such errors. But there must come a stage when the discretion is exercised so carelessly or unreasonably that there has been no real exercise of the discretion which Parliament has conferred. The person purporting to exercise his discretion has acted in abuse or excess of his power. Parliament cannot be supposed to have granted immunity to persons who do that."

Lord Diplock stated at page 1067G:

> "over the past century the public law concept of *ultra vires* has replaced the civil law concept of negligence as the test of the legality, and consequently of the actionability, of acts or omissions of government departments or public authorities done in the exercise of a discretion conferred upon them by Parliament as to the means by which they are to achieve a particular public purpose. According to this concept, Parliament has entrusted to the department or authority charged with the administration of the statute the exclusive

> right to determine the particular means within the limits laid down by the statute by which its purpose can best be fulfilled. It is not the function of the court, for which it would be ill-suited, to substitute its own view of the appropriate means for that of the department or authority by granting a remedy by way of a civil action at law to a private citizen adversely affected by the way in which the discretion has been exercised. Its function is confined in the first instance to deciding whether the act or omission complained of fell within the statutory limits imposed upon the department's or authority's discretion. Only if it did not, would the court have jurisdiction to determine whether or not the act or omission, not being justified by the statute, constituted an actionable infringement of the plaintiffs' rights in civil law."

These two passages were applied rigidly in some cases, irrespective of the particular circumstances of the case, so as to exclude liability for the action complained of, if the action were taken by a public or local authority or one of its servants in the exercise of a statutory discretion. This was the approach taken by the Court of Appeal in *Barrett* v *Enfield London Borough Council* [1998] QB 367. In that case the plaintiff had been placed in the care of the defendant local authority pursuant to a care order when he was ten months old and he remained in care until the age of 17. He claimed damages for psychiatric injuries arising from the alleged negligence of the local authority. The plaintiff's main allegation was that the local authority had failed to place him for adoption, which resulted throughout the years of his childhood and youth in him having no settled home but in moving about between a number of foster parents, interspersed with periods in residential institutions. He claimed that this disturbed and unsettled life, with no firm background of family love and affection had caused him psychiatric damage. The Court of Appeal upheld a decision at first instance that the claim should be struck out as disclosing no reasonable cause of action, and one of its grounds of decision was that the local authority could not be guilty of negligence because it was acting within the ambit of its statutory discretion. Lord Woolf MR stated at page 375D:

> "The complaints which go to the heart of the plaintiff's claim are all ones which involve the type of decisions which an authority has to take in order to perform its statutory role in relation to children in its care. The decision whether or not to place the child for adoption; the decision as to whether to place a child with particular foster parents; the decision whether to remove a child from a foster parent; the decisions as to the child's relationship with his mother and sister; all involve the exercise of discretion in the performance of the differing statutory responsibilities of the local authority."

Evans LJ stated at page 379G:

> "the defendant cannot be held liable for breach of any putative common law duty where he has acted within the scope of his statutory responsibilities."

And Schiemann LJ stated at page 381E:

> "in so far as any of the decisions were made within the ambit of the statutory discretion given to the authority they are not actionable."

This decision was reversed by the House of Lords [2001] 2 AC 530. The House cited a passage in the judgment of Lord Reid in the *Dorset Yacht* case where at page 1031 he said that the Borstal system was based on the belief that it assisted the rehabilitation of trainees to give them as much freedom and responsibility as possible. Accordingly, the responsible authorities had to weigh on the one hand the public interest of protecting neighbours and their property from the depredations of escaping trainees and on the other hand the public interest of promoting rehabilitation. Therefore Lord Reid observed that there was much room for differences of opinion and errors of judgment.

A principal part of the reasoning of the House of Lords in the *Barrett* case was that it was necessary to appreciate that the observations of Lord Reid and Lord Diplock that there can be no action for negligence in respect of actions carried out within the ambit of a statutory discretion were made against the background of the facts of the *Dorset Yacht* case and in the context of the statutory discretion under consideration and that their opinion was based, in part, on the consideration that the courts were ill suited in a sphere such as Borstal training to substitute their views for the views of the Home Secretary and his officials. The underlying principle to be derived from the two relevant passages in the judgments of Lord Reid and Lord Diplock was that the courts would not permit a claim for negligence to be brought where a decision on the existence of negligence would involve the courts in considering matters of policy raising issues which they are ill equipped and ill suited to assess and where Parliament could not have intended that the courts would substitute their views for the views of ministers or officials. The House cited with approval a passage in the judgment of Mason J in *Sutherland Shire Council* v *Heyman* where he said at page 468:

> "The distinction between policy and operational factors is not easy to formulate, but the dividing line between them will be observed if we recognise that a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care. But it may be otherwise when the courts are called upon to apply a standard of care to action or inaction that is merely the product of administrative direction, expert or professional opinion, technical standards or general standards of reasonableness."

Accordingly, the House declined to strike out the action because at the trial the judge might not be required to weigh matters of policy involving the balancing of competing public interest or the allocation of limited financial resources and it might be that the judge, as Mason J put it, would only be called upon

> "to apply a standard of care to action or inaction that is merely the product of administrative direction, expert and professional opinion, technical standards or general standards of reasonableness."

In the judgment of the House in *Barrett* consideration was given to the earlier judgment of Lord Browne-Wilkinson in the *Bedfordshire* case upon which the Court of Appeal had relied. There were passages in that judgment which, if read in isolation, supported the approach taken by the Court of Appeal, but the House considered that the most important passage in Lord Browne-Wilkinson's judgment was the passage at page 748G where he stated:

> "The alleged breaches of that duty relate for the most part to the failure to take reasonable practical steps, for example, to remove the children, to allocate a suitable social worker or to make proper investigations. The assessment by the court of such allegations would not require the court to consider policy matters which are not justiciable. They do not necessarily involve any question of the allocation of resources or the determination of general policy."

Accordingly, the House considered that that judgment did not preclude a ruling in favour of the plaintiff in *Barrett*.

In *Caparo*, in the passage that I have already cited, Lord Bridge of Harwich stated that the court will only impose a duty of care where the situation is one in which it considers it fair, just and reasonable to impose such a duty. This issue was considered both in the *Bedfordshire* case and in *Barrett*. In the *Bedfordshire* case the House of Lords considered a number of cases in which there were allegations that a number of local authorities had been guilty of negligence in exercise of their statutory duty to protect children and the House upheld a ruling that most of the claims should be struck out. Part of the reasoning of the House was that it would not be just and reasonable to impose a common law duty on a local authority in relation to performance of its statutory duties in relation to children because the imposition of such a duty would cut across the statutory system for the protection of children and might, in a delicate situation, make a local authority adopt a more cautious approach, to the prejudice of children. However, in the *Bedfordshire* case at page 749G Lord Browne-Wilkinson said that "the public policy consideration which has first claim on the loyalty of the law is that wrongs should be remedied." In the *Barrett* case the House held that there were not sufficiently potent counter-considerations to override that claim and that it would not be unjust or unreasonable to impose liability on the local authority if negligence were proved and the House expressly approved the statement of Evans LJ in the Court of Appeal at page 380A:

> "I would agree that what is said to be a "policy" consideration, namely, that imposing a duty of care might lead to defensive conduct on the part of the person concerned and might require him to spend time or resources on keeping full records or otherwise providing for self-justification, if called upon to do so, should normally be a factor of little, if any, weight. If the conduct in question is of a kind which can be measured against the standards of the reasonable man, placed as the defendant

> was, then I do not see why the law in the public interest should not require those standards to be observed."

Subsequent to the decision in *Barrett* the Court of Appeal considered the set of circumstances to which I have earlier referred, where a plaintiff brought a claim in negligence against the local authority for placing him with foster parents where he was subjected to serious sexual abuse. Reversing a decision at first instance that the action should be struck out, the Court of Appeal held in *S* v *Gloucestershire County Council* [2001] Fam 313 that the action should be allowed to proceed to trial and May LJ stated at page 337E:

> "Where the failing alleged has related to a discretionary decision which is empowered by statute, the court has been hesitant to say that the exercise of the discretion was wrong so as to give rise to a cause of action unless it was plainly wrong. The intense intellectual analysis which questions of this kind engendered has been simplified by the now clear recognition that there may be circumstances in this acutely difficult area of human endeavour where an ordinary common law claim in negligence upon *Caparo* principles may be academically possible and, in an appropriate case, succeed in fact."

Lord MacDermott concluded his judgment in *Gallagher* v *McDowell Ltd* with these words at page 44:

> "The attitude that any enlargement of the field of tortuous liability is always to be regarded as a step in the right direction is not one to be commended. Some gap between morality and law is inevitable and, if the gap is not too large, may be for the benefit of both codes. On the other hand, the changes to be expected in a progressive society call, from time to time, for such adjustments in the domain of legal responsibility as will promote justice and fair dealing."

I venture to think that Lord MacDermott would have approved the decision in *Barrett* and in *S* v *Gloucestershire County Council* and would have considered that those decisions constituted such an adjustment in the domain of legal responsibility as promoted justice and fair dealing.

Another area where there has been debate whether the principle stated by Lord Atkin should apply so as to impose liability, relates to steps which could have been taken by a highway authority to improve road safety by the painting or erecting of warning signs on a road or the removal of features on neighbouring land which obstruct the visibility of motorists. In the case of *Stovin* v *Wise* [1996] AC 923 the House of Lords divided 3-2 on the question. In that case the plaintiff was riding his motorcycle along a road when a car driven by the defendant emerged from a side road into his path and collided with him, causing him serious injuries. The driver of the car was guilty of negligence but she joined the highway authority as a third party claiming that its negligence had contributed to the accident. The junction was known by the highway authority to be a dangerous one because a bank on adjoining land restricted the view of a motorist emerging from the side road and a number of accidents had already occurred at the junction. Twelve months before the accident involving the plaintiff, a divisional surveyor of the highway authority after a site meeting accepted that the bank obstructed

the view of a driver coming to the junction from the side road and recommended removal of part of the bank. The highway authority accepted this recommendation and proposed to the owner of the adjacent land that the bank should be removed but the owner made no response and the highway authority took no further action until the accident.

The judgments in *Stovin* v *Wise* emphasised that, in part for historical reasons, there is an important distinction between an accident which is caused by the highway falling into disrepair and an accident which may be contributed to by a failure on the part of the highway authority to erect warning signs or to remove an obstruction on adjoining land which interferes with visibility. Since 1961 Parliament has imposed an express statutory duty on highway authorities to keep the highway in repair and a user of the highway injured by reason of lack of repair can recover damages unless the highway authority proves that it had taken such care as was reasonable to secure that the relevant part of the highway was not dangerous for traffic. But there is no statutory duty to erect warning signs or to remove obstructions, although there are statutory powers to do so. In his judgment in *Stovin* v *Wise*, with which Lord Goff of Chieveley and Lord Jauncey of Tullichettle agreed, Lord Hoffmann held that the highway authority did not owe a duty of care at common law and he said at page 953D:

> "In summary, therefore, I think that the minimum preconditions for basing a duty of care upon the existence of a statutory, if it can be done at all, are, first, that it would in the circumstances have been irrational not to have exercised the power, so that there was in effect a public law duty to act, and secondly, that there are exceptional grounds for holding that the policy of the statute requires compensation to be paid to persons who suffer loss because the power was not exercised."

He concluded his judgment by stating at page 958D:

> "Given the fact that the British road network largely antedates the highway authorities themselves, the court is not in a position to say what an appropriate standard of improvement would be. This must be a matter for the discretion of the authority. On the other hand, denial of liability does not leave the road user unprotected. Drivers of vehicles must take the highway network as they find it. Everyone knows that there are hazardous bends, intersections and junctions. It is primarily the duty of drivers of vehicles to take due care. And if, as in the case of Mrs Wise, they do not, there is compulsory insurance to provide compensation to the victims. There is reason of policy or justice which requires the highway authority to be an additional defendant."

The first precondition in the passage at page 953D is similar to the passages from the judgments of Lord Read and Lord Diplock which I have already cited.

In his dissenting judgment, with which Lord Slynn of Hadley agreed, Lord Nicholls of Birkenhead stated that, in his opinion, that there were several features in the case which, in combination, pointed to the conclusion that it would be fair and reasonable to impose a common law duty of care. The

features to which Lord Nicholls referred were these. First, the subject matter was physical injury. The existence of a source of danger exposes road users to a risk of serious, even fatal, injury. Second, the road authority knew of the danger. It was aware of a risk of which road users might be ignorant. Third, if the road authority had complied with its public law obligations the danger would have been removed and the accident would not have happened.

Fourth, in 1961 Parliament had abrogated the old rule which exempted the inhabitants at large and their successors from liability for non-repair of highways, and a highway authority is now liable in damages for failing to take reasonable care to keep the highway safe, but no sound distinction could be drawn between dangers on the highway itself, where the authority has a statutory duty to act, and other dangers, where there is a statutory power but not a statutory duty. The distinction would not correspond to the realities of road safety. Fifth, public law is unable to give an effective remedy if a road user is injured as a result of an authority's breach of its public law obligations. A concurrent common law duty is needed to fill the gap. Sixth, a common law duty in the case before the House would not represent an incursion into a wholly novel field. Although a highway authority does not occupy the highway, there is a certain resemblance between it and the occupier of land who can be under a positive duty to take positive action to protect his neighbours.

Seventh, a common law duty would not impose on the highway authority any more onerous obligation, so far as its behaviour was concerned, than its public law obligations. Finally, there may be cases, unlike the one under consideration, where a road user is injured by reason of a danger on the road where no other road user has been involved and there is no other road user to sue. And Lord Nicholls stated at page 941C:

> "Then it does seem eminently fair and reasonable that the loss should fall on the highway authority and not the hapless road user. And if the existence of a duty of care in all cases, in the shape of a duty to act as a reasonable authority, has a salutary effect on tightening administrative procedures and avoiding another needless road tragedy this must be in the public interest."

Lord Hoffmann's majority judgment in *Stovin* v *Wise* was, of course, given before the judgments in *Barrett* v *Enfield London Borough Council* holding that the fact that a negligent action by a local authority was taken in exercise of a statutory discretion did not necessarily exclude liability for negligence at common law, and the question whether the highway authority could be liable for negligence for a danger on the road was argued for a second time before the House of Lords in the case *Gorringe* v *Calderdale Metropolitan Borough Council* in which judgments were delivered on 1 April 2004 and have not yet appeared in the law reports.

In that case on a country road in Yorkshire, the plaintiff drove her car head on into a bus. The bus was hidden behind a sharp crest in the road until just before she reached the top. When she first caught sight of the bus, a curve on the far side may have given her the impression that it was actually on her side of the road. She braked when travelling at 50 miles an hour and the wheels locked and the car skidded into the path of the bus and the plaintiff suffered very severe brain damage. There was no fault on the part of the bus

driver who was driving with proper care when the plaintiff skidded into him. It appeared to be clear that the council were aware that there was some degree of danger at this point in the road because at some time the word "SLOW" had been painted on the road surface at a point before the crest, but this marking had disappeared, probably when the road was mended seven or eight years before. The plaintiff claimed that the council, as the highway authority, caused the accident by failing to give her proper warning of the danger involved in driving fast when she could not see what was coming. However, the House of Lords unanimously held that there was no common law duty of care on the highway authority and that the plaintiff's claim must fail.

In his judgment Lord Hoffmann stated at paragraph 17:

> "Reasonable foreseeability of physical injury is the standard criterion for determining the duty of care owed by people who undertake an activity which carries a risk of injury to others. But it is insufficient to justify the imposition of liability upon someone who simply does nothing: who neither creates the risk nor undertakes to do anything to avert it. The law does recognise such duties in special circumstances: see, for example, *Goldman* v *Hargrave* [1967] 1 AC 645 on the positive duties of adjoining landowners to prevent fire or harmful matter from crossing the boundary. But the imposition of such a liability upon a highway authority through the law of negligence would be inconsistent with the well established rules which have always limited its liability at common law."

Lord Brown of Eaton-under-Heywood stated in his judgment at paragraph 103:

> "There seems to me, therefore, no good reason for superimposing upon such general powers and duties as are conferred upon highway authorities a common law duty of care in respect of their exercise. Nor does it seem to me that Parliament can have intended a private law liability in damages to flow from a public law failure in the exercise of the authority's powers or the discharge of its duties. Where with regard to highways Parliament does intend users to have a remedy for damages it says so, as initially it did in 1961 and then again, by extending the section 41 duty to encompass the removal of ice and snow, in 2003. A maintenance obligation of this nature, moreover, lends itself to enforcement by way of private law action altogether more readily than a more general duty of care. Section 41 imposes comparatively well defined obligations upon authorities and, although resort to the section 58 statutory defence may complicate the litigation, that is as nothing compared to the problems, exemplified by this very case, of determining just what warnings at any particular point in the highway system are required, in effect as a matter of law, to be given. One cannot over-maintain the fabric of the public highway. Warning overload, however, is all too easily imaginable. As it is, road users tend to discount such warnings

> as are implicit in the various speed limits and other cautionary signs to which they are subject. The currency would be debased still further were highway authorities, anxious to avoid lengthy and expensive litigation of the kind Calderdale has been subjected to here, to feel obliged to multiply its street signing still further."

There are two lines of reasoning in the majority judgment in *Stovin* v *Wise* and in the judgments in *Gorringe*. One related to the policy reasons set out in the judgment of Lord Hoffmann in *Stovin* v *Wise* and the judgment of Lord Brown in *Gorringe*. The other was the recognition that both the earlier common law and the later statute law imposed no liability on a highway authority to pay damages to an injured road user because of a failure to protect him from some danger on the highway (other than a danger caused by non-repair when the law was changed by statute). The policy reasons set out in *Stovin* v *Wise* and *Gorringe* for not imposing common law liability are powerful ones, but in my respectful opinion the reasoning of Lord Nicholls in *Stovin* was also powerful, and having regard to the emphasis which the House of Lords placed on the historical background relating to the absence of liability on the part of highway authorities, I consider that the words of Lord MacDermott in *Gallagher* v *McDowell* at page 32 are again apposite and prescient because he said:

> "The fact seems to be that the concept of negligence as a separate cause of action developed too late to avoid certain anomalies. The flood it begot submerged parts of the older law but it had to eddy round and leave intact other parts that derived from the forms of action and the notions of an earlier age."

As to the relationship between the approach taken in *Barrett* and the approach taken in *Gorringe* there is guidance in paragraph 2 of the judgment of Lord Steyn in the latter case:

> "There are . . . a few remarks that I would wish to make about negligence and statutory duties and powers. This is a subject of great complexity and very much an evolving area of the law. No single decision is capable of providing a comprehensive analysis. It is a subject on which intense focus on the particular facts and on the particular statutory background, seen in the context of the contours of our social welfare state, is necessary. On the one hand the courts must not contribute to the creation of a society bent on litigation, which is premised on the illusion that for every misfortune there is a remedy. On the other hand, there are cases where the courts must recognise on principled ground the compelling demands of corrective justice or what has been called "the rule of public policy which has first claim on the loyalty of the law; that wrongs should be remedied": *M (A Minor)* v *Newham London Borough Council* and *X (Minors)* v *Bedfordshire County Council* [1995] 2 AC 633, at 663, per Sir Thomas Bingham MR. Sometimes cases may not obviously fall in one category or the other. Truly difficult cases arise."

A further issue relating to reasonableness arises in cases where a person has been running a risk in some relatively normal activity, such as swimming or diving in a lake on land occupied by another person, and he injures himself and sues the occupier on the ground that he should have foreseen the risk of injury and failed to take reasonable care to prevent it. Such a case arose in *Tomlinson* v *Congleton Borough Council* [2003] 3 WLR 705. In that case the plaintiff, aged 18, went into a lake and from a standing position in shallow water dived and struck his head on the bottom, breaking his neck. The lake, which had formed in a disused quarry, was in a country park owned and occupied by the defendants, and it attracted many visitors in hot weather. There were attractive sandy banks and in hot weather, many people, including families with children, went there to play in the sand and to sunbathe and paddle in the water. Many prominent notices were displayed reading "dangerous water: no swimming" and the defendants employed rangers to give oral warnings against swimming and to hand out safety leaflets. However the defendants were aware that the notices were frequently ignored and had little effect in stopping swimming and the defendants, aware that several accidents had resulted from swimming in the lake, intended to plant vegetation around the shore to prevent people from going into the water but had not done so because of a shortage of financial resources.

Mr Tomlinson sued the defendants to recover damages for his very severe injuries and one of the questions which arose was whether the risk of the plaintiff injuring himself by diving in the lake was, as provided in section 1(3)(c) of the Occupiers' Liability Act 1984 a risk "against which, in all the circumstances of the case, [the occupier] may reasonably be expected to offer the other [Mr Tomlinson] some protection.". If the risk was such, then section 1(4) imposed a duty to take such care as was reasonable in all the circumstances of the case to see that injury was not suffered by reason of the danger concerned. In the High Court Jack J dismissed the plaintiff's action, but the plaintiff succeeded in an appeal to the Court of Appeal [2003] 2 WLR 1120. In his judgment Ward LJ stated at 1132D:

> "Congleton Beach, as the place was also known, was as alluring to "macho" young men as other dangerous places were to young children. In my judgment the gravity of the risk of injury, the frequency with which those using the park came to be exposed to the risk, the failure of warning signs to curtail the extent to which the risk was being run, indeed the very fact that the attractiveness of the beach and the lake acted as a magnet to draw so many into the cooling waters, all that leads me to the conclusion that the occupiers were reasonably to be expected to offer some protection against the risks of entering the water. It follows that in my judgment the defendants were under a duty to the plaintiff."

However, on appeal to the House of Lords the defendants succeeded and the decision of the High Court was restored. In his judgment Lord Hoffmann said at page 720C:

> "I think it will be extremely rare for an occupier of land to be under a duty to prevent people from taking risks which are inherent in the activities they freely choose to undertake upon

> the land. If people want to climb mountains, go hang-gliding or swim or dive in ponds or lakes, that is their affair. Of course the landowner may for his own reasons wish to prohibit such activities. He may think that they are a danger or inconvenience to himself or others. Or he may take a paternalist view and prefer people not to undertake risky activities on his land. He is entitled to impose such conditions, as the Council did by prohibiting swimming. But the law does not require him to do so.
>
> My Lords, as will be clear from what I have just said, I think that there is an important question of freedom at stake. It is unjust that the harmless recreation of responsible parents and children with buckets and spades on the beaches should be prohibited in order to comply with what is thought to be a legal duty to safeguard irresponsible visitors against dangers which are perfectly obvious. The fact that such people take no notice of warnings cannot create a duty to take other steps to protect them."

In his judgment Lord Hobhouse of Woodborough said at page 732B:

> "it is not, and should never be, the policy of the law to require the protection of the foolhardy or reckless few to deprive, or interfere with, the enjoyment by the remainder of society of the liberties and amenities to which they are rightly entitled. Does the law require that all trees be cut down because some youths may climb them and fall? Does the law require the coast line and other beauty spots to be lined with warning notices? Does the law require that attractive water side picnic spots be destroyed because of a few foolhardy individuals who choose to ignore warning notices and indulge in activities dangerous only to themselves? The answer to all these questions is, of course, no."

I delivered a judgment concurring in the decision that the appeal should be dismissed and at page 724B I cited the observation of the Lord President, Lord Dunedin, in *Hastie* v *Edinburgh Magistrates* [1907] SC 1102, 1106 that there are certain risks against which the law, in accordance with the dictates of common sense, does not give protection – such risks are "just one of the results of the world as we find it".

In conclusion, turning away from the concept of reasonableness in the tort of negligence, I would like to consider the issue of reasonableness in the context of judicial review where a claim is brought, not to recover damages for personal injury, but to set aside the decision of a public or local authority exercising a statutory discretion to which the applicant is opposed. As I have stated, the essence of the principle stated by Lord Greene in the *Wednesbury* case is that when a local authority has exercised a discretion given to it by Parliament, it is not for the court to sit as a court of appeal and for the judge to substitute his or her view of what is a reasonable exercise of the discretion for the view of the authority. This would be contrary to the intent of Parliament which has entrusted the exercise for the discretion to the local authority and not to a court. The function of the court is to ensure that the authority has not acted in excess of its powers and it would only do this if it

acted in a manner which was so unreasonable that no reasonable body could have decided so to act. But the court must not go beyond this and in *R* v *Secretary of State for Trade and Industry Ex parte Lonrho Plc* [1989] 1 WLR 525, 535B Lord Keith referred to:

> "the danger of judges wrongly though unconsciously substituting their own views for the views of the decision maker who alone is charged and authorised by Parliament to exercise a discretion."

A line of cases where the *Wednesbury* principle has been applied in Northern Ireland relates to decisions whether or not a parade should be allowed to pass through a particular area or whether conditions should be imposed on those organising or taking part in the parade. The relevant legislation in the past gave power to a senior police officer to impose conditions and such powers are no vested in the Parades Commission. In 1991 the Court of Appeal in Northern Ireland stated the principle as follows in the case of *In re Murphy's application* [1991] 5 NIJB 88:

> "In parts of Northern Ireland and amongst some groups in the community there can be much concern and interest at particular times of the year in the question whether certain processions should be permitted to use particular routes or whether they should be prohibited by the police from using particular routes. It is therefore important that the public should be fully aware of the functions and duties of the courts in relation to such a question. The relevant law has been stated on frequent occasions by the House of Lords, the highest appellate court, in relation to the function of the courts where judicial review is sought in respect of a decision taken by a police officer, or a government minister, or a local authority so some other public body or official, where the making of that decision has been entrusted to him or it by Parliament, under the terms of a statute. The governing principle can be stated in differing terms, but the essence of the principle is that the court does not sit as a Court of Appeal to substitute its opinion of what should be the proper decision for the opinion of the person or body entrusted by Parliament with the making of the decision. The court exercises only a supervisory jurisdiction and not an appellate jurisdiction. This means, in a case such as the present one, that the court will not intervene to set aside the decision unless (the onus of proof being on the applicant) the person making the decision has failed to consider matters which he was bound to consider or included in his consideration matters which were irrelevant or unless the court considers that the person making the decision has abused the exercise of the discretion given to him and has come to a decision to which no reasonable person could have come. There may be arguments of weight and substance on both sides of the matter, but it is not for the court to weigh up the arguments for and against the decision. The weighing of those arguments is a matter for the decision maker, not for the court."

In recent years there has been some criticism of the *Wednesbury* principle by that very eminent judge Lord Cooke of Thorndon. In *R* v *Chief Constable of Sussex Ex parte International Trader's Ferry Limited* [1999] 2 AC 418, 452C he said:

> "It seems to me unfortunate that *Wednesbury* and some *Wednesbury* phrases have become established incantations in the courts of the United Kingdom and beyond. *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223, an apparently briefly-considered case, might well not be decided the same way today; and the judgment of Lord Greene MR twice uses (at pages 230 and 234) the tautologous formula "so unreasonable that no reasonable authority could ever have come to it." Yet judges are entirely accustomed to respecting the proper scope of administrative discretions. In my respectful opinion they do not need to be warned off the course by admonitory circumlocutions. When, in *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014, the precise meaning of "unreasonably" in an administrative context was crucial to the decision, the five speeches in the House of Lords, the three judgments in the Court of Appeal and the two judgments in the Divisional Court all succeeded in avoiding needless complexity. The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock, at page 1064, as "conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt." These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers."

And in *R* v *Daly* [2001] 2 AC 532, 549B he said:

> "I think that the day will come when it will be more widely recognised that *Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223 was an unfortunately retrogressive decision in English administrative law, in so far as it suggested that there are degrees of unreasonableness and that only a very extreme degree can bring an administrative decision within the legitimate scope of judicial invalidation. The depth of judicial review and the deference due to administrative discretion vary with the subject matter. It may well be, however, that the law can never be satisfied in any administrative field merely by finding that the decision under review is not capricious or absurd."

No doubt one part of Lord Greene's formulation of the *Wednesbury* principle was tautologous, but I respectfully consider that it served the useful purpose of emphasising that where a judge is reviewing the lawfulness of an administrative decision it is not for him to substitute his view of what is reasonable for the view of the decision maker. As Lord Lowry stated in *R* v *Secretary of State for the Home Department Ex parte Brind* [1991] 1 AC 696,

> "what we are accustomed to call *Wednesbury* unreasonableness is a branch of the abuse, or misuse, of power: the court's duty is not to interfere with a discretion which Parliament has entrusted to a statutory body or an individual but to maintain a check on excesses in the exercise of discretion. That is why it is not enough if a judge fees able to say, like a juror or like a dissenting member of the Cabinet or fellow-councillor, "I think that is unreasonable; that is not what I would have done." It also explains the emphatic language which judges have used in order to drive home the message and the necessity, as judges have seen it, for the act to be unreasonable that no reasonable minister etc. would have done it."

In cases relating to human rights under the European Convention on Human Rights and the Human Rights Act 1998, the principle of proportionality may require a greater intensity of review as stated by Lord Steyn in *Daly's* case at page 547D. However, in those cases of judicial review where there is no human rights dimension I consider that if the court failed to take into account the distinction between describing an administrative decision as "unreasonable" and describing it as "unreasonable in the *Wednesbury* sense" there would be a danger that the courts would intrude into the task entrusted by Parliament to administrators and not to judges.

"ELECTIVE AFFINITIES" THE ART OF MEDICINE AND THE COMMON LAW

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INTRODUCTION

Medicine and the common law are commonly studied in terms of their mutual interaction and interpenetration. The lawyer and the ethicist, the student of regulation ask: how are medical decisions taken up in the law; how do legal rules skew medical practice. However, another perspective is possible: that of the philosopher of knowledge, concerned to draw out the similarities between legal and clinical medical reasoning. Such a perspective is adopted in this essay. It investigates the widespread assumption that the practice of both medicine and the common law is a matter of "art":[1] *i.e.* that it entails the exercise of fine and ultimately irreducible judgment; that the true nature of practitioner knowledge cannot be exhaustively captured in the form of explicit rules; that clinical and legal reasoning, proceeding on the basis of exemplary cases, are primarily analogical rather than deductive in form; and that, as a result, practitioner skills are most effectively transmitted subliminally through a period of apprenticeship. These features are explicated through a close reading of prominent writers on the philosophy of medicine and on legal theory. What is sought is a coherent account of the art view of practice, rather than a definitive statement of the realities of clinical and legal reasoning. In the concluding section an attempt is made to locate these common theoretical perspectives on medicine and the law within the context of conservative political theory. In both cases an anti-rationalist epistemology can be shown to ground a philosophical defence of accrued inequalities and the institutions which embody them.

The Art of Clinical Practice

The notion of clinical practice as an art has been frequently deployed by commentators on medicine, as well as by leaders of the profession over the last two centuries.[2] Its strategic value has lain in its valorization of an extensive zone of professional autonomy in the face of attempts to

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[*] Research for this paper was carried out while I was a Jean Monnet Fellow at the European University Institute, Florence, Italy. I am grateful to the Department of Law at the Institute for its support. Thanks are due to Gavin Anderson, Charles Baron, Mark van Hoecke, Christian Joerges, Karl-Heinz Ladeur, Michael Meagher and Ambreena Manji for discussing with me some of the issues raised in this essay. All responsibility for errors and infelicities is mine alone.

[1] For an investigation of other affinities between the two disciplines see J. Harrington, "Red in Tooth and Claw". The Idea of Progress in Medicine and the Common Law" (2002) 11 *Social and Legal Studies* 211.

[2] C. Lawrence, "Incommunicable Knowledge: Science Technology and the Clinical Art in Britain 1850-1914" (1985) 20 *Journal of Contemporary History* 503; D. Armstrong, "Clinical Sense and Clinical Science" (1977) 11 *Social Science and Medicine* 599; W. Anderson, "The Reasoning of the Strongest: The Polemics of Skill and Science in Medical Diagnosis" (1992) 22 *Social Studies of Science* 653.

commercialize or bureaucratize the practice of medicine. The following sub-sections seek to elaborate the specific phenomenology and epistemology, as well as the cognitive style and model of training connoted by talk of medicine as an art.

Phenomenology of Medicine – A Science of Particulars

By medical phenomenology is meant, in this context, the object domain which clinical medicine typically arrogates to itself. The question here is what is the characteristic target of medical intervention? This object domain can be distinguished from those of the basic, or natural sciences, on which clinical medicine draws, but to which it cannot be reduced.[3] As will be seen, it has substantial affinities with the object domain created for itself by the common law. At the heart of this phenomenology lies the idea of the case. In the words of Pellegrino and Thomasma, clinical medicine is "guided by a *telos* of individuation".[4]

One of the most important attempts in recent decades to theorize the object domain of clinical medicine was made by Gorovitz and MacIntyre.[5] Their intervention was motivated by a practical concern with the so-called malpractice crisis which has beset American medicine since the 1960s. They identify three sources of medical mishaps. The first two are familiar: the culpable errors of practitioners; and the under-developed state of scientific knowledge. The third source of error, which had been overlooked until then, lies in the unique complexity of each patient. Unlike physics or chemistry, which aim to establish law-like generalizations about universal phenomena, clinical medicine is a "science of particulars".[6] As such, the objects of medicine are, to use their example, more comparable to unique phenomena like hurricanes or salt-marshes, than to chemical compounds, atoms or sub-atomic particles. "Particulars" are not intelligible *in abstracto*, but only through their distinctive histories and their evolving relations with the environment. Given their complexity, diversity and contingency they cannot be adequately comprehended in law-like generalizations. In fact any prediction regarding their future development, either with or without therapeutic intervention, is prone to a "necessary fallibility".[7] Put another way, each patient-case is a "universe of one".[8] A diagnosis may be incorrect or a therapy may fail regardless of the care taken by the practitioner and

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[3] See N. Maull, "The Practical Science of Medicine" (1981) 6 *Journal of Medicine and Philosophy* 165.

[4] E.D. Pellegrino and D.C. Thomasma, *A Philosophical Basis of Medical Practice. Toward a Philosophy and Ethic of the Healing Professions* (1981), p.80.

[5] S. Gorovitz and A. MacIntyre, "Toward a Theory of Medical Fallibility" (1976) 1 *Journal of Medicine and Philosophy* 51.

[6] As such clinical medicine "is in fact hardly commensurable with any customary notion of science": J. Widder, "The Fallibility of Medical Judgment as a Consequence of the Inexactness of Observations" (1998) 1 *Medicine, Health Care and Philosophy* 119, 119.

[7] S. Gorovitz and A. MacIntyre, "Toward a Theory of Medical Fallibility" (1976) 1 *Journal of Medicine and Philosophy* 51, 62.

[8] D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983), p.68.

irrespective of all possible scientific knowledge. Hence the third source of medial accidents is one which implies no culpability.[9]

Epistemology of Medicine – Segmented Knowledge

The work of Ludwik Fleck allows us to link the phenomenology of particulars with the form and status of medical knowledge.[10] Anticipating Gorovitz and MacIntyre, Fleck started from a recognition of the complexity and contingency of medical phenomena. Like them, he argued against any reduction of clinical practice to the natural sciences. As he put it in a lecture of 1927:[11]

> "A scientist looks for typical, normal phenomena, while a medical man studies precisely the atypical, abnormal, morbid phenomena. And it is evident that he finds on this road a great wealth and range of individuality of these phenomena which form a great number, without distinctly limited units, and abounding in transitional, boundary states."

The primacy of the individual case is reflected in the indeterminacy and instability of medical knowledge. No other discipline has species with so many specific (*i.e.* non-analyzable) features as medicine. None is characterized by such a proliferation of sub-types and exceptions.[12] The complexity generated by the contingent and variable nature of medical phenomena is compounded by the fact that they are connected to each other "by means of a tremendous number of relations".[13] Causal connections in medicine can, accordingly, be "developmental, correlative, substituting, synergetic or antagonistic". This double complexity drives an embarrassing wedge between theory and practice in medicine. As Fleck points out, whereas in the natural sciences no observation can be incompatible with theory, in medicine one commonly hears the saying: "impossible in theory, though it comes up in practice."[14] He asserts that it is easy in medicine to generate pseudo-logical explanations which hold for the short term, but much more difficult to reach general, all-embracing ideas. Given the variety of medical phenomena, it can be said that the more logical the therapy

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[9] For debate and criticism of this thesis, see M.D. Bayles and A. Caplan, "Medical Fallibility and Malpractice" (1978) 3 *Journal of Medicine and Philosophy* 169; and B.P. Minogue, "Error, Malpractice and the Problem of Universals" (1982) 7 *Journal of Medicine and Philosophy* 239.

[10] For an overview, see I. Löwy, "Ludwik Fleck on the Social Construction of Medical Knowledge" (1988) 10 *Sociology of Health and Illness* 133.

[11] L. Fleck, "Some Specific Features of the Medical Way of Thinking", in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39.

[12] He notes in particular the frequency with which clinical categories are qualified by the prefixes "para-" and "pseudo-", as in "para-psoriasis" and "pseudo-anaemia": L. Fleck, "Some Specific Features of the Medical Way of Thinking", in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), pp.39, 41. For a more detailed elaboration of this theme, see J Widder, "The Fallibility of Medical Judgment as a Consequence of the Inexactness of Observations" (1998) 1 *Medicine, Health Care and Philosophy* 119.

[13] L. Fleck, "Some Specific Features of the Medical Way of Thinking", in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.43.

[14] L. Fleck, "Some Specific Features of the Medical Way of Thinking", in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.42.

proposed, the worse the physician is likely to be. Indeed, historically, it has been a common complaint of allopathic medicine that its rivals, such as homeopathy and osteopathy, are *too* logical to be either effective or credible.

At this point Fleck's theses may seem to coincide with an unreflective medical ideology which prioritizes pure and unmediated clinical experience.[15] However, while he rejects dogmatism, Fleck does not embrace such a naïve position. Remarking that "an empty mind cannot see at all",[16] he develops a constructivist and pluralistic account of medical knowledge. He shows, for example, how variations in anatomical drawings over the centuries are a result of the differing "thought-styles" which characterized medicine in each era. Such a plurality of incompatible thought-styles is also characteristic of an increasingly specialized medicine in the contemporary period. Each thought-style is produced and maintained by a historically formed "thought-collective".[17] Initiates have to learn "to see right" in accordance with the canons of that sub-discipline.[18] As Michael Polanyi pointed out, this mode of seeing is acquired through a process of conversion: literally a change of being. He gives the example of a medical student attending a course in the X-ray diagnosis of pulmonary diseases. Initially the novice is wholly puzzled by the pictures they are asked to view.[19]

> "Then as he goes on listening for a few weeks, looking ever carefully at new pictures of different cases, a tentative understanding will dawn on him; he will gradually forget about the ribs and begin to see the lungs. And eventually if he perseveres intelligently, a rich panorama of significant details will be revealed to him: of physiological variations and pathological changes, of scars, of chronic infections and signs of acute disease. He has entered a new world."

As well as enabling certain kinds of seeing, this process also necessarily disables others. (Observation is, thus, characteristically creative rather than merely additive.) In other words the complexity of medical phenomena has its epistemological counterpart in the segmentation of medical knowledge.[20]

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[15] On the historical emergence of this epistemic stance, *cf* M. Foucault, *The Birth of the Clinic. An Archaeology of Medical Perception* (1976); for a contemporary investigation see P. Atkinson, *The Clinical Experience. The Construction and Reconstruction of Medical Reality* (2nd ed, 1997), p.4.

[16] L. Fleck, "On the Question of Medical Knowledge" (1981) 6 *Journal of Medicine and Philosophy* 237, 247.

[17] The notions of "thought style" (*Denkstil*) and "thought collective" (*Denkkollektiv*) were of great influence upon the work of T.S. Kuhn on scientific paradigms.

[18] L. Fleck, "On the Question of Medical Knowledge" (1981) 6 *Journal of Medicine and Philosophy* 237, 251.

[19] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.101.

[20] This point is nicely summarized in I. Löwy, "Ludwik Fleck on the Social Construction of Medical Knowledge" (1988) 10 *Sociology of Health and Illness* 133, p.143.

Medical Cognition – The Role of Exemplars

Fleck was one of the first philosophers to remark on the incommensurability of medical knowledges.[21] As a trained doctor, he was nonetheless aware that clinical decision-making did (and had to) go on. To this end the practitioner had to be capable, somehow, of integrating rival or at least discontinuous perspectives on clinical problems.[22] Fleck noted that in medicine it is "ever and ever necessary to alter the angle of vision and to retreat from a consistent mental attitude".[23] Only thus would "the world of morbid phenomena, which is irrational in its entirety, become rational in its details".[24] In his view, this process was ultimately opaque.[25]

> "Medical observation is not a point but a small circle. It is placed not in the system of co-ordinate straight lines inclined to one another at a constant angle, but in a system of optional, mutually intersecting curves which we do not know closely."

The question, however, remains that posed by Donald Schön: how can a medical professional "use what he already knows in a situation which he takes to be unique?"[26] We find a response to this in the work of Kenneth Schaffner who accepts the pluralism revealed by Fleck, but also goes beyond it in developing a more specific account of medical reasoning.[27] As we have seen, clinical medical knowledge falls short of "the Euclidean Ideal", in not forming "a deductive systematization of a broad class of generalizations under a small number of axioms".[28] Rather, as Schaffner argues, its concepts are characteristically overlapping, blurred at the edges, and linked by a series of family resemblances.[29] Consequently "exemplar" reasoning (and not deduction or induction) is central to medical practice. Exemplars were originally defined by Thomas Kuhn as concrete problem solutions, or shared examples of how to get the job done.[30] Doctors are equipped with a rich stock or "repertoire" of such patient exemplars drawn from their training on

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[21] For a contemporary empirical study of this phenomenon, see A. Mol and M. Berg, "Principles and Practices of Medicine. The Coexistence of Various Anaemias" (1994) 18 *Culture, Medicine and Psychiatry* 247.

[22] Indeed this process of integration amounts to the "spirit of medicine", taking it beyond the natural sciences according to G. Canguilhem, *Ideology and Rationality in the History of the Life Sciences* (1988), p.33.

[23] L. Fleck, "Some Specific Features of the Medical Way of Thinking", in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.43.

[24] L. Fleck, "Some Specific Features of the Medical Way of Thinking", in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.43.

[25] L. Fleck, "Some Specific Features of the Medical Way of Thinking", in *Cognition and Fact – Materials on Ludwik Fleck* (Cohen and Schnelle eds, 1986), p.39, p.45.

[26] D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983), p.138.

[27] K.F. Schaffner, "Exemplar Reasoning about Biological Models and Diseases: A Relation between the Philosophy of Medicine and the Philosophy of Science" (1986) 11 *Journal of Medicine and Philosophy* 63.

[28] K.F. Schaffner, "Exemplar Reasoning about Biological Models and Diseases: A Relation between the Philosophy of Medicine and the Philosophy of Science" (1986) 11 *Journal of Medicine and Philosophy* 63, 69.

[29] For a similar argument see B.P. Minogue, "Error, Malpractice and the Problem of Universals" (1982) 7 *Journal of Medicine and Philosophy* 239.

[30] T.S. Kuhn, *The Structure of Scientific Revolutions* (3rd ed, 1996), p.200.

the wards and their post-qualification experience.[31] With time this knowledge acquires a tacit form, manifesting itself as a certain "feel" for the way cases should be perceived and dealt with. Thus when doctors are confronted by a new case they seek analogies with previous cases they have encountered. The relevant exemplar will indicate what the "right-kind of seeing" is and, thus, what generalizations are applicable in a given situation. In the words of Førde:[32]

> "a diagnosis is frequently made before the specific features upon which the diagnosis is built are consciously recognized . . . [The objective] is not so much to discover something new, as to establish familiarity with something previously discovered."

It is common to seek scientific respectability for medicine by reconstructing the process of analogical reasoning "so that it appears more like a deductive filling in of a general pattern".[33] But this is merely a type of "instant historical revisionism", since exemplars are cognitively prior to the axioms or principles which they are supposed to illustrate.[34] Deduction is generally limited to "easy cases" and to decision-making by novices.[35]

Medical Judgment – Prudence and Maxims

Medicine is a practical discipline directed toward concrete goals. This imposes a burden of decision-making on the individual doctor quite absent from the work of the laboratory scientist. (Though not as we shall see from that of the common law judge.) The doctor has to decide to act, or, which amounts to the same thing for these purposes, not to act in the case of the patient.[36] The practical grounding of medicine is further emphasized by the ineluctable involvement of the patient in the decision making process. The doctor encounters another ethical subject whose consent must presumptively be obtained before any recommended course of diagnosis or treatment is undertaken. Given the now overwhelming rejection of medical paternalism,

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[31] D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983). On the process of acquiring such exemplars, *cf* P. Atkinson, *The Clinical Experience. The Construction and Reconstruction of Medical Reality* (2nd ed, 1997).

[32] R. Førde, "Competing Conceptions of Diagnostic Reasoning – Is there a Way Out?" (1998) 19 *Theoretical Medicine and Bioethics* 59, 67; see also H.G. Schmidt *et al*, "A Cognitive Perspective on Medical Expertise: Theory and Implication" (1990) 65 *Academic Medicine* 611.

[33] A.L. Caplan, "Exemplary Reasoning? A Comment on Theory Structure in Biomedicine" (1986) 11 *Journal of Medicine and Philosophy* 93, 94.

[34] D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983), p.140; see also P. Bourdieu, *Outline of a Theory of Practice* (1977), p.19.

[35] G.J. Groen and V.L. Patel, "Medical Problem-Solving: Some Questionable Assumptions" (1985) 19 *Medical Education* 95.

[36] S. Tyreman, "Promoting Critical Thinking in Health Care: *Phronesis* and Criticality" (2000) 3 *Medicine, Health Care and Philosophy* 117-124; for a more critical view see D. Waring, "Why the Practice of Medicine is not a Phronetic Activity" (2000) 21 *Theoretical Medicine and Bioethics* 139.

the choice of therapy will be informed and further complicated by the preferences and value choices of the autonomous patient.[37]

The process of clinical decision-making has been analyzed from this perspective by Pellegrino and Thomasma. For them, the *telos* of healing imposes an "atmosphere of prudence" on the whole process of diagnosis and recommendation of therapy. At each stage a doctor seeks to weigh, balance and eliminate certain factors, to recall and test the applicability of various exemplars, in a judicious manner which cannot be reduced either to logical reasoning or to technical competence.[38] In this the practitioner is guided by a variety of prudential maxims. Pellegrino and Thomasma give the following examples: a doctor should: "act to optimize as many benefits, minimize as many risks as possible"; "be wary of hunches and intuitions"; "recognize his or her own clinical style, prejudices, and beliefs about what is good for patients"; and so on.[39] Maxims are, thus, rules of thumb. They indicate factors to be taken into account in clinical decision-making, but never dictate specific outcomes. They cannot be ranked in any hierarchical order and no single maxim is indispensable to right clinical action. Furthermore, they are only useful when re-integrated into the doctor's practical or tacit knowledge of the discipline. The relative weight and application of each maxim has to be determined by the ends of medical action and by the need to reach a decision in the particular case. Pellegrino and Thomasma hold that:[40]

> "Each clinical decision is . . . a terminal and unique event in that it cannot remain forever open and it is not universalizable. It must close on the selection of one of a series of remedial actions or none. The action chosen must be the right one for this particular patient."

As has been indicated, a profound consideration of the choices and preferences of the particular patient must form part of the doctor's prudential weighing. Not only will the patient's competent refusal constitute a ban on the relevant procedure; even where a specific course of action is chosen the manner in which it is executed and monitored will be shaped by the wishes and lifestyle of the patient. Respect for the patient's autonomy cannot, on this model, be a simple matter of taking and following instructions. It is achieved continually over the course of the therapeutic relationship and it depends on the ongoing exercise of the doctor's judgment. In Britain the Human Rights Act 1998 provides further direction to the doctor's deliberations. Clinical decisions, for example, to withdraw or withhold treatment, are now subject to scrutiny in accordance with the guarantees of

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[37] For an elaboration of the nature and implications of patient autonomy and its relation to other goals and values in medicine see T.L. Beauchamp and J. Childress, *Principles of Biomedical Ethics* (5th ed, 2001).

[38] To this extent it can be said that the prudential aspects of medicine go beyond the art idea of skill and competence, see F. Daniel Davis, "*Phronesis*, Clinical Reasoning, and Pellegrino"s Philosophy of Medicine" (1997) 18 *Theoretical Medicine* 173.

[39] E.D. Pellegrino and D.C. Thomasma, *A Philosophical Basis of Medical Practice. Toward a Philosophy and Ethic of the Healing Professions* (1981), p.137.

[40] E.D. Pellegrino and D.C. Thomasma, *A Philosophical Basis of Medical Practice. Toward a Philosophy and Ethic of the Healing Professions* (1981), p.124.

the European Convention on Human Rights.[41] While the National Health Service has stated that the majority of its practices already complied with the Convention, it has provided systematic guidance to doctors and other staff on human rights issues. The representative bodies of the medical profession have also been active educating their members on their legal and ethical obligations.[42]

Transmitting Medical Knowledge – The Apprenticeship Model

The foregoing discussion leads us to examine a final, distinctive aspect of the idea of medicine as an art, namely the means by which medical knowledge or more precisely the style of clinical reasoning is transmitted. We have seen that practitioners need to integrate knowledge generated in a number of segmented domains. It was suggested that this process depends: first, on the availability of a repertoire of exemplars which indicate the right way of seeing clinical problems; and second, on the exercise of prudential reasoning in which maxims guide, but do not fully determine the doctor's practical intervention.

The priority of these embodied attributes is linked with a distinctive model of education in the work of Michael Polanyi. He argues that since medical, or indeed any kind of useful knowledge can never be specified in full, explicit detail it cannot be transmitted by prescription. What is necessary instead is exposure to concrete cases during a period of apprenticeship.[43]

> "By watching the master and emulating his efforts in the presence of his example, the apprentice unconsciously picks up the rules of the art including those which are not explicitly known to the master himself."

For Polanyi, therefore, the relationship between master and student is necessarily hierarchical. To be initiated into the hidden wisdom of medicine is to submit to authority, to surrender oneself "uncritically to the imitation of another".[44] Elsewhere he describes this as a process of affiliation: literally the adherence of son to father.[45]

Since true knowledge takes the form of embodied experience, the master attains to his position through longevity of practice.[46] As Schön puts it:[47]

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[41] B. Hewson, "Why the Human Rights Act Matters to Doctors" (2000) 321 *British Medical Journal* 780.

[42] For a consideration of one area of practice see R. Macgregor-Morris, J. Ewbank and L. Birmingham, "Potential Impact of the Human Rights Act on Psychiatric Practice: the Best of British Values?" (2001) 322 *British Medical Journal* 848.

[43] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.53; *cf* also, G. Marckmann, "Teaching Science vs. the Apprentice Model – Do we Really Have the Choice?" (2001) 4 *Medicine, Health Care and Philosophy* 85.

[44] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.53.

[45] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.207.

[46] See further, W. Wieland, "The Concept of the Art of Medicine", in *Science, Technology and the Art of Medicine* (Delkeskamp-Hayes and Cutter eds, 1993), p.165.

> "The artistry of a practitioner . . . hinges on the range and variety of the repertoire that he brings to unfamiliar situations . . . Moreover each new experience [in practice] enriches his repertoire."

It follows that the most senior (*i.e.* the most experienced) members of a profession are those best able to testify to its authentic instances, to successful and unsuccessful performance.[48] They are the custodians and repositories of a traditionary knowledge which ultimately lies beyond the written word. The apprenticeship mode of training doctors is, of course, much diluted. A great deal of scientific learning in classrooms and laboratories now precedes training on the wards. The relentless rise of evidence based medicine and the dense regime of clinical guidelines have also reduced the scope for unfettered judgment in everyday practice. Nonetheless fieldwork has shown that the latter period continues to be privileged in the ideological self-portrayal of the medical profession.[49] Indeed medical students themselves affirm that their true initiation into the profession begins with their clinical training.[50] We now turn to examine the extent to which the idea of medicine as an art is echoed in the self-understandings of common lawyers.

The Art of Common Law Reasoning

This section traces a view of the common law in many important respects similar to that of clinical medicine rendered above. It focuses particularly on the precedent-based system of reasoning used by lawyers in England and other common law jurisdictions. Of course the law in these jurisdictions is not wholly, nowadays not even chiefly, composed of case law. Statute law, including explicit codes of rights, and detailed regulations now abound. Nonetheless it is still true to say that case law methods are at the heart of juristic technique in the common law countries. As with clinical training in medicine, case-base reasoning is at the ideological core of what it is to be a common lawyer. University law students learn in the first instance how to interpret, apply and distinguish precedents.[51] The key substantive areas of contract, tort, constitutional law, and criminal law are still significantly based on case law. Furthermore the meaning and scope of legislative enactments can only be known through the precedent cases in which they have been applied.

Phenomenology of the Common Law

It is perhaps a truism to say that the common law is concerned with individual cases. Nonetheless, as Tim Murphy has shown this orientation, entailed by the adjudicative nature of the legal process, is quite distinctive.

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[47] D.A. Schön, *The Reflective Practitioner. How Professionals Think in Action* (1983), p.140.

[48] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.163.

[49] W. Anderson, "The Reasoning of the Strongest: The Polemics of Skill and Science in Medical Diagnosis" (1992) 22 *Social Studies of Science* 653.

[50] P. Atkinson, *The Clinical Experience. The Construction and Reconstruction of Medical Reality* (2nd ed, 1997).

[51] P.S. Atiyah, *Pragmatism and Theory in English Law* (1987), p.29.

The common law, he argues "is geared to generating a situation of immediacy", a direct apprehension of individuals and their disputes.[52] The parties and any witnesses to a dispute are brought in person before the court. The facts of the case are established through oral examination and the presentation of documentary evidence. Its outcome will often depend on the credibility of witnesses established in the presence of judge and jury. Through these individualizing processes "the knowledge of "society", the management of disagreement, and the practical experience of the business of government are woven together in an indissoluble manner".[53] As such the common law can be contrasted with the statistically-based social sciences, such as economics, which are both abstract and future-oriented.[54]

It is of course true that decisions in individual cases furnish the normative stuff of the common law: precedents applicable in future cases with similar facts. Nonetheless a certain methodological prudence has tended to favour the particularist framing and interpretation of judicial opinions. English judges, in particular, have usually been wary of establishing broad principles from which legal consequences can be drawn "automatically", that is without reference to social consequences and without giving any consideration to the specific facts of possible future cases.[55] At the extreme end of this particularism is Lord Halsbury"s oft-quoted opinion that since "a case is only authority for what it actually decides" it cannot "be quoted for a proposition that may seem to flow logically from it".[56] To take one example, judicial shyness of generalization in the specific context of liability for negligence is attributed to the fact that:[57]

> "circumstances may differ infinitely and, in a swiftly developing field of law, there can be no necessary assumption that those features which have served in one case to create the relationship between the plaintiff and the defendant on which liability depends will necessarily be determinative of liability in the different circumstances of another case."

Epistemology of the Common Law

This orientation to the individual case has strongly influenced the form taken by the common law. In particular it is reflected in the traditional view that the common law does not constitute a system of clearly defined rules.[58] How is this seemingly counter-intuitive position reached? The reasoning in precedent cases is normally a close weave of facts and norms. Rules can be

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[52] W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1997), p.116.

[53] W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1997), p.88; see also, M. Lobban, *The Common Law and English Jurisprudence 1760-1860* (1991), pp.14-15.

[54] W.T. Murphy, *The Oldest Social Science? Configurations of Law and Modernity* (1997), p.149.

[55] P.S. Atiyah, *Pragmatism and Theory in English Law* (1987), p.15.

[56] *Quinn* v *Leathem* [1901] A.C. 459 at 506, HL.

[57] *Caparo* v *Dickman* [1990] 2 A.C. 605 at 623 *per* Lord Oliver, HL .

[58] A.W.B. Simpson, "The Common Law and Legal Theory", in *Oxford Essays in Jurisprudence (Second Series)* (Simpson ed., 1973), p.77, 95; see also, J. Frank, *Law and the Modern Mind* (1963), p.134.

extracted from cases. But this is always a tentative process which does not furnish definitive statements of the law, but merely evidence or opinion as to what it might be. This is so since appellate court judges commonly offer divergent reasons for reaching the same outcome in the same case; and since the reasoning of any judge in any case is subject to interpretation and re-interpretation in future decisions.[59] Thus, although the common law can be said to be composed of authoritative materials in the form of previous decisions, this increases, rather than eliminates, the scope for judicial creativity and conceptual instability.[60] Precedent cases are, therefore, epistemologically prior to the rules which they are taken to instantiate.

This embarrassment is increased by the fact that words in law as elsewhere may stand for a range of diverse, though related things.[61] In English law, for instance, the meaning of "possession" varies significantly when used in relation to larceny, trespass, land tenure, or bailment.[62] Even in a single area of law, such as negligence, the particular instances of a general concept do not all exhibit a fixed set of universal features corresponding to those of an ideal entity. Rather, they are linked by similarities "which some bear to others but not necessarily to all, like family resemblances".[63] If the common law is not composed in the first instance of clearly delimited rules, then it cannot be a system either. Indeed for Brian Simpson systematization is merely:[64]

> "the ideal of an expositor of the law, grappling with the untidy shambles of the law reports, the product of the common law mind which is repelled by brevity, lucidity and system, and it is no accident that its attraction as a model grows as the reality departs further and further from it."

The anti-system view is supported by Charles Sampford"s critique of leading common law theorists.[65] To take one example, he rejects Ronald Dworkin"s model of "law as integrity", according to which legal rules and decisions are justified by a fairly coherent set of high-level principles, and ultimately by a theory of political philosophy.[66] Sampford shows that in practice the achievement of consistency or "integrity" in law is impaired by the intractable heterogeneity of the very material of the common law: precedent

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59 J. Stone, *Legal System and Lawyers' Reasonings* (1964), p.267.

60 J. Stone, *Legal System and Lawyers' Reasonings* (1964), p.281.

61 C. Perelman, *Justice, Law and Argument. Essays on Moral and Legal Reasoning* (1980), p.126.

62 See W. Twining and D. Miers, *How to Do Things with Rules* (3rd ed 1991), p.259.

63 R. Stone, "Ratiocination not Rationalisation" (1965) 74 *Mind* 463, 478.

64 A.W.B. Simpson, "The Common Law and Legal Theory", in *Oxford Essays in Jurisprudence (Second Series)* (Simpson ed, 1973), p.77, 99. The idea of law as system can be traced to aesthetic understandings of law as geometry (17th century) or as architecture (18th century) see P. Stein, "Elegance in Law" (1961) 77 L.Q.R. 242, 252.

65 His analysis relies on a list of "system-features" derived from John Dewey: wholeness; elements; interrelation of elements; and structure or pattern see C. Sampford, *The Disorder of Law. A Critique of Legal Theory* (1989), p.14.

66 For an early formulation see R.M. Dworkin, "The Model of Rules", 35 *University of Chicago Law Review* 14 (1967).

cases establishing various rules are often actuated by opposing principles or policy considerations; judges are prone to distinguish and confine difficult precedents rather than to reject them openly on the basis of high-level principles. This is exacerbated by the fact that judges are engaged primarily in adjudication rather than justification.[67] Spurning the all-embracing idea, they seek to impose order on "a tiny part of the law" sufficient to reach a decision in the particular case.[68]

It is true, of course, that the Human Rights Act 1998 has introduced a set of explicit general principles applicable in all areas of English law. Indeed commentators have noted that the Act is of constitutional significance since it not only incorporates the substantive values of the European Convention on Human Rights, but also guides judicial interpretation of both statutes and the common law.[69] It has been argued, for example, that the Act allows the law of tort to be 'energized by principle' and rooted in a broader 'ethical base' than before.[70] To achieve this will, however, require a more expansive approach to interpretation than that outlined above, one which breaks decisively with traditional common law methods.[71] The difficulties of realizing this break have prompted some to recommend a wholly new constitutional court whose members would be drawn more widely than the present House of Lords.[72] Restraint has also been noted in relation to the courts' obligation under section 3(1) Human Rights Act where 'possible' to give legislation an interpretation consistent with the Convention rights enjoyed by citizens. Case law indicates that judges have in general spurned the option of radically changing the import and meaning of statutes by way of transformative interpretation under section 3(1).[73] They have, thus far, opted instead for a broad fidelity to their incremental traditions.[74]

Reasoning in the Common Law

Given the infinite variability of fact situations and the vagueness and imprecision of many legal concepts we can expect deductive and syllogistic reasoning to play a subordinate role in the common law. It is true that there is a role for deduction where the rule, forming the major premise of the

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[67] C. Sampford, *The Disorder of Law. A Critique of Legal Theory* (1989), p.87.

[68] "Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called upon to rationalize the law of England": *Read* v *Lyons* [1947] A.C. 156 at 175 per Lord Macmillan, HL; see also D. Lloyd, "Reason and Logic in the Common Law" (1948) 64 L.Q.R. 468.

[69] R. Clayton, "Developing Principles for Human Rights" [2002] *European Human Rights Law Review* 175.

[70] C. Gearty, "Tort Law and the Human Rights Act", in *Sceptical Essays on Human Rights* (Campbell, Ewing and Tomkins eds, 2001), p.243, 259.

[71] See M. Hunt, "The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession" (1999) 26 *Journal of Law and Society* 86.

[72] K.D. Ewing, "The Unbalanced Constitution", in *Sceptical Essays on Human Rights* (Campbell, Ewing and Tomkins eds, 2001), p.103.

[73] For an exploration of the functional and ideological constraints upon judicial creativity in this regard see A. Kavanagh, "The Elusive Divide between Interpretation and Legislation under the Human Rights Act 1998" (2004) 24 *Oxford Journal of Legal Studies* 259.

[74] A good example can be found in *Bellinger* v *Bellinger* [2003] 2 A.C. 467 at para 45 per Lord Nicholls, HL.

relevant legal syllogism is clear; *e.g.* "to be valid, contracts for the sale of land must be in writing; this contract is in writing; therefore, all else being equal, it is valid".[75] Most appellate cases arise, however, because just this clarity is missing; *e.g.* "does writing include email". In such cases deduction is only of secondary importance. Rather the judge and advocates must use other heuristic techniques to construct out of the precedent cases a rule (*i.e.* a major premise) applicable to the facts of the case at hand; *e.g.* "writing does not include email; therefore a contract for the sale of land in email form is not valid". In the search for a major premise common lawyers seek:[76]

> "non-necessary truths [by] reflection on the likenesses and dissimilarities of particular instances either actual or hypothetical, particular to particular."

In other words legal cognition is at bottom analogical cognition;[77] *e.g.* "email and paper documents are not substantially similar (analogous) in this context".

It is, of course, possible to analyse analogical reasoning in the law as a combination of deduction and induction.[78] Indeed judges commonly present their reasoning in this more pristine form as a token of their objectivity and their adherence to rule of law values in adjudication.[79] Yet this process is commonly one of reconstruction, since the crucial moment in analogy is the seeing of a similarity (or similarities) between earlier and later cases.[80] Only then can formal logical procedures be undertaken.[81] The vital question at this point is how the lawyer can be brought to see correctly. In other words, it is necessary to move beyond the empty formalism of the injunction that like be treated alike, and to inquire as to the procedures for determining what counts as similar, and what not.

Some writers suggest that analogy is only possible within an overarching rational context which links legal relationships among themselves "harmoniously".[82] Natural law theorists, for instance, affirm a realist ordering of things into "natural classes". Reference to these classes allows one to discriminate conclusively between the accidental and the essential features of any case and, thus, to reason analogically, *i.e.* to say that a later

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[75] It has been argued that a number of crucial analogy-based, pre-judgments are required before syllogistic reasoning can get under way in any case see A. Kaufmann, "Analogy and the 'Nature of Things'. A Contribution to the Theory of Types" (1966) 8 *Journal of the Indian Law Institute* 358.

[76] R. Stone, "Ratiocination not Rationalisation" (1965) 74 *Mind* 463, 481.

[77] G.J. Postema, *Bentham and the Common Law Tradition* (1986), p.31ff.

[78] E.H. Levi, *An Introduction to Legal Reasoning* (1948), p.1; for a thorough analysis see J. Horovitz, *Law and Logic. A Critical Account of Legal Argument* (1972), pp.32-44.

[79] The legal profession seeks "to maintain the image of the rule of law [as] the law of rules": P. Goodrich, *Reading the Law. A Critical Introduction to Legal Method and Techniques* (1986), p.156.

[80] J. Stone, *Legal System and Lawyers' Reasonings* (1964), p.315.

[81] The two stages can be distinguished in terms of the Popperian contrast between discovery and justification.

[82] G. Zaccaria, "Analogy as Legal Reasoning. The Hermeneutic Foundation of the Analogical Procedure" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.42, p.57.

case is essentially similar and should be treated in the same way. However, as Maris correctly notes, any realist metaphysics would now be regarded as untenable and its revival would in any case cut across important normative understandings in liberal society.[83] Rather, as Sandford's critique suggests, the rational context of analogical reasoning in the common law is necessarily plural and regional. i.e. specific to a give area of law.[84] Similarities are usually identified between cases that are conceptually proximate.[85] Clearly the more problematic (i.e. novel) the case, the wider the judge will be tempted to stray in search of analogous cases and relevant principles. But this search is never exhaustive.[86]

Judgment, Training and Tradition

Reasoning in the common law, thus, involves a search for appropriate analogies. It requires the judge and advocates to consider and interpret competing precedents; to adopt some and reject others. The foregoing discussion suggests that arguments in this mode are never wholly compelling. Ultimately while legal decisions should be reasonable, they cannot be rational.[87] Given the impossibility of a "mechanical jurisprudence" there remains a considerable role for the exercise of prudential judgment.[88] This is acknowledged by many writers. Clifford Geertz, for instance, saw lawyers as "connoisseurs of cases in point, cognoscenti of matters in hand".[89] Julius Stone drew attention to the:[90]

> "wisdom, which has always been the governing, moderating and evaluating core of good judgment, is [an] intangible and inarticulate presupposition . . . of the reasoning of lawyers and judges."

This practical wisdom is sometimes referred to as the "personal element" in judicial work or, more bluntly, as hunch.[91]

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[83] Particularly those concerning pluralism and choice in matters of value; see C.W. Maris, "Milking the Meter. On Analogy, Universalisability and World Views" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.71, p.85.

[84] The latter phrase is to be found in K.H. Ladeur, "The Analogy between Logic and Dialogic of Law" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.12, p.17.

[85] C.W. Maris, "Milking the Meter. On Analogy, Universalisability and World Views" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.71, p.102.

[86] See W. Twining and D. Miers, *How to do Things with Rules* (3rd ed, 1991), p.152.

[87] C. Perelman, *Justice, Law and Argument. Essays on Moral and Legal Reasoning* (1980), p.160.

[88] G.J. Postema, *Bentham and the Common Law Tradition* (1986), p.70.

[89] C. Geertz, *Local Knowledge: Further Essays in Interpretive Anthropology* (1993), p.168.

[90] J. Stone, *Legal System and Lawyers" Reasonings* (1964), p.337.

[91] J.C. Hutcheson, "The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision", 14 *Cornell Law Quarterly* 274 (1929); see also C.M. Yablon, "Justifying the Judge"s Hunch: An Essay on Discretion", 41 *Hastings Law Journal* 231-279 (1990).

It would, however, be incorrect to view the exercise of judgment in the common law as a wholly subjective or discretionary affair. Though not finally constrained by formal logic it is nonetheless subject to a number of less rigid normative, social and cultural controls.[92] Karl Llewellyn identified fourteen "steadying factors" in common law decision-making, including: the mental conditioning of lawyers; prior identification and sharpening of issues before trial; accepted ways of handling authoritative sources of law and of presenting arguments in court; constraints of group decision-making and of publicity; judicial security and honesty.[93] In particular, as Brian Simpson has pointed out, within groups like the legal profession, especially among its most powerful members, there must exist strong pressures against innovation. Young members of the group must be thoroughly indoctrinated before they can achieve any position of influence. There should be a "gerontocratic structure" which privileges the wisdom and experience of older members of the profession. The apprenticeship method of training lawyers has traditionally guaranteed this effect.[94] In the common law cohesion is thus preserved, not by rational means, but through a "combination of institutional arrangements and conservative dogma".[95]

The importance of a suitable initiation is made clear when we recall the analogical style of reasoning characteristic of the common law. We noted that there were no explicit, immutable principles, and no realist metaphysics available to instruct the judge or lawyer in how to see resemblances between cases. Instead as Bankowski says:[96]

> " 'Same' is a public concept which makes sense only within the context of a particular form of life. Thus we do not understand the "same" by adding any new facts but, by looking at it from within a context and tradition, we make valid and rational choices. It is within the context of this legal tradition then, with its interlocking network of principles, rules etc. that we find the conditions for making valid assertions of analogy and disanalogy. Analogy is at base a social concept."

Training in law must, therefore, be an extended induction into the professional context, into the tradition which makes it possible to see resemblances between cases. To quote Bankowski again:[97]

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[92] A.W.B. Simpson, "The Common Law and Legal Theory", in *Oxford Essays in Jurisprudence (Second Series)* (Simpson ed, 1973), p.77, 95.

[93] K. Llewellyn, *The Common Law Tradition. Deciding Appeals* (1960), p.19ff.

[94] See J. Harrington and A. Manji, "Mind with Mind and Spirit with Spirit". Lord Denning and African Legal Education" (2003) 30 *Journal of Law and Society* 376.

[95] A.W.B. Simpson, "The Common Law and Legal Theory", in *Oxford Essays in Jurisprudence (Second Series)* (Simpson ed, 1973), p.77, 96; see also D. Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology", 36 *Journal of Legal Education* 518 (1986).

[96] Z. Bankowski, "Analogical Reasoning and Legal Institutions" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.198, 208.

[97] Z. Bankowski, "Analogical Reasoning and Legal Institutions" in *Legal Knowledge and Analogy. Fragments of Legal Epistemology, Hermeneutics and Linguistics* (Nerhot ed, 1991), p.198, 211; see also P. Goodrich, *Reading the Law. A Critical Introduction to Legal Method and Techniques* (1986), p.154.

> "It is this knowing how of the practitioner which comes through socialization, a knowledge of the correct answer without necessarily being well-versed in the structure of the argument which is often evidence of a tradition."

CONCLUSION

The practices of clinical medicine and the common law are thus seen to share a number of significant features. Both disciplines have a primary orientation to the individual case. The clinical gaze and the procedural forms of the common law create "the case" and elevate it to phenomenological and ethical primacy. In this they differ from the aggregative social sciences which emerged in the nineteenth century and which are oriented to a collective field that they themselves call into being.[98] The historical differences between clinical and, say, public health medicine, or between law and public administration are thus reproduced at the level of the phenomenological.

The case is also primary in the domain of epistemology. In both clinical medicine and the common law the record or memory of cases has traditionally been the storehouse of disciplinary knowledge. Rules can be abstracted from various concatenations of cases, but this is always a contingent and revisable process. As a result concepts are never wholly specifiable, having blurred and overlapping meanings; and neither discipline can be fully and exhaustively articulated as a system. Deductive or syllogistic reasoning plays a subordinate part in the procedures of each. Historically both doctors and common lawyers have contrasted the responsive, pragmatism of their own practice with the inflexible dogmatism of rival practitioners.[99] The margin of uncertainty freed up by the analogical style of thought allows the doctor or judge to attend to the particularity of the case at hand.

The primacy of the case, the non-systematic nature of disciplinary knowledge and the importance of exemplary precedents mean that there remains an important role for judgment in the practice of medicine and the common law. Practitioners draw upon a kind of prudential wisdom in deciding on right action in clinical or curial matters. This judgment is guided by non-compelling maxims and principles, but also by certain social and cultural constraints. Both the faculty of judgment and its constitutive parameters are developed in the individual practitioner first during a period of apprenticeship to a more experienced practitioner, and later through constant practice. Though its precise form varies, training usually includes a prominent period of "imitative submission" by pupil to master. Only in this way do initiates acquire the needed stock of exemplary cases and, thus, the ability to see new cases in accordance with the traditions of the discipline.

The shared vision of medical and legal practice which has been developed in this essay is both traditional and traditionalist. It has a distinctively pre-

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[98] See M. Foucault, *The History of Sexuality. The Care of Self vol 1* (1979).

[99] "The lawyer who is not moderately alive to the fact of the limited part that rules play is of little service to his clients. The judge who does not learn how to manipulate these abstractions will become like that physician . . . "who preferred that patients should die by rule rather than live contrary to it"": J. Frank, *Law and the Modern Mind* (1963), p.141.

modern flavour and is obviously rooted in a general conservative and anti-rationalist philosophy. The work of Michael Polanyi, referred to earlier, makes clear the connections between politics and epistemology in this context. Polanyi"s well-known theory of tacit knowledge was developed out of a critique of what he diagnosed as the fallacious, but dominant positivism of the mid-twentieth century. This rested on the assumption that the world was completely knowable and representable "in terms of its exactly determined particulars".[100] The ideal knower was free of bias and commitment, detached from the subject of their inquiries, and fully conscious of all they knew. The completeness and objectivity of this knowledge legitimated the aspirations of democrats and collectivists. Available to expert and layperson alike, it could be used instrumentally to remould the world. The result was totalitarianism which both filled the spiritual void created by value-free science, and made best use of that same science as a tool of planning.[101]

Against this objectivism Polanyi argued that both personal judgment and tradition were indispensable to knowing. The objectivity of knowledge could not be guaranteed by method, but only by the personal commitment of the inquiring subject.[102] The investigator's orientation to the universal and the objective was sustained by an irreducible quotient of belief. Furthermore a great deal of knowledge was held at the tacit or subconscious level. Specific cognitions were only possible on the basis of this "subsidiary" knowledge. Its role increased the more the subject sought to apprehend concrete reality in all its diversity. The languages of the real world, said Polanyi, were necessarily inexact, metaphorical, analogical. The abstractions of physics offered greater precision and coherence, but thinner description. Law and medicine come somewhere on the spectrum between abstract generality and concrete particularity.[103] The aim of medical and legal reformers has been to pull both disciplines towards abstraction: clinical guidelines and protocols; the problem-oriented medical record; codification of the common law. The reaction of practitioners and their philosophical defenders has been to assert the primacy of embodied knowledge and the individual case.

Yet Polanyi is not proposing a wild subjectivism. The knowing subject is for him inevitably inserted into the traditions of the discipline or of society as a whole. Hence the importance which he attributed to apprenticeship. Lacking an appropriate initiation the layperson is incapable of knowing what doctors and lawyers do. The egalitarian democratization of professional knowledge is at the same time its impoverishment. In an irony writ large in the work of Edmund Burke a century and a half before him, Polanyi argues that tradition is the only true bulwark of freedom against totalitarianism. Only self-selecting, self-sustaining elites of practitioners and scholars could

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[100] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.139.

[101] For a similar exposition of this anti-rationalist and anti-democratic epistemology see M. Oakeshott, *Rationalism in Politics and other Essays* (2nd ed, 1991).

[102] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.64.

[103] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.86.

guarantee the integrity and continued reproduction of the various disciplines. Tradition depends not on demonstration and argument, but on authority.[104] A free society founded on tradition (or traditions) is necessarily unequal.

[104] M. Polanyi, *Personal Knowledge. Towards a Post-Critical Philosophy* (1958), p.164.

BUREAUCRACY, NATIONAL SECURITY AND ACCESS TO JUSTICE: NEW LIGHT ON *DUNCAN* v *CAMMELL LAIRD*

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The conventional view of *Duncan* v *Cammell Laird*[1] was succinctly expressed by Wade and Forsyth. "The case", they wrote, "is a good example of the most genuine type where it seems plain that the interests of litigants must be sacrificed in order to preserve secrets of state." To Zuckerman *Duncan* was "the most outstanding" example of a rare number of cases genuinely involving national security.[2] These, along with almost all other commentators, argue that national security considerations meant that the 1942 decision was on its facts pretty well inevitable and probably correct. This article suggests that the view that the plaintiffs had to take second place to the greater good of keeping Germany in ignorance of British naval secrets perpetuates a myth. This myth was fostered by civil service lawyers in the interests of litigation management by the Crown. The case papers tell a different story.

The trial itself arose from the loss of the submarine *HMS Thetis* in Liverpool Bay in June 1939. On her maiden dive she sank with loss of 99 lives. These included naval personnel and also workers from the Birkenhead company commissioned by the Admiralty to build the vessel. Dependants of the civilian victims requested disclosure of official documents to assist their suits for damages against the shipbuilders. The government refused. In a landmark judgement the House of Lords held that the courts could not look behind a properly constituted ministerial claim for Crown privilege. Over twenty years later, in *Conway* v *Rimmer*,[3] the House of Lords overruled that aspect of the judgement and thereafter claimed the right to inspect contested documents while still holding that *Duncan* itself was correctly decided.[4] But the continuing academic contention that neither the courts nor the Admiralty had any choice in refusing disclosure of the contested documents is not borne

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* I am grateful for assistance given by Professor Brenda Barrett, George Malcomson, Archivist at the Royal Naval Submarine Museum, Gosport and by Dr. Robin Agnew.

1 [1942] A.C. 624.

2 W.R. Wade and C.F. Forsyth *Administrative Law* (8th Edn., 2000) OUP p.827. A. Zuckerman in "Privilege and Public Interest", in C. Tapper (ed) *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross*, (1981 Butterworths) p.270 notes. "Very few cases have strictly involved national security or foreign relations, *Duncan* v *Cammell Laird* being the most outstanding among them." A. Gull in "Public Interest Immunity and the Right to a Fair Trial" (1996-7) 1 *Journal of Civil Liberties* 2 p.9 wrote, "on the facts the result was justified".

3 [1968]A.C. 910.

4 Lord Reid stated (at p.938), "I have no doubt that the case of *Duncan* v *Cammell Laird* [942] A.C. 624 was rightly decided. The plaintiff sought discovery of documents relating to the submarine *Thetis* including a contract for the hull and machinery and plans and specifications."

out by the evidence. War-time files of the Admiralty[5] and the Treasury Solicitor's department[6] suggest that the government insistence on secrecy was due less to the need to protect the nation's defences than to an entrenched bureaucratic hostility to court challenges on the part of ordinary citizens. Government officials saw the litigants as an intrusive inconvenience, particularly since they were financed by their trade unions. The claims of Crown privilege were just one aspect of an attempt to undermine these plaintiffs and also to hamper future ones. The government and civil service were anxious to establish clearly the legal principle that the courts would not look behind a claim for non-disclosure if made by a minister in the proper form. This principle was established by the House of Lords in the preliminary hearing on evidence in 1942 and civil servants duly welcomed its future wide sweeping implications for smooth administration. The substantive litigation against Cammell Laird proceeded nonetheless. The archives reveal that a year later, in an almost complete *volte-face,* the government, having gained the long term security of the Lords' ruling, and to the outrage and astonishment of counsel for the plaintiffs, was now disposed to make some of the very documents which were the subject of the 1942 case available to those same litigants. The contemporary record suggests that the administration manipulated the national security claim as part of a longer term strategy to undermine litigation which placed unacceptable demands on the wartime administration. In this the interests of the civil service bureaucracy, proclaimed as the public interest, prevailed over those of plaintiffs and arguably also of justice. The episode highlights a blurring of the distinctions between national security, the public interest and administrative convenience which has long pervaded the operation of the doctrine of Crown privilege (later to be renamed public interest immunity).[7]

Today the mantra of national security perpetuates a continuing judicial deference to executive edict which remains open to abuse. The decision in *Duncan* continues to influence this stance. Indeed Zuckerman suggests that the blanket immunity on national security pronounced in *Duncan* remains even after *Conway* v *Rimmer.*[8] It is therefore pertinent to examine the nature of the national security claim made in 1942. The continuing rather sepulchral acceptance by public lawyers of the correctness of the decision in this case suggests a reluctance to consider alternative narratives. It perpetuates a sort

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5 PRO ADM Series.

6 PRO TS Series. There is a separate series for the Departmental Law Officers, LOD, but this contains nothing of interest to the subject matter of this article. It seems the department then was small and that the Treasury Solicitor's department acted as legal advisors to the Attorney–General. For accounts of the government legal services see J.H. Edwards *Law Officers of the Crown* (1964, Sweet and Maxwell), and *Attorney-General: Politics and Public Interest* (1984, Sweet and Maxwell).

7 See *Rogers* v *Home Secretary* [1973] A.C. 388.

8 See A. Zuckerman. "Public Interest Immunity, a Matter of Prime Judicial Responsibility" (1994) 57 M*odern Law Review,* 703, p.714. " In relation to National Security blanket immunity subsisted both before and after *Conway* v *Rimmer* In *Conway* v *Rimmer* itself there were dicta that could be interpreted as saying that decisions to withhold on grounds of national security must be left to ministerial discretion [1968] 1 All E.R. 874, 880, 888, 890."

of "official version" which should be avoided in the history of administrative law as much as in political, diplomatic or military history.

More generally *Duncan* is an illuminating example of how lawyers, including academic scholars, tend to take the judge's findings of fact in a case as representing the true state of affairs. This is of course quite reasonable when it comes to considering the legal principles of court decisions, since these are based on the application of the law to the facts as found by the judge. But decisions which are "right" in the sense that they apply the law correctly to the judge's factual findings may still be questionable if those findings are in some way flawed. Commentators have hitherto accepted the narrative of *Duncan* v *Cammell Laird* as it appears in the Law Reports. This article shows that there is another story behind this account and also attempts to place the case within broader intellectual and cultural currents of the time. The significance of this case is not only that it demonstrates judicial cowardice towards the executive particularly on the question of national security. On the wider front the hitherto secret departmental papers reveal much about the reservations held by ministers and civil servants over the citizen's right to litigate. These reservations are of interest in the light of events leading up to the Crown Proceedings Act 1947 and the Legal Aid and Advice Act 1949. These two statutes were acknowledged as watersheds in extending rights of access to the courts but the form they took indicates that the postwar administration was determined to confine these rights within tight limits.[9] The argument here is that the roots of this restrictive approach were deep within the bureaucracy. Thus new evidence from the departmental papers indicates that, to a greater extent than has hitherto been appreciated, bureaucratic norms, practices and assessment of the law influenced the development of the legal doctrine of crown immunity. Moreover resistance to disclosure of documents in the name of the blanket claim of national security was in fact part of a more deep seated obstruction of citizens who exercised their right to pursue litigation involving the Crown.

The Disaster

What actually happened in *HMS Thetis* in Liverpool Bay on 1 June 1939 still remains somewhat of a mystery.[10] The first submarine built by Cammell Laird, she sank on her test dive which was due to last for only an hour or so. She was carrying 41 civilians in excess of her naval crew, most of them Cammell Laird employees. The Captain, Lieutenant Commander Bolus, had not, as had been expected, disembarked the visitors, to a waiting tug before she dived. As a result the amount of air available in *Thetis* for those trapped on the seabed was much less than the three days worth originally allocated for her crew. The effect was thereby drastically to limit the time available

[9] See M. Spencer, "The Attlee Government and Civil Legal Aid, 1945-1950". Unpublished PhD thesis Middlesex University, 1999.

[10] For a full account of the sinking of *HMS Thetis* see C. Warren and J. Benson *The Admiralty Regrets. The Disaster in Liverpool Bay (*1997) Avid Publications. See also D. Roberts *HMS Thetis, Secrets and Scandal* (1999) Avid Publications. This draws on detailed archival research and interviews with relatives of the survivors.

for a successful rescue attempt[11]. The disaster itself was precipitated by the opening of the inside doors of number five torpedo tube, one of six inner torpedo tubes, when its outer door was open to the sea. The submarine was not carrying any torpedoes at the time. The consequential rapid flooding of key compartments by the onrush of sea water destabilised the submarine, she dived rapidly and out of control. The crew's efforts to raise her failed. The inner torpedo door had been opened by Able Seaman Hambrook on the orders of First Lieutenant Woods who had not informed Bolus what he was going to do. Woods had read the indicator to the lever of the outer door or bow cap as being closed to the sea. He had not carried out other standard procedures to confirm this but one check he had made was to examine the inside of number five torpedo tube by opening a small hole in the inner door called a test cock. The fact that water had not trickled through had led him to believe the tube was empty of sea water. Four men including Lieutenant Woods escaped from the stricken submarine but Hambrook and Bolus perished in the disaster.[12] When the submarine was raised in September 1939 it was revealed that the indicator to the bow cap of number five tube was set at open, the bow cap itself was open to the sea and the levers operating the outer doors were all in the neutral not the closed position. Moving a lever to the neutral position had the effect of fixing each outer door in whatever position, *i.e.* open or shut, it had formerly been. It was also discovered that the test cock was blocked by a small plug of bitumastic enamel which had been used to paint the door while *Thetis* was in dock. The painting had been carried out by J.H. Stinson, employed by Wailes-Dove Bitmastic, a subcontractor of Cammell Laird. This blockage had not been noticed by either W.G. Taylor, the Cammel Laird foreman, nor Edward Grundy the Admiralty overseer when checking Stinson's work. It was thus apparent that some tragic mistakes had been made by Admiralty or Cammell Laird personnel. Immediately after the sinking the Admiralty had set up an internal inquiry. In this inquiry 51 witnesses were interviewed including Woods, Cammell Laird workers and naval experts. The report was presented promptly at the end of June and made the following critical assessment of Wood's responsibility for the accident.

> "Lieutenant Woods carried out the inspection of the bow tubes by opening the rear doors on his own responsibility. Although there is no danger normally attached to opening the rear doors if the correct procedure is carried out, and this has frequently to be done during work on torpedoes, on this occasion there were no torpedoes on board and the rear doors became part of the normal safety fittings of the submarine such as the lower conning tower hatch, which the Commanding Officer would expect to be closed before diving especially under "trial conditions". We consider that in these circumstances there

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[11] The rescue attempts themselves were much delayed and there were accusations of bungling by the Admiralty. The situation was made all the more poignant since she sank in relatively shallow waters and part of the stern of the vessel was visible.

[12] There seems no doubt that Woods demonstrated considerable heroism during abortive efforts to refloat the submarine and in volunteering to embark on the hazardous escape in order to help with rescue attempts. He was to return to active service and was awarded the Distinguished Service Cross in 1940.

> was no adequate reason for Lieutenant Woods opening the rear doors and he was not justified in doing so without instructions."[13]

The naval inspectors however were impressed with the undoubted bravery of Woods in the aftermath of the flooding of the submarine and concluded:

> "We are of the opinion that the behaviour of all in the submarine – naval personnel and civilians – was exemplary and in accordance with the best traditions of the Naval service and the British Race."[14]

Woods was later to admit at the High Court trial in 1943 that the question he had asked Hambrook about the bow cap levers was not whether they were shut but, more ambiguously, whether they were "correct". This change from his earlier testimony did not shake the official view that he was a reliable and convincing witness and that his version of what happened was accurate. Nor did the plaintiffs' lawyers, persuaded by publicly expressed official confidence, challenge this view of Woods' account of what happened. It was not until the summer of 1943 that the Treasury Solicitor's department had picked up the inconsistency in Woods' evidence. Assisting Woods prepare for the hearing G.B. Burke wrote, "In your evidence I noticed that you asked the rating whether the levers were shut and he answered 'yes'. It is now known that after the disaster the levers were found in the neutral position. It is most unlikely that anyone – assuming that a third party had deliberately or accidentally moved the Number 5 lever – moved all the levers. It therefore seems to me that it must be assumed that at the time when the rating answered 'yes' all the levers were in the neutral position. If one makes that assumption then the rating's answer was clearly inaccurate and this point will no doubt be seized upon by the Plaintiffs." Woods acknowledged that he had in fact asked the rating the different and more ambiguous question.[15]

The Unions Sponsor Litigation

In August 1939, supported by the victims' trade unions and represented by solicitors Evill and Coleman, relatives of a number of civilians on board initiated legal action against Woods, the widows of Hambrook and Bolus, Cammell Laird and the subcontractors Wailes-Dove Bitumastic.[16] In all, 26

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[13] I am grateful to maritime historian David Roberts for drawing my attention to the papers of the internal naval inquiry which are housed in the archives of the Submarine Museum at Fort Gosport, Hants, files A1939/023 and A/1939/5.

[14] *Ibid*.

[15] See TS 32/113 Hearing before Mr Justice Wrottesley, September 1943. TS 32/110 Burke to Woods 5/7/1943.

[16] It is not clear from the papers why Grundy was not initially joined in the action but the Treasury Solicitor's department noted at the end of 1939 that "it is particularly to be noticed that neither Grundy nor Stinson nor Stinson's employers have been joined as defendants in these proceedings. So far as Grundy is concerned it is now too late for him to be joined as a defendant, as any claim against him is now barred under the Public Authorities Protection Act." TS 32/111. "HMS Thetis" undated. Stinson's employers Wailes Dove Bitumastic were joined to the action at a later stage.

separate actions were initiated and two cases were selected as test cases.[17] As the law stood then no legal liability existed for deaths to serving naval personnel. In addition the Crown could not be sued in tort for the civilian deaths. By custom it supported employees, both civil servants and military personnel, who were sued by civilians for performing allegedly negligent acts in the course of their duties other than military exercises.[18] Initially the Admiralty considered not standing behind Woods, however Treasury Solicitor's department official E.A.K. Ridley pointed out problems in this.[19]

Ridley suggested as an alternative that the litigants might be threatened with the ancient offence of unlawful "maintenance" of litigation by a non-party. Such action was arguably also legal professional misconduct. Ridley conveniently overlooked the point that under common law the trade unions had been exempted from this offence for half a century. Moreover the government was in effect "maintaining" its defendant employees.[20] Ridley stressed that:

> ". . . if the Department are going to refuse to stand behind Woods they must make up their minds to put a bold face on the matter from the first. They have in the present emergency an unusually favourable opportunity for doing so and it is impossible not to feel that any sort of stand against the accident claims racket be salutary. It ought not to be very difficult to make it clear to reasonably minded persons that what really lies behind these claims is not so much the desire of the claimants to obtain redress for their wrongs but the desire of the AEU to embarrass the government and of the solicitors to make money out of a national calamity. That would have, I think, to be the main justification for refusing to stand behind Woods and it could be shown that the claimants have exhibited no great willingness to prefer claims but have been pressed to do so by Evill and Coleman."

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[17] Nineteen cases were sponsored by trade unions. The two test cases originally selected were those of Mrs Ankers and Mrs Craven. Mrs Duncan was substituted for Mrs Ankers in August 1940. Solicitors Evill and Coleman wrote to Lawton that Mrs Ankers "is not very well mentally and is worried by the action". Lawton noted on this. "I am beginning to suspect that it may be due to the reluctance of the Plaintiffs to proceed with the action" TS 32/110. Evill and Coleman to Lawton, 8/8/1940, Lawton, 24/8/1940.

[18] The Crown Proceedings Act 1947 changed the law on Crown Immunity. Before that Act Crown Immunity meant that the Crown could not be either personally or vicariously liable for torts.

[19] TS 32/110. Ridley to Lawton, 31/9/39. He wrote, "The fact that a Service defendant is being defended at the public expense has, I think, generally been taken in the past to imply that the Crown were standing behind him in regard to damages. . . I think one can feel pretty sure that a refusal by the Department to stand behind Woods would kill these actions, but if they are pursued there is nothing to prevent the Department telling Woods that if the action goes against him they pay him anything which he loses in bankruptcy and that bankruptcy will involve no stigma against him in the Service."

[20] For an account of the law on maintenance as it then existed see E.H. Bodkin *The Law of Maintenance and Champerty* (1935 Stevens and Sons).

Ridley suggested that the plaintiffs were undeserving cases who were in receipt of adequate compensation for their loss. He went on, "This contention would be reinforced if it could be shown that the proceedings were illegally maintained and that the solicitors' action in touting the claims has been the subject of disciplinary action by the Law Society". A further suggestion was to undermine the litigation by drawing attention to the support the plaintiffs were getting from the Fund established by the Lord Mayor of London. Ridley continued:

> "It would probably be possible to carry the matter further by showing that no real hardship would be suffered by the claimants if they were unable to recover these claims, since they have not only workmen's compensation but in addition a large fund has been raised by public subscription and it is not to be supposed that this fund would have been subscribed if it had been known that the persons to benefit from it were looking to the Admiralty for full compensation, nothing having been said about this while the fund was being collected."[21]

Ridley's argument demonstrates the extent to which the department's lawyers took a partisan position in relation to litigation which challenged the government. There was no acknowledgement that the plaintiffs might be justified in taking action; on the contrary, they were pictured as passive participants in the hands of the troublesome unions and solicitors. The Attorney General Donald Somervell,[22] however, was rather more familiar with current law and not inclined to adopt such an extremist stance. His response was that it would be a mistake not to support Woods since that "would lead to a demand, which would be very difficult to resist, that the old immunity of the Crown should be done away with." With regard to "(1) the impropriety of the Solicitors' actions and (2) the question of maintenance with regard to the union" he noted, "I doubt whether much can be made of either of these . . . I do not profess to speak with authority on the etiquette of the Solicitor's profession, but I understand that it is not unusual when a Solicitor finds himself interested in one or members of a class for him to communicate to see whether others who on the basis of the legal advice he has received have similar rights would care to join in any proceedings." He did not think that actions in maintenance would succeed, pointing out that "there are one or two cases which seem to leave the position of Unions in some doubt". He observed that "as the potential plaintiffs are probably all poor the maintenance could be refuted on the ground that it was an act of charity".[23]

The Admiralty Version

Before the internal inquiry had completed its work the government appointed a full public inquiry under the Tribunals and Inquiries Act 1921, to be chaired by Mr Justice Bucknill. This took evidence from June to December

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21 TS 32/110 Ridley to Lawton 21/9/1939.

22 Sir Donald Somervell was Conservative MP for Crewe 1931-1945. He became Lord Justice of Appeal 1946-54 and Lord of Appeal in Ordinary and life peer 1954-60.

23 TS 32/110. Somervell to Lawton, 4/10/1939.

1939.[24] With the possibility of having to face negligence suits it was important that the public inquiry findings should not be adverse to Admiralty personnel. As is usual in such circumstances the Treasury Solicitor's department supplied legal services to the inquiry with particular responsibility allocated to F.W. Lawton, Senior Legal Assistant, supported by his colleague E.A.K Ridley. Privately Lawton's view was that "the claimants may well have chance of making out a prima facie case of negligence on the part of Lieut. Woods but that they would have difficulty in doing so against the others".[25] At the outset of the inquiry, concerned about pressure from the Admiralty, Lawton had written to Ridley "I imagine it will be made clear we are acting for the Tribunal not the Admiralty which is what they seem to be imagining".[26] However the government officials were clearly anxious that the Admiralty version of events should prevail. As the inquiry reached its concluding stages they presented a memorandum to the government's counsel. This noted that Woods "was able with calmness and deliberation so faithfully and accurately to recall what happened, and it will not be forgotten that at no time did he seek to cast any blame on any other person or to suggest that anyone was responsible for any act or omission connected with the accident." In contradiction to the view secretly expressed in the report of the naval internal inquiry, officials accepted the public Admiralty position that Woods was not blameworthy. The memorandum noted:

> "The fact that he opened the tubes is no sufficient reason for condemning Lieutenant Woods. The tubes are designed to be opened and but for the accident no one would have thought of complaining or of suggesting that that was not the time or the occasion for examining the insides of the tubes. . . Strenuous efforts will no doubt be made to establish a case of negligence sufficient to sustain a claim for damages. . .[27]

Evidence from Admiralty witnesses to the inquiry had argued that the Number 5 bow cap was not opened until the last minute before the rear torpedo door was opened probably accidentally by persons unknown and so Woods' reading of the lever at shut was correct at that point. So convinced were the Admiralty and the Treasury Solicitor's department that Woods' account should be believed that they did not suggest an alternative version to the inquiry. A plausible alternative explanation was however that Number 5 bow cap had been opened in dock at Cammell Laird before *Thetis* sailed, that all the levers were then put at neutral not shut (thus locking the outer doors in their previous open position with disastrous results when Woods opened the inner door) and that Woods had misread the indicator. In July 1944 in the Court of Appeal, Lord Greene MR sitting with Goddard and du Parcq LJJ, heard the appeal in the negligence suit. Before Wrottesley J the plaintiffs had lost against Mrs. Hambrook, Lieutenant Woods and Wailes-Dove

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24 See TS 32/101-115.

25 TS 32/110. FW Lawton, 10/10/1939.

26 TS 32/102. Lawton to Ridley, 12/6/1939.

27 TS 32/111 "HMS Thetis" undated. Unfortunately this file has one page missing which, it appears from the context, dealt more fully with Woods' account to the Tribunal.

Bitumastic but won against Cammell Laird. The plaintiffs appealed. Lord Greene stated:

> "there are only four possible explanations of the accident . . . at least only four have been suggested. The first is that when the vessel left Birkenhead Number 5 bow cap was open, the pressure was locked by closing the isolating valves at bulkhead Number 40, the valves on the panel were closed and Number 5 lever as well as the other levers were left in the neutral position. If this theory was correct, an intelligible explanation of the accident could be given as follows: Hambrook finding the levers at neutral, assumed wrongly that they had all been moved to the neutral position from the closed position, whereas in the case of number five the penultimate position was in fact the open position with the result that when the pressure was locked and the bow cap remained open. . . . This explanation of course would involve a finding that Lieut. Woods misread the indicator . . . I have a strong suspicion that this is the true explanation of the catastrophe. But I cannot adopt it for this reason. At the trial it was admitted by counsel for the plaintiffs that the bow cap was closed when the vessel left Birkenhead and remained closed throughout the voyage. As a result of this admission the matter was not investigated at the trial."

Thus the account of events given by the Admiralty at the Bucknill Inquiry had convinced the plaintiffs.[28]

The Attorney General is, as Bradley put it, the "independent guardian of the public interest"[29] but his legal advisers had conveyed to counsel how necessary it was for the Admiralty explanation of what had happened to be accepted by Bucknill:

> "Counsel will appreciate that it is a matter of no small importance that this position should be established and, if possible, be reflected in the findings of the Tribunal".[30]

In the event, the Bucknill Inquiry concluded that the disaster was due to a combination of factors but there should be no individual responsibility.[31] The government next considered whether to publish the Bucknill Report. First Sea Lord Winston Churchill wrote, (with a rather insensitive choice of words), "All interest in this tragedy has been submerged by the war. I should deprecate any disciplinary action unless some definite act can be traced to an individual. Indeed I should be glad if Lieutenant Woods' mind could be set

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[28] TS 32/113. Court of Appeal 7 /7/1944. The Court of Appeal went on however to find Woods liable in negligence. The bow door indicator dials were acknowledged to be badly positioned and difficult to read. The shut position was different on each dial. Modifications were made to all submarines after the tragedy.

[29] A.W. Bradley "Justice, Good Government and Public Interest Immunity" (1992) *Public Law* 514, 517.

[30] TS 32/111 "H.M.S. Thetis" undated.

[31] Cmd 6190 1940.

at rest."[32] The Second Sea Lord, Sir Charles Little, noted "I am in favour of publication as owing to the incidence of the war it will receive the least notice at the present time. . ." Little referred to the parts played by Woods and Grundy in the disaster, echoing the criticism of them made in the internal inquiry:

> ". . . the door of the torpedo tube is fitted to admit offloading or withdrawing the torpedo; it is not intended as a means for observing whether the tube is full or empty of water. For this purpose a drain cock is specially fitted at the forward and after ends of the tube underneath and the special fitting referred to with the time attachment is placed on the rear door for the same purpose. In my opinion no discreet or experienced submarine officer would have tested the tube for this purpose and especially under the circumstances of the trial dive, by the rear door. Mr Grundy, the Admiralty overseer who inspected the internal painting of the tube is also not free from blame as he failed to make a thorough and secure inspection."

However, despite this private acceptance of failures on the part of Admiralty personnel, Little welcomed the conclusion reached by Bucknill:

> "It is clear that the action of these two (Lieutenant Woods and Mr Grundy) only forms part of a series of what the judge calls "perverse mishaps" in the report of the Tribunal. It is suggested that an official letter should be sent to their superior authorities to the effect that, after considering the reports of the Naval Board of Inquiry and of the Public Tribunal, their Lordships have come to the conclusion that the loss of HMS Thetis is to be attributed to a combination of mischances, and that it has not been possible to discover the whole facts; in the circumstances, it is to be put on record that Their Lordships will not hold Lieutenant Woods or Mr Grundy to blame for the disaster, and that in this respect the matter is to be regarded as closed".[33]

The Bucknill Inquiry findings however did not halt the litigation and for the next six years the negligence suits received a considerable amount of attention from government law officers. They provided legal assistance for Woods, Bolus and Hambrook and instructed the Attorney-General who appeared for these defendants in the substantive hearings. The decision to refuse disclosure of the official documents which were in the hands of Cammell Laird was just one of a number of moves to halt the litigation and depict the plaintiffs as unpatriotic and self seeking. The papers suggest that administrative convenience, not concern for the relatives of the victims, was of paramount concern and that officials considered employing questionable

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[32] ADM 116/4115. Personal Minute, 12/2/1940.

[33] ADM 116/4115. Memorandum by Second Sea Lord, 16/2/1940. Prime Minister Neville Chamberlain approved of this outcome. His private Secretary wrote to the Admiralty that the Prime Minister "was glad to hear that the Board of Admiralty have been able to take the view that Lieut. Woods and Mr. Grundy need not be held to blame for the disaster." ADM 116/4115 A.N. Rucker to E.A. Seal 7/3/1940.

tactics such as manoeuvring the case into a friendlier court in order to remain in control of events.[34] Behind the official front of even handedness there was collusion between the administration and court service.

Seeking a Friendly Court

Government lawyers appeared to have greater confidence in some courts than others and discussed with defendants the possibility of Cammell Laird transferring the case to a sympathetic court. In early 1940 Cammell Laird's Liverpool solicitors, Laces, wrote to Lawton suggesting the transfer of the case to the Commercial or Admiralty Court.

> "We feel somewhat strongly about this, as we think there is considerable danger if the actions are left in the KBD [Kings Bench Division] of their coming before a Judge who is really unsuitable to try an action of this nature and who may be one of the plaintively-minded judges."[35]

Lawton replied:

> "With regard to the suggested transfer to the Commercial or Admiralty Court, I am not so much concerned about the first of the two grounds you mention as I think the KB Division could easily cope with such matters of construction or technicalities as are likely to arise, but on the second ground I am in complete agreement, hence my desire to defer the matter for the time being."[36]

Cammell Laird's London solicitors, Carpenters, took up the same theme a few months later and wrote to Lawton stating that. "We are instructed to strongly oppose an order for a special jury or a jury of any description; apart from the fact that there are difficult questions of law arising; the preliminary findings of fact will involve long investigation, in which questions of scientific evidence will arise – matters quite unsuitable to be decided by a jury."[37]

The issue was still contentious in September of the same year. Laces solicitor J. Holland wrote to Lawton expressing confidence that a sympathetic hearing would be arranged:

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34 It appears some influence was exerted to prevail on the coroner at the inquest on the victims in June 1940 not to call Grundy as a witness. He had given inconsistent and damaging evidence to the public inquiry and although he was officially exonerated and any suit against him was time barred Treasury Solicitor lawyers were still concerned about the embarrassing nature of his evidence. The firm of solicitors acting for the government wrote to Lawton, ". . . maybe we could get him [the coroner] to agree not to call evidence of so controversial a character." Lawton replied, "Unless the coroner insists upon calling Mr. Grundy I quite agree with you that it will be very much better if Mr. Grundy does not give evidence at the inquest." Grundy was not called. Thus fact finding was subservient to the need to keep inconvenient witnesses away from court. TS 32/102. Batesons to Lawton, 22/6/1940. Lawton to Batesons, 24/6/1940.

35 TS32/110. Laces to Lawton, 3/9/1940.

36 TS32/110. Lawton to Laces, 12/2/1940.

37 TS32/110. Carpenters to Ass. Treas. Sol., 30/5/1940.

> "I am wondering whether you have still in mind the question of the transfer of these actions to the Commercial or the Admiralty Court. I have a feeling that when the actions are ready for hearing you will probably be able to arrange for them to be heard by a suitable judge, even if they stay in the KBD, in which case I would have no objection to their being tried there, but I do want particularly to avoid the possibility of an unsuitable judge."[38]

In fact the case was to be heard in the Kings Bench Division. Both series of litigation, the interlocutory hearings on disclosure as well as the substantive negligence suit were appealed to the House of Lords.

The government need not have worried about "plaintively–minded judges". Woods was found liable in negligence in the Court of Appeal but this was reversed in the House of Lords in 1946. The single speech in the House of Lords 1942 judgement on disclosure was made by Lord Simon, the Lord Chancellor, and thus a Cabinet member, sitting in judgement on a claim made by another government minister namely the First Lord of the Admiralty. Simon sat in the House of Lords in both the interlocutory and substantive hearings.[39]

Settlement Offer Rejected as Charity

One way out of the unwelcome litigation was suggested by Attorney–General Somervell. He was clearly worried that the litigants had a winnable case. In November 1940 Somervell suggested that the Admiralty should consider offering a settlement. He wrote to the Treasury Solicitor:

> "I have considered whether the plaintiffs could get their case on its legs; I am inclined to think that they could. They could interrogate Lieutenant Woods or ask for admissions of fact,

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[38] TS32/110 Holland to Lawton 3/9/1940.

[39] The litigation on the negligence suit was not completed until February 1946. After the final judgment of the House of Lords Treasury Solicitor's assistant F. Lawton drafted a table for the Admiralty showing the outcomes of the various hearings (PRO TS 32/110 "HMS Thetis. Actions for Damages". 27/2/1946). It reads as follows:

	Wrottesley J	Court of Appeal (3judges)	House of Lords (5 judges)
Woods	Not liable	Liable	Not liable
Hambrook	Not liable	Not Liable	Not liable
Bolus	Not liable	No appeal	-----
Cammell Laird	Liable	Not liable	Not liable
Wailes Dove	Not liable	Not liable	Not liable

An indication of the financial risk the government had faced is given in Lawton's additional note. "The final result is that the Plaintiffs are held to be disentitled to recover against any one of the Defendants, Lt. Cmdr. Woods; Mrs Bolus (as representing the late Cmdr. Colus(sic); Mrs Hambrook (as representing the late leading Seaman Hambrook); Cammell Laird & Co Ltd; Wailes Dove Bitumastic Ltd, a result that I think you will agree is most satisfactory. I have not sufficient information to make any reliable estimate of the sum that might have been recovered if damages were awarded but a total in the neighbourhood of £100,000 would not surprise me".

> and I am of the opinion that they could probably in this way, with possibly some other evidence, make out a prima facie case."[40]

He pointed out the difficulty of calling defence witnesses in wartime and considered various ways to deal with the situation. He emphasised what he saw as the unnecessary and inappropriate nature of the plaintiffs' case:

> "The actions were felt to be objectionable partly because of the circumstances of the case and the unpleasantness of pursuing with a claim for negligence the executors of dead men who were not there to give evidence and deal with allegations made against them. Lieutenant Woods is alive, so this objection did not apply to his case, but it would I think seem distasteful to many to pursue him in this way. In his case and the other cases one's mind is affected by the very large sum of money (I believe about £150,000) raised by the public in order that the Workmens' Compensation and other payments should be supplemented. On the other hand of course one must be careful of adopting the position of suggesting that people are not entitled to enforce their legal rights."

He assessed the likely outcome of the case:

> "It is one of those cases in which I do not think anyone could or would express a confident opinion one way or the other as to the result. There is the possibility envisaged by the Bucknill Report that the real cause of the disaster may have been an unwitting interference with the lever by someone unknown. I think myself that a finding that Lieutenant Woods and Able Seaman Hambrouk (sic) were negligent is a possible result and perhaps a not unlikely one. They were jointly engaged in opening the rear doors and in fact one bow cap was open and the levers were in the neutral and not in the shut position. When an accident happens in circumstances such as this, however fortuitous the group of circumstances which lead to the disaster, the Court rarely, if ever, find it was accidental."

He suggested that the Admiralty make an offer since the "circumstances of the war may have affected the attitude of the plaintiffs and those advising them". The offer should be to pay the costs incurred and make a payment to the Lord Mayor's Fund for the accident. The latter proposal would have the effect of ensuring that any donation from government was available to relatives of all the victims not just those who had the temerity to sue. He pointed out that "As the trustees of the fund will, I imagine, take into account any sums that might be received as a result of these proceedings by the plaintiffs, the plaintiffs have not the same financial interest as they would have in an ordinary case".[41]

Lawton however took a punitive stance and advised the Treasury Solicitor, Sir Thomas Barnes, against the proposal noting that "the actions reflect no

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40 TS32/110 Somervell 6/11/1940.
41 *Ibid.*

credit on those who are responsible for their institution and to pay damages without an order of the court would be to put a premium on such conduct".[42] However Barnes suggested to Admiralty Permanent Secretary Sir Archibald Carter that a possible way forward was that "an informal approach should be made to the leaders of the two Trades Unions concerned". He added that the Solicitor-General, William Jowitt, "was prepared to see Sir Walter Citrine who he knows very well".[43]

In suggesting a settlement the officials were clearly determined that the victims' relatives should not benefit inordinately from the disaster and officials used their influence to obtain precise figures of the charitable payouts. Somervell wrote to Barnes asking "whether it might be a good idea to discover from the Trustees of the Fund what payments are being made to these people. I feel that this should and might affect the mind of the court, and I also feel that from the point of view of any injustice by delay it would be satisfactory to know".[44] Barnes replied with the figures sending a detailed list of the weekly sums to the widows. Mrs Duncan was receiving £1 a week and Mrs Craven £1 7s 8d.[45] Reluctantly the Admiralty and Treasury agreed to the proposal of paying costs and a donation to the Lord Mayor's Fund of a sum not exceeding £10,000 although pointing out to the Treasury Solicitor "it being understood that you will try and settle for a lower figure".[46]

Jowitt arranged to meet Citrine and other union representatives. The Treasury Solicitor's lawyers prepared a Note for the meeting which emphasised a rather different view of the likely outcome of the litigation than that secretly conceded by the Attorney-General.[47] It was suggested that Jowitt should stress that "it is thought that the Plaintiffs would have very great difficulty in establishing any case of negligence". The unions were also to be asked to bear in mind that the "changed circumstances since *HMS Thetis* was lost may well have rendered it extremely distasteful to any of the Plaintiffs to continue with their proceedings". On 5 June 1941 Jowitt reported on his meeting with the unions[48] who expressed their objection to the proposal of a government donation to the Fund. They pointed out to Jowitt that "the charitable funds were being doled out to the various recipients on a means tested basis and as a matter of charity". Jowitt reported that as a result of discussions with the unions he was "pretty sure they won't be content merely with a payment by the Admiralty to the fund as they would regard this with all the hatred which they regard (sic) the means test and charity generally." He thought they "might be disposed to look to their workmen's compensation remedy if this was sweetened by some lump

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[42] TS32/110. Lawton to Barnes, 12/11/1940.

[43] TS32/110. T. Barnes to A. Carter, 20/11/1940. Sir Walter Citrine was Secretary–General of the TUC.

[44] TS32/110. Somervel to T. Barnes, 20/12/1940.

[45] TS32/110. Barnes to Somervell, 17/1/1941.

[46] TS32/110. J.S. Barnes to T. Barnes, 3/45/1941. See n.39 for the amount Lawton feared might have been awarded if the claim had succeeded.

[47] TS32/110. "HMS Thetis. Claims for damages. Observations for Purposes of Discussions with Trade Union Representatives", undated.

[48] TS 32/110. Jowitt to Barnes, 5/6/1941. The note indicates that the litigants were disadvantaged by the delay in settling the case since the claims for damages meant they could not receive statutory industrial compensation.

sum payment by the Admiralty directly or indirectly". Another meeting took place between Jowitt and the union leaders in October 1941 and the unions again expressed their hostility to the proposal of a contribution to the Fund.[49] They asked if the Admiralty would consider contributing £10,000 outside the Fund. In the event the talks appear to have foundered in part because Cammell Laird refused to countenance making any contribution to costs, they had already made a donation of £5,000 to the Fund and in any case thought the actions should be "contested as a matter of principle"[50]

The episode illustrates the extent to which the Second World War was a watershed in developing notions of citizenship and rights, specifically a right of access to the courts. It seemed almost incomprehensible to the government lawyers that the plaintiffs might not be satisfied with charitable handouts and wanted to assert a legal right to redress. The government officials stressed the sense of collective wartime suffering which in their view made the litigation "distasteful" while on the other hand the litigants through their unions exhibited a confidence in their entitlement to redress. There are hints here of themes in the later debates on the Beveridge proposals and the notion of rights to benefits without means testing. Jose Harris has doubted whether the spirit of Dunkirk and the Blitz during the Second World War imbued the general populace to the extent that is generally portrayed. She writes:

> "Support for the war and acceptance of the need for overall controls was almost certainly more general than in the First World War; but an unpretentious popular patriotism in no way precluded widespread resentment against "red tape", "bull", "snoopers" and other manifestations of official interference. . . Days lost in strikes throughout the war were fewer than in 1914-18, but were still sufficiently numerous to indicate considerable industrial discontent. . . . Popular humour of the period portrayed the prevalent attitude to authority as one of 'much binding in the marsh'."[51]

A sense of this somewhat subversive approach to the state is evident in the reactions of the unions to the attempt by the government to persuade them to drop their legal action in what was claimed was the national interest.

The National Security Claim

The above account suggests that the government's strategy of resisting disclosure of official documents to the plaintiffs was just one of several in their overall objective of stemming the litigation. In the course of making the case for an out of court settlement the Treasury Solicitor made the point that it was:

> ". . . obviously undesirable in the public interest that questions relating to construction of submarines should be discussed in

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[49] TS32/110. Jowitt to Barnes, 31/10/1941.

[50] TS32/110. Holland to Lawton, 20/5/1941.

[51] J.Harris, "Society and the State in Twentieth Century Britain "in FML Thompson (edn.) *Cambridge Social History of Britain 1750-1950 Vol.3*: *Social Agencies and Institutions* (1993, Cambridge University Press) p.91.

> open court and while the Admiralty could claim privilege in respect of many matters involved there might well be some feeling of injustice to the particular claimants if, by reason of a claim to privilege, they were barred from pursuing what would otherwise be a good claim."[52]

The issue of disclosure had arisen early in 1940 and here again the Treasury Solicitor's staff took the initiative in determining government policy on the issue. Cammell Laird had possession of the contract with the Admiralty, the plans of the submarine and the records of the painting of the doors and the plaintiffs requested discovery. The Admiralty had not formally taken possession of the vessel on 1 June 1939 and so legal ownership under the contract was one issue in the case. Since these were Crown documents Cammell Laird asked the Admiralty for advice. Sixteen documents were requested. They included the 1936 contract between the Admiralty and Cammell Laird and also the contract between Cammell Laird and Bitumastic Ltd. Item 15 was the notebook of Cammell Laird's foreman painter, Taylor.[53] Some of these documents had been presented to the Bucknill Inquiry and referred to in the Report. Lawton outlined his assessment of the law:

> "The Crown's claim for privilege which has at all times been jealously guarded, is based solely upon considerations of general public interest. I regard it as of very great importance that in no case should there be any relaxation of the direct application of the principle where it properly applies."

He explained that the claim was based upon one or other of two grounds, namely, that it would be contrary to the public interest to disclose a particular document because of its contents or that it would be contrary to the public interest to disclose a document because it belongs to a class which as a class it would be against public interest to disclose, *e.g.* inter-Departmental communications. Although he did not think that the listed documents fell wholly within one category or the other he did allocate them to the two categories. He added:

> "It is undesirable to select extracts from documents if that course can possibly be avoided. Nor do I think that the war should be expressly relied on as a ground for refusal to admit disclosure since the actions may not come on for trial until after the war."

Lawton concluded:

> "In my view, whatever importance is attached to the documents either by the solicitors or by the court, the claim for privilege if made by the First Lord in the proper manner cannot be challenged successfully in or by the court and it is unlikely that anything further will be required from the First Lord than an affidavit in which the claim is made formally."[54]

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[52] TS32/110. Barnes to Markham, 27/3/1941.
[53] TS32/110. "HMS Thetis. List of Documents", 26/6/1940.
[54] TS32/110. Lawton to Secretary, Admiralty July 1940.

The Admiralty acted on Lawton's advice and the Treasury Solicitor wrote to Cammell Laird solicitors refusing disclosure.[55] During this time the Treasury Solicitor was pressing for delaying the trial until after the war. Evill and Coleman complained about "the indefinite adjournment of this case".

> "You must appreciate that we are representing poor widows, and the Crown has no right to elect to postpone the hearing of a suit at its own convenience. It would, we think, be a monstrous abuse of etiquette that an action should stand over to await the convenience of the Attorney General. There is in fact no reason why the action should not be tried except some vague fears in the minds of the advisers to the Treasury. Every fact which will come out at the trial is well known to the Germans by reason of the fact that it was all thrashed out at the public inquiry. We shall, of course, become too happy to collaborate with you to prevent anything which is not already known from leaking out if it is of the slightest value to anybody. Here this action is merely concerned with legal contentions to be drawn from facts which, it is true, will have to be proved over again, but which are already well known. . . ."[56]

Finally in January 29 1941 Alexander, First Lord of the Admiralty, signed the affidavit forbidding disclosure "in the public interest". The High Court and the Court of Appeal both gave judgments in favour of the Crown and in early 1942 the plaintiffs appealed to the House of Lords. The impending case appears to have created keen interest in other departments of the Civil Service. For example Sir Alfred Brown, Solicitor at Customs and Excise, presciently noted in March 1941, "I hope the case goes to the House of Lords as I imagine the present Lord Chancellor can be trusted to make a good decision from our point of view".[57] In *Duncan* v *Cammell Laird and Co* Lord Simon, Lord Chancellor, gave the single judgement which almost exactly mirrored Lawton's 1940 advice.[58]

The Documents Revealed

Despite this 1942 ruling litigation on the substantive issue continued through the courts although subject to constant delays. It was finally listed in the King's Bench Division in September 1943. One continuing cause of contention was that despite the ruling on disclosure the government wanted to have the case heard "in camera". Evill and Coleman resisted,

> ". . . there is no justification whatsoever for the order which you propose to ask to be made for a hearing in camera under the Emergency Powers Act 1939 and this will be opposed by the Plaintiffs. . . . In our view it is idle to say that there is much that could affect security in this action. It is simply an action to ascertain which of the many Defendants is liable for sending a perfectly good submarine to the bottom and killing

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[55] TS32/110. Lawton to Carpenters, 7/6/1940.
[56] TS32/110. Evill and Coleman to Lawton, 28/10/1940.
[57] TS58/317. Brown to Lawton, 27/3/1941.
[58] [1942] A.C. 624.

> 100 men . . . We do not think that our Counsel would oppose the hearing of the evidence in camera of the details of the construction of the submarine but this can only be a comparatively small part of the case.
>
> We understand that one of the grounds of asking for this order will be that Messrs Cammell Laird and Co intend to read some of the clauses of the Admiralty Contract and rely thereon. This, we suggest, is entirely an illusory ground for hearing the case in camera because we think that the effect of the decision of the House of Lords is that nobody in this action is able to refer to this contract at all and the contract clearly cannot be kept up the sleeves of the parties to the action and suddenly produced therefrom at will of any party to the action – it and all its detail, by the wish of the Admiralty, are now for ever unproducible."[59]

Faced with this inconvenient approach and with Cammell Laird pressing to refer to the contract whose disclosure had been forbidden by the House of Lord's ruling, Lawton told the Admiralty that a review of strategy for the trial was necessary. It had been decided that the transcripts of the Bucknill Inquiry would provide the basis of the trial although Woods himself would be called in person as a witness. The problem was that the transcript of the Bucknill proceedings would not be intelligible if the official documents which were available there could not now be referred to in the court. The Admiralty response was that:

> ". . . the First Lord directed that the matter should proceed on the following lines:
>
> The Admiralty should not press for the trial to be held in camera
>
> The extracts for which privilege was claimed by the First Lord in 1940 should be shown to the Judge and Counsel only;
>
> An Admiralty representative should be present in Court with authority to advise the Judge and Attorney General when he considers that for reasons of security the public should be cleared from the Court".[60]

Thus a year and a half after the landmark victory in the House of Lords the government effected an extraordinary about turn. As counsel for Wailes-Dove expressed it ". . . notwithstanding the journey to the House of Lords (!) [exclamation mark in the original] the First Lord is now prepared to allow copies of the documents for which privilege was successfully claimed to be made available for use of the Judge and Counsel". . .[61] The Honourable H. Parker, Counsel for Woods, reported to the Treasury Solicitor's department the reaction of Counsel for the plaintiff, Mr Wallington KC, who:

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[59] TS32/110 Evill and Coleman to Treasury Solicitor 31/8/1943.

[60] TS32/110 Lawton to Head of N.L. Admiralty 7/9/1943; Head of N.L. to Treasury Solicitor 13/9/1943.

[61] TS32/110 Streatfeild to Parker 17/9/1943.

> "expressed great indignation that the First Lord was now prepared that those documents should be shown to Judge and Counsel and he could not understand how the First Lord came to allow this".

Parker had replied that:

> ". . . today conditions are very different to what they were when the First Lord swore his affidavit. Mr Wallington appreciated this, but said that it was unfortunate, since, if he had known that the First Lord was prepared to make this limited disclosure, he would never have appealed to the House of Lords".

Parker's note concluded:

> "Finally Mr Wallington said that he saw no objection to the proposal because:
>
> (1) he very much doubted whether he would desire to refer to any of the documents; indeed, he thought that he might be in a better position as against Cammell Laird if the documents were not referred to, and
>
> (2) The House of Lords having decided that these documents were not to be disclosed, he did not think that the Judge could admit them".[62]

When the trial opened the Attorney-General explained the position:

> "The First Lord of the Admiralty, having looked at [the documents] filed an affidavit in the terms referred to saying that it was not in the public interest that they should be disclosed. That was taken to the House of Lords really on the point as to whether that was a matter for the First Lord or for the Courts. When arrangements were made some time later . . . that this case should be tried on the transcript [of the Bucknill Inquiry] we communicated with the First Lord and we also communicated with my learned friend, who said that these documents should be available for Counsel and the Judge and if required by anyone for the purpose of seeing that all proper issues were brought before your Lordship".

Wallington's response was indignant:

> "The position was this, that this matter of production and indeed the question whether it would be injurious to the public interest that any of the said documents should be disclosed to any person, as the First Lord swore it would be, went to the House of Lords, despite the fact that in each Court on our way up to the House of Lords and in the House of Lords what we were saying was: 'Let the Judge look at the documents; let him be the judge of whether this is unjust or not and at all events let some direction be given that the Judge himself and Counsel may see the documents'. But that was rejected and right up to

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[62] TS 32/110. Note by H.L. Parker 14/9/1943.

> the House of Lords the position was maintained against us that nobody must see them and the affidavit of the First Lord was final and conclusive about it. Various arguments that I need not reiterate to your Lordship now were addressed on other parts of the matter in order to show how unreasonable that would be, but they availed nothing because the First Lord had made this affidavit in these terms . . . What I feel and what I want to present to your Lordship on the case now is that the House of Lords having ruled, as they did, that none of these are to be seen by anybody because the First Lord so said, it is not now open to the Attorney-General to be magnanimous and say, 'Well, now, in 1943, although there has been no change in circumstances, what the First Lord swore in 1941 no longer holds and you may see them, although we refused to allow you to see them in 1941'."

Mr Justice Wrottesley rather tartly observed that the logic of this argument was that he "should decide upon what is apparently on issue, namely as to who owned this submarine on the 1st June, without looking at the contract". He suggested that Wallington should look at the document and told him, "I shall not hold it against you if after that you say it is in an unclean thing which you refuse to look at any further".[63]

The clear inference from the apparent about turn was that the overriding objective of the administration had been to assert its unquestioned authority over the courts on the decision on disclosure. Once this was achieved and thus settled the law for all future claims it suited the government to make this limited disclosure, particularly since Cammell Laird wanted to refer to the terms of the contract. The Attorney General was forthcoming about the government's motives. He told the court "everybody has been told" what is in the contract.

> "The real point in the Cammell Laird issue which was decided was whether, as my learned friend was saying, the question of non-disclosure in the public interest was a matter for the Judge or a matter for the Crown. That was the issue and the House of Lords did not make any order that the First Lord of the Admiralty could never at any time allow anybody to see it".[64]

There is also a hint in the papers that the administration had hoped that their earlier tactics would halt the litigation and that the national security claim was part of a manoeuvre to do that. In December 1940 Wallington had asked to inspect a submarine similar to the *Thetis* and been refused. The approach had changed by the summer of 1943, as Admiralty official H.N. Morrison revealed:

> "When application was made in December, 1940 for Mr Wallington KC to be permitted to inspect a submarine similar to the "Thetis" we were hoping to arrange for the threatened legal actions to be withdrawn. The Attorney General was not in favour of granting the facilities, we took the hint from him

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[63] TS32/113 Transcript of Proceedings in KBD, September 1943.
[64] *Ibid*.

> and refused to grant them "under present conditions" without giving any reason. The papers show that the actual reason was expediency and not considerations of public interest and security, since representatives of the Press were constantly being given facilities to visit submarines. . . The circumstances have changed the plaintiffs have now got their case together and obtained a date for the trial, the Attorney-General considers it would be desirable, if at all possible, that facilities should be granted to the plaintiffs' counsel and also the counsel for Cammell Lairds, to inspect a "comparable submarine". [65]

The visit was to be arranged this time.

Postscript: What Was the Secret?

Of course it almost goes without saying that there will be sensitive security issues in a case involving a Royal Navy submarine taking place during a World War. However, even here claims should not just be accepted on faith. The actual content of the claim in Duncan remains somewhat of a mystery. Wade and Forsyth, approving the government's claim for non-disclosure, write: "After the war it was divulged that the Thetis class of submarines had a new type of torpedo tube which in 1942 was still secret."[66]. They do not source this revelation. Lord Simon in the House of Lords debate on the Crown Proceedings Bill in 1947 did refer to torpedo tubes of a new type. Justifying his 1942 ruling he stated: "I do not think I am disclosing any secret nowadays when I say that if those blueprints had been produced it would have appeared that submarines of the type of the "Thetis" were not only armed so that they could fire forwards under water but that there were also further tubes which could fire from behind. That was a secret and we were at war with the Germans".[67] In June 1939 the Admiralty had sent a note to the Treasury Solicitor's department in preparation for the Bucknill Tribunal. This stated that the external torpedo tubes were among a list of ten items which were "very secret" and should not be referred to in public but added that, "If it is desired during the course of the investigations to refer to them, arrangements should be made for the Court to sit in camera while these items are dealt with". The papers examined for this article contain no reference to backward firing torpedos. The historian of the T class of submarine to which Thetis belonged, records that backward firing torpedoes were not fitted to these vessels until after the outbreak of the Second World War.[68]

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[65] TS32/110 H.N. Morrison 5/7/1943.

[66] *Sup cit* n.2 p.817. See also, C. Forsyth "Public Interest Immunity: Recent and Future Developments". (1997) *Cambridge Law Journal* 56(1) p51, n 1.

[67] H.L. DebVol 146 cols 927-8 (March 31 1947).

[68] TS 32/102 Synott to Lawton 29/6/1939; Paul J Kemp *The T-Class Submarine. The Classic British Design* (1990) Arms and Armour Press, p.47. *Thetis* was raised from the sea-bed, refitted and returned to active service as *HMS Thunderbolt.* Kemp records that she was fitted with the new backward firing torpedo in 1942.

CONCLUSION

The longer term implication of the House of Lords ruling to the smooth running of administrative decision making was noted by a number of departments immediately. The Treasury Solicitor's department appears to have lost little time in informing the rest of the civil service of the victory. They received some grateful responses. W.B. Blatch, lawyer at the Inland Revenue commented, ". . . we shall have to consider the position in relation to the numerous small actions in which one side or the other wants to see his opponent's income tax returns. I am glad to have it; a statement I could not always make about judgment in the House of Lords".[69] Sir Oscar Dowson, Legal Adviser to the Home Office, congratulated the Treasury Solicitor: "The LC's exposition, (plus the chorus of concurrences at the end) makes this a very helpful case for future guidance and removes some of the embarrassments of the past".[70] The decision was to remain good law until 1968 although some concessions were made in the meantime by the government.[71] Its deferential approach to claims for government secrecy was duly followed in a number of common law countries, including the United States.[72]

An account of the events surrounding this landmark case indicates how the wartime increase in government powers had had a profound effect on the administrative landscape in Britain. Jacob in his examination of the background to the Crown Proceedings Act has outlined the pivotal position of the civil service lawyers whom he described as "a small, tightly knit group of ostensibly apolitically motivated men"[73] and an examination of the events surrounding *Duncan* gives further evidence of this. As civil service departments became organisations in their own right there was an increasing tendency to assume the features of a professional elite. The lawyers reflected a growing civil service professionalism with all its concomitant emphasis on secrecy, confidentiality and intermingling of professional and public interests.[74] The Second World War, when the whole system of government became significantly *étatiste*, created the conditions to extend much further

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[69] TS32/110. Blatch to Lawton, 15/5/1942.

[70] TS32/110. Dowson to Lawton, 21/5/1942.

[71] See M. Baber *Public Interest Immunity Research Paper 96/25* 22 February 1996. Home affairs Section, House of Commons Library, a paper prepared for the Scott Inquiry.

[72] *US* v *Reynolds* 345 US 1 (1953), see also K. Taymor, "Military State Secrets Privilege" (1982 1 *Yale Law Journal* 570. Taymor writes, at 571 "The exact origins of the state secrets privilege are unclear . . . its modern use stems from English precedence established during World War Two". It is interesting to note that the decision in *Reynolds* is now under challenge in the courts on the grounds that declassified documents show the government lied in invoking national security. See <http://www.rcfp.org/news/2003/0304.petiti.html>. Accessed 28/9/2004.

[73] Joseph M. Jacob "The Debates behind an Act: Crown Proceedings Reform, 1920-47" [1992] *Public Law* 452 p.457.

[74] See D. Vincent, *The Culture of Secrecy: Britain 1832-1998 (1998* OUP). However, Vincent, like most historians of the history of official secrecy, largely ignores the development of Crown privilege.

the pre-existing culture of secrecy.[75] Government lawyers were not so much interested in finding out what happened on the *Thetis*, but in asserting an executive right to control the flow of information. In this case of course the Crown itself was not being sued, the existence of the contested documents was only known about since they were records of commercial transactions in the hands of a private party, Cammell Laird. The plaintiffs not surprisingly resented the defendants having this advantage. The ruling in *Duncan* was to be of inestimable value when the law was changed so that the Crown itself became a potential defendant. There was, as Jacob shows, an ongoing internal debate on discovery before the Crown Proceedings Act was passed and the 1942 decision was enlisted as part of this.[76] In 1945 as the proposals for the legislation were being put together Simon had pointed out to Sir Granville Ram, First Parliamentary Counsel:

> "At first sight I do not appreciate the necessity of including in the Bill elaborate provision about discovery; the principle surely is the principle which we laid down recently in the "Thetis" appeal, and it would seem . . . much wiser, if possible to leave it there".[77]

Jacob argues, "Resting as it did on Lord Simon's speech in *Duncan* the 1947 Act required us to believe that there was a public interest in the public not knowing some particular fact or that someone held a particular opinion."[78] The constitutional conventions were formally preserved since Ministers were considered to be principled champions of that public interest and challengeable in Parliament for any failings. Equally civil servants were expected to give reliable impartial advice. Simon in the House of Lords debate on the Bill stated:

> " What we have to rely on – and I would willingly devise any other method if one occurred to me – is the uprightness of Ministers who are properly advised by skilled, fearless, loyal, independent members of the Civil Service…In common practice, I think, the Treasury Solicitor is asked to join in the consultation in cases of difficulty. For my part, I speak only of the Treasury Solicitors I have known and I would put the greatest confidence in their complete independence of judgement. They would most certainly prevent a Minister who from personal reasons, Party reasons or improper reasons wanted to prevent a document from being produced."[79]

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[75] See Harris n 50 at 90. She writes on wartime Britain: "Centralised control over people and resources far exceeded that of any other combatant power with the possible exception of Russia. By a strange irony of history the United Kingdom, with her tradition of scepticism and hostility towards state power, generated a far more powerful centralised wartime state than any of her more metaphysically minded, state exulting continental enemies."

[76] Joseph M. Jacob "From privileged Crown to interested public"[1993] *Public Law* 121.

[77] LCO2/3361. Simon to Ram, 2/10/1944. Quoted in Jacob *sup cit* at 133.

[78] *Sup cit* p.150.

[79] H.L. Deb Vol 146 col 929 (March 31, 1947).

The discussion surrounding *Duncan* v *Cammell Laird* however suggests that Simon's description is a rather minimalist version of the role of the civil service lawyers. It was not just that they were watchdogs against impropriety on the part of Ministers. They had a more influential position. Civil servants' perception of the need for confidentiality as a necessary ingredient of good administration largely determined the development of the law on Crown privilege in this period. The departmental papers in the National Archives reveal the extent to which middle ranking officials were engaged in influential decision making.[80] As far as the government was concerned it was important that the formal constitutional position of Ministerial accountability was preserved. In 1947 Attlee was to promulgate a Memorandum stressing the primacy of political decision making in demands for Crown Privilege. It read:

> "It cannot be too strongly emphasised that the decision whether or not a document is to be withheld from production is the responsibility of the Minister himself. It has been suggested that matters of this kind may properly be left to an official of the Department. This is not so, and the Minister must personally consider the document and form his own judgement with such advice as he thinks fit to take. . ."[81]

But this was not what happened. In *Duncan* the original refusal of disclosure of the documents was initiated in the Treasury Solicitor's department whose reasoning was to be an almost complete anticipation of Simon's House of Lord's judgment. Further, as this article has argued, it is misleading to separate disclosure from more general considerations of the administration's perception of the public interest. There was, officials argued, an overwhelming public interest in protecting the Crown from unwelcome judicial challenge, a claim indeed very difficult to refute in wartime when national survival it seemed depended on downplaying sectional and individual demands in the name of patriotism and collectivity. But in reality the national security considerations in the case were somewhat peripheral to the contested issues. The case turned on the legal implications of human error, not the blueprints of the submarine design, and the litigants arguably did not need to present any more sensitive information about the *Thetis* design than what was already in the public domain. Just as the legal principles articulated in the Lords' ruling on Crown privilege were wider than the rationale of the case demanded so the government demand for non disclosure in *Duncan* was wider than the negligence suit required. It covered both obviously sensitive and possibly irrelevant documents, such as the design features of the external torpedo tubes, as well as those both relevant and arguably harmless to national security such as the dates in the contract and the notebooks of the ship's painters. As the above account shows Counsel for the plaintiffs was to complain that he would not have appealed to

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[80] See R. Lowe (1997) 8 *Twentieth Century British History* 2, pp.239-265. He makes interesting observations about the limited extent to which the release of papers in the Public Record Office leads to new discoveries about policy making. He suggests that their main value is in revealing the level of administration at which decision making operated.

[81] TS32/233. Crown Proceedings Act. Memorandum by the Prime Minister. CP(47) 321 8/12/1947.

the House of Lords if he had known some of the documents were to be released at trial. Ironically the 1942 ruling had probably little effect on the outcome of the plaintiffs' negligence suit which was undermined more by an uncritical adoption of the original Admiralty version of how the bow door came to be opened. For the administration the case presented a very powerful opportunity to prevent unwelcome litigation and establish incontrovertibly by the highest authority the legal principle which Lawton for one had decided was already good law. The principle was that government secrecy would be judicially preserved if claimed by ministerial edict. Lord Simon obliged by neatly eliding national security and the public interest into one.[82] *Conway* v *Rimmer* went some way to disentangle the two and subsequent courts have questioned ministerial claims of the latter and clearly abusive claims of the former. Apart from the obvious excesses exposed by the trial judge in the Matrix Churchill trial in 1992, national security claims are in many ways the last frontier of judicial non interference, so their current potential for abuse is beyond inspection. The argument for abstention still rests in part on the strangely enduring legend of *Duncan* v *Camell Laird.*

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[82] See A.L Goodhart, "The Authority of *Duncan* v *Cammell Laird*" 79 *Law Quarterly Review* 153,155. A.W.B. Simpson draws the connection between *Duncan* and *Liversidge* v *Anderson* [1942] AC 206 in *In the Highest Degree Odious: Detentions without Trial in Wartime Britain* Clarendon, Oxford 1992.

THE COMMUNITY INTEREST COMPANY: MORE CONFUSION IN THE QUEST FOR LIMITED LIABILITY?

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INTRODUCTION

In the United Kingdom there is at present a strong culture of support for easy access to legal forms which provide the protective benefit of limited liability to those involved in the conduct of the affairs of the organisation in question[1]. A new vehicle in the form of the limited liability partnership was introduced in 2000[2] with an express aim of providing access to limited liability status for individuals and firms which had hitherto been largely restricted to using conventional unlimited liability partnership structures. The UK Company Law Review (CLR) also sought to make the limited liability company more attractive to smaller businesses.[3] This culture is now also clearly evident in respect of the not- for- profit sector. The report by the Performance and Innovation Unit of the Cabinet Office into the not-for-profit sector[4] proposed the creation of a new legal form for charities: the Charitable Incorporated Organisation (CIO). That proposal has been followed by a recommendation that a new form of social enterprise organisation called a Community Interest Company (CIC) should be created.[5] The proposal in respect of the CIC has now been confirmed in the Government's legislative proposals for the 2003-2004 parliamentary session and a bill containing the requisite provisions for the creation of the CIC has now been introduced in the House of Lords.[6] This article considers the recent development of arguments within the United Kingdom for new organisational forms in the

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[1] See, for example, paragraph 1.27 of The Company Law Review Steering Group Final Report (URN 01/942 and 943) (DTI, 2001) (hereafter referred to as the "Final Report") which states that "It is crucial that the law provides an optimal framework for the establishment, efficient operation and development and growth of . . . companies".

[2] Limited Liability Partnerships Act 2000.

[3] See paragraph 1.3 of the White Paper, "Modernising Company Law" (Cm. 5553) which followed the publication of the Final Report. This reflects the stance taken in the Final report and states that "Company law should make it easy to start and run businesses".

[4] Private Action, Public Benefit – A Review of Charities and the Wider Not For Profit Sector, (London, Strategy Unit Report, September 2002, also published electronically and to be found at www.strategy-unit.gov.uk/2002/charity/report /index.htm (hereafter referred to as "*Private Action, Public Benefit*").

[5] The proposal is contained in a consultation paper "Enterprise for Communities - Proposals for a Community Interest Company" published by the DTI, HM Treasury and the Home Office in March 2003 (hereafter referred to as "Enterprise for Communities").

[6] The Companies (Audit, Investigations and Community Enterprise) Bill [HL] (referred to hereafter as the" Companies Bill") was introduced in the House of Lords on 3rd December 2003, had its second reading on 8th January 2004 and completed the Grand Committee stage on 29th March 2004.

not-for-profit sector and the resulting legislative proposals for such organisations against the backdrop of significant issues which have arisen in respect of the most recently introduced legal form, the LLP. The article considers in detail the proposed structure of the CIC, identifies a number of practical issues arising from the proposals and considers whether lessons may be learnt from the process which led to the Limited Liability Partnerships Act 2000. The article concludes that while there may be arguments which appear to justify ease of access to limited liability status in the form of dedicated legal forms such as the CIC, the manner by which access to and the organisations through which such status is to be offered may give rise to confusion both in the minds of those dealing with such organisations and those responsible for running them as to which organisational form is best suited to their needs.

RECENT DEVELOPMENTS IN LEGAL FORM

The LLP

The most recently introduced legal form in the United Kingdom is the Limited Liability Partnership (LLP).[7] While the LLP is only available for use by those carrying on business in the United Kingdom[8] and is therefore not directly available for not-for-profit organisations, the manner by which the LLP came into existence and the legislative approach inherent in the LLPA are both informative as to how the CIC, as the first legal form to be proposed after the creation of the LLP, might be received and how it might impact on those who contemplate using it as a vehicle for incorporation..

The LLP was introduced into the United Kingdom primarily to address the concerns and meet the perceived requirements of the accountancy and other professional partnerships[9] where the potentially unlimited liability associated with the partnership form used by such organisations was increasingly being criticised by such users as inherently unsatisfactory. However, concerns were raised from the outset as to how well founded the LLP was in terms of the reasoning and preparation which was undertaken before its introduction. In reviewing the early proposals for the LLP the House of Commons Select Committee on Trade and Industry remarked that "neither of the two DTI papers contained anything approaching a full and considered analysis of the issues addressed by the Bill".[10] At the same time the Department of Trade and Industry was undertaking a wide ranging review of company law and the Law Commissions in England and Scotland were embarking on a joint review of the law of partnership.[11] The LLP was not included as an item for consideration in either review process and as a result it appeared to be shaped

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[7] Introduced by the Limited Liability Partnerships Act 2000 (LLPA).

[8] S.2 of the LLPA specifies that a limited liability partnership can only be formed by two or more persons "carrying on a lawful business with a view of profit".

[9] For a detailed discussion of the history of the LLP in the United Kingdom see J. Freedman and V. Finch, "Limited Liability Partnerships: Have Accountants Sewn Up the 'Deep Pockets' Debate?", [1997] J.B.L 387.

[10] Paragraph II, 6 of the proceedings of the Fourth Committee of the Select Committee on Trade and Industry which met on 16th February 1999.

[11] The Law Commissions have now reported. "Partnership Law", Cm.6015, SE/2003/299.

more by reference to the particular needs and desires of the professional bodies who sought its creation rather than as part of a broader process looking at the evolution and development of business forms in the United Kingdom. The resulting structure of the LLP is characterised by the adoption of elements of existing rules and principles of both partnership and company law in the United Kingdom. The LLPA is a very short piece of legislation extending to only nineteen sections and two brief schedules, with many substantive principles and the clearest examples of deemed application of existing company and partnership law being found in subsequent regulations.[12] Despite the adoption of rules and principles from both company and partnership law the LLP is inherently corporate in nature and character.[13] It has been argued that this process of adopting a corporate character for the LLP which is overlaid with partnership law principles gives rise to a potential weakness in the LLP. Freedman and Finch[14] argue that the adoption of rules and principles from two conceptually different legal forms has practical and legal consequences[15] which give rise to "serious conceptual confusion".[16] One of the areas where Freedman and Finch identify an example of this conceptual confusion is in respect of the position of members of an LLP and the nature and extent of the limited liability protection which is actually afforded to such members.[17] Freedman and Finch argue that particular difficulties arise in connection with what is referred to as 'the clawback'. In its originally proposed form the LLP would only have been available to regulated professions[18] and as part of the price for receiving the broad benefit of limited liability, members of an LLP would have greater liability for their personal wrongs than would otherwise have been the case with a conventional limited liability company. The 'clawback' is the mechanism devised to provide this greater degree of creditor protection. The clawback is introduced by means of a new section 214A of the Insolvency Act 1986 and its purpose is to provide some degree of protection against members siphoning off funds in the event of insolvency. The difficulty Freedman and Finch identify in respect of the clawback arises from the manner in which it has been implemented. Section 214A of the Insolvency Act 1986 is closely modelled on the existing section 214 of that Act. Conceptually, however, the section deals with an entirely different issue whereby members effectively place themselves in a preferential position. The concern expressed by Freedman and Finch is that there will be considerable uncertainty as to how the clawback will be interpreted by the judiciary with potentially adverse consequences for creditors of an LLP. The

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[12] The Limited Liability Partnerships Regulations 2001(SI2001/1090).

[13] S.1 (2) of the LLPA states that the LLP is a body corporate separate from its members.

[14] See J. Freedman and V. Finch, "The Limited Liability Partnership: Pick and Mix or Mix-Up", [2002] J.B.L 475 (referred to hereafter as "Freedman and Finch").

[15] Freedman and Finch n.13 above at pp. 482-483.

[16] Freedman and Finch n.13 above at p.483.

[17] Freedman and Finch n.13 above at pp.483-488.

[18] Both the original consultation papers on the LLP raised the question of whether it should be restricted in availability to regulated professions. The title of the first consultation paper DTI, "Limited Liability Partnerships-A New Form of Business Association for Professionals" (Consultation Paper URN 98/874) clearly anticipated that availability would be restricted.

potential problem identified[19] is that creditors may have risk disproportionately transferred to them as a result of possible judicial interpretation of section 214A. If the courts take a stance which favours trading through difficulties and as a result are less than strict with members, then creditors have to assume a greater degree of risk. Similarly, if the courts adopt a differing interpretation of the clawback which is strict in its treatment of members they will be encouraged to leave their LLP when difficulties emerge, which again has an adverse impact on creditors. Freedman and Finch argue that the uncertainty for creditors associated with the clawback mechanism is likely to encourage them to deal with the potential risks by possibly increasing loan rates for LLPs and encouraging borrowers to use existing and understood legal forms such as the limited liability company.

The introduction of the LLP has therefore been accompanied by at least two substantive grounds for criticism. Firstly, the very reason for the introduction of the LLP was not based on a clearly reasoned analysis as to why a new legal form was required as opposed to the use of existing organisational structures which might have been capable of development to meets the identifiable needs of those who sought the introduction of the LLP. Secondly, the impact of the clawback mechanism on creditors is at best uncertain and may influence the approach of creditors in their dealings with LLPs and have potentially adverse consequences for creditors in the event of insolvency. Now that there are proposals to introduce another legal form so rapidly after the introduction of the LLP it is important to consider the CIC proposals in detail and assess whether similar issues are likely to arise in respect of the CIC.

THE COMMUNITY INTEREST COMPANY

Background

In September 2002 the Strategy Unit of the Cabinet office published a review of the charities and wider not-for-profit sector. The review, *Private Action, Public Benefit*[20] considered the existing range of legal forms taken by charities and other not-for –profit organisations. In chapter five[21] of *Private Action, Public Benefit* the first reference is made to CICs. In very brief terms it is argued that:

> ". . . companies legislation was not designed with the needs of smaller scale community-based social enterprises in mind. Problems include the fact that there is no entrenchment of the non-profit distributing nature of the organisation, nor the devotion of assets to a public purpose: that the Company limited by guarantee does not allow access to equity; and that the company "brand" is almost exclusively associated with profit-making."[22]

Having drawn these conclusions the review recommended:

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[19] Freedman and Finch n.13 above at pp.502-511.
[20] *Supra,* n 4.
[21] Private Action, Public Benefit, p.53.
[22] Private Action, Public Benefit, para.5.20 at p.53.

> ". . . the establishment of a Community Interest Company ("CIC"), drawing as appropriate on company law, but with certain additional constraints and features which make it suitable for use by small scale community-based not-for-profit social enterprises familiar with the company form."[23]

Following *Private Action, Public Benefit* the Department of Trade and Industry issued a consultation paper[24] on 26th March 2003 and the period for consultation closed on 18th June 2003.

Following the consultation exercise a report[25] was issued by the DTI on 22nd October 2003 and finally, the Companies Bill, containing proposals to create the CIC was introduced into the House of Lords on 3rd December 2003.

Features of the CIC

(a) A New Type of Company

Part 2 of the Companies Bill contains the proposals for creation of the CIC. The CIC itself may be distinguished from the LLP in respect of the novelty of legal form. The LLP is an entirely new species of legal form which has a strongly corporate character with features of a partnership but which is entirely distinct from both the company and the partnership. The CIC will not be a new legal form in the pure sense but will take the form of a new species of company.[26] The nature of the CIC as a company is further defined by the Companies Bill which specifies that a CIC may take the form of a company limited by guarantee or a company limited by shares[27] and that even if formed for purposes which are charitable the CIC is not to be treated as charitable.[28] The CIC can therefore be distinguished from the LLP in terms of possible issues arising from the creation of a new legal form *de novo*. As a form of company the CIC will be subject to the application of existing principles of company law. By comparison with the approach adopted in respect of the LLP this structure has the benefit of a level of certainty for potential users, advisers and the judiciary who, when dealing with CIC's, will simply look to existing principles of company law on most routine matters.[29] Nonetheless, the CIC is novel and will be the subject of a number of principles and rules set out in the Companies Bill which do not exist in UK company law at present and an additional tier of regulation managed and implemented by a new regulator known as the Regulator of

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[23] Private Action, Public Benefit, para.5.21 at p.53.

[24] "Enterprise For Communities-Proposals for a Community Interest Company", DTI, URN 02/1460

[25] "Enterprise For Communities: Proposals For A Community Interest Company-Report on the public consultation and the government's intentions", DTI URN 03/1344.

[26] Companies Bill, Clause 23(1).

[27] Companies Bill, Clause 23(2).

[28] Companies Bill, Clause 23(3) (a).

[29] In Enterprise for Communities this approach was outlined by the DTI and it was suggested that CIC's ". . .will follow the same incorporation and reporting procedures as other companies, and their directors and members will have the same rights and duties." Enterprise for Communities, para.15.

Community Interest Companies.[30] The most obvious manifestation of the new regulatory regime is the community interest test which any proposed CIC will have to satisfy before it may be registered as a CIC.

(b) The Community Interest Test

Before a CIC can be incorporated (or an existing company's status changed to permit it to operate as a CIC) it is proposed that it must satisfy a preliminary assessment as to whether it complies with what is referred to as the Community Interest Test. The most important function to be undertaken by the Regulator in the proposals for the CIC will be the determination as to whether or not the proposed company satisfies the proposed test.[31] The Community Interest Test was first proposed in the DTI's Enterprise for Communities consultation paper but the discussion within that paper as to the underlying rationale behind the introduction of the test is not extensive. It is simply stated that:

> "Public and community interest is the defining factor at the heart of the CIC. To ensure that CICs are focussed on this, the regulator will need to apply a robust test at the time of registration".[32]

The consultation paper elaborates on this basic premise by suggesting that:

> "To become a CIC, an organisation will have to satisfy the regulator that its purposes could be regarded by a reasonable person as being beneficial to the community or wider public benefit".[33]

Despite the brevity of the discussion on the issue at the consultation stage and the apparent absence of any discussion as to whether the adoption of a preliminary scrutiny mechanism was the only means of regulating access to CIC status, the Community Interest Test is the access mechanism which has been proposed. For those wishing to incorporate a CIC the proposed procedure appears to be relatively straightforward. The documents which are presently required by the Registrar of Companies for incorporation of a company must be prepared[34] and submitted to the Registrar of Companies along with any other prescribed formation documents. These documents are then to be forwarded to the Regulator[35] who will apply the Community Interest Test. If the documents submitted to the Regulator evidence compliance with the test the Regulator notifies the Registrar of Companies that this is the case, the company then proceeds to be registration[36] and a certificate of incorporation will be issued which contains a statement to the effect that the company is a community interest company.[37] If the Regulator decides that the documents submitted do not provide a basis to confirm

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[30] Companies Bill, Clause 24(1), hereafter referred to as "the Regulator".
[31] Companies Bill, Clause 32.
[32] Enterprise for Communities, para.16.
[33] Enterprise for Communities, para.17.
[34] Companies Bill, clause 33. The documents required are specified in s.10 of the Companies Act 1985.
[35] Companies Bill, clause 33(3) (a).
[36] Companies Bill, clause 33(7).
[37] Companies Bill, clause 33(8).

compliance with the Community Interest Test the subscribers to the memorandum of association submitted to the Regulator are entitled to appeal to another official referred to in the Companies Bill as the Appeal Officer.[38] The function of the Appeal Officer is simply stated in the Companies Bill as being the determination of appeals against decisions and orders of the Regulator.[39] For existing companies seeking recognition there are provisions which are designed to ensure that alterations to existing memoranda and articles of association and names are such that they too must comply with the Community Test.

There are a number of issues which arise in respect of the approach to admission to CIC status on the basis of the Community Interest Test. The first issue to consider is whether the approach adopted is the only or most effective approach which could have been adopted. The DTI consultation process offered no alternative approaches and in Enterprise for Communities, the Community Interest Test was the only mechanism discussed. In structural terms the adoption of the Community Interest Test has some parallels with the approach adopted in respect of charities in the United Kingdom whereby, irrespective of jurisdiction, charitable status is adjudicated upon by one body[40] and organisational status may be dealt with by another. Thus, for example, in Scotland promoters of a charitable organisation may incorporate a company but that company will only be recognised as a charity once its purposes have been recognised as charitable by the Inland Revenue. This two stage process can be recognised in the slightly differing but nonetheless consistent approach of the Community Interest Test. Where the two approaches differ is in respect of the consequences which flow from recognition. Recognition as a charity is directly linked to a state concession in the form of relief from taxation. This relief is an inherent justification for the scrutiny process which affords recognition of charitable status. There is no similar concession from the state to CICs and, apart from the assertion in Enterprise for Communities that "public and community interest is the defining factor at the heart of the CIC",[41] there is no clearly convincing alternative public policy argument adduced in the consultation process to the effect that the regulatory approach proposed is the only, or indeed, the most appropriate recognition mechanism. There are a number of alternatives. The present process for incorporation of companies in the United Kingdom recognises the various types of companies which exist. Existing companies legislation recognises differences in the ways differing types of companies are regulated and the levels of accountability to which they are subjected.[42] One alternative to the

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[38] Clause 25 of the Companies Bill specifies that there is to be an officer known as the Appeal Officer who is to be appointed by the Secretary of State.

[39] Companies Bill, clause 25.

[40] In England and Wales by the Charity Commission and in Scotland the Inland Revenue.

[41] Enterprise for Communities, para.17.

[42] The approach to company audit requirements is a clear example. In the 1980's there was a general move to review the regulatory burden imposed on small and medium sized companies in particular (for a good general discussion of the issues involved see Freedman and Goodwin, 'The Statutory Audit and the Micro Company – An Empirical Investigation' [1993] J.B.L 105. The debate resulted in 1994 in the abolition of the audit requirement for companies with a turnover of

regulatory approach proposed in the Companies Bill would have been to require a formal declaration as part of the incorporation process that the company was being incorporated for community interest purposes. The initial declaration at the formation stage would be supported by repetition in the annual return. Failure to declare community status in the annual return would result in the company no longer being considered to be a community interest company. If this approach is considered to be too light in regulatory terms more robust mechanisms can be identified which are still consistent with the present approach of UK company law and which do not require the introduction of an entirely new regulatory regime. The elective regime is one such possibility. This regime provides companies with a mechanism whereby they may elect to structure certain of their activities in a manner which they consider to be efficient and which may relieve them of certain regulatory burdens.[43] Extension of the elective regime to include adoption of CIC status, accompanied by annual declarations confirming the retention of that status would be another means whereby the unique identity of a company as a community interest company could be recognised. What the consultation process, Enterprise for Communities and the Companies Bill fail to identify is the fundamental reason why the Community Interest Test and the Regulator are the only and most effective mechanisms which should be adopted.

The second issue to address in connection with the Community Interest Test is the very nature of the test itself. The test is stated in the Companies Bill as follows:

> "A company satisfies the community interest test if a reasonable person might consider that its activities are being carried on for the benefit of the community".[44]

There is no significant elaboration in the Companies Bill as to what may be construed to be in the public interest but the bill clearly anticipates that regulations may be forthcoming which will provide guidance as to what activities might constitute community benefit.[45] There exists the clear potential for uncertainty and confusion with the proposed formulation. If it is anticipated that regulations will be promulgated which will offer guidance as to what constitutes community benefit then it is unlikely that there will be a rush to seek CIC status until the activities which might give rise to recognition have been clarified. Another concern relates to the potential overlap in definitions. The reasonable person test for community benefit activities may be confused with the existing public benefit test for charitable organisations. The matter may become even more complicated if definitions within the charitable sector are revised.[46] Some guidance has been given as

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less than £90,000 (see the Companies Act 1985 (Audit Exemption Regulations 1994, SI 1994/1935). The present threshold is now £1,000,000 (see the Companies Act 1985 (Audit Exemption) (Amendment) Regulations 2000, SI 2000/1430).

[43] Private companies may choose not to comply or observe certain provisions of the companies legislation if they pass an elective resolution in accordance with section 379A of the Companies Act 1985.

[44] Companies Bill, clause 32(3).

[45] Companies Bill, clause 32(4).

[46] Separate Charities Bills are being consulted on for England and Wales and Scotland. The proposals for the Scottish bill were announced after two high

to what the Government anticipates will inform the Regulator in assessing the reasonable person test. In the report[47] on the public consultation on Enterprise for Communities the Government outlined its intentions on the test and detailed three features which will presumably be included in any regulations to be promulgated on the basis of the mechanism set out in clause 32(4) of the Bill. The three elements are as follows:[48]

> "(a) Objective.
>
> It is anticipated that the Regulator will base the assessment of community interest on what a reasonable person's assessment of the applicant's purposes would be and not on the regulator's interpretation;
>
> (b) Transparent
>
> Guidance will be published on the test and there will be an appeal process against decisions made by the Regulator; and
>
> (c) Scope
>
> The test is to be materially wider than the existing charitable test of public benefit."

Elements a) and b) offer little further illumination on how the test will be construed and applied by the Regulator. The fact that the scope of the test is to be materially wider than the existing charitable public benefit is significant but does not at this stage provide the level of certainty which will be sought by those contemplating the adoption of CIC status. The baseline definition of 'public benefit' is itself the subject of review in a charitable context and may become broader than is presently the case. This in turn would imply that the formulation of community interest could be construed even more broadly than might even be contemplated at present. If the criteria applied in determining community interest become too broad and diffuse there is a real risk that the credibility of the new CIC structure will be undermined and the necessity for a regulated admissions structure will become questionable. There will be a very delicate balance to be struck between the desire for the flexible application of relatively broad criteria which will permit access to CICs to a broad range of social enterprises and the risk of creating a situation where the criteria are so broad that access to CIC status is almost at will.

(c) Finance

In addition to the Community Interest Test, the other element identified in Enterprise for Communities as ". . . central to the CIC concept"[49] is what is referred to as the asset lock. It is argued that it will be critical for acceptance of CICs by investors that there should be a commitment by CICs and those

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profile Scottish charities (Moonbeams and Breast Cancer Scotland) were the subject of investigation by and subsequent court intervention at the behest of the Scottish Charities Office. See Scottish Parliament Official Report, Col 1955-1965, 24th September 2003.

[47] *Enterprise For Communities: Proposals For A Community Interest Company, Report on the public consultation and the government's intentions*, October 2003 (hereafter referred to as "The Report").

[48] The Report, paras. 2.7 and 2.8.

[49] Enterprise for Communities, para.23

who set them up to lock profits and assets into the company irrevocably. Clause 27 of the Companies Bill contains the mechanism whereby the asset lock is created. Again the mechanism adopted is the facility to create regulations which may:

> "(a) prohibit or impose limits on the distribution of assets by community interest companies to their members, and
>
> (b) impose limits on the payment of interest on debentures issued by, or debts of, community interest companies."[50]

The intention also appears to be that the Regulator should be empowered by any such regulations to set any limits that may be required. The range of responses to the proposal to establish the asset lock was particularly diverse and in the Report the difficulties identified in striking an appropriate level of cap are reflected in the Government's decision not to deal with the matter in detail in primary legislation.[51] The principle of the asset lock is, however, entrenched within the present proposals and, subject, to the limits on distribution to be developed by the Regulator, there is no mechanism for disapplication of the lock so long as the company retains its CIC status. For those who are members or shareholders of a CIC it is unlikely that this will be a matter of concern. Their very purpose in adopting CIC status is presumably to pursue community objectives and not to maximise any form of return on their contribution to the company. A much more complex situation will prevail in respect of potential investors and lenders who have in contemplation investment in a CIC. The Regulator faces another difficult task in balancing the need to create an investment climate whereby the financial return to potential investors is sufficiently attractive to encourage investment, and the potentially conflicting desire to limit distributions from CICs with the intent of maximising the assets and capital available to further community activities. While CICs taking the form of a company limited by shares will be able to issue what are referred to in the Explanatory Notes to the Companies Bill as "investor shares"[52] and to make distributions to shareholders, the extent of any such distribution will be capped. If the cap is overly restrictive there is the risk that no new market will open up for potential investors and only those who are already motivated to invest in such activities and organisations on a largely philanthropic basis will find investment in CIC's attractive. If the cap is unduly lenient the market for investors may be larger but the resulting distinction between CICs and unregulated companies may be so minimal that those contemplating a new community venture may choose not to opt for CIC status, particularly given the increased regulatory burden associated with such status.

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[50] Companies Bill, clause 27 (1).

[51] At paragraph 6.14 which outlines the Government's intentions on the cap it is stated that "The detailed workings of the cap will not be set out in primary legislation; the Government will set the structure of the cap in secondary legislation, and the CIC regulator will be responsible for setting the cap in a way that will balance the need to encourage investment with the primacy of community interest."

[52] The Explanatory Notes (published electronically at <www.publications.parliament .uk/pa/ld200304/ldbills/008/2004008.htm> paragraph) simply refer to investor shares at paragraph 161 of the Notes as being "dividend paying . . . The dividend payable on such shares will be subject to a cap".

The position of creditors is also addressed in the proposals in the Companies Bill. Again, the mechanism adopted to regulate the distribution of assets on winding up of a CIC is the use of regulations.[53] The Companies Bill and accompanying explanatory notes do not elaborate on how creditors may be treated but some guidance as to Government thinking may be found in the working paper on finance for CICs which accompanied Enterprise for Communities. Paragraph 9 of the working paper confirms the simple company law position which is that creditors of a CIC will have exactly the same rights as those of any other company. It is also stated that any residual assets remaining after payment of creditors will be safeguarded by the Regulator, carrying out a similar role to that undertaken by the Charities Commission in the winding up of charities. What remains unclear is what is likely to be the effect of any regulations of the type anticipated by clause 28 of the Companies Bill. The potential breadth of any such regulations is significant and the clause confirms that the regulations "(. . . may, in particular, amend or modify the operation of any enactment or instrument)." This wording would afford the possibility of a distribution mechanism which might differ from the conventional statutory distribution models recognised in respect of other companies in the United Kingdom. This proposal has within it a level of uncertainty which will be unwelcome to potential investors in and creditors of a CIC and will represent yet another factor which will be of significance in any assessment as to whether or not to become financially associated with a CIC.

In the consultation process the DTI also canvassed opinion as to whether CICs should be able to issue shares on which an uncapped dividend might be paid. The conclusion stated in Enterprise for Communities was that despite the possible attractiveness of this mechanism in opening up a wider range of finances "the use of real equity is contrary to the concept of the CIC profit and asset lock"[54] and that accordingly, CICs should not be able to issue shares that pay an uncapped dividend. The profit and asset lock is, therefore, at the very heart of proposals for the CIC. In the absence of availability of 'real equity' the capped equity which is proposed for CICs must be both sufficiently attractive to encourage external investors and adequately capped to secure ongoing financial needs of the CIC. Striking this balance will be a delicate task.

(d) Governance

The Companies Bill is largely silent on governance issues which were dealt with in some detail in Enterprise for Communities. Central to the original proposals was a desire that "all organisations should engage with their stakeholders for the long term health of their businesses."[55] The Government also anticipated that CICs would also "display a strong focus on stakeholder needs."[56] The fact that the Companies Bill makes no reference to these apparently key issues is a reflection of the strength of comment on the original proposals and the potential difficulties associated with the introduction of a stakeholder centred duty. The Government's intention to

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[53] Companies Bill, clause 28.
[54] Enterprise for Communities, para.31.
[55] Enterprise for Communities, para.33.
[56] Enterprise for Communities, para.34.

move away from the concept of stakeholder involvement was signalled in the Report. Citing the existence of "clear practical difficulties"[57] and "the lack of a consensus about the need for a statutory requirement"[58] [to seek the views of . . . stakeholders] the Government is now apparently of the belief that CICs' annual reporting obligation on engagement with stakeholders and guidance from the Regulator on engagement with stakeholders will achieve most of the requirements that could have been obtained by statutory means, but in a less burdensome regulatory and practical environment.

By moving away from the original proposals for a statutory mechanism obliging engagement with stakeholders, potential problems of inconsistency with company law are removed. CICs will be companies established under existing UK companies legislation and it is apparently intended that their "directors . . . will have the same rights and duties."[59] Retention of the proposed stakeholder engagement mechanism would have given rise to a number of difficult issues in respect of the interaction of existing directors' duties and the stakeholder mechanism. Directors at present owe their duties to the members of their companies[60] and even under the present proposals for a statutory statement of directors' duties[61] that position remains unchanged. A statutory engagement mechanism would have placed directors of CICs in a position where their duties as directors were clearly not the same as those owed by directors of non-CIC companies. Other difficulties would have arisen from a statutory engagement mechanism. There would have been a fundamental problem for directors in the identification of the stakeholders for their CIC. The proposed statement of directors' duties set out in the White Paper is accompanied by notes which elaborate on material factors and matters which directors must consider in the observance of their duties, and these include:

> "the company's need to foster its business relationships, including those with its employees and suppliers and the customers for its products or services".[62]

The original governance proposals in Enterprise for Communities did not elaborate on how stakeholders would be identified but did recognise that there could be difficulty in identifying such a group.[63] Given the likely diversity of activity of organisations which might seek CIC status the range of potential stakeholders would have been equally diverse with the associated concern that directors of CICs would have had considerable difficulty identifying this group with any level of certainty. Even if the process of identification had been achievable directors and stakeholders would still have been uncertain as to how the duty of engagement would be fulfilled and enforced. No guidance was given in the original proposals for the CIC as to how this would be addressed. A final potential difficulty

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57 The Report, para.9.12
58 The Report, para.9.12
59 Enterprise for Communities, para.15.
60 The leading authority remains *Percival* v *Wright* [1902] 2 Ch.421.
61 The White Paper, *Modernising Company Law* (2002) Cm.5553-I, (hereafter referred to as "The White Paper") which followed the DTI's Company Law Review favoured a statutory statement of directors' duties.
62 The White Paper, Clause 19 and Sch.2.
63 Enterprise for Communities, para.35.

would have occurred had disputes arisen between the interests of investors *qua* members of the company, to whom duties would clearly have been owed in accordance with existing company law, and other stakeholders owed some form duty under the proposed engagement principle. In the absence of statutory guidance directors would potentially have been faced with very difficult issues had such disputes arisen.

Stakeholders still appear to be significant in the mind of the Government in relation to CICs but do not figure in the proposals contained in the Companies Bill. Two issues arise as a result. Firstly, the decision not to proceed with the statutory concept highlights the difficulty of deeming an existing body of law to be applicable, *i.e.* company law, and then attempting to graft on to that body of law concepts which at best rest uneasily and at worst in complete contradiction with that existing body of law. Secondly, the question arises as to how effective governance of CICs can be in respect of their dealings with stakeholders if such a core principle is not to have the benefit of statutory regulation. On this issue The Report comments as follows:

> "Where a CIC does not make efforts to engage with its stakeholders, the community interest report will invite it to explain its reasons for not doing so. In effect, CICs will be encouraged either to comply with good practice in this area or to explain why they have not done so. The Government does not propose to introduce a legal requirement for CICs to give a detailed explanation in these reports of any decision not to follow good practice . . . where a CIC decides to do nothing to involve its stakeholders and to offer no explanation for this in its report, the public nature of this report means that this decision will be clearly apparent to the community the CIC serves."[64]

This approach to the governance of CICs and the interests of stakeholders is significantly weaker than that originally proposed. The principle of stakeholder engagement sits easily with the philosophy of community benefit which is so central to community interest companies. It may be the case that the revised approach to governance will operate effectively in the promotion of stakeholder interests but there are two issues to note. Firstly, it would remain open to directors of CICs to adopt what has in other contexts been referred to as a box-ticking[65] philosophy in respect of their engagement with stakeholders. A simple affirmation in the community interest report that engagement had taken place with stakeholders may be deemed by directors of a CIC to be sufficient evidence of their engagement. Secondly, reliance upon "the community the CIC serves"[66] is hardly a robust or obviously enforceable governance mechanism and it is not obvious what course of

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[64] The Report, para.9.13.

[65] For a good general discussion of the approach by Boards of Directors to compliance statement obligations see C.A. Belcher, "Regulation by the Market: The Case of the Cadbury Code and Compliance Statement", [1995] J.B.L 321-342.

[66] The Report, para.9.13.

action such a community might take were it to be unhappy with the actions of a CIC and its board.

The other significant governance proposal outlined in the original proposals for the CIC was some form of limitation on the power that might be exercised by investors over the control of CICs. Although the Companies Bill is again silent on this issue the Government's intention in this area is to limit investor voting rights to below twenty five per cent of the total, with scope for greater voting rights on matters which specifically affect the value of their shares.[67]

(e) Regulation

Central to the CIC is the role of the officer to be known as the Regulator of Community Interest Companies.[68] Recognising concerns expressed in the consultation process over the potential for burdensome regulation, the Companies Bill attempts to outline how the Regulator will discharge the functions to be exercised in respect of CICs. The philosophy appears to be based upon a light touch approach and in exercising regulatory functions the Regulator must have regard to:

> "(a) the likely impact on those who may be affected by the discharge of those functions,
>
> (b) the outcome of consultations with community interest companies and others with relevant experience, and
>
> (c) the desirability of using resources in the most efficient and economic way."[69]

The functions to be undertaken by the Regulator will include vetting that applicants for CIC status satisfy the community interest test,[70] reviewing and publishing community interest reports[71] and dealing with the disposal of residual assets of wound-up CIEs.[72] The Regulator will also have extensive powers to investigate CICs, to appoint and remove directors, to appoint a manager to run the affairs of a CIC and to vest property in an Official Property Holder.[73] Unfortunately, there is no guidance as to the identity of the Regulator. Given the CIC's proposed identity as a company there are strong arguments to the effect that the Regulator should be the Registrar of Companies. Conversely, now that Industrial and Provident Societies (which often operate and provide services similar to those anticipated in respect of CICs) are regulated by the Financial Services Authority it can be argued that CICs should also be regulated by the FSA. To use either existing body raises issues of significance. While the Registrar of Companies has historically exercised a wide range of regulatory powers in respect of companies it would be a significant move to afford the Registrar the range of investigatory powers which are proposed in respect of CICs. Using the FSA as the

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[67] The Report, para.10.9.
[68] Companies Bill, clause 24(1). Hereafter referred to as "the Regulator".
[69] Companies Bill, clause 24(4).
[70] Companies Bill, clause 33(4).
[71] Enterprise for Communities, para.41.
[72] Enterprise for Communities, para.41.
[73] Companies Bill, clause 39 to 45.

regulatory body would give rise to an altogether different concern that the regulatory approach it might adopt would not sit easily with the light touch approach which is anticipated in the Companies Bill.

In structural terms the approach adopted in the CIC regulatory model is in the broadest of terms similar to that used in respect of charities in England and Wales. Under that model the Charities Commission deals with, *inter alia*, recognition and registration[74] of charities and exercises an ongoing supervisory role with powers of investigation and management.[75] A fundamental issue relating to the adoption of such a regulatory model is whether the very existence of that regime will act as a disincentive to adopt the form. There is no directly parallel financial gain associated with CIC status such as the tax relief associated with charitable status, yet a regulatory regime is proposed which in many respects parallels the charitable regime (albeit with what is intended to be a light touch). Whether the existence of the regulatory regime proposed for CICs will be seen as reassuringly attractive to potential investors and a price worth paying for those adopting the form or an unnecessary and heavy handed burden remains to be seen.

PROGRESS OR CONFUSION?

The LLP has been the subject of criticism on the basis of an absence of clarity and certainty. The absence of clarity relates to the very rationale for the LLP and the form adopted and the absence of certainty relates primarily to the potential impact on creditors of hybrid mechanisms and provisions based on new and existing legal structures. The CIC can also be assessed by reference to measures of clarity and certainty.

Clarity

The proposals for the CIC differ fundamentally from those which led to the introduction of the LLP in that they do not have their origin in a campaign by an interest group which has identified the need for a remedy for a perceived wrong. Proposals for a CIC have not been at the very top of the agenda of groups campaigning for reform in the broader not-for-profit sector. The CIC has emerged from the present Government's proposals for reform and change in the charitable and not-for-profit sectors. The proposals for a CIC are largely uncontroversial and are not intended to remedy any form of glaring wrong in existing legal provision. It also seems unlikely at present that the CIC will become a legal form of major significance in terms of numerical take up.[76] It is a form designed for a very specific purpose.

The proposals for the introduction of a CIC have been broadly welcomed[77] and there are positive elements which may be contrasted with the LLP.

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[74] Charities Act 1993, s.3.

[75] Charities Act 1993, Parts III and IV.

[76] The Regulatory Impact Analysis ("RIA") which accompanied the Bill (DTI, URN 03/1606, December 2003) suggests that that ". . . our working assumption is that initially there may be between 100 and 300 new CICs registering each year (RIA. Paragraph 4.7 at page 92).

[77] A total of 122 responses were received in respect of the first proposal in Enterprise for Communities, which was the intention to legislate for CICs when

While the decision to adopt an existing corporate form may be prudent the reasoning for the adoption of the company is superficial and none of the elements of the consultation process have involved what could be considered as an in-depth evaluation of alternative structures.[78] Nonetheless, the outcome does have the benefit of adopting a form which is generally well understood and, predominantly in the form of the company limited by guarantee, already extensively used in the not-for-profit sector. The twin aims of securing limited liability for those involved in promoting and running the organisation and locking in finance to the objectives of the organisation are arguably achieved by the CIC. While the regulatory regime associated with CICs will initially be new and unfamiliar, clarity will exist in the form of existing rules and principles of company law. What may be less clear for those contemplating which form of organisation to adopt for their non-for-profit activity is whether the CIC is the ideal form. There are issues here which are remarkably similar to those which arose in respect of the LLP which was introduced at a time when reviews of both partnership and company law were being undertaken. The CIC is being introduced at a time when considerable change is underway or in contemplation in respect of much of the not-for-profit sector. The regulation of industrial and provident societies is being modernised[79] and bills are being prepared which will contain proposals for significant reform and change for charities.[80] It is in respect of the overlap with charitable organisations where clarity becomes particularly significant. Central to the proposals for CIC is the concept of community benefit and the test to be administered by the Regulator. While it has been indicated that the test will be wider in application than the existing charitable public benefit test that test will almost inevitably be the subject of attention in the anticipated changes in charity law. If there is change in the overall definition of charity, with possible change in the existing public test this may have a consequential effect on how the Regulator interprets the community benefit test. The provisions in the Companies Bill also give rise to issues in respect of the overlap. Clause 23(3) specifies that "A community interest company established for charitable purposes. . . is to be treated as not being a charity". While the intention behind this proposal may be to improve certainty and remove confusion in the mind of the public as to the nature of a CIC in fact the overall effect may lead to even greater confusion.[81] There

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Parliamentary time permitted. 77% of those proposals were deemed to be in support of the proposals, 9% against and 14% neutral (The Report, page 5).

[78] Enterprise for Communities spends only four pages (pp.10-14) considering alternative structures and making the case for the use of a company.

[79] The first stage of the modernisation process is The Industrial and Provident Societies Act, 2002. which states in the preamble to the Act that "An Act to enable the law relating to societies registered under the Industrial and Provident Societies Act 1965 to be amended so as to bring it into conformity with certain aspects of the law relating to companies . . ."

[80] For an indication of the likely proposals to be contained in any Bills which may be promulgated this year see Private Action, Public Benefit, n.3 *supra* and in Scotland as referred to at n.46, *supra*.

[81] During the debate on the second reading of the Companies Bill Lord Phillips of Sudbury commented that ". . . we will then have the bizarre state of affairs whereby the type of company most distant from that which the public conceives of as a "charity"– namely, a typical company limited by shares, which is the standard

exists the possibility that a body, with entirely charitable purposes by having opted to register as a CIC, may not be charity. There is no obvious justification for this clause and it must be uncertain how it will be construed and applied, particularly in respect of tax law. It is unclear for tax purposes how a CIC is to be treated when it has exclusively charitable purposes. In the absence of any convincing arguments for the restriction proposed in clause 23(3) it would be more appropriate to permit CICs to be charities where their constitutions are appropriately drafted to take account of matters such as asset distribution. If clause 23(3) is retained two further issues arise. Firstly, and particularly in respect of those contemplating the creation of a new organisation as opposed to those contemplating a change in legal form, there will need to be clear guidance both from the Registrar and the regulators of charities as to the respective merits and regulatory regimes in both areas when the purposes of the anticipated organisation are charitable. While the CIC may be attractive in being the only form available for what appears to be a community interest project, limited liability can also be obtained through the use of a company limited by guarantee for an organisation which is recognised as a charity. Promoters of an organisation with clearly charitable purposes will still be faced with the potentially confusing and difficult task of deciding whether to pursue community interest or charitable status. The second issue relates to public perception. If an organisation has purposes which are clearly charitable but it is in fact a CIC, it is not clear that members of the public or third parties dealing with such an organisation will in fact draw or indeed be readily able to draw a distinction between community status and charitable status. It is unclear what accidental and unanticipated consequences this may have for CICs with charitable purposes which may in fact be perceived to be and treated as if they were charities. The position may become even less clear if any amended definition of charity and charitable status which flows from the charity law reform proposals in contemplation, places more reliance on language which emphasises public benefit.

Certainty

Criticisms of the LLP in respect of certainty were largely focussed on the impact on creditors and the willingness of lenders to lend on terms no less favourable to those made available to other organisational forms. Much of the uncertainty identified arose as a result of the application of a mixture of rules and principles from partnerships and company law. The CIC will not suffer from this difficulty. It will not be an entirely new legal form in the unique sense of the LLP. Existing rules of company law will apply to the CIC. There are, however, questions as to how relevant and applicable certain of those existing rules may be in respect of CICs. The applicability of section 214 of the Insolvency Act 1986 is an example. It is questionable whether this section should apply in respect of CICs. A combination of the proposed asset lock and scrutiny by the Regulator arguably provides a level of protection to investors which does not require the additional support of the

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vehicle for a private benefit business – will continue to be permissible as a vehicle for a charity, while a CIC – expressly a community interest company with controls on the distribution of its assets – cannot be used as a vehicle for a charity. That is extremely confusing." Hansard, Col 277, 8th January 2004.

contribution mechanism contained in section 214. Generally, however, it appears that the decision to recognise the CIC as a company subject to existing company law means that it is less likely that the CIC will encounter difficulties arising from the interaction of differing legislative and common law regimes such as those which have been identified in relation to the LLP. It remains in the area of overlap with charities where substantial confusion and uncertainty certainty is likely to arise.

CONCLUSION

The proposed creation of the CIC is entirely consistent with the DTI's broad aim of providing ready access to corporate form and the protective nature of limited liability status. The CIC also appears to provide a vehicle which will protect investment made for a clearly community based purpose. Unfortunately, the proposals also give rise to fundamental difficulties which may adversely impact on the attractiveness of the CIC and give rise to even greater confusion for those faced with choosing from an even broader range of legal forms for their chosen activity than has hitherto existed. Lessons have not been learned from the process which led to the creation of the LLP. Uncertainty for creditors of an LLP has been identified as a consequence of that process. For those seeking limited liability status, particularly those with charitable purposes, the CIC will be another option but the process of identifying which form to adopt will be more complex than ever. The issue of uncertainty in respect of which the LLP has been the subject of considerable criticism is also evident in respect the CIC. On this occasion the focus of the uncertainty is not directly related to creditors of the organisation and the potential impact of a potentially confused hybrid legal regime, but in respect of those who are faced with the even more fundamental decision as to which legal form to adopt. With the likelihood of yet further choice to follow in the legal forms available to the broader not-for-profit sector, the need for clear guidance and support for those seeking to make an informed and appropriate choice will never have been greater. The present proposals for the CIC may very well be suited to the needs of a small group of organisations who are clear in their focus and direction. For organisations which may already have objects and purposes which are 'charitable' even although they may not be registered or recognised charities, the proposed construction of the CIC may not be an attractive route to limited liability.

THE PROVISION OF INFORMATION NECESSARY TO DETERMINE CLAIMS TO SOCIAL SECURITY BENEFITS – *KERR* v *DEPARTMENT OF SOCIAL DEVELOPMENT FOR NORTHERN IRELAND*

Dr Kenneth Mullan, Full-Time Chairman, Appeal Tribunals, Northern Ireland*

BACKGROUND

Kerr began before an appeal tribunal with the relatively narrow issue of the knowledge of a claimant to a social fund funeral payment of the benefit status of other close relatives of the deceased. By the time the case had passed through the hands of the Social Security Commissioner,[1] and the Northern Ireland Court of Appeal,[2] the issue had widened to become the question of where the burden of proof lay in establishing whether a close relative of a deceased person is in receipt of a qualifying benefit, or has capital exceeding the relevant amount, for the purposes of Regulation 6(6) of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987.[3] Further the NI Court of Appeal also considered the application of Regulation 7 of the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987,[4] and the duty to furnish 'such certificates, documents information and evidence in connection with the claim, or any question arising out of it, as may be required by the Department'. In arriving at its conclusions on this issue, the Court rejected the long-standing decision of Commissioner Mesher in *R(IS) 4/93*.[5]

Now, after consideration by the House of Lords,[6] the subject-matter has broadened even further to a consideration of the role and function of social security adjudication. This general but comprehensive analysis confirms that the adjudication process in respect of social security benefits is inquisitorial rather than adversarial. While that proposal had always been accepted in respect of the role and function of the appeal tribunal, as part of the adjudication process, the reasoning of the House of Lords is innovative in re-emphasising the applicability of the principle to other adjudication levels, more particularly first-tier adjudication. What is being submitted is that the process by which information necessary to determine claims to social

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* The author is writing in a private capacity.

1 *C1/00-01(SF)*, available at <www.dsdni.gov.uk/benefitlaw/benefitlaw.asp>.

2 (2002) NICA 31, available at <www.courtsni.gov.uk>. See the analysis by this author at (2003) 54 *NILQ* No.4, p.430.

3 Equivalent in every detail to the Social Fund (Maternity and Funeral Expenses) (General) Regulations 1987 for Great Britain.

4 Equivalent in every detail to the Social Security (Claims and Payments) Regulations 1987 for Great Britain.

5 Available at <www.osscsc.gov.uk/pages/des.htm>.

6 [2004] UKHL 23, available at <www.publications.parliament.uk/pa/ld200304/ldjudgment/jd040506/kerr-1.htm>.

security benefits is collated and managed, involves co-operation between the claimant and the Department.

In the longer term, the reasoning of the House of Lords in *Kerr* will have implications across the whole process of social security adjudication. In the shorter term, it will also have a significant influence on the submissions made to the House of Lords, and the eventual decision of that court, in the appeal[7] from the Court of Appeal in *Hinchy* v *Secretary of State for Work & Pensions.*[8] That case analysed the roles and responsibilities of the recipients of social security benefits, and the Department, with respect to the duty to disclose information likely to affect entitlement to such benefits.

Proceedings before the Chief Social Security Commissioner and the Northern Ireland Court of Appeal

Mr Hugh Kerr died on 19th July 1999. His funeral took place on 27th July 1999 at a cost of £1,172.58. An application for a Social Fund Funeral Payment was made to the Department for Social Development (the NI equivalent of the DWP) by a surviving brother of the deceased, Mr Thomas Frank Kerr. His application was refused (on the basis of a factual error, as it turned out) and he appealed to an appeal tribunal. At the date of the death of the deceased he had another brother and a sister living.

The appeal tribunal found, as a fact, that the appellant and his siblings had drifted apart, and had lost contact, and that the appellant simply did not know whether any of them was in receipt of a qualifying benefit. The appeal tribunal concluded that, while it was reasonable for the appellant to accept responsibility for the funeral expenses, it simply was not known whether any of the close relatives of the deceased was in receipt of a relevant benefit, and the same applied to their capital position. The tribunal concluded that the onus was on the appellant to show that his brother or sister was in receipt of a relevant benefit and did not have capital over the prescribed amount. As he was unable to prove those things, the consequence was that his claim failed.

On appeal before the Chief Social Security Commissioner for NI, and on the issue of the burden of proof, the Chief Commissioner followed a decision of Mr Commissioner Henty in *CIS/5321/98,*[9] particularly paragraph 7, and held that a claimant has to prove the basic qualifications to a social security benefit, by proving the circumstances that make him or her entitled, whilst the Department normally had to prove any exceptions such as those matters set out in Regulation 6(3) (of the Social Fund (Maternity and Funeral Expenses) (General) Regulations 1987).

The Chief Commissioner concluded that once the Tribunal had found all the siblings were in equally close contact then the question turned to finances and the burden of proof. It seemed to the Chief Commissioner that a burden might be on the Department if there was sufficient evidence to enable the Department to make relevant enquiries. It was clear, however, that any claimant must to the best of his or her ability give such information to the

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[7] The appeal is likely to be heard early in 2005.

[8] [2003] EWCA Civ 138, available at <www.bailii.org/cgi-bin/markup.cgi?doc =/ew/cases/EWCA/Civ/2003/138.html>.

[9] Available at <www.osscsc.gov.uk/pages/des.htm>.

Department as he reasonably can. Siblings were, on balance, expected to have some knowledge of each other and must be expected to provide basic information to the Department or at the very least show that they have taken all reasonable steps to obtain such information.

The Commissioner also swiftly rejected the argument that contact with the deceased could include contact after death, holding that the contact required by the legislation must be contact during the lifetime of the deceased, though the taking of responsibility for a funeral can be supportive evidence of the quality and nature of a relationship during his life.

In the Northern Ireland Court of Appeal, the majority thought that, as the legislature had not expressly specified on which party the burden of proof lay, it was necessary to attempt to ascertain that by implication or by the application of any relevant rules of construction or presumptions. Applying the principles that 'exceptions are to be set up by those who rely on them',[10] and that where a matter requiring proof is particularly within the knowledge of one party and it would be unduly onerous for the other to have to prove it, the burden lies on the former, the majority thought that that it was the intention of the legislature that the burden of proof of establishing that the exception contained in Regulation 6(6) applies should rest upon the Department.

The majority also thought that if Commissioner Mesher, in *R (IS) 4/93,* had intended to hold that failure to comply with the statutory obligation to furnish evidence has no effect other than to leave the claim short of the necessary evidential foundation, they could not find it possible to agree with that conclusion, which would make the provision of (the equivalent of) Regulation 7 of the Social Security (Claims and Payments) Regulations 1987 otiose. Rather, it seemed to the majority that it was intended to impose an obligation on the claimant fulfilment of which is a condition of entitlement to claim benefit and that failure to comply with the statutory requirement entitled the Department to withhold payment on his claim.

Accordingly, the majority held that the appeal tribunal and the Commissioner were in error in imposing the burden on the appellant of proving that the case did not come within the exception contained in Regulation 6(6) of the 1987 Regulations.

The minority dissented on the important issue of the burden of proof. As the procedure for deciding a claim is an administrative one, rather than judicial, the provision could not be construed in such a way as to suggest that Parliament intended that any onus lay upon the Department under Section 1(1) of the Social Security Administration (Northern Ireland) Act 1992 to establish satisfaction of any of the conditions relating to entitlement to benefit or to negative the existence of disqualifying conditions. Further, the minority thought that it is quite impracticable for the Department to prove many of the matters, which, if established, effectively disqualify a claim, and that Regulation 7(1) of the Social Security Claims and Payment Regulations 1987 was incompatible with an intention on the part of Parliament that the

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[10] Described by Lord Wilberforce in *Nimmo* v *Alexander Cowan & Sons Ltd,* [1968] A.C. 107 at 130.

Department should be required to establish facts independently of the applicant for benefit.

The House of Lords

The main speech in the House of Lords was delivered by Baroness Hale of Richmond. All other four members of the Appellate Committee were in agreement with Baroness Hale's substantive reasons for dismissing the appeal of the Department of Social Development. Accordingly, this note will concentrate on her analysis. In addition, however, Lord Hope of Craighead and Lord Scott of Foscote undertook an examination of other aspects of the issues, as they arose in the Northern Ireland Court of Appeal, and disagreed on them. These additional considerations will also be explored below.

Baroness Hale began by undertaking a detailed analysis of the evolution of the legislative provisions for entitlement to a Social Fund funeral payment. That analysis included an examination of the significant amendments to the rules, which were made in 1994,[11] and further refined in 1997,[12] in order to ensure that the person who had accepted responsibility for funeral costs was so closely connected with the deceased that it was reasonable for that person, rather than a more closely connected family member, to do so.[13]

The judge then considered the submissions of the parties. For the Department, counsel had argued that a claimant had to prove all of the conditions of entitlement to a benefit. The conditions set out in Regulation 6(6) were still conditions of entitlement rather than exceptions, and the claimant must provide the material to establish them. Granting entitlement to the benefit without this basic information would be open to abuse. Counsel for the Department did concede, however, that the administration of the social security benefits system is an inquisitorial rather than an adversarial process in which strict notions of the burden of proof might be inappropriate.

For the claimant, counsel argued that the reasoning of the majority of the Court of Appeal was correct, for the reasons which they had given. He, too, also submitted that the burden of proof had no function at all in the processing and determination of a claim for funeral expenses.[14] The

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[11] The Social Fund (Maternity and Funeral Expenses) (General) (Amendment) Regulations (Northern Ireland) 1994 (S.R. 1994/68). The equivalent for Great Britain were the Social Fund (Maternity and Funeral Expenses) (General) (Amendment) Regulations 1994 (S.I. 1994/527).

[12] The Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations (Northern Ireland) 1997 (S.R. 1997/155). The equivalent for Great Britain were the Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations 1997 (S.I. 1997/792).

[13] Baroness Hale comments that the original entitlement conditions were exploited by some claimants to ensure that responsibility for arranging the funeral was undertaken by someone in receipt of a qualifying award. This had led to a marked increase in the number of awards of funeral payments between 1988 and 1994.

[14] It is submitted that the concessions on the inquisitorial nature of the system of benefits' administration by counsel for the Department, and on the non-relevance of the burden of proof by counsel for the claimant, may have influenced Baroness Hale's eventual reasoning on the issues raised by the appeal.

Department had the mechanisms to discover facts necessary to determine the claim. Further, certain of those facts were peculiarly within the Department's own knowledge. If, after all proper enquiries are made, there is no evidence that the disqualifying conditions in Regulation 6(6) exist, then the claimant should succeed.

On the basis of this analysis, Baroness Hale identified two issues arising in the appeal:

> "(i) What sort of process is involved in the determination of a claim?
>
> (ii) What happens if, at the end of the process, relevant facts are simply not known?"

In relation to the first question, the judge began by conceding that the benefits system is necessarily enormously complex.[15] That intricacy was increasing in line with the policy objective of targeting benefits to those who needed them most. Such complexities were not for members of the public, however:

> "The general public cannot be expected to understand these complexities. Claimants should not be denied their entitlements because they do not understand them. It has been a consistent objective of social security administration over the years to devise user-friendly forms and procedures to enable the benefits agencies to discover whether or not a claimant is entitled to benefit."[16]

How should the process of claim determination work? It is for the claimant to start the process. Clearly, the relevant legislative provisions[17] provide that no claimant is entitled to a social security benefit, unless a claim is made in the appropriate manner, and require any claimant to furnish relevant certificates, documents, information and evidence in support of the claim. Thereafter, the duty is on the Decision Maker,[18] having received the relevant information from the claimant, to determine the claim. Further enquiries

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[15] This comment reflects a plethora of parallel observations by the appellate authorities over the years. Many examples could be quoted. Mr Justice Stanley Burnton in *Bell* v *Todd* ([2002] Lloyd's Rep Med 12) stated: "I should only like to add one comment. If there is one area of the law that should be clear and accessible it is social security law. As the arguments in this case showed, so far as the issues between the parties in this case are concerned, it is neither clear nor accessible."

[16] [2004] UKHL 23 at para 56.

[17] S.1(1) of the Social Security Administration (Northern Ireland) Act 1992 and the Social Security (Claims and Payments) Regulations (Northern Ireland) 1987. In Great Britain the equivalent are the Social Security Administration Act 1992, and the Social Security (Claims and Payments) Regulations 1987.

[18] Baroness Hale refers to an 'Adjudication Officer'. The Social Security (Northern Ireland) Order 1998 (Social Security Act 1998 in Great Britain) transferred the functions of Adjudication Officers to the Department (Secretary of State). The Department's duties with respect to decision-making are now delegated to Decision Makers.

may be made by the Decision Maker, if required.[19] Finally the decision of a Decision Maker may be appealed to an Appeal Tribunal.[20] The judge then referred to the sequence of litigation which had established the principle that the process of benefits adjudication is inquisitorial rather than adversarial. In particular, she makes reference to the judgement of Mr Justice Diplock, as he then was, in *R* v *Medical Appeal Tribunal (North Midland Region), Ex p Hubble.*[21]

Baroness Hale thought that what emerged from her analysis of the process of claim determination was:

> ". . . a co-operative process of investigation in which both the claimant and the department play their part. The department is the one which knows what questions it needs to ask and what information it needs to have in order to determine whether the conditions of entitlement have been met. The claimant is the one who generally speaking can and must supply that information. But where the information is available to the department rather than the claimant, then the department must take the necessary steps to enable it to be traced."[22]

The judge thought that such an approach was sensible, and, if taken, meant that it should rarely be necessary to resort to concepts taken from adversarial litigation such as the burden of proof.

Where do the duties lie in the Baroness Hale's 'sensible' process? She thought that the claimant was, naturally, under a duty to provide all of the information to the Department which he or she reasonably can. Relying on the comments of Commissioner Henty in *CIS/5321/1998,*[23] she agreed that adverse inferences could be drawn against a claimant who defaulted in the duty to provide relevant information. Similar considerations could also apply to the Department, however. If the Department fails to obtain information which it could reasonably be expected to discover for itself, then inferences could be drawn against the Department.

Applying those principles to the facts of the appeal, the judge found that the claimant, after initial mistakes made by the funeral undertakers who had completed the claim form to the Social Fund funeral payment, had collaborated fully with the Department and had given the Department all of the information which he had about his brother and sister. He had played his

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[19] Once again, Baroness Hale refers to the Social Security (Adjudication) Regulations (Northern Ireland) 1995 (S.R.1995/293) (Social Security (Adjudication) Regulations 1995 (S.I. 1995/1801) in Great Britain), in support of this conclusion. The 1995 Regulations have now been repealed and replaced with the Social Security and Child Support Decisions and Appeals (Northern Ireland) Regulations 1999 (S.R. 1999/162) (Social Security and Child Support (Decisions and Appeals) Regulations in Great Britain (S.I. 1999/991)).

[20] Baroness Hale refers to a 'Social Security Appeal Tribunal'. Social Security Appeal Tribunals were amalgamated with other type of appeal tribunal to become the 'Appeal Tribunal' under the reforms introduced by the Social Security (Northern Ireland) Order 1998, (Social Security Act 1998).

[21] [1958] 2 QB 228, at p.240.

[22] [2004] UKHL 23 at para 62.

[23] Available at <www.osscsc.gov.uk/pages/des.htm>.

part in the co-operative process. The Department had not, however. The information given to the Department by the claimant was not sufficient for the Department to determine whether the brother and sister were, or were not receiving qualifying benefits. The Department could, however, have easily obtained such information. Names, and dates of birth are sufficient to enable National Insurance numbers to be traced. In turn, National Insurance numbers provide the key to information about social security benefit entitlement. The Department did not play its part in the process, despite having the capability to do so. The consequences of such failure should lie with the Department.

As was noted above, Lord Hope of Craighead and Lord Scott of Foscote both agreed with Baroness Hale's substantive reasoning. Both judges, however, wished to add some comments on the meaning of the phrase 'close contact' within the context of Regulation 6 of the Social Fund (Maternity and Funeral Expenses) (General) Regulations (Northern Ireland) 1987, as amended. In the event, the judges were in disagreement.

Lord Scott was of the view that the reason why the appeal tribunal had found that it was reasonable for the claimant to accept responsibility for the expenses of his deceased brother's funeral, was that they were brothers, had grown up together, and that the claimant was the eldest of all of the siblings, not that the claimant and his deceased brother had been in close contact with each other. The judge could find no fault with that reasoning, holding that paragraph (5) of Regulation 6 did not require contact to be 'close' or 'recent' contact.

Comparison of contact was required by paragraph (6) of Regulation 6. Here, the appeal tribunal, the Social Security Commissioner, and the majority in the Northern Ireland Court of Appeal, had found that an equal amount of close contact can constitute equally close contact within the meaning of Regulation 6(6). Lord Scott could not agree with such a proposition finding that both a literal and purposive construction of the provision were inconsistent with it. The judge then gave details as to the manner in which the provision was to be tackled by adjudicating authorities.

Lord Hope disagreed with Lord Scott, finding that there was nothing in the Regulation that required that the relevant contact must have been current at, or immediately before, the date of the deceased's death. Accordingly, he concluded that there is no restriction as to the time of the relevant contact.

Commentary

This re-interpretation of the legislative provisions concerning entitlement to a Social Fund funeral payment, to the advantage of the claimant, will be welcomed. The constant restrictive amendments to the rules, described in detail, and in terms of policy objective, by Baroness Hale, have consistently been criticised by advisory groups, appellate authorities, and academic commentators.

The attempts to amend the rules concerning entitlement to a funeral payment have been subject to consistent comment and criticism by the Social Security Advisory Committee. Following earlier reports on the 1995[24] and 1997[25] amendments to the Regulations, the Committee decided to prepare a paper for submission to the Secretary of State. In its 14th Report,[26] the Committee criticised the current legislative provision on the grounds of complexity, inappropriateness, method, and disincentives provided. The specific 'closeness' provision is described as involving 'an investigation which – at the time of bereavement – is intrusive, undignified and simply impracticable'.[27] Although the reasoning in *Kerr* does not amount to the whole-scale reform sought by the SSAC, the requirement for the Department to have some role to play in the collation of required information, goes some way to meeting the censure of unseemly imposition at the time of grief.

Criticism of the current form of the legislation has come from elsewhere. In *CIS/3150/99,*[28] Commissioner Howell commented:

> "Not for the first time, I express my regret that I am required to interpret and apply the dispiriting set of means-testing regulations that now constitute the state provision for state benefit . . . which regulations themselves have been the subject of repeated and successive piecemeal amendment, mainly to the disadvantage of claimants, by amending instruments too numerous to mention here. The contrast between the simplicity, practicality and humanity of Lord Beveridge's original scheme for a universal insured death grant to pay for a decent burial . . . and the ignoble set of complex means-tested restrictions we have now simply could not be more stark. The proportionate cost of administering all this must be enormous, to say nothing of the cost in human terms to those subjected to it just at a time when any ordinary person of family is at their most vulnerable."[29]

The facts of *Kerr*, although not the most graphic, illustrate something of this vulnerability and human cost. Mr Kerr, having willingly accepted responsibility for the funeral costs of his deceased brother, whom he had not seen for twenty years, re-paid the funeral directors in full, 'albeit with great difficulty over a long period',[30] and had to go as far as the House of Lords to obtain his funeral payment entitlement. Commissioner Howell must welcome this minor victory for claimants.

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24 SSAC *Social Fund Maternity and Funeral Expenses (General) Amendment Regulations 1995* (1995, Cm 2858).

25 SSAC *Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations 1997* (1997, Cm 3585).

26 SSAC *Fourteenth Report* (2001), Annex D, available at <www.ssac.org.uk/ pubs.htm>.

27 *Ibid* at para 17.

28 Reported as *R(IS) 3/02*, and available at <www.osscsc.gov.uk/pages/des.htm>.

29 *Ibid* at para 2.

30 [2004] UKHL 23 at para 46.

Professor Nick Wikelely describes the 'immediate family test' in Regulation 6 as the 'zenith of tortuous legislative complexity in the social fund'.[31] He also recognises the potential for the application of the relevant provisions to involve 'highly intrusive questioning', and reflecting the criticisms of the SSAC that they represent 'a narrow and inflexible view of family responsibilities'.[32]

The greater significance of the decision in *Kerr* lies in the more general application of the reasoning across the adjudication system for all social security benefits, not just the Social Fund.[33] Baroness Hale did not impose any single benefit restriction on her reasoning. As was noted above, she was prepared to describe all aspects of the process of benefits adjudication as inquisitorial. That the appeal tribunal, as the second-tier of the adjudication system, has been categorised as inquisitorial, or 'enabling', in its functions has never been without doubt. Indeed, a Tribunal of Commissioners in Great Britain has recently re-emphasised the appeal tribunal's philosophy.[34] While the case-law cited by Baroness Hale supports the inquisitorial philosophy which she advocates, it is some time since it was applied to first-tier adjudication by Decision Makers. Rather, this is the first opportunity, since the administrative reforms introduced in 1998,[35] for the re-application of the role formerly applied to Adjudication Officers to the duties and functions of Decision Makers. This is to be welcomed, for two reasons.

Firstly, the emphasis on an enabling role for the Appeal Tribunal, as the second-tier level of social security adjudication, has not been unproblematic. The decision of the Tribunal of Commissioners in *CIB/4751/2002 et al,*[36] confirmed that an Appeal Tribunal has the power to remedy defects in the first-tier decision-making process. That conclusion led to a submission that the new power might encourage poor- decision-making within the Department, with the possibility that Decision Makers might become careless in the identification of the proper method of altering a decision, in the knowledge that any defects may be remedied by the appeal tribunal.[37] There has also been a concern that the Appeal Tribunal, on the face of it strictly independent of the Department, might come to be seen to doing the Department's job for it, where it takes the enabling philosophy too far. This might be evident in the many appeals where no representative of the

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31 N. Wikeley, *Wikeley, Ogus & Barendt's The Law of Social Security*, (5th ed, 2003, Butterworths) at p.490.

32 SSAC *Social Security (Social Fund and Claims and Payments) (Miscellaneous Amendments) Regulations 1997* (1997, Cm 3585) at para 46.

33 The relevance of the decision in *Kerr* for the determination of claims to Housing Benefit and Council Tax Benefit is seen by the inclusion of a detailed analysis of the decision in the latest *Supplement* to the annotated legislation related to those benefits. See Wright S *Housing Benefit and Council Tax Benefit Legislation 2003/2004 – Supplement* (2004 CPAG) at iv and 2-3.

34 In *CIS/1459/2003* available at <www.osscsc.gov.uk/pages/des.htm> at paragraph 26. See also the comments of the Tribunal of Commissioners in *CIB/4751/2002* at para 32.

35 The Social Security (Northern Ireland) Order 1998 and the Social Security Act 1998.

36 Available at <www.osscsc.gov.uk/pages/des.htm>.

37 See K. Mullan, '*Supersession – The One True Interpretation?*' 2004 3 *JSSL* 148 at pp.154-155.

Department are present, and the Appeal Tribunal finds it incumbent to put the Department's submissions, points and evidential base to the appellant.[38] The danger in such a case is that the reality of independence is lost. In such circumstances, the re-emphasis of an inquisitorial role for first-tier adjudicators by Baroness Hale is to be welcomed, and may take some of the inquisitorial glare off Appeal Tribunals.

Secondly, an inquisitorial role carries with it duties and responsibilities for those involved in first-tier adjudication. Decision Makers are under a duty to fully explore entitlements, or changes to entitlements, and to identify the evidence necessary to make decisions on initial claims or on alterations to existing entitlements. The decision in *Kerr* outlines the extent of the duty imposed on Decision Makers with respect to the provision of information necessary to determine claims. The Department knows which questions need to be asked, and what information needs to be collated in order to determine whether the conditions of entitlement have been met. While the claimant is under a duty to supply information available to him/her, where the information is alternatively available to the Department, then the Department is under a duty to take the necessary steps to enable it to be traced.[39]

It has been the experience of appeal tribunals, (through the exercise monitoring the correctness of decisions of decision makers, and the President's report, on the standards achieved by the Secretary of State in the making of decisions[40]) that many decisions are incorrectly made due to insufficient facts/evidence due to inadequate investigation of the claim or other faults in eliciting evidence or in relevant fact-finding. That experience has been confirmed by the House of Commons Select Committee on Public Accounts. In its 12th Report *'Getting it Right, Putting it Right: Improving Decision Making and Appeals in Social Security Benefits'*,[41] the Select Committee found that some 20% of benefit decisions contained errors.

The decision in *Kerr* now makes it clear that there are consequences for a failure to elicit information relevant to the determination of a claim to a social security benefit. The Department can no longer use its own failure to ask questions, or to use its own superior facilities to obtain information relevant to the claim, to disallow entitlement. That is not to say that this new duty for the Department in any way abrogates a parallel duty on the claimant. The co-operative process requires the claimant to play his or her part. What

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[38] In *CIS/1459/2003*, the Tribunal of Commissioners thought that the inquisitorial nature of the appeal tribunal involved an obligation, in the absence of a Presenting Officer, to put the Department's case to the claimant. The Tribunal further concluded that this duty does not affect the independence or impartiality of the appeal tribunal. That conclusion, with the utmost respect to the Commissioners, must be open to debate.

[39] [2004] UKHL 23 at para 62 per Baroness Hale.

[40] Para 10 of Sch 1 to the Social Security Act 1998, and the Social Security (Northern Ireland) Order 1998.

[41] House of Commons Select Committee on Public Accounts 'Getting it Right, Putting it Right: Improving Decision Making and Appeals in Social Security' (HC 406) available at <www.parliament.uk/parliamentary-committees/committee-of-public-accounts/>. See also the comments of the Commissioner in *C34/02-03(IB)* at para 13.

is clear, however, is that where the claimant does co-operate but the Department fails to act, the consequences will be adverse to the Department.

Baroness Hale made significant comments about the question of the burden of proof in social security adjudication. She exhorts all of those involved in the adjudication process to avoid recourse to a concept more relevant to the adversarial process of litigation.[42] Where does this leave the important legal principle of the burden of proof in relation to social security adjudication? Has it been swept away?

The place of the rules of evidence in appeal tribunal proceedings, and the inevitable tension between the informality of the inquisitorial role and the convention of the rules of evidence, have been discussed in depth by a number of commentators.[43] Commissioner Mesher[44] thought that the formal rules of evidence, particularly the burden of proof, was problematic in a number of areas of social security adjudication. Firstly, the claimant may be able to take advantage of a number of express statutory presumptions. Secondly, where there are exceptions from the basic conditions of entitlement to a social security benefit, it was for those who asserted that any exception should apply, invariably the Department, to prove that they do. Thirdly, where the legislative provisions left adjudicating authorities with a discretion which has to be exercised judicially, the application of the burden of proof might be difficult. Fourthly, it had always been accepted that once a decision had been made that a social security benefit should be awarded for a particular period, the onus of proving that such a decision should be reversed had always been on the Department.[45] Finally, the Commissioner thought that there were some practical difficulties in applying the standard of the balance of probabilities in an inquisitorial jurisdiction.[46]

Two further aspects of Commissioner Mesher's analysis are worth noting. Firstly, he addresses the issue as to how the former Adjudication Officers approached the question of the burden of proof in determining claims to social security benefits. He thought that there was authority for the proposition that there might have been a duty on the Adjudication Officer to assist the claimant in collecting and presenting relevant evidence. Secondly, he was of the view that the main area of difficulty lay in drawing lines in particular cases between the elements of entitlement which are for the claimant to prove, and exceptions or disqualifications which are for the Adjudication Officer to prove. The Commissioner thought that there was no authority for the general proposition that where there are exceptions from basic entitlement, it is for those who assert that the exceptions apply to prove

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[42] Clearly, these comments reinforce her conclusion that the entire process of social security adjudication is inquisitorial.

[43] See, for example, C. Yates, *Supplementary Benefit Appeals and the Rules if Evidence* , Logie & Watchman, *Social Security Appeal Tribunals: An Excursus on Evidential Issues* (1989) 8 C.J.J. 109.

[44] Writing in a private capacity, 'Social Security Law' in A.K.R. Kiralfy (ed.) *The Burden of Proof* (1987, Professional Books) 211.

[45] Commissioner Mesher cites the well-known case of *R(I) 1/71* in support of this proposition.

[46] That the standard of 'balance of probabilities' is the applicable standard in social security adjudication has been confirmed on numerous occasions. See *R(I) 32/61*, for example.

that they do. There is now. In *Kerr*, Lord Hope clearly states that 'it is a general rule that he who takes advantage of an exception must bring himself within the provisions of the exception'.[47]

Professor Rowe has also tackled the issue of the relationship between the burden of proof and the inquisitorial role of the adjudicating authorities.[48] He concludes that the laws of evidence are an invaluable guide to accurate fact-finding, and to exclude them altogether would be a fruitless exercise. He concedes that the presumption of legitimacy might be developed into a declaration that, apart from the rules of inadmissibility, all of the rules of evidence, applicable in civil cases, should apply to social security adjudication, particularly at the second-tier.

Can a compromise on the issue be reached? It is submitted that the solution lies in Baroness Hale's qualifying words that it will 'rarely' be necessary to resort to concepts such as the burden of proof. This clearly confirms that the burden of proof retains a relevance for adjudicators but should not be the routine determinative factor for such adjudication. This reflects earlier guidance to the judiciary[49] on the place of the formal rules of evidence which exhorted those charged with the assessment of evidence to adopt a systematic approach to the task. It is important that the issue is rarely admissiability of evidence but its relevance. The accurate weighing and assessing of admitted evidence is usually sufficient for the determination of the issues in dispute. It is only when there is a significant conflict in evidence that more formal principles such as the application of the standard, and, eventually, the burden of proof, should be considered.

The decision of the House of Lords in *Kerr* will have significant implications for the future direction of another case waiting to be heard by the court, *Hinchy* v *Secretary of State for Work & Pensions.*[50] In *Hinchy*, the Court of Appeal of England and Wales was concerned with the issue of the duty imposed on a recipient to a social security benefit to disclose information which could affect entitlement to that benefit, and which might lead to a sum of benefit being overpaid, for the purposes of Section 71 of the Social Security Administration Act 1992.[51] The court decided that there could be no failure to disclose in circumstances where the information was already known to the Department, albeit in a different branch of the Department.

Hinchy confirms that where the Department has actual knowledge or information which is relevant to an entitlement to a social security benefit, it is under a duty to act on that knowledge or information. Further, in such circumstances, the claimant's existing duty to disclose is abrogated. Failure to act on the relevant knowledge or information cannot be laid at the door of the recipient to a social security benefit. Rather the consequences of a failure to act should lie with the Department who cannot recover resultant overpaid social security benefit. The House of Lords in *Kerr* employs similar

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[47] [2004] UKHL 23 at para 16, relying on *Nimmo* v *Alexander Cowan & Sons Ltd* [1968] A.C. 107.

[48] *'The Strict Rules of Evidence in Tribunals: Rhetoric* v *Reality'* (1994) 1 J.S.S.L. 9.

[49] See K. Mullan and A. Wilton '*Weighing the Evidence*' (2002) Tribunals 2.

[50] [2003] EWCA Civ 138.

[51] The Social Security Administration (Northern Ireland) Act 1992 in Northern Ireland.

reasoning. The Department is a under a duty to act on existing knowledge or information, and where it fails to do so, the adverse consequences of the failure should lie with the Department rather than with the claimant to benefit.

The appeal by the Department in *Hinchy* is due to be heard early in 2005. Given the House of Lords thinking in *Kerr*, it is submitted that it is difficult to see how the House could over-turn the decision of the Court of Appeal. There might be one further line of argument. In *Kerr*, it was accepted that the claimant had co-operated fully in the information-gathering process, necessary for the determination of his claim, and that, having done so, the onus switched to the Department. In overpayment cases, such as *Hinchy*, it is often the case that the recipient of benefit does not co-operate in the process. Indeed, the recipient may intentionally refrain from disclosing information in order to retain existing entitlement. Will such a claimant's duty to disclose be abrogated, on the Court of Appeal's reasoning, by the Department's failure to act on its existing information or knowledge? That argument, although not strong, might support the confining of the decision in *Kerr* to its own facts.

The comments of Baroness Hale concerning the enormous complexity of the social security benefits system are entirely appropriate. The volumes of annotations to social security legislation now run to four volumes,[52] with a fifth likely to appear soon. This legislation is supplemented by various user-friendly guides,[53] associated web-sites,[54] official manuals,[55] academic textbooks[56] and journals.[57] Appeal tribunals, involving hundreds of members,[58] apply this law to tens of thousands of appeals per annum[59], which, in turn lead to numerous appeals before the Social Security Commissioners, and other appellate authorities. Despite this complexity, there is strong evidence to suggest that appeal tribunals, as the second-tier of adjudication, perform a very good job.[60]

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52 *Social Security Legislation 2003 – Volumes I-IV* (2003 Sweet & Maxwell).

53 The best of which is undoubtedly the Child Poverty Action Group's *Welfare Benefits and Tax Credits Handbook 2004/2005* (2004 CPAG).

54 Of which the best is <www.rightsnet.org.uk>.

55 See the wealth of Departmental guidance available at <www.dsdni.gov.uk/benefit law/benefitlaw.asp> and <www.dwp.gov.uk/resourcecentre>.

56 The most comprehensive text is N. Wikeley, *Wikeley, Ogus & Barendt's The Law of Social Security*, (5th ed, 2003, Butterworths).

57 *The Journal of Social Security Law* and *The Journal of Social Welfare & Family Law*, for example.

58 In Great Britain there are over 2000 part-time judicial members appointed to determine social security appeals. See *The Appeals Service: Annual Report and Accounts 2003-2004* available at <www.appeals-service.gov.uk>. The figure for Northern Ireland is approximately 250.

59 In Great Britain there are approximately 250,000 social security appeals per annum. See *The Appeals Service: Annual Report and Accounts 2003-2004* available at <www.appeals-service.gov.uk>. The figure for Northern Ireland is approximately 23,000.

60 See *Transforming Public Services: Complaints, Redress and Tribunals* (2004, Cm 6243), Chap. 5.

Finally, it might be argued that the reasoning in *Kerr* should be restricted to its own particular facts, given that the entitlement at issue was to a Social Fund funeral payment. It might be submitted that the rules relevant to adjudication on Social Fund payments should not have a universal application to all social security benefits. Such a submission can be easily dismissed. The functions of the former Social Fund Officers were transferred to the Department,[61] under the provisions of Article 3 of the Social Security (Northern Ireland) Order 1998,[62] and it is now for the Department to decide any claim for a Social Fund payment.[63] Appeals from such decisions lie to the Appeal Tribunal[64], and onwards to the Social Security Commissioners.[65]

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[61] Dept of Social Development in Northern Ireland, the Dept for Work & Pensions in Great Britain.

[62] S.1 of the Social Security Act 1998 in Great Britain.

[63] Art. 9(1)(b) of the Social Security (Northern Ireland) Order 1998. S.8(1)(b) of the Social Security Act 1998 in Great Britain

[64] Art.13 of the Social Security (Northern Ireland) Order 1998. S.12 of the Social Security Act 1998 in Great Britain

[65] Art.15 of the Social Security (Northern Ireland) Order 1998. S.14 of the Social Security Act 1998 in Great Britain

BOOK REVIEW

THE ENFORCEMENT OF JUDGMENTS IN NORTHERN IRELAND, David Capper, (2004) SLS Legal Publications (NI) ISBN 0 85389 865 0; 253 + xlv pp, £60.00 (Hardback)

This monograph, whose subject-matter is clearly flagged by the chosen title, deals with a largely forgotten area of civil justice. The focus of interest of lawyers and policymakers always tends to be upon the issue of substantive rights and also these days to an increasing extent on the grant of remedies by the court. Unfortunately, limited attention is lavished on what happens next, once the dispositive order of the court has been handed down, yet, as any civil litigant will attest, this can often be the most frustrating part of the process of seeking civil justice. Capper neatly fills that *lacuna* with this impressive and pioneering monograph on the unified and modern system of enforcement of judgments operating in Northern Ireland.

In the first two chapters Capper outlines the origins of the radical innovation of the Enforcement of Judgments Office in 1969 and traces its organisational evolution in Northern Ireland since that watershed. The formative recommendations of the Anderson and Hunter Reports are explained in an intelligent manner. Capper conveys lucidly the unique nature of this Office, which manifests both bureaucratic (in the best sense of the term) and judicial functions. Full attention in Chapter 3 is given to the standard procedure for enforcement applications. There is a real risk of the text becoming tedious when covering such procedural steps but Capper avoids that trap by his lively style of writing, illuminating forays into relevant case law and by creative use of headings. Various enforcement procedures against land and goods are detailed in Chapter 5. The controversial use of enforcement mechanisms where there is no underlying money judgment is explained in Chapter 6. Chapters 7 and 8 deal with various other procedural facets of the enforcement matrix. The interface between these enforcement procedures and the general rules on insolvency is analysed in Chapter 9. A consistent theme running throughout this work concerns the compatibility (or otherwise) of these enforcement procedures with the standards set by the European Convention on Human Rights. This is a significant contextual aspect that it increasing in importance on a daily basis.

Clearly this will become the standard work for practitioners in Northern Ireland on the subject, but, in the opinion of this commentator, this text should have much wider scholarly appeal. Significant reforms have been, and are about to be, made in civil justice enforcement procedures in Great Britain (*i.e.* in the English and Scottish legal systems) and Capper makes extensive reference to this broader picture in his commentary. Comparisons are drawn, where appropriate. It is interesting to note how the judgment enforcement procedures adopted in Northern Ireland appear to be more efficiently organised than those operating on this side of the water where we are still a long way from having such a radical reform. That said, there is still scope for systemic improvement in Northern Ireland and Capper does not hesitate to suggest areas of possible enhancement. Although Capper provides a beautifully clear exposition of the enforcement procedures

operating in Northern Ireland he is never afraid to join issue on fundamental policy issues. There is a real depth of scholarship manifested in this work with extensive reference to Commonwealth jurisprudence and the works of academic writers where they may cast light on difficult issues.

The text is produced in a reader-friendly manner using a numbered paragraph system and is clearly indexed. The quality of the page reproduction is high. It will thus be very easy to access and will provide an invaluable source of reference for many years to come.

This monograph is recommended to a wide readership without hesitation.

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