

CONTENTS

Irish-Language Education and the Council of Europe’s Minority Treaties:  
The Monitoring of Developments in Northern Ireland  
(*Elizabeth Craig*) ..... 121

Gender and “Modern” Constitutionalism: The Treaty Establishing a  
Constitution for Europe (*Charlotte Skeet*) ..... 142

The Legal Implications of a National Police Force  
(*Kiron Reid*) ..... 167

Mortgage Default and Repossession: Procedure and Policy in the Post-  
Norgan Era (*Lara McMurtry*) ..... 194

Boundaries, Corporate Decision-Making and Responsibility  
(*Alice Belcher*) ..... 211

The Character of the Oriental Despot in Classical Jurisprudence  
(*Piyel Haldar*) ..... 229

Published four times yearly by SLS Legal Publications (NI),  
Lansdowne House, 50 Malone Road, Belfast BT9 5BS,  
Northern Ireland.

ISSN 0029-3105



## IRISH-LANGUAGE EDUCATION AND THE COUNCIL OF EUROPE'S MINORITY TREATIES: THE MONITORING OF DEVELOPMENTS IN NORTHERN IRELAND

*Dr. Elizabeth Craig, Lecturer in Law, University of Sussex\**

### Introduction

Like many other minority languages in Europe, the Irish language suffered considerable decline during the 20<sup>th</sup> Century<sup>1</sup> and the development of Irish-medium education has been a particular priority of the Irish-language revival movement.<sup>2</sup> The first Irish-medium primary school was established in Northern Ireland in 1971, followed by the first Irish-medium secondary school twenty years later.<sup>3</sup> Although English is the normal language of communication in Northern Ireland, the Irish language is considered by many to be an important part of their cultural heritage<sup>4</sup> and an increasing number of English-speaking parents are choosing to send their children to Irish-medium schools.<sup>5</sup> The role of education in promoting tolerance and understanding was specifically recognised in the Good Friday Agreement of 1998,<sup>6</sup> which envisaged the placing of a statutory duty on the Department of Education to encourage and facilitate the development of Irish-medium education,<sup>7</sup> a duty subsequently introduced through legislation.<sup>8</sup> By that time the UK had already ratified the Council of Europe's Framework Convention for the Protection of National Minorities 1995<sup>9</sup> and was giving "active consideration" to the signing of the European Charter for Regional or

---

\* With thanks to Professor Craig Barker, Professor Marie Dembour, Professor Sue Millns and an anonymous referee for their comments on earlier drafts.

<sup>1</sup> Hindley, *The Death of the Irish Language: A Qualified Obituary* (1990).

<sup>2</sup> O'Reilly, *The Irish Language in Northern Ireland: The Politics of Culture and Identity* (1999), p.22.

<sup>3</sup> Mercator-Education, *Irish – The Irish Language in Education in Northern Ireland* 2<sup>nd</sup> ed. (2004) [http://www1.faknaw.nl/mercator/regionale\\_dossiers/PDFs/irish-north.pdf](http://www1.faknaw.nl/mercator/regionale_dossiers/PDFs/irish-north.pdf) (2 February 2007), pp.18 and 21.

<sup>4</sup> In the 2001 Census 10.35% of all persons aged three and over in Northern Ireland declared that they had some knowledge of Irish. 4.64% declared that they could speak, read, write and understand Irish. (Northern Ireland Statistics and Research Agency 'Census 2001 Output' <http://www.nisranew.nisra.gov.uk/Census/Census2001Output/KeyStatistics/keystatrep.html> (2 February 2007) Table KS24: Knowledge of Irish).

<sup>5</sup> Mercator-Education, *supra* n.3 at 3.

<sup>6</sup> 'Agreement Reached in the Multi-party Negotiations (10 April 1998)' <http://www.nio.gov.uk/agreement.pdf> (2 February 2007) 'Rights, Safeguards and Equality of Opportunity' para.13 (on integrated education) & 'Economic, Social and Cultural Issues' paras.3-4 (on linguistic diversity and Irish-medium education).

<sup>7</sup> *ibid.* at para.4.

<sup>8</sup> S.89 Education (Northern Ireland) Order 1998 SI 1998/1759.

<sup>9</sup> 'Framework Convention for the Protection of National Minorities CETS No.: 157' <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=157&CM=7&DF=2/2/2007&CL=ENG> (2 February 2007).

Minority Languages 1992.<sup>10</sup> Both of these treaties deal extensively with minority-language education issues and therefore appeared to be particularly relevant for the development of Irish-language education in Northern Ireland.

Whilst there is an ever-increasing body of commentary on both the Framework Convention and the Languages Charter,<sup>11</sup> much less has been written about the relationship between the two treaties<sup>12</sup> and their particular implications for minority-language education in the UK.<sup>13</sup> This article therefore aims to use the UK's experiences in relation to Irish-language education to explore further the relationship between the two treaties. The article begins by examining the failure of the UN human rights treaty-monitoring bodies to address Irish-language education issues under the core human rights treaties, despite the concerns raised by civil society. The article then considers the extent to which the Council of Europe's minority treaties provide a more appropriate framework for the consideration of such issues. Although both treaties were considered together to form part of a new "regime of linguistic promotion" in Europe,<sup>14</sup> this article argues that they have very different roles in relation to the protection of indigenous and non-indigenous languages and of the speakers of those languages. The article focuses in particular on differences in their scope of application and in their normative content and uses the UK's experiences in relation to Irish-language education in Northern Ireland to illustrate the significance of the differences in approach.

### **Irish-Language Education and the UN Human Rights Treaties**

Although issues relating to minority-language education have occasionally been addressed under the UN human rights treaty framework, particularly in relation to the right to education,<sup>15</sup> the situation of Irish-language education

<sup>10</sup> *Supra* n.7.

<sup>11</sup> See, for example, Council of Europe (ed), *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities* (2004); Weller (ed.), *The Rights of Minorities: A Commentary on the Framework Convention for the Protection of National Minorities* (2005); Oeter, 'The European Charter for Regional or Minority Languages' in Council of Europe Publishing (ed.) *Mechanisms for the Implementation of Minority Rights* (2004) 131 and Woehrling, *The European Charter for Regional or Minority Languages: A Critical Commentary* (2005).

<sup>12</sup> For an early analysis of the different approaches in the two treaties, see Dunbar, 'Minority Language Rights in International Law' (2001) 50 *ICLQ* 90.

<sup>13</sup> However, see Williams and Rainey, 'Language, Education and the European Convention on Human Rights in the Twenty-First Century' (2002) 22 *LS* 625. On the more general implications of the Charter for linguistic minorities in the UK, see Dunbar, 'Implications of the European Charter for Regional or Minority Languages for British Linguistic Minorities' (2000) 25 *EL Rev Supp* 46. On debates in Northern Ireland over the scope of the Framework Convention, see McCrudden 'Consociationalism, Equality and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities' in Morison, McEvoy and Anthony (eds.), *Judges, Transition and Human Rights* 2007 p.315.

<sup>14</sup> Dunbar, *supra* n.12 at 92.

<sup>15</sup> E.g. 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Estonia. 19/12/2002' UN Doc. E/C.12/1/Add.85 at paras.32 and 57 (expressing concern about the lack of opportunities for being educated in

in Northern Ireland has not been addressed by the relevant treaty monitoring bodies on a consistent basis, despite the voicing of concerns by civil society. The Committee on the Administration of Justice<sup>16</sup> in its submission to the Committee on the Rights of the Child in 1994 expressed concern that government policy in relation to the funding of Irish-medium education was discriminatory.<sup>17</sup> In response the committee suggested that the UK provide further support for the teaching of the Irish language in schools but notably did not recommend the provision of further support for Irish-medium education.<sup>18</sup> At the time the committee appeared much more interested in strategies to promote integration amongst Roman Catholic and Protestant children in Northern Ireland,<sup>19</sup> recommending that the State party provide further support for integrated education.<sup>20</sup> This reflects a more general trend evident also in the focus on the development of integrated education in the later concluding observations of both the Committee on the Rights of the Child and the Committee on Economic, Social and Cultural Rights.<sup>21</sup> This trend can be attributed not only to the intercultural educational aims identified in both the International Covenant on Economic, Social and Cultural Rights 1966 and the UN Convention on the Rights of the Child 1989<sup>22</sup> but also to a general perception that segregation in education had

---

minority languages in Estonia); 'Concluding Observations of the Committee on the Rights of the Child: Latvia. 21/02/2001' UN Doc. CRC/C/15/Add.142 at paras.51-52 (expressing concern about plans to provide secondary legislation in Latvian only) and 'Concluding observations of the Committee on the Elimination of Racial Discrimination: France. 18/04/2005.' UN Doc. CERD/C/FRA/CO/16 at para.23 (expressing concern about shortcomings in the teaching of certain minority languages).

<sup>16</sup> The Committee on the Administration of Justice is an independent NGO in Northern Ireland.

<sup>17</sup> CAJ 'Report for consideration during the Committee's scrutiny of the UK Government's report, 1 August 1994' [http://www.crin.org/docs/resources/treaties/crc.8/UK\\_Committee\\_NGO\\_Report.pdf](http://www.crin.org/docs/resources/treaties/crc.8/UK_Committee_NGO_Report.pdf) (2 February 2007) Education – Arts. 28-29.

<sup>18</sup> 'Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. 15/02/95.' UN Doc. CRC/C/15/Add.34 at para.33.

<sup>19</sup> E.g. CRC Committee 'List of Issues: United Kingdom of Great Britain and Northern Ireland. 20/10/94.' UN Doc. CRC/C.8/WP.1 Q 36: ". . . What strategies are being developed to promote greater integration amongst children from the different communities?"

<sup>20</sup> 'Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. 15/02/95.' UN Doc. CRC/C/15/Add.34 at para.33.

<sup>21</sup> 'Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland. 04/12/97.' UN Doc. E/C.12/1/Add.19 at para.29; 'Concluding observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland. 05/06/2002.' UN Doc. E/C.12/1/Add.79 at para.42 and 'Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. 09/10/2002.' UN Doc. CRC/C/15/Add.188 at para.48(g).

<sup>22</sup> Art. 29(1) UNCRC and Art. 13(1) ICESCR.

contributed to the prolonged conflict between the two main communities in Northern Ireland.<sup>23</sup>

Despite the lack of concrete recommendations from the UN treaty-monitoring bodies, the Irish-medium education sector expanded considerably in the 1990s in response to increased parental demand with the same procedures being used to determine State funding as those used in relation to English-medium schools.<sup>24</sup> By 2002-03 there were 18 Irish-medium primary schools in Northern Ireland, five of which were fully funded by the State and seven of which received State funding for recurrent expenditure only. Seven Irish-medium units in English-medium primary schools at that time received funding from the State.<sup>25</sup> In the same year funding was also provided to Meanscoil Feirste, the first Irish-medium secondary school, and to two Irish-medium secondary units.<sup>26</sup> The UK was therefore able to report a number of positive developments in its second report submitted under the UNCRC in 2002, including the fact that four Irish-medium primary schools and the Irish-medium secondary school had been given grant-aided status in the previous three years, that provision had been made for GCSE examinations to be taken in Irish and that a unit had been established to provide teaching materials for use in Irish-medium schools.<sup>27</sup>

There nevertheless remains a growing demand for Irish-medium education and, in its submission to the Committee on the Rights of the Child in 2002, the Northern Ireland Human Rights Commission observed that “adequate support has yet to be provided to ensure the right of parents to have their children educated in an Irish-medium or integrated school”.<sup>28</sup> The Commission recognised that more funding had been provided but observed in particular that schools had to fulfil very strict funding criteria and that it could be difficult for children to access transport services and special needs provision while schools were awaiting approval of their status.<sup>29</sup> The Commission therefore requested information from the Government on how it intended to ensure that children attending Irish-medium and integrated schools were not discriminated against in terms of access to funding.<sup>30</sup> In a similar vein, in its submission to the Committee on Economic, Social and Cultural Rights one month later, the Commission noted that there had been a “substantial improvement” in the provision of Irish-medium education but considered that additional funding should be provided to redress “historic underfunding of many schools” and to meet the start-up costs of new

---

<sup>23</sup> *E.g.* ‘Summary record of the 38th meeting: United Kingdom of Great Britain and Northern Ireland. 28/11/97.’ UN Doc. E/C.12/1997/SR.38 at para.62.

<sup>24</sup> ‘Summary record of the 206th meeting: United Kingdom of Great Britain and Northern Ireland. 03/07/95.’ UN Doc. CRC/C/SR.206 at para.33 and ‘Fourth periodic report: United Kingdom of Great Britain and Northern Ireland. 28/02/2001.’ UN Doc. E/C.12/4/Add.8 at paras.13.124 - 13.125.

<sup>25</sup> Mercator-Education, *supra* n.3 at 18.

<sup>26</sup> *ibid.* at 21.

<sup>27</sup> ‘Periodic reports of States parties due in 1998: United Kingdom of Great Britain and Northern Ireland. 25/02/2002.’ UN Doc. CRC/C/83/Add.3 at para. 9.47.

<sup>28</sup> NIHRC, ‘Submission to the United Nations Committee on the Rights of the Child, March 2002’ <http://www.nihrc.org/documents/landp/79.doc> (5 June 2006) at 4.

<sup>29</sup> *ibid.* at 39.

<sup>30</sup> *ibid.* at 40.

schools.<sup>31</sup> Despite the Commission's concerns, neither committee made recommendations in relation to Irish-language education in the last reporting cycle. This suggests that such issues are not a particular priority of the UN treaty-monitoring bodies, especially where a majority language is the normal language of communication and there are no obvious individual rights violations. As both the Framework Convention and the Languages Charter contain provisions on minority-language education, they appeared to provide a much clearer legal basis for challenging State policy in this area. However, important differences in the scope of application and the normative content of these two treaties have had a significant influence on the outcome of the relevant monitoring processes.

### Differences in the Scope of Application of the Two Treaties

Although the Framework Convention and the Languages Charter both came into force early in 1998,<sup>32</sup> the initiative for the adoption of the Charter was taken in the 1980s,<sup>33</sup> "at a time when the problem of minorities was not on everybody's lips",<sup>34</sup> and reflected a general concern "to protect the linguistic diversity of Europe" rather than the pursuit of a minority rights agenda.<sup>35</sup> It is therefore aimed at the protection of regional or minority languages rather than the protection of linguistic minorities<sup>36</sup> and was not intended to establish any individual or collective rights for language speakers.<sup>37</sup> However, as noted by Oeter, it is clear that the imposition of obligations on the State in relation to the protection of such languages "might give rise in consequence to subjective rights in the internal legal sphere."<sup>38</sup>

According to the Explanatory Report, the "overriding purpose" of the Languages Charter was "to protect and promote regional or minority languages as a threatened aspect of Europe's cultural heritage".<sup>39</sup> One consequence of this is that the Languages Charter covers only those languages "traditionally used within a given territory of a State by nationals of that State who form a group numerically smaller than the rest of the State's population" and expressly excludes the languages of migrants.<sup>40</sup> The

---

<sup>31</sup> NIHRC, 'Submission by the Northern Ireland Human Rights Commission to the United Nations Committee on Economic, Social and Cultural Rights, April 2002' <http://www.nihrc.org/documents/landp/80.doc> (5 June 2006) at paras.5(e) and (f).

<sup>32</sup> The Framework Convention (ETS 157) was opened for signature 1 February 1995 and came into force 1 February 1998. The Languages Charter (ETS 148) was opened for signature 5 November 1992 and came into force 1 March 1998.

<sup>33</sup> On the history, see Grin, *Language Policy Evaluation and the European Charter for Regional or Minority Languages* (2003), pp.57-58.

<sup>34</sup> Krüger, 'Opening address' in *International Conference on the European Charter for Regional or Minority Languages, Strasbourg, 26-27 March 1998* (1998), p.7 at 9.

<sup>35</sup> PACE Opinion No.142 (1988) on Resolution 192 (1988) on regional or minority languages in Europe, adopted by the Standing Conference of Local and Regional Authorities of Europe (4 October 1988).

<sup>36</sup> 'Explanatory report' in *European Charter for Regional or Minority Languages and explanatory report* (1993) 3 at para.11.

<sup>37</sup> *ibid.*

<sup>38</sup> Oeter, *supra* n.11 at 131.

<sup>39</sup> 'Explanatory report', *supra* n.36 at para. 10.

<sup>40</sup> Art. 1(a).

drawing of such a distinction supports Dunbar's assertion that the Languages Charter reflects an "ecological" as opposed to an "identity" approach to language rights,<sup>41</sup> based on comparisons made between threats to linguistic diversity and threats to biodiversity.<sup>42</sup> One of the arguments used by those who draw such comparisons is that linguistic diversity is a public good, the production costs of which should be fairly distributed.<sup>43</sup> Such an approach can be used to support language preservation policies and provides an alternative to the notion of language as "a central and defining feature of identity", which is often associated with a rights-based approach.<sup>44</sup>

The Framework Convention was the Council of Europe's response to the political upheaval in Central and Eastern Europe after the end of the Cold War<sup>45</sup> and the immediate concern of the drafters was the situation of autochthonous minorities in Central and Eastern Europe.<sup>46</sup> However, the drafters decided "to adopt a pragmatic approach" to the definitional issue "based on the recognition that at this stage, it is impossible to arrive at a definition capable of mustering general support of all Council of Europe member States."<sup>47</sup> There were initial concerns about the failure of the drafters to define the term "national minority"<sup>48</sup> and many States did respond by adopting a very restrictive approach in relation to its scope of application.<sup>49</sup> However, the lack of a definition can also be used by those

<sup>41</sup> Dunbar, *supra* n.12 at 95.

<sup>42</sup> E.g. Skutnabb-Kangas, *Linguistic Genocide in Education – or Worldwide Diversity and Human Rights?* (2000), pp.63-97.

<sup>43</sup> Boran, 'Global Linguistic Diversity, Public Goods, and the Principle of Fairness' in Kymlicka and Patten (eds.), *Language Rights and Political Theory* (2003), p.189. On the intrinsic value of languages as collective human accomplishments and as manifestations of human creativity, see Réaume, 'Official-Language Rights: Intrinsic Value and the Protection of Difference' in Kymlicka and Norman (eds.), *Citizenship in Diverse Societies* (2000), p.245.

<sup>44</sup> Patten and Kymlicka 'Introduction: Language Rights and Political Theory: Context, Issues and Approaches' in Kymlicka and Patten (eds.), *Language Rights and Political Theory* (2003), p.1 at 45.

<sup>45</sup> 'Vienna Declaration of the Heads of State and Government of the Member States of the Council of Europe on the Reform of the Control Mechanism of the ECHR, on National Minorities, and on a Plan of Action against Racism' (1993) 14 *HRLJ* 373.

<sup>46</sup> Malloy describes an "autochthonous minority" as "a minority that is native to a particular region, in this case certain regions of Europe that were once either independent or belonged to a neighbouring state. The autochthonous minority's present minority status is a result of incorporation into a larger political unit or the change of borders after major conflicts in modern times." (Malloy *National Minority Rights in Europe* (2005) p.21)

<sup>47</sup> 'Explanatory report' in *Framework Convention for the Protection of National Minorities: Collected texts* (1999) 17 at para.12.

<sup>48</sup> E.g. Alfredsson, 'A Frame for an Incomplete Painting: Comparison of the Framework Convention for the Protection of National Minorities with International Standards and Monitoring Procedures' (2000) 7 *IJMG* 291 and Benoît-Rhomer, *The Minority Question in Europe. Texts and Commentary* (1996), p.41.

<sup>49</sup> E.g. Denmark, Netherlands, Slovenia, Sweden and the Former Yugoslav Republic of Macedonia. See 'List of declarations made with respect to treaty No.: 157' <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=157&CM=7&DF=2/2/2007&CL=ENG&VL=1> (2 February 2007).

advocating a more inclusive approach, particularly as Article 1 makes it clear that the protection of national minorities is considered to be “an integral part of the international protection of human rights.”<sup>50</sup> For example, Keller has argued that immigrant minorities should have an equal claim to the benefits of the Framework Convention on the basis that the “right to maintain and develop a cultural identity<sup>51</sup> is in principle a universal right.”<sup>52</sup> The UK appeared to adopt such an approach in its first report under the Framework Convention, which purported to be based on the definition of a racial group in the Race Relations Act 1976 as “a group of persons defined by reference to colour, race, nationality or ethnic or national origins”.<sup>53</sup> However, this approach is also flawed as this definition does not cover groups defined exclusively by language or religion.<sup>54</sup> Whilst it was clearly intended that the Irish language would be protected under the Languages Charter,<sup>55</sup> the extent to which Irish-language speakers would be protected under the Framework Convention was less clear. The next section argues further that, despite some substantive overlap, there are also important normative differences between the two treaties.

### Differences in the Normative Framework

The Framework Convention has been described as “a weak first attempt” at guaranteeing minority rights in Europe<sup>56</sup> with criticisms directed towards the failure to confer rights on groups, the emphasis on the obligations of the State at the expense of the rights of the individual, the weak wording of the substantive provisions and the envisaged enforcement system.<sup>57</sup> Of course the problem, as identified by Keller, is that human rights treaties, in order to be effective, “must reflect sound, coherent principles, but must also stay within the bounds of political acceptability.”<sup>58</sup> It was clear from the outset that the norms adopted would have to be sufficiently flexible to accommodate a range of minority groups and situations and the focus is

---

<sup>50</sup> On the inclusive approach to the definitional issue adopted by the Advisory Committee on the Framework Convention, see Wheatley *Democracy, Minorities and International Law* (2005) pp.48-56.

<sup>51</sup> Art. 5(1) of the Framework Convention specifically requires States “to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity”.

<sup>52</sup> Keller, ‘Re-thinking Ethnic and Cultural Rights in Europe’ (1998) *OJLS* 29, at 43.

<sup>53</sup> S.3(1) Race Relations Act 1976 (UK) c.74. See ‘Report submitted by the United Kingdom pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities’ ACFC/SR(1999)013 (26 July 1999) at para.2.

<sup>54</sup> Dunbar, ‘Is There a Duty to Legislate for Linguistic Minorities?’ (2006) 33 *J Law & Soc* 181, at 186-187.

<sup>55</sup> *Supra* n.7.

<sup>56</sup> Gilbert, ‘The Council of Europe and Minority Rights’ (1996) 18 *HRQ* 160 at 189.

<sup>57</sup> E.g. Alfredsson, *supra* n.48; Benoît-Rhomer, *supra* n.48, pp.38-51; Gilbert, *supra* n.56; Packer, ‘On the Content of Minority Rights’ in Rääkkä (ed.), *Do We Need Minority Rights?* (1996), p.121 at 159-161 and Troebst, *The Council of Europe's Framework Convention for the Protection of National Minorities Revisited*, ECMI Working Paper 2 (1998).

<sup>58</sup> Keller, *supra* n.52 at 57.

notably on the identification of objectives which the Parties undertake to pursue rather than the creation of directly applicable rights.<sup>59</sup>

Whilst the Framework Convention contains norms of general application, the approach under the Languages Charter is quite different. Although Part II of the Charter applies to all regional or minority languages spoken within a State's territory, States can choose which languages to register under Part III and undertake to apply a minimum of thirty-five paragraphs or subparagraphs from among the sixty-eight provisions in Part III "in respect of each language specified at the time of ratification, acceptance or approval."<sup>60</sup> This "à la carte system" was initially considered to be one of the Charter's main weaknesses,<sup>61</sup> although Oeter has noted that one of the advantages of such an approach is that the obligations contained therein are more precise and concrete than the "programme-type provisions"<sup>62</sup> in the Framework Convention.<sup>63</sup>

As minority-language education is considered to play a particularly important role in the preservation of cultural identity and the maintenance of cultural diversity, the rest of this section will focus on the wording of the substantive norms on education. These reveal the particular limitations of the Framework Convention's approach and provide a clear indication of the desire of the drafters "to stay within the bounds of political acceptability".<sup>64</sup> For example, Article 13(1) requires States to "recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments" but Article 13(2) qualifies this considerably by providing that: "The exercise of this right shall not entail any financial obligation for the Parties." In a similar vein Article 14(1) requires States "to recognise that every person belonging to a national minority has the right to learn his or her minority language" but the Explanatory Report makes it clear that it was not intended that this obligation would require "positive action, notably of a financial nature, on the part of the State."<sup>65</sup> The positive obligations of the State in relation to minority-language education therefore appear to be restricted to Article 14(2), which notably avoids the use of rights language and provides in highly qualified terms that:

"In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language."

Furthermore there is an additional qualification in Article 14(3), which stipulates that paragraph 2 "shall be implemented without prejudice to the

---

<sup>59</sup> 'Explanatory report', *supra* n 47 at para.11.

<sup>60</sup> Art.2(2).

<sup>61</sup> E.g. Benoît-Rhomer, *supra* n.48 at 51.

<sup>62</sup> 'Explanatory report', *supra* n.47 at para.11.

<sup>63</sup> Oeter, *supra* n.11 at 135.

<sup>64</sup> *Supra* n.58.

<sup>65</sup> 'Explanatory report', *supra* n.47 at para.74.

learning of the official language or the teaching in this language". Such knowledge is identified in the Explanatory Report as "a factor of social cohesion and integration"<sup>66</sup> but commentators have cautioned that this provision should not be used to limit the rights of persons belonging to national minorities "to learn or be instructed in their language."<sup>67</sup> Unsurprisingly, the wording of these provisions has been criticised. For example, Article 13(2) has been described as "bleak" and "draconian"<sup>68</sup> and it has also been observed that Article 14(2) does not provide a very strong legal basis for action.<sup>69</sup>

Similar issues are dealt with under the Languages Charter but the use of rights-language is avoided altogether and the obligations accepted by States are more concrete. In relation to those languages protected under Part III of the Charter, States must choose a minimum of three options from the paragraphs and sub-paragraphs in Article 8 on education.<sup>70</sup> The undertakings in Article 8(1) relate to the different stages of education and apply "within the territory in which such languages are used, according to the situation of each of these languages, and without prejudice to the teaching of the official language(s) of the State". In relation to primary education, States can choose from the following options in Article 8(1)(b):

- “(i) to make available primary education in the relevant regional or minority languages; or
- (ii) to make available a substantial part of primary education in the relevant regional or minority languages; or
- (iii) to provide, within primary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or
- (iv) to apply one of the measures provided for under i to iii above at least to those pupils whose families so request and whose number is considered sufficient;”

Similar options are available in relation to secondary education and to technical and vocational education but the last option is "to apply one of the measures provided for under i to iii above at least to those pupils who, or where appropriate whose families, so wish in a number considered sufficient".<sup>71</sup> Other undertakings in Article 8 relate to the provision of pre-school education,<sup>72</sup> higher education<sup>73</sup> and adult and continuing education courses;<sup>74</sup> the making of arrangements "to ensure the teaching of the history and the culture which is reflected by the regional or minority language"<sup>75</sup> and the provision of the basic and further training of teachers required to

---

<sup>66</sup> *ibid.* at para.78.

<sup>67</sup> De Varennes and Thornberry, 'Article 14' in Weller (ed.), *supra* n.11, p.407 at 428.

<sup>68</sup> Thornberry 'Article 13' in Weller (ed.), *supra* n.11, pp.395 at 404 & 405.

<sup>69</sup> *Supra* n.67 at 427.

<sup>70</sup> Art. 2(2).

<sup>71</sup> Art. 8(1)(c) and (d).

<sup>72</sup> Art. 8(1)(a).

<sup>73</sup> Art. 8(1)(e).

<sup>74</sup> Art. 8(1)(f).

<sup>75</sup> Art. 8(1)(g).

implement the obligations accepted.<sup>76</sup> In respect of territories other than those in which the regional or minority languages are traditionally used, Parties can also undertake under Article 8(2) “to allow, encourage or provide teaching in or of the regional or minority language at all the appropriate stages of education” if the number of users justifies it. States may also undertake under Article 8(1)(i) to set up a supervisory body to monitor “the measures taken and progress achieved in establishing or developing the teaching of regional or minority languages and for drawing up periodic reports of their findings, which will be made public.”

As a consequence of its focus on linguistic diversity and the preservation of minority languages, the Languages Charter places considerable emphasis on “the value of interculturalism and multilingualism”.<sup>77</sup> This is particularly evident in Article 7, which is in Part II of the Charter and therefore applies in respect of all regional or minority languages spoken within the territory.<sup>78</sup> In relation to education, Article 7(1) provides that:

“In respect of regional or minority languages, within the territories in which such languages are used and according to the situation of each language, the Parties shall base their policies, legislation and practice on the following objectives and principles: . . .

the provision of appropriate forms and means for the teaching and study of regional or minority languages at all appropriate stages;

the provision of facilities enabling non-speakers of a regional or minority language living in the area where it is used to learn it if they so desire . . .”

The Explanatory Report makes it clear that the “spirit of receptiveness to several languages should not be confined to the speakers of regional or minority languages” and that the latter requirement was included “to facilitate communication and understanding” and “to ensure greater mutual permeability” between language groups.<sup>79</sup> Article 7(3) further requires States to promote mutual understanding between linguistic groups<sup>80</sup> and particular emphasis is placed in the Explanatory Report on the role that the development of a spirit of receptiveness and tolerance can play in the preservation of such languages.<sup>81</sup>

Such ideas are not completely neglected under the Framework Convention and the Preamble stresses “that the creation of a climate of tolerance and

<sup>76</sup> Art. 8(1)(h).

<sup>77</sup> Preamble, para.5.

<sup>78</sup> Art. 2(1).

<sup>79</sup> Explanatory report’ in *European Charter for Regional or Minority Languages and explanatory report* (1993) at paras.65-66.

<sup>80</sup> Art. 7(3): “The Parties undertake to promote, by appropriate measures, mutual understanding between all the linguistic groups of the country and in particular the inclusion of respect, understanding and tolerance in relation to regional or minority languages among the objectives of education and training provided within their countries and encouragement of the mass media to pursue the same objective.”

<sup>81</sup> ‘Explanatory report’, *supra* n.79 at para.74.

dialogue is necessary to enable cultural diversity to be a source and a factor, not of division, but of enrichment for each society”<sup>82</sup> Article 12(1) is specifically aimed at the creation of such a climate,<sup>83</sup> providing that: “The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.” The need for intercultural education initiatives, defined as “educational policies and practices by which the members of different cultures, whether in a majority or minority position, learn to interact constructively with each other”,<sup>84</sup> is more specifically recognised in Article 12(2), which provides that: “In this context the Parties shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.” Meanwhile Article 12(3) requires States “to promote equal opportunities for access to education at all levels for persons belonging to national minorities.” The Framework Convention is more specific than the Languages Charter about what States are required to do to promote intercultural education and it is fairly unsurprising that Article 12 has been more favourably received in the literature than Articles 13 and 14.<sup>85</sup>

There is clearly considerable substantive overlap between the Framework Convention and the Languages Charter and, despite clear normative differences, both treaties essentially defer to the discretion of individual States on matters relating to the provision and funding of minority education. This discretion is conferred on States through the weak wording of the provisions on education in the Framework Convention and through the “à la carte system” introduced under Part III of the Languages Charter. The rest of this article therefore focuses on the UK’s response.

### **The UK’s Experiences in relation to Irish-Language Education in Northern Ireland**

The Framework Convention was opened for signature on 1 February 1995 and was ratified by the UK on 15 January 1998, coming into force on 1 May of that year.<sup>86</sup> The Languages Charter was opened for signature on 5 November 1992 but took much longer to come into force<sup>87</sup> and was only ratified by the UK on 27 March 2001.<sup>88</sup> Pentassuglia has suggested that delays in ratification might be attributed to the need for time to choose the most appropriate options for the languages spoken within a particular territory and/or to address positively the wider legal and political implications of ratification.<sup>89</sup> These explanations are certainly supported by

---

<sup>82</sup> Paras.6 and 8.

<sup>83</sup> ‘Explanatory report’, *supra* n.47 at para.71.

<sup>84</sup> UN Working Group on Minorities ‘Montreal International Seminar on Intercultural and Multicultural Education’ (31 March 2000) UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.4 at para.6.

<sup>85</sup> Thornberry, ‘Article 12’ in Weller (ed.), *supra* n.11, p.365.

<sup>86</sup> *Supra* n.9.

<sup>87</sup> *Supra* n.32.

<sup>88</sup> ‘European Charter for Regional or Minority Languages CETS No.: 148’ <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=148&CM=7&DF=2/2/2007&CL=ENG> (2 February 2007).

<sup>89</sup> Pentassuglia, *Minorities in International Law* (2002), p.131.

the UK's experience with considerable debate over the languages to be included and the options to be selected. At one time it was envisaged that Irish would only be protected under Part II of the Charter<sup>90</sup> but upon ratification the UK declared that it recognised Scots and Ulster-Scots as regional or minority languages for the purposes of Part II and that Welsh, Scottish-Gaelic and Irish would be protected under Part III. The UK subsequently declared that Part II would also apply to the Cornish and Manx-Gaelic languages.<sup>91</sup>

The provisions chosen for Irish were selected by an inter-departmental steering group coordinated by the Department of Culture, Arts and Leisure in Northern Ireland,<sup>92</sup> whose minimal approach has been criticised by the Northern Ireland Human Rights Commission.<sup>93</sup> In relation to pre-school, primary, secondary and technical and vocational education and Irish, the UK merely undertook to apply one of the measures identified to those pupils or whose families so wished and whose number is considered sufficient.<sup>94</sup> This compares unfavourably with its undertakings to make pre-school, primary and secondary education available in both Welsh and Scottish-Gaelic.<sup>95</sup> Dunbar has argued that, in view of similarities in the situation of Scottish-Gaelic and Irish and the development of Irish-medium education in Northern Ireland, it would have been appropriate to make the same designations for Irish as for the other two languages.<sup>96</sup> In relation to higher education, the UK undertook "to encourage and/or allow" the provision of such education in regional or minority languages "or of facilities for the study of these languages as university or higher education subjects". It also undertook to offer Irish as a subject of adult or continuing education; to make arrangements to ensure the teaching of the history and the culture reflected by the Irish language; to provide the training of teachers required to implement its chosen options and "to allow, encourage or provide teaching in or of the regional or minority language" in respect of territories other than those in which the language is traditionally used.<sup>97</sup>

---

<sup>90</sup> Dunbar 'Implications of the European Charter for Regional or Minority Languages for British Linguistic Minorities' (2000) 25 *EL Rev (Supp)* 46, at 65.

<sup>91</sup> Declaration contained in a Note Verbale from the Foreign and Commonwealth Office of the United Kingdom, handed at the time of deposit of the instrument of ratification on 27 March 2001; Declaration contained in a letter from the Permanent Representative of the United Kingdom, dated 11 March 2003 and Declaration contained in a letter from the Permanent Representative of the United Kingdom, dated 22 April 2003 ('List of declarations made with respect to treaty No.: 148', <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=148&CM=7&DF=2/6/2007&CL=ENG&VL=1> (6 February 2007)).

<sup>92</sup> Martin, 'The charter at work – the role of regional and local authorities' in Council of Europe Publishing (ed.) *From Theory to Practice – the European Charter for Regional or Minority Languages* (2002) pp.63 at 64.

<sup>93</sup> NIHRC, *supra* n.31 at para.5(e).

<sup>94</sup> *Supra* n.91.

<sup>95</sup> *ibid.*

<sup>96</sup> Dunbar 'Working Papers 10: The ratification by the United Kingdom of the European Charter for Regional or Minority Languages' (2003) <http://www.ciemen.org/mercator/pdf/WP10-def-ang.pdf> (2 February 2007), p.52.

<sup>97</sup> *Supra* n.91.

Whilst the ratification instrument lacked “normative ambition” in relation to Irish, equally important has been the extent of the UK’s engagement with the relevant monitoring procedures. The monitoring procedures under both treaties are fairly similar with State reports to be submitted every five years under the Framework Convention<sup>98</sup> and every three years under the Languages Charter.<sup>99</sup> State reports are considered by independent experts within the Advisory Committee established under the Framework Convention and within the Committee of Experts established under the Charter. The findings of these committees are then transmitted to the Committee of Ministers, which adopts its own conclusions about the adequacy of the measures taken. It is now standard procedure for both committees to receive and invite information from sources other than States and to visit States whose reports are being considered, when their members will meet with a range of different actors and also visit minority areas. States are also given an opportunity to comment on their findings before the Committee of Ministers considers all the relevant documentation.<sup>100</sup> The Advisory Committee under the Framework Convention in particular has placed considerable emphasis on the need to develop an on-going dialogue with States and a number of follow-up seminars with representatives from government bodies, national minorities and the Advisory Committee in order to consider the most appropriate ways of translating the findings into action have taken place.<sup>101</sup>

The UK’s first report under the Framework Convention was submitted on 26 July 1999,<sup>102</sup> the Advisory Committee adopted its Opinion on 30 November 2001<sup>103</sup> and the Committee of Ministers’ Resolution followed on 13 June 2002.<sup>104</sup> The UK’s delay in ratifying the Languages Charter meant that its initial report under that treaty was considered much later. The UK’s first report was submitted on 1 July 2002,<sup>105</sup> the Committee of Experts adopted its

---

<sup>98</sup> Committee of Ministers ‘Rules on the monitoring arrangements under Articles 24 to 26 of the Framework Convention for the Protection of National Minorities’, Resolution(97)10 of 17 September 1997, Rule 21.

<sup>99</sup> Art. 15.

<sup>100</sup> For further information about the Advisory Committee’s role, see Art. 26 of the Framework Convention, ‘Rules of Procedure of the Advisory Committee on the Framework Convention for the Protection of National Minorities’ ACFC/INF(1998)002 (29 October 1998) and ‘Fourth Activity Report covering the period from 1 June 2002 to 31 May 2004’ ACFC/INF(2004)001 (1 June 2004). On the role of the Committee of Experts, see Arts. 15-17 of the Charter and ‘Monitoring the application of the European Charter for Regional or Minority Languages’ [http://www.coe.int/T/E/Legal\\_Affairs/Local\\_and\\_regional\\_Democracy/Regional\\_or\\_Minority\\_languages/2\\_Monitoring/About\\_Monitoring.asp#TopOfPage](http://www.coe.int/T/E/Legal_Affairs/Local_and_regional_Democracy/Regional_or_Minority_languages/2_Monitoring/About_Monitoring.asp#TopOfPage) (2 February 2007).

<sup>101</sup> ‘Fourth Activity Report’, *supra* n.100 at para.19.

<sup>102</sup> ‘Report submitted by the United Kingdom’, *supra* n.53.

<sup>103</sup> ‘Opinion on the United Kingdom’ ACFC/INF/OP/I(2002)006 (30 November 2001) at paras.2-3.

<sup>104</sup> ResCMN(2002)9.

<sup>105</sup> ‘Initial Periodic Report presented to the Secretary General of the Council of Europe in accordance with Art. 15 of the Charter: United Kingdom’ MIN-LANG/PR(2002)5 (1 July 2002), p.2.

Report on 29 August 2003,<sup>106</sup> almost two years after the report adopted by the Advisory Committee under the Framework Convention, and the Committee of Ministers concluded the reporting cycle with the adoption of its recommendation on 24 March 2004.<sup>107</sup> Given the potential overlap in the jurisdiction of the relevant monitoring bodies, the differences in timing appeared advantageous. However, the rest of this section argues that the two treaties have played very different roles in relation to the protection of indigenous and non-indigenous languages in the UK.

**(a) *The UK's Experiences under the Framework Convention***

The UK's initial report under the Framework Convention addressed the situation of a range of linguistic, religious and immigrant minorities, despite the apparent limitations of its definition of the term "racial group".<sup>108</sup> However, the report itself was drafted by officials of the Home Office's Race Equality Unit in consultation with other parts of Government and NGOs.<sup>109</sup> This clearly influenced the content of the report. For example, the main focus under Article 12 was on the provision made for the education of children from ethnic minority groups.<sup>110</sup> The Advisory Committee's main findings in respect of that article subsequently concerned the low attainment levels, disproportionately high number of exclusions and under-representation in higher education of certain groups of ethnic minority pupils, as well as the low attendance levels of Roma/Gypsy and Irish Traveller children rather than the fostering of knowledge of minority languages, history and culture.<sup>111</sup> This can be contrasted with the recommendations made to other States that have limited the Framework Convention's scope of application to specified autochthonous groups.<sup>112</sup>

The stance adopted in the UK's report was that it would not be practicable to provide teaching of the national curriculum in the variety of mother-tongues represented in the UK<sup>113</sup> and the main focus under Article 14 was therefore on the provision of State support for Welsh, Scottish-Gaelic and Irish-medium education.<sup>114</sup> The Advisory Committee welcomed the increasing possibilities for receiving education in all three languages<sup>115</sup> but also referred specifically to representations it had received from Irish-language speakers "that more could be done to support Irish language education, including at the level of higher education where no such possibility exists"<sup>116</sup> and from

---

<sup>106</sup> 'Report of the Committee of Experts on the Application of the Charter in the United Kingdom' ECRML(2004)1 (made public on 24 March 2004).

<sup>107</sup> RecChL(2004)1.

<sup>108</sup> 'Report submitted by the United Kingdom', *supra* n.53.

<sup>109</sup> 'Memorandum to the Joint Committee on Human Rights from Michael Wills MP, January 2002' Annex B, at para.7(b).

<sup>110</sup> 'Report submitted by the United Kingdom', *supra* n.53 at paras.172-190.

<sup>111</sup> 'Opinion on the United Kingdom', *supra* n.103 at paras.120-123.

<sup>112</sup> On the Advisory Committee's practice under Art. 12, see Thornberry, *supra* n.85 at pp.376-386 and Advisory Committee 'Commentary on Education under the Framework Convention for the Protection of National Minorities' ACFC/25DOC(2006)002 (2 March 2006) chap.2.1.2.

<sup>113</sup> 'Report submitted by the United Kingdom', *supra* n.53 at para 193.

<sup>114</sup> *ibid.* at paras. 193-203.

<sup>115</sup> "Opinion on the United Kingdom", *supra* n.103 at para. 92.

<sup>116</sup> *ibid.*

Ulster-Scots speakers, who wanted to see the teaching of the Ulster-Scots language and literature introduced in schools.<sup>117</sup> Its overall conclusion therefore was that “further support is needed, in particular, for Irish language education and that the situation of Ulster Scots also needs to be examined” and “that the United Kingdom should examine with those concerned further measures that could be taken in support of such education.”<sup>118</sup> Although not a particularly strong recommendation, it is fairly typical of the recommendations made to other States under Article 14 and reflects the weak wording of the provision itself.<sup>119</sup> However, it does not appear that the situation of Irish was considered in any real depth and the Advisory Committee focused most of its attention instead on the situation of ethnic minority languages,<sup>120</sup> recommending also that the UK “further assess the level and variety of language needs of the ethnic minority communities”.<sup>121</sup>

The UK's initial response to the Advisory Committee's opinion was quite positive, noting that further measures had been taken to encourage and facilitate Irish-medium education, including the establishment and funding of a new body to promote Irish-language education, Comhairle na Gaelscolaíochta, and a reduction in viability criteria for grant-aid for new primary and secondary schools. However, its response in relation to Ulster-Scots was that there was no similar demand from parents for access to education in “Ulster-Scots-medium schools”, apparently missing the point that this was not what was being sought by the representatives in contact with the Advisory Committee, whose requests related to the teaching of the Ulster-Scots language and literature.<sup>122</sup> As is standard procedure, the Committee of Ministers recommended that appropriate account be taken both of its conclusions and the Advisory Committee's opinion and invited the Government to continue “the dialogue in process” with the Advisory Committee and to keep that body “regularly informed” of the measures taken in response.<sup>123</sup> The UK's subsequent engagement with the Advisory Committee has been disappointing. The UK notably did not organise a follow-up seminar after the conclusion of the first monitoring cycle<sup>124</sup> and the UK's second report, due on 1 May 2004, was only submitted on 22 February

---

<sup>117</sup> *ibid.*

<sup>118</sup> *ibid.*, at para 125.

<sup>119</sup> On the practice under Art.14, see Wilson, ‘Report: A critical evaluation of the first results of the monitoring of the Framework Convention on the issue of minority rights in, to and through education (1998-2003)’ in Council of Europe (ed), *Filling the Frame: Five Years of Monitoring the Framework Convention for the Protection of National Minorities* (2004) p.163 at pp.184-189 and ‘Commentary on Education’, *supra* n.112, chap.2.3.2.

<sup>120</sup> ‘Opinion on the United Kingdom’, *supra* n.103 at paras.89-91 (on ethnic minority languages) and para. 92 (on the indigenous languages).

<sup>121</sup> *ibid.*, para.124.

<sup>122</sup> ‘Comments of the Government of the United Kingdom on the Opinion of the Advisory Committee on the Implementation of the Framework Convention for the Protection of National Minorities in the United Kingdom’ GVT/COM/INF/OP/I(2002)06 (18 April 2002) at para.125.

<sup>123</sup> ResCMN(2002)9, at paras.2 and 3.

<sup>124</sup> ‘Fourth Activity Report’, *supra* n.100, Appendix 2.

2007.<sup>125</sup> This delay can be at least partly attributed to the logistical challenges of producing a report that deals with such a wide range of minority groups as well as to continuing debates over which groups should come within its scope of application.<sup>126</sup>

**(b) *The UK's Experiences under the Languages Charter***

Whereas the UK's decision to adopt a broad stance on the definitional issue under the Framework Convention meant that it was perhaps inevitable that the situation of Irish would not be considered in much depth by the Advisory Committee, the situation under the Charter was quite different. The particular significance of the Languages Charter for the development of Irish-medium education in Northern Ireland was recognised from the outset<sup>127</sup> and information for the UK's initial report was provided by the devolved institutions.<sup>128</sup> This included information on the reduction of viability criteria for Irish-medium primary schools to obtain recurrent grant-aid<sup>129</sup> and about the provision of funding from the Irish-language agency for a voluntary support organisation for Irish-medium schools, teaching and learning resources and for schools awaiting departmental recognition as well as to a voluntary organisation for special-needs in Irish-medium education.<sup>130</sup> Significantly, the Committee of Experts' visit to the UK included a visit to Northern Ireland and meetings were held with representatives of the Northern Ireland Assembly and the Ulster-Scots and the Irish-language agencies as well as representatives of associations promoting the use of minority languages.<sup>131</sup>

In relation to Part II of the Charter, the Committee of Experts noted that the official position was that there was no demand for the teaching of the Ulster-Scots language but expressed the view that "a lack of demand is often due to a lack of supply".<sup>132</sup> It therefore suggested that the authorities consider taking initiatives in that area.<sup>133</sup> In relation to Irish, the view of the Committee of Experts was that most of the undertakings made had been fulfilled<sup>134</sup> but that it did not have enough information to conclude whether the undertakings in relation to vocational training<sup>135</sup> and territories other than

---

<sup>125</sup> 'List of State Reports 2<sup>nd</sup> Cycle' [http://www.coe.int/t/e/human\\_rights/minorities/2\\_framework\\_convention\\_\(monitoring\)/2\\_monitoring\\_mechanism/3\\_state\\_reports\\_and\\_unmik\\_kosovo\\_report/2\\_second\\_cycle/List\\_SR\\_2nd\\_cycle.asp#TopOfPage](http://www.coe.int/t/e/human_rights/minorities/2_framework_convention_(monitoring)/2_monitoring_mechanism/3_state_reports_and_unmik_kosovo_report/2_second_cycle/List_SR_2nd_cycle.asp#TopOfPage) (1 June 2007).

<sup>126</sup> See report drafted for the consideration of the Advisory Committee 'The Cornish and the Council of Europe Framework Convention for the Protection of National Minorities' <http://www.geecee.co.uk/CNMR/> (2 February 2007).

<sup>127</sup> *Supra* n.7.

<sup>128</sup> 'Initial Periodic Report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter: United Kingdom' MIN-LANG/PR(2002)5 (1 July 2002), p.2.

<sup>129</sup> *ibid.*, at 48.

<sup>130</sup> *ibid.*

<sup>131</sup> 'Report of the Committee of Experts on the Application of the Charter in the United Kingdom' ECRML(2004)1 (24 March 2004) at para.6.

<sup>132</sup> *ibid.*, at para.68.

<sup>133</sup> *ibid.*

<sup>134</sup> *ibid.*, at paras.307, 310, 312, 319, 325, 326 and 330.

<sup>135</sup> *ibid.* at para.316.

those in which Irish was used had been fulfilled.<sup>136</sup> The Committee of Experts' overall assessment was that steps were being taken to improve the situation of Irish but, as the situation was developing rapidly and sufficient information had not always been available, it concluded that it would be difficult to propose any concrete recommendations.<sup>137</sup> It noted in particular that, although positive steps had been taken in the field of education, more needed to be done "in terms of coherent policy-making and planning, including the allocation of adequate resources".<sup>138</sup> The Committee of Ministers did not subsequently make any recommendations in relation to Irish-language education.<sup>139</sup> However, it did recommend that the authorities take account of the observations of the Committee of Experts and, "as a matter of priority: 1. make primary and secondary education in Scottish Gaelic generally available in the areas where the language is used".<sup>140</sup> This provides an indication of the significance of the greater "normative ambition" shown in the instrument of ratification in relation to Scottish-Gaelic.

Whilst the lack of concrete recommendations in relation to Irish-language education appears disappointing, the Committee of Experts at least reached its conclusions after a thorough examination of the current position with particular account taken of the views of NGOs representing Irish-language speakers and the Irish-language agency.<sup>141</sup> This compares favourably with the much more cursory examination adopted by the Advisory Committee, which had to focus on a much wider range of minority groups and on a broader range of minority issues. It also highlights the benefits of the State visits and meetings with minority representatives, which form an important part of the work of both the Advisory Committee and the Committee of Experts and can be favourably contrasted with the more passive approach adopted by the UN treaty-monitoring bodies. In the main body of its report, the Committee of Experts referred specifically to concerns from NGOs about a lack of sufficient teaching materials in Irish<sup>142</sup> and the enrolment criteria for Irish-medium pre-schools.<sup>143</sup> It also noted that reference had been made to the challenges of ensuring the training of a sufficient number of teachers to keep up with demand for Irish-medium education.<sup>144</sup> In so doing, it appeared to highlight areas where improvements could be made and which might be subject to further investigation in the next reporting cycle, emphasising the importance of continuing to improve the situation of minority languages within States.

---

<sup>136</sup> *ibid.* at para.331.

<sup>137</sup> *ibid.* Chapter 3F.

<sup>138</sup> *ibid.* Chapter 3G.

<sup>139</sup> Recommendation RecChL(2004)1 on the Committee of Ministers on the application of the European Charter for Regional or Minority Languages by the United Kingdom (24 March 2004).

<sup>140</sup> *ibid.* at para.1.

<sup>141</sup> 'Report of the Committee of Experts on the Application of the Charter in the United Kingdom', *supra* n.131 at paras.302-331.

<sup>142</sup> *ibid.* at para. 305

<sup>143</sup> *ibid.* at para.307.

<sup>144</sup> *ibid.*, at para.329.

The reporting cycle under the Languages Charter is shorter than under the Framework Convention and the UK's second report was submitted promptly, just over a year after the end of the first reporting cycle on 1 July 2005.<sup>145</sup> Both the Irish-language and Ulster-Scots agencies were consulted on the Northern Ireland contribution to the report<sup>146</sup> and, as no specific recommendations had been made in relation to Irish-language education, no information was needed on the UK's response.<sup>147</sup> Nevertheless some important developments were noted. For example, it was reported that Ulster-Scot primary and secondary school materials were being developed at Stranmillis University College,<sup>148</sup> that an Irish-medium Unit had been established by the Council for the Curriculum Examinations and Assessment to translate examination and assessment materials<sup>149</sup> and that an Irish-Medium Curriculum Materials Unit had been established at St Mary's University College.<sup>150</sup> It was also noted that there had been an increase in the number of Irish-medium primary schools with grant-aided status to 19 (with 10 Irish-medium units within existing schools)<sup>151</sup> and an increase in the number of pupils studying Irish as a second language at GCSE level.<sup>152</sup> Reference was also made to the continuation of funding for Irish-language vocational training programmes for those leaving Irish-medium secondary education at 16<sup>153</sup> and to developments in the area of teacher-training.<sup>154</sup> Meanwhile another important initiative reported was the establishment in Northern Ireland of an Interdepartmental Charter Implementation Group with responsibility "for coordinating work to implement, monitor and report on the Charter."<sup>155</sup> It therefore appears that there have been a number of positive developments in this area since the UK ratified the Charter, despite the lack of concrete recommendations from the Committee of Experts. These may be partly attributable to the effective use of the Charter as lobbying tool and the next section explores further the profile of both treaties at the domestic level.

---

<sup>145</sup> 'Second Periodic Report presented to the Secretary General of the Council of Europe in accordance with Article 15 of the Charter: United Kingdom' MIN-LANG/PR(2005)5 (1 July 2005).

<sup>146</sup> *ibid.*, at 18. See also 'Second UK Report on Compliance with the European Charter for Regional or Minority Languages: Northern Ireland Contribution, June 2005' [http://www.dcalni.gov.uk/Contman/includes/upload/file.asp?ContentID=1063&file=c\\_24](http://www.dcalni.gov.uk/Contman/includes/upload/file.asp?ContentID=1063&file=c_24) (2 February 2007).

<sup>147</sup> States are asked to summarise the measures for each recommendation in their periodic reports ('The European Charter for Regional or Minority Languages: Outline for three-yearly Periodic Reports to be submitted by Contracting Parties' MIN-LANG(2002)1 (7 February 2002) Part I, Q 5).

<sup>148</sup> 'Second Periodic Report', *supra* n.145 at 37.

<sup>149</sup> *ibid.*, at 38.

<sup>150</sup> *ibid.*, at 63.

<sup>151</sup> *ibid.*, at 62.

<sup>152</sup> *ibid.*, at 63.

<sup>153</sup> *ibid.*, at 64.

<sup>154</sup> *ibid.*, at 65.

<sup>155</sup> *ibid.*, at 5.

### Recent Developments at Domestic Level

Although the Council of Europe's minority treaties do not have as high a profile as the UN human rights treaties in the UK as a whole,<sup>156</sup> the situation is rather different in Northern Ireland. Both the Framework Convention and the Languages Charter were mentioned in the Good Friday Agreement<sup>157</sup> and have influenced debates over future legislative developments, in particular in relation to proposals for a Bill of Rights and for an Irish Language Act. In relation to the former, there has been some discussion about the possible incorporation of the Framework Convention into domestic law<sup>158</sup> with debate over whether members of the Protestant majority should be entitled to protection under the Framework Convention and whether use of the term "community" is preferable to the term "minority".<sup>159</sup> As the UK has not restricted the scope of application of the Framework Convention to indigenous minorities, it is perhaps unsurprising that it has been proposed that some of the rights in the Framework Convention should be applied in relation to all linguistic minorities.<sup>160</sup> These include the right "to be educated in and through their language, where there are sufficient numbers of users and sufficient demand".<sup>161</sup> Although it has been recognised that sufficiency of demand already exists in relation to the Irish, it has also been suggested that this might develop over time in relation to other languages.<sup>162</sup> It therefore appears that the provisions of the Framework Convention, as a human rights treaty, are considered to be relevant to a range of linguistic groups and not just the indigenous minorities.

It was also proposed by the Northern Ireland Human Rights Commission that legislation be introduced specifically to implement the UK's commitments under the Charter in relation to the Irish language and Ulster-Scots.<sup>163</sup> Meanwhile legislative proposals for an Irish Language Act have been drafted by POBAL, the umbrella organisation for the Irish-language community, and include recognition of a right of parents to have their children receive Irish-medium education and to be taught the Irish language at all stages of primary and post-primary education.<sup>164</sup> The proposals also envisage the imposition of more specific obligations on the Department of Education in relation to the development of Irish-medium education, the teaching of the Irish language in

---

<sup>156</sup> For example, the Joint Committee on Human Rights now routinely produces reports for Parliament on the UK's obligations under the UN human rights treaties.

<sup>157</sup> 'Good Friday Agreement', *supra* n.6 'Human Rights' para.9 and 'Economic, Social and Cultural Issues' para.4.

<sup>158</sup> NIHRC 'Making a Bill of Rights for Northern Ireland – Consultation Document. September 2001' chap.13 and NIHRC 'Progressing a Bill of Rights for Northern Ireland: An Update. April 2004' s. 14. These documents can be found on the Bill of Rights section of the NIHRC's website at 'Consultation Documents' [http://www.nihrc.org/index.php?option=com\\_content&task=view&id=54&Itemid=71](http://www.nihrc.org/index.php?option=com_content&task=view&id=54&Itemid=71) (2 February 2007).

<sup>159</sup> McCrudden, *supra* n.13.

<sup>160</sup> *Supra* n.158.

<sup>161</sup> 'Progressing a Bill of Rights for Northern Ireland', *supra* n.158, s.14(3).

<sup>162</sup> 'Making a Bill of Rights for Northern Ireland', *supra* n.158 at p.78.

<sup>163</sup> 'Progressing a Bill of Rights for Northern Ireland', *supra* n.158, s.14 (4).

<sup>164</sup> 'POBAL's Proposals for The Irish language Act Northern Ireland' (February 2006) Pt III, s.42 <http://www.pobal.org/english/docs/act.pdf> (2 February 2007).

English-medium schools, the development and provision of teaching materials, assessment tools and the curriculum and teacher training.<sup>165</sup> The drafters were clearly influenced by the requirements of the Charter and this reinforces the overall impression that the two treaties have very different roles in relation to the protection of indigenous and other languages.<sup>166</sup> It is particularly significant that the idea of an Irish Language Act has now acquired official support with the St Andrews Agreement of 13 October 2006, which also improves the future prospects of the Bill of Rights project.<sup>167</sup>

## Conclusion

Despite some substantive overlap and similar monitoring procedures, this article has argued that the Framework Convention and the Languages Charter have very different roles in relation to the protection of indigenous and non-indigenous languages in the UK. These different roles can be attributed not only to the UK's decision to adopt a broad definition of the term "national minority" but also to the role of the Framework Convention as a human rights treaty, which has clearly influenced both the wording of the substantive provisions on education and the decision of the Advisory Committee to focus on educational issues impacting on a range of minority groups. Although most States have adopted a narrower approach on the definitional issue, the UK's experiences provide an illustration of how the requirements of the Framework Convention can be applied in relation to immigrant minorities.<sup>168</sup> The Languages Charter specifically excludes migrant languages from its scope of application and imposes more concrete and precise obligations on ratifying States. It has been noted that the usefulness of the Charter's "à la carte system" depends to a large extent on the "normative ambition" shown by States Parties<sup>169</sup> and the UK's cautious response to the selection of provisions was perhaps disappointing. Nevertheless there have been a number of positive developments in relation to Irish-language education since the Charter came into force and the UK has so far engaged to a greater extent with the monitoring procedures under the Charter than with those developed under the Framework Convention. However, there remain concerns that insufficient measures have been taken to meet increased demand for Irish-medium education in Northern Ireland,<sup>170</sup> and this is reflected in the more critical stance adopted at the end of the

---

<sup>165</sup> *ibid.*, s.45.

<sup>166</sup> The experts consulted included Robert Dunbar, who has written extensively on the Charter (*supra* nn.12, 54, 90 and 96).

<sup>167</sup> Annex B included a commitment to establish a forum on a Bill of Rights and to introduce an Irish Language Act.

<sup>168</sup> As Wheatley has noted, States are permitted but not required to exclude "new minorities" from its scope of application and the Advisory Committee has consistently encouraged States to widen its scope of application to cover a wider range of minority groups (Wheatley, *supra* n.50 at pp.48-56).

<sup>169</sup> Oeter, *supra* n.11, at pp.147-148.

<sup>170</sup> (POBAL 'The European Charter for Regional or Minority Languages: The Implementation of the Charter with Regard to the Irish Language 2002-5' at paras.5.37-5.50 <http://www.pobal.org/english/docs/tua.cairt.b.pdf> (2 February 2007)).

second monitoring cycle.<sup>171</sup> The committee of experts therefore has an important role to play in continuing to monitor developments in this area.

---

<sup>171</sup> Although the Committee of Experts adopted its second evaluation report on the UK on 14 September 2006, the contents have only just been made public ('Monitoring the implementation of the European Charter for Regional or Minority Languages' [http://www.coe.int/t/e/legal\\_affairs/local\\_and\\_regional\\_democracy/regional\\_or\\_minority\\_languages/2\\_Monitoring/Monitoring\\_table.asp#TopOfPage](http://www.coe.int/t/e/legal_affairs/local_and_regional_democracy/regional_or_minority_languages/2_Monitoring/Monitoring_table.asp#TopOfPage) (1 June 2007)).

## **GENDER AND “MODERN” CONSTITUTIONALISM: THE TREATY ESTABLISHING A CONSTITUTION FOR EUROPE**

*Dr Charlotte Skeet, Lecturer in Law at Sussex Law School,  
University of Sussex*

### **Abstract**

*This paper takes as its starting point the understanding that constitutions and constitutional processes are gendered and that different constitutional forms may have different consequences for women as citizens. The paper then reflects on the gender gap revealed by the recent referenda on the Treaty Establishing a Constitution for Europe (Constitutional Treaty) in France and the Netherlands. In these referenda women led the “no” vote against the Constitutional Treaty. The paper looks at the involvement of women in the drafting process, reviews feminist critique of the Constitutional Treaty and analyses the gendered nature of the current European constitutional project, to address why women said “no” to the Constitutional Treaty. Moreover, by relating feminist critique to wider issues around the constitutional form embodied by the Constitutional Treaty, the paper goes beyond questions of participation in the process and content of the Treaty. It argues that the type of constitutional settlement which the Constitutional Treaty sought to introduce are inimical to gender justice.<sup>1</sup>*

### **Introduction**

The Treaty Establishing a Constitution for Europe (Constitutional Treaty) was drafted, amended, and debated through the Convention on the Future of Europe, February 2002 – July 2003 and the subsequent Inter-Governmental Conferences, October 2003 - June 2004. The Constitutional Treaty was signed in October 2004 and was intended to replace previous European Union treaties signed over the last 50 years.<sup>2</sup> While some governments stated that accession would be a purely governmental matter others offered their citizens referendums.<sup>3</sup> An official “toolkit” for citizens on the Constitutional Treaty suggested that “Only the support and the participation of the 450 millions citizens who make up the European Union will make this Europe a reality. Regardless of the method of ratification of the Constitution.

---

<sup>1</sup> This is based on a paper given at the University of Sussex / University of Bergamo Legal Forum September 17 2005.

<sup>2</sup> With the exception of the EUROTOM , [http://Europa.eu/constitution/index\\_en.htm](http://Europa.eu/constitution/index_en.htm)

<sup>3</sup> Ten states announced that they would allow referendums. But only in Spain, Luxembourg, France and The Netherlands did referendums take place before the process was halted.

. . .”<sup>4</sup> While in Spain and Luxembourg the referenda outcomes were in favour of the Constitutional Treaty both French and Dutch citizens sent back a clear “no”.<sup>5</sup> This had inevitable ramifications.<sup>6</sup> Two weeks later the remaining referenda were placed on hold and it is now widely accepted that the Constitutional Treaty has been set to one side.

It is less recognised that the voting in Holland showed a clear gender gap with around 66% of women voting “no” compared to 58 % of men.<sup>7</sup> Some evidence also suggests that in the French referendum women led in the “no” vote.<sup>8</sup> Certainly France was the focus of concerted campaigning by feminist groups against the Constitutional Treaty. There have been previous feminist campaigns against constitutional changes in Europe. In Sweden there were feminist campaigns against monetary union and women led in the “no” vote which defeated the EMU.<sup>9</sup> The vote on the Maastricht Treaty in France was also close and showed women more likely to vote “no” than men.<sup>10</sup> But the feminist campaign against the Constitutional Treaty was trans-national with Europe wide conferences and initiatives. Well-documented criticisms from academics and European feminist lobbies of the draft versions and of the final Constitutional Treaty fed into feminist and socialist-feminist campaigns against the Constitutional Treaty.

To many UK feminists this anti-Treaty stance might initially seem surprising. In the United Kingdom there is a clear history charting the importance of the EU in developing women’s equality and in increasing awareness of constitutionalism as an equality tool for feminists.<sup>11</sup> This paper will not argue that all feminists voted “no” or that all the women who so voted were feminists, but it will address the issue of why there was a women’s campaign against the Constitutional Treaty and how this fits into

---

<sup>4</sup> *Information Tools on the Constitution*, Brussels, 11<sup>th</sup> August, 2005 [http://europa.eu/constitution/download/Catalogue\\_EN.pdf](http://europa.eu/constitution/download/Catalogue_EN.pdf) , 1.

<sup>5</sup> Respectively 55% and 62% overall.

<sup>6</sup> H. H. Joseph Weiler, *On the Power of the Word: Europe’s Constitutional Iconography* (2005) 3:2 *International Journal of Constitutional Law*, 173, considered that if such a vote occurred the Treaty would have to be set aside.

<sup>7</sup> Austin, Greg and Grace Annan, Gary Hindle and Kate Parker, *Reform in the Europe after the 2005 Referendums: Battling for the Results: Policy Brief*, Foreign Policy Centre June 9 2005, [www.fpc.org.uk/publications](http://www.fpc.org.uk/publications), at 8.

<sup>8</sup> A series of IPSOS polls leading up to the vote suggested women and the poor were much more likely to vote “no” than men. America Vera-Zavala, a Swedish journalist and member of ATTAC cites these in her article “French Vote on European Constitution” ZNet, May 29 2006, [www.zmag.org/content](http://www.zmag.org/content). However Sylvain Brouard, and Vincent Tiberj, “The French Referendum: The Not So Simple Art of Saying Nay,” American Political Science Association online, PSOnline [www.apsanet.org/content\\_24661.cfm](http://www.apsanet.org/content_24661.cfm), cite the IPSOS exit Poll on the May 29 2005 which revealed the “no” vote from women slightly behind men 53% to 57%.

<sup>9</sup> Nicholas Aylott, *The Sweden referendum on EMU of September 14 2003: Referendum Briefing No.9* EPERN, <http://www.sussex.ac.uk/sei/documents/epernbrefsweden.pdf> at 4.

<sup>10</sup> Brouard + Tiberj, “The French Referendum” (2006), at 262

<sup>11</sup> *E.g.* in the UK, women’s activism in the Scottish Constitutional Convention and in the Northern Ireland peace talks. Elizabeth Meehan, *Women’s Rights in Citizen Europe*, in *The Manchester Papers*: <http://www.charter88.org.uk/pubs/manpaps/meehan.html>.

theoretical understandings of the relationship between constitutions and gender.

The next section examines the wider debate on gender and constitutionalism and asks whether political movements like feminism should ever seek a stronger constitutionalism. The following sections explore women's participation in drafting the Constitutional Treaty and considers subsequent criticisms and the campaign for a "no" vote. Finally feminist opposition to the Constitutional Treaty is examined in light of the Constitutional form it sought to introduce.

### Gender and Constitutional Theory

The understanding of constitutions as gendered and impacting differentially on men and women is recognised by a wide variety of organisations<sup>12</sup> and is supported by a wide literature on women, constitutions, constitutional interpretation and constitutional change.<sup>13</sup> The different operation of constitutions for men and women may be evidenced in a number of ways. For instance statements of who is and is not a citizen, and rights framing and implementation may be gendered.<sup>14</sup> The way that constitutions distribute power – who exercises power and where it is exercised may have a differential impact for women;<sup>15</sup> women's access to political process may vary at local, national or state/federal level. The anticipated reach of constitutional provisions, or the way constitutions divide powers may re-

<sup>12</sup> Including the EU, the UN, UNDP, UNIFEM the World Bank, Amnesty International, Human Rights Watch among others.

<sup>13</sup> For instance , Beverley Baines, and Ruth Rubio-Marin (eds.), *The Gender of Constitutional Jurisprudence* (CUP, 2005); Christine Chinkin, *Gender Mainstreaming in Legal and Constitutional Affairs: A Reference Manual for Government and Other Stakeholders*, Commonwealth Secretariat, London, 2001; Dobrowolsky, Alexandra and Vivien Hart, *Women Making Constitutions: New Politics and Comparative Perspectives* (2003); Shah, Niaz, *The Constitution of Afghanistan and Women's Rights*, [2005] 13 FLS 239; Gill Vickers, *Why Should Women Care About Constitutional Reform*, in David Schneiderman, (ed.), *Conversation Among Friends: Interdisciplinary Conference on Women and Constitutional Reform* (1991). Ralph Sandland, "Between "Truth" and "Difference": Post-structuralism, Law and the Power of Feminism" [1995] 3 1 FLS 47; Catherine Dauvergne, *A Reassessment of the Effects of a Constitutional Charter of Rights on the Discourse of Sexual Violence in Canada*, (1994) 22 *International Journal of the Sociology of Law* 291; *Constitutional Equality: The Implication For Women in South Africa*, (1995) *Summer Social Politics* 208; Kim Scheppele, *Constitutionalising Abortion*, in Marianne Githens, and Dorothy McBride Stetson, (eds.), *Abortion Politics: Public Policy in Cross-Cultural Perspective* (1996); *Human Rights Watch: Woman's Watch*, [www.hrw.org/women/](http://www.hrw.org/women/); Women's Human Rights Net, [www.whrnet.org](http://www.whrnet.org); *Minority Rights Group International* [www.minorityrights.org](http://www.minorityrights.org).

<sup>14</sup> For examples see Rebecca Cook, *Human Rights of Women: National and International Perspectives* (1994); Patricia Grimshaw, Katie Holmes and Marilyn Lake, (eds.), *Women's Rights and Human Rights: International Historical Perspectives* (2001); Joanna Kerr, (ed.), *Ours By Right: Women's Rights as Human Rights* (1993).

<sup>15</sup> Gill Vickers, "Why Should Women Care About Constitutional Reform" in Schneiderman, David, (ed.), *Conversation Among Friends: Interdisciplinary Conference on Women and Constitutional Reform* (1991).

enforce the public/private divide. Activities may or may not be covered by rights instruments and other constitutional provisions depending on where they take place.<sup>16</sup> Finally, since women are over-represented among the poor, provision (or not) for welfare rights and other shared social goods will have particular resonance for women.<sup>17</sup>

In addition to the differential impact of constitutions on men and women, questions arise about the very nature of constitutionalism and how constitutionalism serves women as a group. In considering different types of constitutionalism the next section examines critiques of “modern” constitutionalism in relation to women and considers how understandings of the extant European Union constitution fits into these theoretical understandings.

This feminist query about the nature of constitutionalism itself stems, in part, from a longstanding feminist critique of constitutionalism and the “modern” constitutional form, which is said to date from the United States of America Constitutional Convention and Constitution 1787.<sup>18</sup> There is also an historical failure of constitutions and constitution making to reflect the concerns of women and other excluded groups. The history of constitutions can be seen as a history of the categorisation and exclusion of certain groups, either through imperial projects or internally through the construction of a citizenship.<sup>19</sup> This, Iris Marion Young argues, has prevented the full recognition of women and denied black and indigenous peoples an identity as citizens in the US; and has operated similarly against women, Jews and the lower socio-economic classes in Europe.<sup>20</sup> Alan Cairns iterates twentieth century exclusions of certain groups, referring to the phenomenon as “constitutional stigmatisation.”<sup>21</sup>

Yet some traditional constitutional theorists do not view changes concerning women’s political equality as constitutional changes at all, because they impact more on the relationship amongst the governed rather than between

---

<sup>16</sup> For instance *Attorney General of Canada v Attorney General of Quebec* [2005] S.C.J. no 57 and in the UK, *R v Leonard Cheshire Foundation (a Charity) & HM Attorney-General* [2002] EWCA Civ. 366 21 March 2002.

<sup>17</sup> For evidence of this in the UK, which is not atypical, see Frances Katie Drever, Joanna Brown Fisher, and Jenny Clark, *Social Inequalities* (London, National Statistics Office, 2000).

<sup>18</sup> Abigail Adams, (S Mitchell Editor) *New Letters Of Abigail Adams:1788-1801* (1947); Kingdom, Elizabeth, “Gendering Rights” in Andre Jean Arnauld, and Elizabeth Kingdom, (eds.) *Women’s Rights and the Rights of Man* (1990) Sandra Van-Burkleo, *Belonging to the People: Women’s Rights and American Constitutional Culture* (2001). Sylvana Tomaselli, (ed.), *Mary Wollstonecraft, - A Vindication of the Rights of Man and A Vindication of the Rights of Women (1792)* (Cambridge, Cambridge University Press, 1995), Stopes, Charlotte Carmichael, *The Sphere of “Man”: In Relation to that of “Woman” In the Constitution* (1908).

<sup>19</sup> James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1995), p.179-180.

<sup>20</sup> Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, in Sunstein, Cass, (ed.), *Feminism and Political Theory* (1989).

<sup>21</sup> Alan Cairns, *Constitutional Stigmatisation*, in Patrick Hanafin, and Melissa Williams, *Identity, Rights and Constitutional Transformation* (1999).

the governed and government.<sup>22</sup> In contrast, Canadian constitutionalist, James Tully, makes an analogy between the claims of aboriginal peoples arguing for self-determination and the claims of women arguing for equality provisions. He argues both can be viewed as claims for cultural recognition within constitutionalism,<sup>23</sup> and suggests that equality claims are central to questions of legitimacy within a nation or a political institution.<sup>24</sup> Tully suggests that although amendments to constitutions gave some recognition to equality groups seeking groups they rarely changed the dominant and exclusionary language of modern constitutionalism. He therefore concludes that the “modern” constitutional form,<sup>25</sup> with its narrow understandings of the purpose and nature of constitutions, cannot do justice to demands from women and other previously excluded groups.<sup>26</sup>

In descriptions and understandings of “modern” constitutions the principles for legitimate government are usually envisaged as a regulator or limiter of the political process.<sup>27</sup> Neil Walker critiques dominant norms in constitutionalism from the meta-constitutional perspective of the European Union; Tully from the position of sub-national groups; but their critiques are similar. Both hold that conventions in the dominant language of constitutionalism operate to either assimilate or exclude cultural diversity. Tully argues that conceptions of popular sovereignty serve to exclude diversity from the democratic process.<sup>28</sup> These conceptions include the myth of a homogenous citizenship, concepts of “a common good,” and of a universal equality which transcends difference. While modern constitutionalism pretends neutrality, Walker states that its normative bias favours certain interests and ideas at the expense of others.<sup>29</sup> The constitutional state is presented as connected to “identity,” an “imaginary community” to which people must belong if they are to be considered citizens.

---

<sup>22</sup> In the 1999 Hamlyn lectures, Anthony King argued that the extension of the franchise to women in the UK between 1918 and 1928, while “undoubtedly desirable . . . and undoubtedly important to large numbers of women,” was “probably not” constitutional change. Anthony King, *Does the United Kingdom Still Have a Constitution?* (2001), p.1. King argues that this is because the extension of the franchise does not substantially alter the relationship between the governors and the governed. He makes a football analogy: The offside rule in football is fundamental to the game, however, the rule stating that a coin is to be tossed to decide who goes first is not. In his view the extension of the franchise to women is like the rule relating to the tossing of a coin. I don’t think football is necessarily the best analogy but staying with it I argue that franchise change is very much like the offside rule both raise questions of legitimacy which are fundamental.

<sup>23</sup> Tully, *Strange Multiplicity* (1995), p.39.

<sup>24</sup> Though Judith Squires warns that the process of constitutionalising difference in the form of representational guarantees may “rigidify what are actually very fluid identities,” in “Liberal Constitutionalism, Identity and Difference” (1996) *XLIV Political Studies* 620 at 633.

<sup>25</sup> Dating from the US constitutional Convention at Philadelphia 1787.

<sup>26</sup> Tully, *Strange Multiplicity* (1995), p.16.

<sup>27</sup> Kenneth Wheare. *C Modern Constitutions* (OUP, 1960).

<sup>28</sup> Tully, *Strange Multiplicity* (1995), p.64.

<sup>29</sup> Neil Walker, ‘The Idea of Constitutional Pluralism,’ (2002) 65 *MLR* 317 at 324-326.

The identification of the classical constitution with specifically European origins also aligns constitutions to the state and constitutions are contrasted with ‘stateless, irregular and ancient societies.’<sup>30</sup> Walker suggests that binding constitutions to this statist framework prevents modern constitutional theory from being able to explain, contain or steer the major flows of political, economic and social power that “escape the state.”<sup>31</sup> Walker also notes the exploitation of constitutionalism as a symbolic authority to clothe the aspirations and ideas of politicians with a greater legitimacy. Similarly, Tully critiques presentations of constitutionalism which view the constitution as a pre-condition and not a product of democracy, a mechanism to legitimate politics, when in fact political machinery is needed to legitimate constitutional arrangements.<sup>32</sup> Finally, Walker critiques what he calls “constitutional fetishism” by which he means overstating the impact of constitutional discourse to the extent that insufficient attention is given to other mechanisms that wield power in society.<sup>33</sup> All these critiques reveal a constitutional form that disadvantages women and other political minorities, politically, economically and socially.

But this model of the constitution as the only constitutional form is contested. Other models presented by authors who reject this “modern” form show that constitutionalism can present positive opportunities for women and other political minorities. For instance Walker and Tully see constitutions not just as isolated frameworks, which underpin representative democracy, but as themselves caught up in the “dynamics of social and political life.”<sup>34</sup> Both believe that constitutionalism has the potential for a radical and transformative form where it is informed by the constitutional convention of mutual recognition, legitimated by political discussion and debate, not viewed as an abstract above politics.

The authors, and others taking this wider view, give historical and current examples of constitutional models that they believe to do this.<sup>35</sup> Craig for

---

<sup>30</sup> Tully, *Strange Multiplicity* (1995), p.68.

<sup>31</sup> Walker, “Constitutional Pluralism,” (2002) at 318-321. Though Himsworth notes that it is precisely the failure to describe and conceive of the state fully in the UK which has led to problems with the UK constitution. Himsworth, Christopher, “In a State No Longer: The End of Constitutionalism” [1996] *PL* 639

<sup>32</sup> *ibid.*, at 649.

<sup>33</sup> Walker, “Constitutional Pluralism” (2002) at pp.324-326.

<sup>34</sup> Tully, James “Radical Democratic Constitutionalism,” paper presented at the Conference on *Constitutionalism in Transition* University of Leeds, 5th July 2001, p.1. This view of constitutions as inside rather than external to the political framework is also expressed by Richard Bellamy, and Dario Castiglione, in “Introduction: Constitutions and Politics” (1996) *XLIV Political Studies* 413 and Richard Bellamy, “The Political Form of the Constitution: The Separation of Powers, Rights and Democracy” (1996) *XLIV Political Studies* 620.

<sup>35</sup> Tully, *Strange Multiplicity* (1995) and Walker, “Constitutional Pluralism.” (2002). Examples cited by Tully include the 1774 Quebec Act, which brought Quebec into the then British Empire. Also Patrick Glen, in *Legal Traditions of the World*, (OUP, 2000) p.81 provides a more recent example and suggests New Zealand Land’s Tribunal established for the adjudication of chthonic land claims is a “looser,” more inclusive form of constitutional structure within the “modern” constitutional state. The current South African Constitution, highly praised as a

instance suggests that before the modern concept of constitutions came to be applied to the British Common Law constitution in the 19<sup>th</sup> century, the constitution operated to regulate activity between groups and individuals rather than focussing on state institutions. He states that this earlier operation meant that:

“. . . the courts did not reason on the basis of any rigid dichotomy between public and private law. They were therefore able to control power based on sound normative principles without necessarily being limited by its source.”<sup>36</sup>

Charlotte Stopes writing at the end of the 19<sup>th</sup> century provided historical examples for her argument that the British constitution did not discriminate against women as a group. Rather, she suggested, the discrimination came from a particular line of misinterpretation by male lawyers and judges in the 18<sup>th</sup> and 19<sup>th</sup> centuries.<sup>37</sup>

Currently within Europe, the Good Friday Agreement in Northern Ireland provides a further illustration of the concept of “mutual recognition.” The agreement recognises “within the authoritative tradition” the legitimacy of alternative constitutional visions belonging to the UK and the Republic of Ireland.<sup>38</sup> A similar type of agreement, recognising both the legitimacy of UK sovereignty and that claimed by Spain, is proposed for Gibraltar.<sup>39</sup> In terms of European regional arrangements, the European Convention on Human Rights (ECHR) system recognises a multiplicity of co-existing constitutional arrangements. The qualifiers and limiters that define the scope of rights within the European Convention on Human Rights and Fundamental Freedoms and the principle of “margin of appreciation” applied by the European Court of Human Rights acknowledge a multiplicity of legislative rules, customs, and cultures.<sup>40</sup>

---

model for constitution making, is said to embody the idea of the constitution as process and in this way bucks the modern constitutional fetish for fixity.

<sup>36</sup> Paul Craig, “Public Law, Political Theory and Legal Theory” [2000] *Public Law* 211. This is also by Sir Stephen Sedley in, *The Making and Remaking of the Constitution* (1997) and this theory fits with Wittgenstein’s view of the Common law constitution as pluralistic. Pitkin, Hanna Fenichel *Wittgenstein and Justice* (1972) p.52.

<sup>37</sup> Stopes, Charlotte Carmichael, *The Sphere of ‘Man’ in relation to that of ‘Woman’ in the Constitution* (1908).

<sup>38</sup> Walker, “Constitutional Pluralism,” (2002), at 34; The Good Friday Agreement, <http://www.nio.gov.uk/the-agreement>.

<sup>39</sup> Tony Blair, Hansard Official Report, House of Commons, 20 March 2002, Vol. 382 c.300. Notable in both situations is the recognition of the role of politics. In each case more than one sovereign country is involved and change must be legitimated by reference to the people. They operate at both meta-state and sub-state level, with much wider scope than that envisaged by proponents of the traditional view of constitutions.

<sup>40</sup> But the ECHR system may be much better in its recognition of states than of other groupings. For instance there is criticism about the ability of the European Court of Human Rights to recognise the rights of minority religions and lifestyles within states. See Marie-Benedict Dembour, “The Cases That Were Not To Be: Explaining the Dearth of Case-Law on Freedom of Religion at Strasbourg” in Italo Prado, (ed.), *Morals of Legitimacy: Between Agency and System* (2000).

Most importantly a number of theorists note that the distinct nature of the European Union’s extant constitution seems to fit this concept of mutual recognition.<sup>41</sup> For instance Walker, writing prior to the Convention On The Future of Europe, argues that the ‘search for meta-constitutional authority’ within the European Union “freed up debate” and encouraged greater resort to “the ample tool-kit of state constitutionalism.”<sup>42</sup> The extant European Union constitution, by constantly seeking legitimacy through its operation and process, arguably fits the discursive constitutional model and provides a space for discussion of gender. This does not suggest that the current political structures are the best in terms of their accommodation and facilitation of debate: the machinery of the European Union was not established to respond to democratic demands and is in need of change, but in terms of constitutive form it is forward looking. Bellamy states for instance that the extant constitution is neither based on closed agreed European Union norms and purposes nor on the concept of a fixed sovereign people, two models of nation state constitutions common within Europe.<sup>43</sup> Instead it has developed from notions of neo-republican governance and the evolution of a European Common law.<sup>44</sup> Bellamy’s argument, that this flexibility suits the “EU’s character as an evolving polity and must be enhanced not rejected,”<sup>45</sup> has a relevance for a gender analysis. The struggle for women’s full acceptance is a continuing project at a substantive, if not formal level, within the European Union. In this respect a constitution that fixes neither the current polity nor regime<sup>46</sup> makes sense for the women’s movement. Any change to the extant constitution should recognise in its form the need for ongoing legitimating discourse and likewise provide space for agenda setting.

### **The Treaty Establishing a Constitution for Europe**

This section considers why women’s participation in the process should have been specifically addressed. It then addresses feminist lobbying around the Constitutional Treaty, initially as an attempt to get more women involved,

---

<sup>41</sup> Walker, “Constitutional Pluralism” (2000); Bellamy, Richard, “Which Constitution For What Kind of Europe? : Three Models of European Constitutionalism” Paper for CIDEL Workshop “Constitution Making and Democratic Legitimacy in the EU” London, 12-13<sup>th</sup> November 2004, p.1 5-6; Wieler, “On the Power of the Word” (2002); Castiglione, Dario “From The Charter to the Constitution of Europe?: Notes on the Constitutionalisation Process in the EU,” Queens Papers on Europeanisation No. 5/2002; Paul Craig, “Constitutions, Constitutionalism, and the European Union” (2001) 7 ELJ 125.

<sup>42</sup> Walker, “Constitutional Pluralism” (2002) at 343.

<sup>43</sup> Richard Bellamy, “Which Constitution For What Kind of Europe?: Three Models of European Constitutionalism” Paper for CIDEL Workshop “Constitution Making and Democratic Legitimacy in the EU” London, 12-13<sup>th</sup> November 2004 p.6. He suggests that the former accords with the French constitution and the latter with the German.

<sup>44</sup> *ibid.*, 15-6.

<sup>45</sup> *ibid.*, at 3. Bellamy uses the example of women as a previously excluded group and notes that historically women struggled for changes to both regimes and polities in order to be accepted as full subjects in national constitutions.

<sup>46</sup> *ibid.*, at 3.

then in order to try to change the content of the drafts and finally in connection with the campaign for a “no” vote.

### Women and Constitution Making

International law recognises the right to participate in governance.<sup>47</sup> At one point it was believed that these rights to participate in democratic processes did not apply to the constitution making process because constitutions were a pre-condition but not a part of democratic governance. But Vivien Hart argues that rights to participate in constitution making have crystallised. So constitution making should be subjected to the same democratic participatory processes as other areas of governance.<sup>48</sup> Since it is recognised that women have a right to participate in governance then this should include their right to participate in constitution making.<sup>49</sup> Moreover the desirability of including women in such processes is formally recognised at an international level through development programmes,<sup>50</sup> United Nations<sup>51</sup> and World Bank literature and programmes.<sup>52</sup>

Mere physical presence of women within the constitution-making convention, what Hannah Pitkin calls symbolic or descriptive representation,<sup>53</sup> is not a guarantee that gender issues will be raised and discussed. But research shows that where women are represented in a “critical mass”<sup>54</sup> changes in political culture, discourses and policy take place.<sup>55</sup> It is therefore important to include women’s voices in constitution making processes so that the outcome of constitutional debate reflects the aspirations and concerns of women.

But irrespective of any tangible outcomes it is suggested that the process of entering into constitutional debate itself can have a stimulating and mobilising effect on campaigns for women’s equality. Merely entering the

---

<sup>47</sup> UNHR (1948) Article 21 ICCPR Article 25. In relation specifically to women, African Charter on Humans and Peoples Rights (1981) Article 13, Convention on the Political Rights of Women (1952) Preamble, CEDAW Article 7 and Article 8. But these rights do not appear in the European Convention on Human Rights and Fundamental Freedoms (1952) or the more recent EU Charter of Fundamental Rights of the European Union. (2000).

<sup>48</sup> Vivien Hart, “The Right to Participation in Constitution-Making: A Response to Frank” 2007 forthcoming.

<sup>49</sup> *ibid.* Though the scope of such rights is not clear.

<sup>50</sup> Chinkin, Christine, *Gender Mainstreaming in Legal and Constitutional Affairs: A reference Manual for Governments and Other Stakeholders* (Commonwealth Secretariat, London, 2002).

<sup>51</sup> Hart, *Democratic Constitution Making*, United States Institute of Peace (USIP) Special Report July 2003, p.7. See also in relation to women’s representation in post-conflict situations UN Security Council Resolution 1325 (2000).

<sup>52</sup> <http://www.worldbank.org>.

<sup>53</sup> Hanna Fenichel Pitkin, *The Concept of Representation*, (1967), p.81.

<sup>54</sup> Dahlerup was one of the first people to use this term in relation to women’s representation. Drude Dahlerup, (ed.), *The New Women’s Movement: Feminism and Political Theory in Europe and the USA* (SAGE, 1986).

<sup>55</sup> Dalerup, *The New Women’s Movement* (1986); Norris, Pippa, *Women Politicians Transforming Westminster*, (1996) 49 *Parliamentary Affairs* 89; High-Pippert, Angela and John Comer, *Female Empowerment: The Influence of Women Representing Women* (1998) 194 *Women and Politics* 53.

debate raises the profile of women’s rights and the status of women within the wider polity.<sup>56</sup> Melissa Haussman notes that both in Canada during the Charter debates, which had a favourable outcome for women’s groups, and during and after United States of America Equal Rights Amendment discussions, which did not lead to constitutional change, women’s status and profile were raised.<sup>57</sup> Democratic participation in constitution-making is also recognised as affecting the subsequent use of constitutional provisions by both citizens<sup>58</sup> and the judiciary.<sup>59</sup> It also raises debate in political institutions. Therefore involvement in the process itself generates positive discourses which act both internally on the women’s movement and externally on constitutional institutions.

Despite widespread recognition of the importance of ensuring gender debate in constitutional development and change, it is certainly not always addressed. While women were major players in South Africa and other recent constitutional processes,<sup>60</sup> the inadequate inclusion of women in the Iraq constitutional process was widely criticised.<sup>61</sup> But there were two reasons why it was expected that women would be specifically included in the deliberations. Firstly because the European Union had commitments to gender mainstreaming and gender representation.<sup>62</sup> Second because the

---

<sup>56</sup> Gill Vickers, *Why Should Women Care About Constitutional Reform*, in David Schneiderman, (ed.), *Conversation Among Friends: Interdisciplinary Conference on Women and Constitutional Reform* (Edmonton, Centre for Constitutional Studies, University of Alberta, 1991).

<sup>57</sup> Melissa Haussman, *Feminist Strategies for Equality Rights in the U.S. and Canada*, in Jill Bystydzienski, (ed.), *Women Transforming Politics: Worldwide Struggles for Empowerment* (1992).

<sup>58</sup> Louise Carbert, (1996), “With, Without, and In Spite of an ERA: Legal Equality and Public Opinion in Canada, United States and Japan.” Paper presented at American Political Science Association San Francisco, California, September 1996.

<sup>59</sup> In relation to the way that constitutional Articles and principles are interpreted. Roland Penner, “The Canadian Experience with the Charter of Rights: Are There Lessons for the United Kingdom?” [1996] *PL* Spring 104.

<sup>60</sup> Alexander Dobrowolsky and Vivien Hart, “Introduction: Women, New Politics and Constitutional Change” in Dobrowolsky and Hart, *Women Making Constitutions* (2003), p.1-19.

<sup>61</sup> Mona Imam, “Draft Constitution Gained But an Important Opportunity Was Lost.” USIP Briefing October 2005, [http://www.usip.org/pubs/usipeace\\_briefings/2005/1011\\_draft.html](http://www.usip.org/pubs/usipeace_briefings/2005/1011_draft.html); Johnathon Morrow, “Iraq Constitutional Process II: An Opportunity Lost” USIP Special Report No. 155, December 2005, <http://www.usip.org/pubs/specialreports/sr155.html>.

<sup>62</sup> Lombardo notes that both the Treaty of Amsterdam 1997 Articles 2 and 3.2 express a commitment to promoting gender equality in all EU activity and that the Third Fourth and Fifth Commission’s Action Programmes for Equal Opportunities Between Men and Women and Commission’s Communication (96) 67 on Incorporating Equal Opportunities for Women and Men Into All Community Policies and Activities” also stress the importance of this Lombardo, Emmanuela, “Integrating or setting the Agenda? Gender Mainstreaming in the European Constitution-Making Process.” (2005) Project MUSE Fall 412 at 416. Moreover Council Recommendation 96/694EC is specific in suggesting that there should be gender balance in all the decision making processes of the commission and Commission Decision 2000/407/ EC. 19 June recommends that women make up 40% of all commission expert groups and committees. Leon, Margarita; Mercedes

project had as one of its stated aims the greater legitimation of Europe through the inclusion of the European citizenry. Constitutions have two principal qualities as descriptors of the arrangements for government, first as official existing power maps and secondly as a 'set of principles for legitimate government.'<sup>63</sup> The Laeken Declaration<sup>64</sup> which initiated the process developing the Constitutional Treaty required it to be driven by the search for the latter. The project was initially identified as something to further change not to support the status quo. Laeken presented the Convention on the Future of Europe - the body which was to draft the Constitutional Treaty - as an answer to the European Union's "crisis of legitimacy ... particularly in relation to its capacity to satisfy the expectations of its citizens."<sup>65</sup> Moreover comparative analysis of the literature on gender and constitutions suggests that it is at times where there is a search for legitimation that women and other marginalized groups may have more chance of gaining power in the processes of constitutional change.<sup>66</sup> The need to legitimise the process leads to a more inclusive politics, at least during the period of change.<sup>67</sup>

So it was surprising that there was little attempt to ensure that women were involved in the constitutional process.<sup>68</sup> Diaz and Millns, drawing on their comparative work in this area, note that it is recognised within member states that affirmative measures are always necessary to ensure gender equality in political representation.<sup>69</sup>

### Women in the Convention on the Future of Europe

Once it was known that there would be a Convention on the Future of Europe, the Women Citizens of Europe Network (RCE) called for balanced representation of men and women in its formulation and decision making

Mateo Diaz and Susan Millns, "Engendering the Convention: women and the Future of the European Union" (2003) March *The Federal Trust, European University Institute Florence*, [www.fedtrust.co.uk/uploads/constitution/06\\_03.pdf](http://www.fedtrust.co.uk/uploads/constitution/06_03.pdf). at 3; A range of other reports and recommendations from Parliament, Council and Commission in favour of Parity democracy within the EU institutions also subsist see [Eropa.eu.int/futureeu/documents/other/oth001101\\_en.pdf](http://Eropa.eu.int/futureeu/documents/other/oth001101_en.pdf).

<sup>63</sup> Harden, Ian "The Constitution and Its Discontents" (1991) 21 *British Journal of Political Science* 489 at 491. Though there will always be some tensions between these two elements.

<sup>64</sup> See particularly Part II [http://europa.eu.int/constitution/futurum/documents/offtext/doc151201\\_en.htm](http://europa.eu.int/constitution/futurum/documents/offtext/doc151201_en.htm). Adopted December 15<sup>th</sup> 2001.

<sup>65</sup> Jo Shaw, "Europe's Constitutional Future" [2005] *PL* 132 at 141.

<sup>66</sup> Dobrowolsky, Alexandra, "Women, Constitutionalism and Contestation" in Dobrowolsky and Hart, *Women Making Constitutions* (2003), p.236.

<sup>67</sup> This was the case in Canada before the 1984 Charter and in Australia during the debate on a republic. See Helen Irving, "The Republic is a Feminist Issue" (1996) 52 *Feminist Review* 87. Is it also exemplified in a range of other recent processes see Alexandra Dobrowolsky, and Vivien Hart, *Introduction: Women, New Politics and Constitutional Change* in Dobrowolsky and Hart, *Women Making Constitutions* (2003).

<sup>68</sup> The convention was likened to the US founding fathers convention in 1787, which is noted for its exclusion of women and black citizens from the process.

<sup>69</sup> Diaz, Mercedes Mateo and Susan Millns, "Parity Power and Representative Politics: The Elusive Pursuit of Gender Equality in Europe." (2004) 12: 3 *FLS* 279 at 301.

processes and they drew attention to the fact that women had been poorly represented in the Convention which drew up the European Union Charter of Fundamental Rights.<sup>70</sup> From October 2001, The European Women’s Lobby (EWL) and the European Women Lawyers Association (EWLA) ran letter-writing campaigns to decision makers asking for parity in the participation of men and women in the convention and the Presidium.<sup>71</sup> Yet only in January 2002, did Chairman of the Convention, Giscard d’Estaing draw government’s attention to the importance of “ensuring that women are well-represented on our convention.” This was on the last line of his letter to heads of government requesting a final list of delegates.<sup>72</sup> This was too late and the Convention, composed of representatives from the European Parliament and national governments and national parliaments comprised just seventeen women out of a hundred and five full delegates.<sup>73</sup> Only two women were sent by governments and six by national parliaments the remainder came from among MEP’s. Later, when chided about the lack of women in the convention, Giscard rather lamely replied that women would make up for their lack of numerical presence through the force of their personalities.<sup>74</sup>

Millns and Diaz note that when the convention members were then divided between the Praesidium, Secretariat and Working groups, only the secretariat was gender balanced.<sup>75</sup> They argue that this was no accident and that the allocation of women to the Secretariat which was largely administrative and supportive of convention work, rather than to the Praesidium, agenda setting and taking final decisions, or the working groups, mirrors usual gender divisions in employment in Europe.<sup>76</sup> Initially two women were appointed to the Praesidium, but when Ana Palaccio, the Spanish MEP left<sup>77</sup> only Gisela Stuart UK MEP remained. Percentages in the working groups varied from 5% in the Group on Subsidiarity to 30% in the Group on National Parliaments.<sup>78</sup> Men headed ten of eleven working groups.<sup>79</sup> There were slightly more women among the alternates sent to the convention, twenty-four out of a hundred and five.<sup>80</sup> Indeed, Baroness Scotland, the only member

---

<sup>70</sup> Europa.eu.int/futureeu/documents/other/oth001101\_en.pdf Professor Alice Brown, expert advisor to the Gender and Equality group of the Scottish Constitutional Convention was one of the signatories this letter.

<sup>71</sup> EWL Press Release on Convention Campaign 4/4/2002; “Chairpersons of Convention’s Working Groups: Statement of EWLA” Brussels, 16 May 2002.

<sup>72</sup> Hoskyns, Catherine, “Gender Equality and the Convention – A Comment” (2003) The Federal Trust online Paper 08/03 www.fedtrust.co.uk.

<sup>73</sup> Cathryn Hoskyns suggests that by the time the European Women’s Lobby and the European Parliaments Women’s committee started to lobby on composition of this convention it was too late to have influence. *ibid.*

<sup>74</sup> Lombardo, *Integrating or setting the Agenda*, (2005) at p.423. She quotes “Elles compensent cette situation d’infèrioritè numerique par la forte personalitè de beaucoup d’entre elles.” (The poor translation in the text is by Dr. Skeet).

<sup>75</sup> Diaz, Mercedes Mateo and Susan Millns, *Women and the Constitutional Future of the European Union* (2004) at 9

<sup>76</sup> *ibid.*, at 9.

<sup>77</sup> March 2003.

<sup>78</sup> Millns and Diaz, *Women and the Constitutional Future* (2004) at 9.

<sup>79</sup> Gisela Stuart was President of the Working Group on National Parliaments.

<sup>80</sup> Millns and Diaz, *Women and the Constitutional Future* (2004), p.11 Table 5 figs. for 21 October 2002

of an ethnic minority in the convention attended as an alternate.<sup>81</sup> But the Convention initially limited their involvement, though after intense lobbying this was relaxed.<sup>82</sup>

Once it was understood that the composition was fixed, the lobbies turned attention to the question of representing gender within the Convention through other means. EWL launched a “Where are the Women?” postcard campaign.<sup>83</sup> They also set up email links to women within the convention to support those women taking up gender issues in the talks and provided shadow directives and comprehensive feedback on the treaty drafts.<sup>84</sup> EWLA made 12 written contributions through the drafting life of the Constitutional Treaty’s, providing detailed written proposals and comment on changes.<sup>85</sup> The European Parliamentary committee on “Women’s Rights and Equal Opportunities” also made written submissions. In addition they drew up a list of concerns<sup>86</sup> and set up two conferences in 2002 providing alternative forums for women to speak directly to Convention members.<sup>87</sup> All Convention members were invited but Anna Kamanou, Chair of the Committee, considered the response from the male-dominated Convention members both “disappointing and worrying”<sup>88</sup>

The absence of a “critical mass”<sup>89</sup> of women is evidence at least of failure of the Convention to concern itself with gender issues if not evidence of actual discrimination against women.<sup>90</sup> Women’s initial disappointment with the selection process for the Convention became a disappointment with the way that women’s concerns were represented in the debate and drafting of the Constitutional Treaty.

---

<sup>81</sup> Discussion with Annette Lawson, Women’s European Lobby. “A New Model Europe - Citizens at the Centre Conference” Westminster University London, 15<sup>th</sup> September 2005.

<sup>82</sup> If alternates had been fully incorporated into proceedings from start, as they were in the proceedings for discussion of the Charter, then Schonlau believes that this would have boosted the range of political representation within the proceedings. Justus Schonlau, “The Membership of the Convention: Issues of Representation and Legitimacy” (2004) Paper for Cidel Workshop “Constitution-making and Democratic Legitimacy in the EU” London, 12-13<sup>th</sup> 2004.

<sup>83</sup> EWL Press Release 27/2/2002 “Convention on the Future of Europe: Where are the Women?”, Le Fil D’Ariane Gender Equality Newsletter of the European Parliament, [www.europarl.eu.int/comparl/femm.newsletter/newsletter0](http://www.europarl.eu.int/comparl/femm.newsletter/newsletter0), at 2.

<sup>84</sup> [www.womenlobby.org](http://www.womenlobby.org).

<sup>85</sup> [www.ewla.org](http://www.ewla.org).

<sup>86</sup> Praesidium member Ana Palacio delivered it to the convention.

<sup>87</sup> 22 May and 2 October.

<sup>88</sup> Introductory Speech by Anna Kamanou, Chairwoman of the Committee on Women’s Rights and equal Opportunities of the European Parliament. Extraordinary Meeting Spring 2003 [www.europarl.europa.eu/comparl/femm/cccec/meetings/athens2003/karamanou\\_en.pdf](http://www.europarl.europa.eu/comparl/femm/cccec/meetings/athens2003/karamanou_en.pdf).

<sup>89</sup> Dahlerup was one of the first people to use this term in relation to women’s representation. Drude Dahlerup, (ed.), *The New Women’s Movement: Feminism and Political Theory in Europe and the USA* (London, SAGE, 1986).

<sup>90</sup> Phillips presents this view in relation to formal political arenas. Anne Phillips, “Democracy and Difference: Some Problems for Feminist Theory” (1992) 63 *Political Quarterly* 79.

### Content of Draft and Final Treaty

The main structure of the Constitutional Treaty remained the same through the different drafts. It is divided into four main parts: Part I Principles and objectives; Part II the European Charter of Fundamental Rights as amended for the Constitutional Treaty; Part III functioning of the institutions and internal and external policies including the internal market, security and justice and foreign policy; Part IV details revision procedures and entry into force and repeal of earlier treaties and includes protocols to the Constitutional Treaty.<sup>91</sup> A number of authors have given gender audits of draft and versions and the final treaty.<sup>92</sup> It is not intended to replicate these here but instead to draw on them to evidence the continuing dissatisfaction with the drafting process and to raise points which were later taken up by women campaigning for a “no” vote.

The Preliminary Draft of the Constitutional Treaty was presented in October 2002. It contained no references at all to equality between men and women in Part I Principles and Objectives. Moreover the document was not drafted in gender inclusive language and either used the generic masculine, or was gender blind in many places.<sup>93</sup> Gisela Stuart suggested that the absence of equality from Part I in the first draft was just an oversight, a mistake.<sup>94</sup> But the EWL suggested that the text indicated “an alarming backlash in the field of gender equality”.<sup>95</sup>

There was no responsibility allocated for ensuring mainstreaming within each group and separate working group on gender.<sup>96</sup> Hoskyns also cites as evidence of women’s absence, and lack of influence in the Convention, the failure to set up a working group on Social Europe at the start.<sup>97</sup> A group was eventually set up in November 2002 following a vigorous campaign led by Anne Lancker, one of the few female members of the Convention.<sup>98</sup> The late establishment of the committee placed great pressure on work and meant the opportunity for true engagement and consultation was lost. Both Hoskyns and Shaw suggest that this lack of concern for the Social Europe was also evident in all subsequent drafts of the Constitutional Treaty.<sup>99</sup> In the event this late established group was the only one in the European Convention which openly discussed gender issues.<sup>100</sup>

---

<sup>91</sup> There are also a number of annexes and declarations following the Treaty.

<sup>92</sup> For instance see Hoskyns, “Gender Equality and the Convention” (2003) and Millns and Diaz, *Women and the Constitutional Future* (2004).

<sup>93</sup> Despite strong lobbying from the EWLA and the EWL see “Linking EU Competencies with Women’s Rights” 6/6/2002 <http://www.womenlobby.org>

<sup>94</sup> Hoskyns, “Gender Equality,” (2003), at 3.

<sup>95</sup> EWL “Comments on the Preliminary Draft Constitutional Treaty.” 11/11/2002 <http://www.womenlobby.org>.

<sup>96</sup> EWLA Second Contribution and Fifth Contribution to the Convention p.6.

<sup>97</sup> Hoskyns, “Gender Equality” (2003) at 2.

<sup>98</sup> Jo Shaw, “A Strong Europe is a Social Europe” *The Federal Trust Online Paper* 05/03 February 2003. at 2. This group had a very tight re-mit and was only able to meet five times in a very short space of time in order to achieve its seven point mandate.

<sup>99</sup> Jo Shaw, “A Strong Europe is a Social Europe” (2003); Hoskyns, “Gender Equality” (2003), at 2.

<sup>100</sup> Lombardo, *Integrating or Setting the Agenda* (2005).

When the Second Draft of Articles 1-16 was produced, 6<sup>th</sup> February 2003, equality between men and women appeared but only in I.3, under the Aims of the Union rather than in 1.2 which set out its Values. While gender equality might be “read obliquely” into the value of human dignity and human rights, Millns and Diaz argue that this gives insufficient protection.<sup>101</sup> The significance of Gender Equality appearing in 1.2 is that 1.2 is referred to by many subsequent sections and provides a checklist of democratic criteria for aspirant countries to meet as well as informing the future policies of the European Union. Therefore many critics suggested that the reference in 1.3 was not only weak in its construction but was also weak in relation to its position in the treaty. The EWL described this as “a betrayal of the women of Europe”.<sup>102</sup> The failure to express equality as a “higher order value” marked a retrograde step from the Treaty of Amsterdam.<sup>103</sup> Gender equality must be expressed as a *transversal* principle as in the TEC so that the duty to ensure gender equality applies to all the Union’s activities.<sup>104</sup> There was also criticism that where the principle of non-discrimination in relation to nationality was referred to (Article 1.4.2 of the Constitutional Treaty) no mention was made of sex and none to any other categories like sexuality which were previously presented in Article 13 of the TEC.<sup>105</sup> Amongst other criticisms was the failure to mention gender equality as a separate area in the division of competencies Article 12 – it was presumably subsumed under social policy.<sup>106</sup>

The Convention on the Future of Europe only produced the draft constitutional treaty, and like any other European Union Treaty final content would ultimately be determined by a conference of the representatives of national governments. It is not unusual for positive constitutional changes for women to be effected through a combination of elite group activity and mass mobilisation<sup>107</sup> and, in this case, the continued lobbying of the Inter-Governmental Conference by the EWL and EWLA brought some successes. For instance the efforts of Baroness Scotland in achieving change were notable.<sup>108</sup> The EWLA noted that as a result of the IGC discussion equality was placed in Article I.2 as a value, Article III.2 (116) on gender mainstreaming was to apply to all policies and in relation to this Article the

---

<sup>101</sup> Diaz and Millns, *Women and The Constitutional Future* (2004) at 15.

<sup>102</sup> EWL – Letter to the Convention 27 May 2003 <http://www.womenlobby.org/site>. In fact Hoskyns, “Gender Equality,” (2003), at 3 notes that this was positioning was discussed Giscard d’Estaing argued for it to appear as a value but was defeated by a majority in the Praesidium.

<sup>103</sup> Sylvia Walby, “The EU and Gender Equality: Emergent Varieties of Gender Regime,” (2004) 11:1 *Social Politics* 4 at 7.

<sup>104</sup> Network of Legal Experts on the Application of Community Law on Equal Treatment between men and women. “The European Convention and Gender Equality: Observations on the Draft Articles of the Constitutional Treaty,” [www.ewla.org/wf\\_dl/convent\\_network.doc](http://www.ewla.org/wf_dl/convent_network.doc), at 2.

<sup>105</sup> Hoskyns, “Gender Equality,” (2003), p.3.

<sup>106</sup> *ibid.*, at 3.

<sup>107</sup> Kome, Penny, *The Taking of Twenty-Eight: Women Challenge the Constitution* (Women’s Press, Toronto, 1983).

<sup>108</sup> Discussion with Annette Lawson, Women’s European Lobby. “A New Model Europe - Citizens at the Centre Conference” Westminster University London, 15<sup>th</sup> September 2005.

IGC gave a declaration on fighting domestic violence.<sup>109</sup> While this latter provision was welcomed by feminists it has no binding legal status and the EWL amongst others would have preferred a stronger stand on all forms of violence against women.<sup>110</sup> After lobbying by the High Commissioner for National Minorities, a further positive addition was a reference to minority rights in Article 1.2 as a value of the Union. Reference to minority rights had been completely absent from the drafts up until this point.<sup>111</sup> Moreover no minority rights clause appears in the Charter of Fundamental Rights annexed to the Constitutional Treaty.<sup>112</sup>

Negative changes also occurred. Protocol 9 was annexed to Treaty Article 62. This states that “Nothing in the Treaty establishing a Constitution for Europe or in the Treaties and Acts modifying or supplementing it shall affect the application in the territory of Malta of national legislation relating to abortion”. This pre-empted any possible interpretation of the dignity and equality values in 1.2 applying to this aspect of women’s reproductive rights.<sup>113</sup> No other general protection for reproductive rights was added into the Treaty. IGC changes also removed a positive requirement, in Article I-26.2 of the Convention draft, stating that member states would have to put forward three names for Commissioners in which “both genders were represented.”<sup>114</sup>

Overall, Millns and Diaz, assessing the gender output of the Convention, suggest it is “fairly negligible although not quite as impoverished as it looked set to be earlier. . . .”<sup>115</sup> They conclude that the Treaty illustrates the “paucity of interest in and commitment to gender equality at the highest constitutional level.”<sup>116</sup>

### ***Campaigns against the Treaty***

Specific groups and individuals among the EWL membership adopted anti-treaty positions, but the two main European women’s lobby groups, EWLA and EWL, did not express a position in relation to voting on the Treaty.<sup>117</sup> Instead both issued statements expressing their opinion on both positive aspects and deficiencies of the Treaty,<sup>118</sup> and the EWL continued to inform

---

<sup>109</sup> “Resolution of EWLA On the Treaty Establishing A Constitution for Europe”. [http://www.ewla.org/wf\\_content/506.html](http://www.ewla.org/wf_content/506.html).

<sup>110</sup> EWL June 21 2004, “IGC Outcome June 17-18” at 1.

<sup>111</sup> Krzysztof Drewewicki, High Commissioner on National Minorities, “A Constitution For Europe: Enshrining Minority Rights – Words Can Make Worlds of Difference” (2005) 19:2 *OSCE Magazine* March, at 1.

<sup>112</sup> *ibid.*

<sup>113</sup> Feminist Assembly of Madrid, “Women and the European Constitution,” (2005) IV Online Magazine: IV365- March, [http://www.internationalviewpoint.org/print\\_article.php?id\\_article=576](http://www.internationalviewpoint.org/print_article.php?id_article=576).

<sup>114</sup> EWL 21 June 2004. “IGC final Outcome June 17-18, 2004” at 1; Stop Violence Against Women.

<sup>115</sup> Diaz and Millns, “Women and The Constitutional Future”(2004) at 18.

<sup>116</sup> *ibid.*, at 18.

<sup>117</sup> Of course not all women in Europe were to be offered this opportunity in any case.

<sup>118</sup> Resolution of EWLA on the Treaty on a Constitution For Europe 17 and 18 March 2005 Brussels. [http://www.ewla.org/wf\\_content/506.html](http://www.ewla.org/wf_content/506.html); EWL IGC

women about the content of the Treaty so that they could make an informed choice when voting.<sup>119</sup>

Other feminist groups across Europe campaigned in their own countries against the Treaty but the campaign was also trans-national and was intensified in order to influence women in France and Holland to vote “no” and end the Constitutional Treaty on behalf of all women across Europe.<sup>120</sup>

In addition to looking at the absence of positive gender initiatives, campaigns against the treaty also addressed other aspects they believed to have negative impact for women. Women’s groups had been among those who successfully lobbied for removal of explicit references to the Judeo-Christian heritage of Europe in the Values of the Union. But reference still remained to the “religious . . . inheritance” of Europe,<sup>121</sup> Article 1.52 singles out churches over and above any other social group in Europe for regular dialogue. *Women Living Under Muslim Laws* (WLUML), *London European Assembly for Women’s Rights* and *Association pour la Tax Tobin pour l’Aide aux Citoyens France Women*, who campaigned against the Treaty were particularly concerned that this reference to religion undermined the principle of secularism in the European Union at a time when women in minority groups were under increasing pressure from disadvantageous governance by religious family law.<sup>122</sup> Therefore they considered women who were “other” would not be treated equally. *The Feminist Assembly of Madrid*, *Women Towards a Different Europe* and *Catholics for Free Choice* argued that this privileged consultation with churches on Union policy ran contrary to “equality between the sexes” and the right for women to make free decisions about divorce, abortion, contraception and protection against AIDS, and threatened the rights of homosexuals and lesbians.<sup>123</sup> Other groups suggested that reference to religious heritage and the use of the word “Churches” inferred a preference for the established Christian churches of Europe and constituted Muslim and other religions as outside or other within

---

Outcome June 17-18 2004 <http://www.womenlobby.org/site/1abstract.asp?DocID=190&v11D>.

<sup>119</sup> EWL Communication Strategy for the European Constitution, Briefing Document on the Treaty Establishing a Constitution For Europe <http://www.womenlobby.org/site/1abstract.asp?DocID=194&v11D>.

<sup>120</sup> “The European Feminist Initiative Acts in Priority for a NO to The Constitution and for a YES To Another Europe Memorandum” *Women’s Centre For Democracy and Human Rights* [http://www.globalizacija.com/doc\\_en/e0032dok.htm](http://www.globalizacija.com/doc_en/e0032dok.htm), at 1; See also the campaign by Les Penelopes <http://penelopes.org> and the campaign by Women Towards A different Europe, with contributions from Swedish feminists who led the Swedish campaign against monetary union.

<sup>121</sup> The humanist inheritance is also referred to.

<sup>122</sup> WLUML – Femmes Sous Lois Musulmanes, “Europe: European Feminist Initiative for “NO” to the Constitution.” 24/11/2004 <http://www.wluml.org/english/newsfulltext.shtml>; European Women: ATTAC France Statement “For Women’s Rights, For Equality, No to this Europe.” IV Online Magazine: IV365-March 2005 [http://www.internationalviewpoint.org/print\\_article.php3?id\\_article=576](http://www.internationalviewpoint.org/print_article.php3?id_article=576).

<sup>123</sup> This was expressly stated at the London European Assembly for Women’s Rights 15/10/04 <http://www.wluml.org/english/newsfulltext.shtml>.

Europe.<sup>124</sup> Further critiques that the Treaty fostered “otherness” centred on the conflation of European Union citizenship with nationality within member states: there was concern for the rights of the many women immigrants in the European Union.<sup>125</sup>

Some feminist groups saw incorporation of the Charter, even with its restricted legal scope, as positive. Yet those arguing for the “no” vote were concerned that the Charter, already criticised as insufficient to properly support women’s rights in Europe,<sup>126</sup> had been subjected to such “drafting adjustments” as to limit its scope still further. Moreover the Charter had no provision for future amendment to improve or extend rights within it.<sup>127</sup> The Constitutional Treaty therefore set in stone provisions that women had been unable to participate in developing and which they considered to be inadequate.<sup>128</sup>

A further major thrust against the Constitutional Treaty was led by green and socialist feminists in Women Towards a Different Europe (WTDE), European Feminist Initiative (EFI) and the socialist women in – *Association pour la Tax Tobin pour l’Aide aux Citoyens* (ATTAC)<sup>129</sup> These groups and others argued that Part III of the treaty<sup>130</sup> fixed a neo-liberal economic structure, which would force privatisation, re-structuring, cutbacks on welfare and would effectively harm women as the poorest citizens in Europe. Moreover they argued that this treaty would remove whole swathes of national and European social policy permanently from the reach of democratic influence.<sup>131</sup>

---

<sup>124</sup> Certainly COMECE – The Catholic Bishop’s Conference in Europe believe the wording still recognises and privileges Christianity within Europe, “The Treaty Establishing a Constitution for Europe: Elements for Evaluation” 11 March 2005. [http://www.comece.org/upload/pdf/pub\\_const\\_treaty\\_050311\\_EN](http://www.comece.org/upload/pdf/pub_const_treaty_050311_EN).

<sup>125</sup> Feminist Assembly of Madrid, “Women and the European Constitution”, in IV Online Magazine: IV365- March 2005 [http://www.internationalviewpoint.org/print\\_article.php3?id\\_article=576](http://www.internationalviewpoint.org/print_article.php3?id_article=576).

<sup>126</sup> Letter to Convention on the Charter of European Rights from European Women’s Lobby, 18th February 2000, Charter 4132/00 Contribution 27.

<sup>127</sup> Spilotopoulos, Sophia, “From Nice to the Draft Constitutional Treaty and Beyond: Which Charter and Which Fundamental Rights?” Paper given at ECSA-DK 24-25 September 2004 “The Future of Europe”; also criticism from EWLA, “Fifth Contribution of EWLA on the Future of the Union” EWLA website at 5.

<sup>128</sup> For instance the Feminist Assembly of Madrid, “Women and the European Constitution”, in IV Online Magazine: IV365- March 2005 [http://www.internationalviewpoint.org/print\\_article.php3?id\\_article=576](http://www.internationalviewpoint.org/print_article.php3?id_article=576) noted the lack of re-productive rights and they there was provision for marriage but not for divorce.; A further argument was that any women’s rights protection might be weakened by determinations from the ECJ which balanced Charter rights against economic objectives. Haralanova, Christina, Les Penelopes, “The EU Constitution and the Consequences for Women”. 17 October 2004 <http://www.penelopes.org/anglais/ximpression.php3?type=article>.

<sup>129</sup> Association for the Taxation of Financial Transactions for the Aid of Citizens.

<sup>130</sup> This part was only released to the public some months after Parts I and II.

<sup>131</sup> “The EU Constitution and the Consequences for Women,” Report on the Workshop Organised by Women Towards A different Europe, European Social Forum London 16<sup>th</sup> October 2004, at 1 [www.socialrights.org](http://www.socialrights.org); “The EU Constitution and the Consequences for Women”, Les Penelopes [http://www.penelopes.org/Anglais/xarticle.php3?id\\_article=1152](http://www.penelopes.org/Anglais/xarticle.php3?id_article=1152); George, Susan

The WTDE and EFI also campaigned against what they perceived as the militarism inherent in the Treaty. After the French “no” vote a declaration announced, “The victory of the “No” in France is that of the Left, pro-European, alternative –globalist, feminist and democratic No, against neo-liberalism and war.”<sup>132</sup> Although peace was mentioned as an aim of the European Union, the Constitutional Treaty constitutionalised support for NATO,<sup>133</sup> and committed members to increase military budgets.<sup>134</sup>

Women’s groups in opposition were acutely aware that the Constitutional Treaty had been drafted by a convention that had not actively sought women’s representation. Groups who attended consultations and lobbied for specific social protections and guarantees felt that they had not been listened to. Criticism was also levelled at the failure to clearly state a position on violence against women, the absence of protection for reproductive rights,<sup>135</sup> and the lack of gender perspective in other areas of “health, culture and education.”<sup>136</sup> Moreover there were concerns that specific enumeration and protection of social rights including maternity and paternity rights was absent.<sup>137</sup>

In relation to all this there was added anger that the treaty purported to be the “will of the people.”<sup>138</sup>

It is just unrealistic to dismiss the rejection of the Constitutional Treaty by all these groups as anti-Europe sentiment. Rather they were sceptical that the Constitutional Treaty actually conserved and built on all that was good about Europe. Instead they considered it an attempt to set in stone exclusionary social and economic modes and would remove their potential to influence the development of Europe in a way that reflected the concerns of women. The campaign against the Constitutional Treaty was presented as a fight to prevent “dominating male and neo-liberal power” from being “carved ‘in marble’ for several decades.”<sup>139</sup>

---

and Erik Wesslius, “Why French and Dutch Citizens are Saying NO” (2005) redpepper <http://www.redpepper.org.uk/europe/x-jun2005-constitution2.htm>.

<sup>132</sup> Declaration of the European Conference, Paris, 25th June, 2005 <http://www.socialnpravna.info/article1235.html>.

<sup>133</sup> Cassen, Bernard, “Attac Against The Treaty,” (2005) 33 May/June *New Left Review* 27 at 31.

<sup>134</sup> Eva Cruells, 16 October 2004, *Les Penelopes* “Feminist European Initiative for the No to the Constitution.” <http://penelopes.org>.

<sup>135</sup> ASTRA and the Centre for Reproductive Rights detail breaches in International Rights in the EU and explain why this safeguard is so important for women’s rights generally. [www.astra.org](http://www.astra.org).

<sup>136</sup> Lombardo, “Integrating or setting the Agenda” (2005) at 421.

<sup>137</sup> Network of Parliamentary Committees for Equal Opportunities for Women and Men in the European Union. Extraordinary Conference, Athens 31 March 2003.

<sup>138</sup> See *Les Penelopes*; *Social Rights Bulgaria*; *Women Towards a Different Europe*.

<sup>139</sup> “The European Feminist Initiative Acts in Priority for a NO to The Constitution and for a YES To Another Europe Memorandum” *Women’s Centre For Democracy and Human Rights* [http://www.globalizacija.com/doc\\_en/e0032dok.htm](http://www.globalizacija.com/doc_en/e0032dok.htm), at 1.

### The Treaty Establishing a Constitution for Europe in Relation to Constitutional Theory and Gender

Grass roots opposition by women’s groups to the Constitutional Treaty was not articulated in terms of constitutional theory yet the specific and practical concerns raised by the feminist “no” campaign show synergy with critiques on the direction of this constitutional project raised by European constitutionalists. These critiques also accord with forms of constitutions and in particular with the ideological critiques of “modern constitutionalism” discussed at the start of paper.<sup>140</sup> All focus on concern with the use of the constitutional form as a fetish, with process or lack of it in constitution-making and with the type of constitutional form used to frame the treaty provisions. This section addresses these points.

Firstly, “fetish”. It is suggested that the Constitutional Treaty does not look like a constitution.<sup>141</sup> It is long, 448 Articles, and has a large quantity of appendices. It lacks the usual style of preamble expected in a constitution,<sup>142</sup> and the aspirations expressed lack the clarity expected in a genuine constitution.<sup>143</sup> Moreover in the 202 pages of the main text, Cassan notes that there are 176 instances of the word “bank” and its derivatives. “The word market appears 88 times, trade competition 29 capital 23 and commodity 11.”<sup>144</sup> This linguistic focus on the market is also not redolent of constitutional language. If “Constitution” were removed from the title of a “Treaty Establishing a Constitution for Europe” then Weiler suggests the treaty would be indistinguishable from any other.<sup>145</sup> From this it must be inferred that the word “Constitution” is an attempt to imbue the resulting treaty with a legitimacy which it could not otherwise have gained. This use of the constitution as “fetish” standing above ordinary political processes is argued to be a striking feature of the closed modern constitutional form.<sup>146</sup>

There was no obligation on the Convention on the Future of Europe to attempt to draft a constitutional treaty. The convention could have kept a more open discussion, focussed on democratic reforms and carried out consultation exercises to engage Europeans on in the future of Europe. Indeed Bogdanor suggests a number of democratic reforms which could be carried without even any Treaty changes.<sup>147</sup> The convention chose instead to

---

<sup>140</sup> Judith Squires, *Liberal Constitutionalism, Identity and Difference* (1996) XLIV *Political Studies* 620; Young, *Polity and Group Difference* (1989); Anne Phillips, *The Politics of Presence: The Political Representation of Gender, Ethnicity and Race* (Oxford, OUP, 2003); James Tully, ‘Strange Multiplicity’ (1995).

<sup>141</sup> Weiler, *On the Power of the Word* (2005) at 175; Vernon Bogdanor, *Legitimacy, Accountability and Democracy in the European Union*, A Federal Trust Report January 2007 [www.fedtrust.co.uk](http://www.fedtrust.co.uk) at 11; Bernard Cassan, *The Referendum on the EU Constitution - Europe : No Is Not a Disaster*, (2005) April , *Le Monde Diplomatique*, <http://mondediplo.com>.

<sup>142</sup> Weiler, *On the Power of the Word* (2005) at 175.

<sup>143</sup> Bogdanor, *Legitimacy, Accountability and Democracy* (2007).

<sup>144</sup> Cassan, *The Referendum on the EU Constitution* (2005).

<sup>145</sup> Weiler, *On the Power of Word* (2005) at 176.

<sup>146</sup> Walker, “The Idea of Constitutional Pluralism,” (2002); Tully, *Strange Multiplicity* (1995).

<sup>147</sup> Bogdanor, Vernon, *Legitimacy, Accountability and Democracy in the European Union*.

invoke the rhetoric of constitution-making and made reference to the Philadelphia convention 1787 in order to present the treaty as a defining moment in European history.<sup>148</sup> While the 1787 process can not be described as “a democratic exemplar for today”<sup>149</sup> Nevertheless its invocation calls for the resultant processes, drafts, and final document, to be judged, against the norms and standards applicable to our current understandings of constitution-making.<sup>150</sup>

### Process

Although this paper principally addresses the disaffection of the women’s movement in Europe with participation in the constitutional treaty process this disaffection is also illustrative of wider disillusion and disengagement with the process.

The initial failure to ensure women’s direct representation in the convention need not have been fatal to the sense of legitimacy for women. Other means of representation and engagement might have sufficed. For instance gender concerns might have been addressed by setting up a Gender Working Group in the Convention on the Future of Europe, but this approach was rejected. At the October 2002 Women’s Convention on Building a Democratic Europe,<sup>151</sup> Presidium member Gisela Stuart was asked why there was no working group on gender, she said that she had not supported such a group because of the risk that women’s issues would become marginalised.<sup>152</sup> But this was not the experience of the Scottish Constitutional Convention 1991-1994, which despite smaller proportion of women, only 10%, established a working group on gender issues that successfully influenced the work of all the other groups in that convention.<sup>153</sup>

Consultation and the co-option of advisors are other recognised ways of increasing representation in constitution-making bodies.<sup>154</sup> But as stated earlier, Convention on the Future of Europe members did not all take up their invitations to attend alternative forums.

Good engagement generally with civil society can compensate for under-representation of women and other political minorities within formal bodies.<sup>155</sup> These groups tend to be better represented within social

---

<sup>148</sup> Walker, Neil, “After the Constitutional Moment” The Federal Trust for Education and Research, Online Paper 32/03, 2003 p.3 [http://www.fedtrust.co.uk/eu\\_constitution](http://www.fedtrust.co.uk/eu_constitution).

<sup>149</sup> Hart, *Democratic Constitution-Making* (2003) p.4.

<sup>150</sup> Weiler, *On the Power of the Word* (2005).

<sup>151</sup> Set up by the European Parliament Committee on Women’s Rights and Equal Opportunities. October 2002.

<sup>152</sup> Though she also accepted the difficulties of mainstreaming equality within the Convention [www.europarl.eu.int/comparl/femm.newsletter/newsletter02-](http://www.europarl.eu.int/comparl/femm.newsletter/newsletter02-) at 2.

<sup>153</sup> Final Report of the Women’s Issues Group of the Scottish Constitutional Convention, National Archives of Scotland Uncatalogued Records of the Scottish Constitutional Convention 1989-1996 Document Ref GD 498/1/6.

<sup>154</sup> Pitkin, Hanna Fenichel, *The Concept of Representation* (Berkeley University of California Press, 1967), p.76; Young, Iris Marion, *Inclusion and Democracy* (Oxford, OUP, 2000).

<sup>155</sup> Young, *Inclusion and Democracy* (2000), p.194.

movements than in formal politics.<sup>156</sup> Yet representation in these senses was also poor and civil society had only limited access to the convention. So despite its remit to engage with the citizens of Europe and infuse the proceedings with legitimacy the Convention on the Future of Europe is widely criticised for failing to fulfil the spirit of the Laeken remit by properly engaging society.<sup>157</sup> In fact Jean Luc Dehanne the person appointed by Giscard d’Estaing to liaise with civil society initially gave “the impression that he might ignore calls for a structured dialogue with civil society,” altogether and he only set up structures for engagement after intense lobbying.<sup>158</sup> Moreover it was not considered feasible to allow the Social Affairs Working Group to consult widely with civil society and NGO’s because it was set up so late.<sup>159</sup>

This lack of engagement is illustrative of Weiler’s criticism that this constitution-making process saw democracy solely as the end of the “European construct” rather than as a means.<sup>160</sup> The focus was on capturing a constitutional moment instead of seeing the importance of constitutional discourse and process.<sup>161</sup> Yet for women and other political minorities it is essential that constitution-making allows for the complex process of mobilisation of grass roots and elite activity necessary to gain a hearing for their claims.<sup>162</sup>

Certainly those initially in favour of a written or codified constitution for Europe, like Habermas, saw this opportunity for deliberation and project building as key to the constitution-making process. Habermas believed this could have “catalytic effect” on Europe’s future providing an “unique opportunity for trans-national communication,”<sup>163</sup> which could be used to develop a European citizenship and vision.<sup>164</sup> Habermas’ understandings of what he calls a “European Demos” very much require this development. He explicitly bases the idea of an EU citizenship on the development of shared civic values rather than on conceptions of community based on the

---

<sup>156</sup> Young, *Inclusion and Democracy*; Lindsay, Isobel, “The Voluntary Sector” in Crick, Bernard, (ed.). *Citizens: Towards Citizenship Culture* (Oxford, Blackwell, 2001).

<sup>157</sup> Berger, Nicolas, “Participatory Democracy: Organised civil Society and the New Dialogue” (2004) July Online Paper 09/04, *The Federal Trust For Education and Research*. Berger argues that the meetings that were arranged had little political impact but great symbolic significance, at 5; Stuart, Gisela, “The Making of the European Constitution” (2003) *Fabian Ideas*, 609 *Fabian Society* 2003, at 25.

<sup>158</sup> Berger, *Participatory Democracy* (2004) at 5.

<sup>159</sup> Shaw, “A Strong Europe is a Social Europe” (2003) at 2. Though Shaw does say that many members listened carefully and made substantial use of submissions from civil society groups.

<sup>160</sup> Weiler, *On the Power of the Word* (2005) at 183

<sup>161</sup> Walker, *After the Constitutional Moment* (2003); Shaw, “Europe’s Constitutional Future” (2005) at 150.

<sup>162</sup> Dobrowolsky and Hart, *Women Making Constitutions* (2003), Tully, *Strange Multiplicity* (1995).

<sup>163</sup> Habermas, Jurgen, “Why Europe Needs a Constitution” (2001) 11 *New Left Review* 5.

<sup>164</sup> *ibid.*, at 16-17.

“accidental connexions” of shared history religion or ethnicity.<sup>165</sup> In this way he argues for an inclusive not exclusive conception of the people.

### Form

The Treaty represented a radical change in form to the Constitution of the European Union. Prior to the Constitutional Treaty theorists were discussing and celebrating the open texture of European Union constitutional architecture.<sup>166</sup> Yet the Treaty rejects the distinctively open and arguably more dynamic constitutionalism and instead clothes the EU in “modernist” form. Effectively the more flexible, discursive and political constitution is swapped for a rigid and codified model. So at exactly the time when there is pressing need for discussion on essential questions relating to who lives together in Europe and how we live together in Europe<sup>167</sup> the Constitutional Treaty appears to constrain debate. Weiler argues it does this because it usurps the fundamental principle: that it is only the continued debate itself which serves to legitimise the “discipline” of the EU over national political forums.<sup>168</sup> Yet the desire on the part of women to take part in and continue the debate can be seen prior to the “no” votes through the *Budapest Declaration*<sup>169</sup> and through organisations like Women Towards A Different Europe. The focus of these debates are precisely the areas sidelined by the constitutional process: diversity, equality, social inclusion and discussion on the shape and form, including economic form, that the European Union should take.<sup>170</sup>

The presentation of an European Union constitution in the form contained in the Constitutional Treaty also poses questions for women seeking constitutional change in the future. Where there is no formal process for constitutional amendment the need to legitimate change rests on the deliberations and the process of change itself. Though as we see this was not properly recognised by the Convention on the Future of Europe. In codified constitutions the formal amendment process may be seen as sufficient legitimisation itself and the ability to orchestrate and achieve change may therefore be limited to existing elites.<sup>171</sup> For example, in the United States of America women’s campaigners have repeatedly failed to gain an equal rights

---

<sup>165</sup> *ibid.*

<sup>166</sup> De Burca, Grainne and Joanne Scott, *Constitutional Change in the EU: From Uniformity to Flexibility* (Hart, Oxford, 2000).

<sup>167</sup> Jo Shaw, “Europe’s Constitutional Future” (2004).

<sup>168</sup> Weiler, “On the power of the Word” (2005) at 183.

<sup>169</sup> *The Budapest Declaration : Building European Civil Society through Community Development*, March 28 2004.

<sup>170</sup> The experience of exposure to markets especially for women from newer accession countries, has caused hardship. “Gender Equality in the EU- Two Years After Accession of New Member States: Unifem Consultation, Concluding Statement UNIFEM 2006”, [www.unifem.org](http://www.unifem.org); Another group researching specifically in this area is Women’s Network in Development Europe – WIDE [www.eurosur.org/wide/home.htm](http://www.eurosur.org/wide/home.htm). See *The Enlarged European Union and Its Agenda for a ‘Wider Europe’: What Consideration of Gender Equality?* (WIDE 2005).

<sup>171</sup> See Harrison, Cynthia, “Heightened Scrutiny”: A Judicial Route to Constitutional Equality for US Women” in Dobrowolsky and Hart, *Women Making Constitutions* (2003), p.155-172.

amendment to the constitution.<sup>172</sup> Moreover we can compare the ability of women’s groups to get representation in the 1982 constitutional discussions in Canada, where there was a perceived need to legitimate through process rather than form and contrast this with the difficulty for women in gaining access to the process at Meech Lake after the Canadian constitution was codified.<sup>173</sup> This does not necessarily preclude future feminist support for some codification of an EU constitution. But women need to ensure not only that the content of any codified documents reflects their interests but also that the constitutional form is underpinned by the principles of “mutual recognition” and deliberation so that they and other political minorities, and groups from civil society are guaranteed access and representation to deliberations for change.

As stated above the Convention assumed an already constituted people with a common purpose. In this again the Constitutional Treaty also shows fixity, invoking accidental connections and referring back to the already constituted “peoples of Europe” rather than forward to a shared purpose. In relation to this Loughlin’s sees the threatening concept of a “kulterkampf”<sup>174</sup> and Weiler asks whether “the unanswerable question is whether the discourse of formal constitutionalism, the very power of the word [constitution]. . . , will rob Europe of this ethos of tolerance that was its defining grundnorm.”<sup>175</sup>

### Conclusion

This paper examined the Treaty Establishing a Constitution for Europe from the perspective of gender and constitutional change and noted the gender gap in the referenda which stopped its progress to ratification. The paper first considered how changes to constitutions and changes to constitutional form can have a gendered dimension. It then examined the extent to which women had participated in and influenced the process of change and content outcomes of the Constitutional Treaty, before examining the specific campaigns against the treaty by women’s groups. The final sections linked the basis for the feminist campaigns back to the theoretical critiques of the type of constitutionalism for gender equality and showed the synergy between the two.

The focus of campaigns were ostensibly on the absence of women in the constitutionalising processes and on the content of the Constitutional Treaty but feminists were also questioning something larger, the way of determining the future of Europe and of deciding the parameters of further political debate: the exclusivity of that constitutional form itself.

In as much as the campaigns were negative about the Constitutional Treaty, a rejection of a hollow constitutional rhetoric<sup>176</sup> of participation and equality;

---

<sup>172</sup> *ibid.*

<sup>173</sup> Shelagh Day, “Speaking For Ourselves” in Kenneth McRoberts and Patrick Monahan, *The Charlottetown Accord, the Referendum, and the Future of Canada* (1993), p.58-72.

<sup>174</sup> Martin Loughlin “The constitution of Europe: The new Kulturkampf?” (2004) *European Law Review* 557-569.

<sup>175</sup> Weiler, “On the power of the Word” (2005), at 186.

<sup>176</sup> Weiler suggested that this rhetoric might prove to be the Constitutional Treaty’s undoing. *ibid.*

then they were also positive in expressing interest and concern for a closer Europe based on social values.<sup>177</sup> If Habermas “unique opportunity for trans-national communication”<sup>178</sup> was not after all achieved through the Convention on the Future of Europe perhaps the trans-national campaigns against the Constitutional Treaty may have “catalytic effect”<sup>179</sup> in forming a value-based European citizenry and developing the constitution.

---

<sup>177</sup> Less than 3% of no votes were against further enlargement.

<sup>178</sup> Habermas, “Why Europe Needs A constitution” (2001) at 16-17.

<sup>179</sup> *ibid.*

## THE LEGAL IMPLICATIONS OF A NATIONAL POLICE FORCE\*

*Kiron Reid, University of Liverpool*

### Introduction

The increased centralised control of the police has been charted over more than ten years and is well documented.<sup>1</sup> There are also well known arguments put in favour of a greater degree of centralisation and some in favour of a national police force.<sup>2</sup> There are 43 geographic forces in England and Wales, 8 in Scotland, and the Police Service of Northern Ireland.<sup>3</sup> The current controversy over merging police forces has led to a great deal of debate but can be seen as following an historical pattern with earlier mergers in past decades. The 1990s saw the creation by statute of national policing bodies outside of the traditional tripartite structure in which local forces and local accountability are key elements. It can be argued that the country is nearer the creation of a single 'national' police force for England and Wales at least than ever before.<sup>4</sup> The reviews of Cambridgeshire and Humberside forces following the investigation into the murder of Jessica Wells and Holly Chapman highlighted areas in which greater national cooperation would assist local police investigations for example.<sup>5</sup> The merging of the National

---

\* Thank you to Ian Dennis for encouragement and to Fiona Beveridge and the journal's anonymous referee for comments on an earlier draft of this paper. The usual disclaimers apply.

<sup>1</sup> I. Oliver, "Police Accountability in 1996" [1996] *Crim LR* 611; N. Walker *Policing in a Changing Constitutional Order* (Sweet & Maxwell, London, 2000); K. Reid "Current developments in police accountability" (2002) 66 *Journal of Criminal Law* 172; "The Police Reform Act 2002 - Increasing Centralisation, Maintaining Confidence and Contracting Out Crime Control" D. Ormerod and A. Roberts [2003] *Crim LR* 141 at pp.142-146; R. Sullivan "Police Reform Act 2002: A Radical Interpretation" [2003] *Crim. LR* 468; T. Newburn and R. Reiner "From PC Dixon to Dixon PLC: Policing and Police Powers Since 1954" [2004] *Crim. LR* 601 at pp.611-614.

<sup>2</sup> Walker *op. cit.* p.29. S. Uglow, *Criminal Justice*, 2<sup>nd</sup> ed. (Sweet & Maxwell, London, 2002), pp.50-54. For an overview of the issues see S. H. Bailey, D. J. Harris and D. C. Ormerod, *Bailey, Harris & Jones Civil Liberties: Cases and Materials*, 5th ed. (Butterworths: London, 2001) pp.95-100. "A National Police Service: Any Day Now?" D. Donnelly, K. Scott & R. Wilkie (2002) 75 *Pol. J.* 287 with detailed debate about the police in Scotland.

<sup>3</sup> For detail on each see M. McBride and G. Collins, *The UK Police: A Pocket Guide 2002-2003* (Pen and Sword Books: Barnsley, 2002); also <www.police.uk> a site maintained by the Police Information Technology Organisation (PITO) on behalf of the Association of Chief Police Officers (ACPO).

<sup>4</sup> Generally see discussion in the White Paper *One Step Ahead: A 21st Century Strategy to Defeat Organised Crime*, Cm 6167, March 2004, pp.21-27. Consultation Paper *Policing: Building Safer Communities Together* (Home Office, London, 2003) discussion at 25-27.

<sup>5</sup> *The Bichard Inquiry Report*, HC653 (HMSO, London, 2004) pp.13-17 especially recommendations 1-5. See also *Report by Sir Michael Bichard's reconvened Inquiry to establish progress on delivering the recommendations made in his*

Criminal Intelligence Service (NCIS) and National Crime Squad to create the Serious Organised Crime Agency (SOCA) can be seen as a logical rationalisation to enable the police to respond more effectively to serious and organised and trans-national crime.<sup>6</sup> On the other hand it could be seen as the first step in the creation of a national police force, to be followed by the abolition of the county based police forces.

For the time being the Government does not appear to be about to embark on such a policy. For example there was no hint of this in the Queen's Speech for the Labour Government's third term.<sup>7</sup> Instead this debate was dramatically opened up by the publication of a report by Her Majesty's Inspectorate of Constabulary (HMIC) calling for a reduction in the number of police forces in England and Wales and the creation of strategic police forces in each region as the preferred option.<sup>8</sup> The then Home Secretary supported this option which was subsequently supported by the next Home Secretaries, at least initially (below).<sup>9</sup> The Police Superintendents' Association responded by renewing its call for a national police force.<sup>10</sup> The Government have not supported that proposal. However the centralisation of the police that has occurred by 2006 would have been unprecedented even in 1985 and the idea of further wholesale centralisation cannot be ruled out within the next ten years.

This article examines the potential legal implications of establishing a national police force, as well as briefly looking at some of the arguments about accountability. Concerns about lack of local accountability, and the benefit of a possible increase in central accountability, are both considered. The article concludes that the Government could create a national police force by legislation relatively simply and with few legal problems as obstacles to doing so. The aim of this article is not to consider the theoretical arguments for or against national policing or to advocate in favour of or against a national police force. However it will make a clear conclusion based on analysis of the trends in police accountability as to how the Government could be more honest in the debate about policing. The article will mainly consider England and Wales but Scotland and Northern Ireland

---

*original report*. 15 March 2005 (HMSO, London), p.iv. Website <<http://www.bichardinquiry.org.uk/>> as at 17 June 2005.

<sup>6</sup> Accountability issues relating to the establishment of SOCA are noted in K. Reid "The Home Secretary and Improved Accountability of the Police?" (2005) 69 *JCL* 232 at 252-253, and considered further below.

<sup>7</sup> HL Debs, Vol. 672, Col. 5, 17 May 2005. Also White Paper, *supra*, p.27; *Policing: Building Safer Communities Together – Summary of consultation responses* (Home Office, London, 2004) pp.33-36.

<sup>8</sup> *Closing the Gap - A review of the 'Fitness for Purpose' of the current structure of policing in England and Wales* by HM Inspector of Constabulary Denis O'Connor CBE, *QPM*. 16 September 2005.

<sup>9</sup> Home Office Press Release (HOPR) "Home Secretary Calls on Police to Undertake Radical Reform of Structures" 19 September 2005. Compare the media reaction of the *Daily Express* "POLICE CRISIS" "Super-forces planned as chiefs say: We can't cope" front page and the BBC "Cost warning on police shake-up" BBC news online, both 17 September 2005.

<sup>10</sup> See Rick Naylor's President's address to the national conference, 29 September 2005 <[http://www.policesupers.com/scripts/P\\_index.html](http://www.policesupers.com/scripts/P_index.html)> viewed at 6 October 2005.

will also be examined in places. This article will not reprise the theoretical arguments in detail but is more concerned about how such change could be effected.<sup>11</sup> O'Connor concluded in his report (para. 1.60): "the 43 force structure is no longer fit for purpose. In the interests of the efficiency and effectiveness of policing it should change." In the Autumn of 2005 police chiefs were asked to put forward proposals for merging forces. A reduction from 43 to 17 was likely. Given that scenario a single national force may not be such a dramatic alternative. Even given that mergers were put on hold and then apparently stopped when John Reid had a change of heart due to local and national political opposition the debate over the structures of the police will not go away.<sup>12</sup> This included stopping the one 'voluntary' merger of Cumbria and Lancashire that had been agreed by those Police Authorities in response to being told that smaller forces must merge proceeding.<sup>13</sup> A member of West Yorkshire Police Authority predicted that mergers themselves would come back in the future, no matter whether party changed and the continuity in policy between Labour and Conservative Governments make that appear a likely true prediction.<sup>14</sup>

### The Current Policy Setting

The tripartite system of police accountability divided responsibility between the local police Chief Constable (each force generally covering one or sometimes more counties), the police authority made up of local representatives including councillors and magistrates, and the Government Minister the Home Secretary. This system was set out in the Police Act 1964 and though that was replaced, heavily amended and updated by the Police Act 1996, the basic structure is still the structure of accountability in place today. Amendments since the early 1990s have made the system significantly different from that in the Police Act 1964. In the Police and Magistrates' Courts Act 1994 under the Conservatives the Home Secretary was given the power to set objectives for the policing of the areas of all police authorities, and set performance targets.<sup>15</sup> 'Independent' members were introduced appointed from a short-list approved by the Government minister. With the creation of the National Crime Squad and National Criminal Intelligence Service by the Police Act 1997 national statutory policing bodies were introduced for the first time. Policy continuity was apparent under the Labour Government from 1997 onwards, although local

---

<sup>11</sup> For incisive debate on the meaning of accountability in the context of the police see S. Spencer, *Called to Account*, (NCCL, London, 1984), Introduction, pp.1-8.

<sup>12</sup> See letter from the Home Secretary and force restructuring news, as at 19 June 2006. <http://police.homeoffice.gov.uk/police-reform/force->. Restructuring HOPR "Home Secretary delays police force mergers" 20 June 2006. For examples of media coverage "Police forces merger plan will be scrapped, says chief constable" *The Independent* 11 July 2006. "Government scraps police merger plans" *The Huddersfield Daily Examiner*, 13 July 2006 and editorial. <http://ichuddersfield.icnetwork.co.uk/>.

<sup>13</sup> "Home Office Fails to Meet Police Authority Conditions for Amalgamation" Cumbria Constabulary Press Release 10 July 2006. <[http://www.cumbria.police.uk/news\\_4908.htm](http://www.cumbria.police.uk/news_4908.htm)> See the Prime Minister's statement at *H.C. Debs* Vol. 448, Col. 1383, 12 July 2006.

<sup>14</sup> Cllr. Tony Woodhead, letter *The Huddersfield Daily Examiner*, 13 July 2006.

<sup>15</sup> Incorporated as ss.37 and 38 of the Police Act 1996.

inter-agency cooperation was stressed by the Crime and Disorder Act 1998. The Criminal Justice and Police Act 2001 continued the trend towards the establishment of national policing structures, this time for police training. The Act set up a Central Police Training and Development Authority (Centrex) and gave the Home Secretary power to set regulations about training. The Police Reform Act 2002 introduced the National Policing Plan. For the first time the Government's priorities, performance indicators and plans for new development of policing have been brought together in a single document. At the same time the Act greatly enhanced the role of the Government Minister to intervene in and give guidance to police forces and police authorities both generally and specifically. This included in Part 1 enhanced powers regarding inspection of policing in the areas and in Part 3 regarding the removal and suspension of senior officers. The Home Secretary had always had powers in the tripartite structure regarding inspection and to make regulations but the totality of the reforms since 1994 have put the Government in a far stronger position than previously *vis a vis* local police chiefs and police authorities. One strength of the 'New Labour' approach has been that the Government is willing to overturn policies if it decides that they are not working. On the other hand this can lead to an alarming pace of change. Key policy innovations such as the National Policing Plan and creation of Centrex for police training discarded after just a few years by the Police and Justice Act 2006. However the key recent theme of increased Government influence remains strong.<sup>16</sup>

Jones and Newburn make the point that there is much continuity as well as radical change in policing and that many new approaches have in fact been found in the past.<sup>17</sup> This can be illustrated by referring to many well known works from the recent history of policing and criminal justice literature that show debate about the same legal, policy and operational issues as today. A fairly random search by the author for instance records the following examples: the discussion of flaws in police accountability by Kinsey, Lea and Young;<sup>18</sup> a call for independent scrutiny of police complaints in America by Morris and Hawkins;<sup>19</sup> similarly their expressing concern about corruption in the 1980s calling for very similar reforms as proposed a decade earlier and introduced in Britain and to some extent in the USA in more recent times.<sup>20</sup>

In *Crime – Cause & Cure Conference, Conference Report* Liverpool and Bootle Constabulary Chief Constable J. Haughton in the introduction describes the policy adopted in 1970 "to more closely identify the police with community life and to join with the community in seeking solutions for

---

<sup>16</sup> The Police and Justice Act received Royal Assent on 8 November 2006 after preparation of this article. Key changes are noted here. Centrex replaced by the National Policing Improvement Agency (NPIA), operational from 1 April 2007.

<sup>17</sup> "The Transformation of Policing? Understanding Current Trends in Policing Systems" (2002) 42 *Br J Criminol* 129, particularly at 142-3.

<sup>18</sup> R. Kinsey, J. Lea & J. Young *Losing the Fight Against Crime* (1986) chap.8.

<sup>19</sup> N. Morris and G. Hawkins *the honest politician's guide to crime control* (1970) pp.98-101.

<sup>20</sup> E. Mallow *The Ethics of Law Enforcement and Criminal Punishment* (1982) chap.2.

many neighbourhood problems”.<sup>21</sup> Twenty five years later the Chief Constable of Northern Ireland devotes two of the twelve pages of his report to community issues and the Merseyside Chief Constable produces for the fourth year five area versions of his Annual Report.<sup>22</sup>

The debate over a national police force has returned more strongly than at any time since the majority Royal Commission rejected this option in 1963.<sup>23</sup> Various writers have recently pondered the issue as to whether there are moves towards creating a national force. Writing in 2001 Bailey, Harris and Ormerod pose the question whether there is a *de facto* national police force.<sup>24</sup> Implicitly the answer is not at the moment. On the other hand the five trends in policing identified by the authors in December 2001 all continued as predicted including increased centralisation. These are the development of European policing, increased centralisation, increased ‘militarisation’ of the police (plastic bullets and tasers being deployed subsequently), increased use of surveillance techniques, the rise in the private security industry.<sup>25</sup>

Sir Michael Bichard’s reconvened Inquiry noted recent developments in national coordination.

“The apparently strong commitment of forces to the development of the national IT intelligence system (IMPACT) is further evidence of a more corporate approach by the service, while the advent of the National Policing Improvement Agency augurs well for a more effective approach to developing and disseminating best practice in support of operational policing.”<sup>26</sup>

Government thinking was found in the March 2004 White Paper. This discusses the “strategic capacity of existing police forces”. The paper observes:

‘one option may lie in developing fewer, more “strategic” forces across the country and identifying forces to act as “lead” forces on specific issues, so acting as a focal point for intelligence and expertise.’<sup>27</sup>

This development was predicted by Uglow.<sup>28</sup>

Opponents of centralisation and a national police force have emphasised the importance of local governance as a precaution against tyranny and practically as an effective means of dealing with local concerns. There is nothing in UN or EU or Council of Europe principles or ECHR jurisprudence that necessarily requires local police forces and local

<sup>21</sup> Liverpool and Bootle Constabulary, University of Liverpool September 1973 (report January 1974).

<sup>22</sup> Respective Annual Reports 2004/05 published by PSNI Belfast (pp.6-8) and Merseyside Police, Liverpool. Thanks to Tim Moore, Merseyside Police Authority, for up to date information.

<sup>23</sup> Royal Commission on the Police, *Final Report* Cmnd. 1728 (1962).

<sup>24</sup> *Op. cit.*, p.99-100.

<sup>25</sup> *Ibid.*, pp.147 – 151.

<sup>26</sup> *Op. cit.*, p.iv.

<sup>27</sup> *Op. cit.*, p.27.

<sup>28</sup> *Op. cit.*, p.53.

accountability. General Assembly resolution 34/169 of 17 December 1979 *Code of Conduct for Law Enforcement Officials* requires that: “every law enforcement agency should be representative of and responsive and accountable to the community as a whole.” This could be at local or national level, however.<sup>29</sup> At the same time the Home Secretary, in supporting larger forces, has critically stressed the continued importance of making the police accountable to their local community. This is through emphasis on local cooperation.<sup>30</sup> This concept of, in effect, accountability through partnership will be considered in more detail below. Trends in police policy in the UK have matched those in other jurisdictions.<sup>31</sup> Ormerod and Roberts described the scene for the major reforms by Tony Blair’s second Government.

“the Secretary of State acquires greater powers which may be exercised in relation to matters including those of an operational nature; although not to the extent originally proposed in the Bill. . . . It was suggested the Bill represented a move “by stealth . . . unnoticeably and slowly towards a national police force.” [Lord Carlisle]”

They conclude that there was “a limited shift towards centralised power, without completely undermining the tripartite structure” but “[n]evertheless, the safeguards against abuse of the Secretary of State’s enhanced powers rest only in obligations of consultation and report, which will ensure that there is at least transparency in the process.”<sup>32</sup> Sullivan believes that “the 2002 Act already amounts to change that overturns the tripartite structure of British policing.”<sup>33</sup> Creating a national police force and giving the Home Secretary more explicit powers would remove any confusion about lines of accountability. The tripartite structure allows each party to imply that another party is responsible for any failure or lack of performance. Giving the Home Secretary responsibility would enable Parliament to clearly hold the Home Secretary to account and to monitor police performance more closely.

Newburn and Reiner, like Bailey and co-authors, note a *de facto* national control legitimised by the myth of the tripartite structure. They conclude “it is difficult to see how this centralising and managerialising tide is to be turned back.”<sup>34</sup>

One argument in favour of centralisation is that local control is not necessarily effective at protecting civil rights or holding the police to account. There are problems with local accountability in this context. Galligan

---

<sup>29</sup> For more analysis see: *Human Rights and Law Enforcement: A Manual on Human Rights Training for the Police*, Ch. IX Policing in Democracies, pp.39, 40 (Office of the United Nations High Commissioner for Human Rights, Professional Training Series No. 5). Available at [www.ohchr.org](http://www.ohchr.org) as at September 2005.

<sup>30</sup> HOPR 19/09/2005, above.

<sup>31</sup> For an overview of developments in Australia, Britain and the United States refer to C. Edwards, *Changing policing theories for 21st century societies* (Federation Press, Sydney, 2005) 2nd ed.

<sup>32</sup> *Loc. cit.* p.142.

<sup>33</sup> *Loc. cit.* p.469.

<sup>34</sup> *Loc. cit.* p.618.

has warned 'Local control also has its dangers: small communities can be repressive and intolerant of minority interests'.<sup>35</sup>

While this writer has rejected Crawford's critique of a "mythical golden age" of local accountability precisely because it was clearly an argument set up to be knocked down, it is fair to highlight that local control has often not been seen to provide appropriate safeguards for the public.<sup>36</sup> This was true historically as well as in recent times. The arguable failure of Humberside Police Authority to take account of public concern was highlighted by the Home Secretary taking legal action against the Authority.<sup>37</sup> This same Authority was the subject of a judicial review over the composition of the elected members of the Authority in December 2000. This was a political row over the political composition. The High Court upheld a decision by the Joint Committee for the Purpose of Making Appointments to the Humberside Police Authority to disregard independent councillors in the exercise of its duty to ensure that the members it appointed reflected the balance of parties among the members of the relevant councils taken as a whole. Mrs. Justice Rafferty stated that the law was clear.<sup>38</sup> However had the Joint Committee followed the advice of their clerk (at paragraph 5) this matter may never have reached court. Arguably a membership that took account of the existence of independent members would have better reflected local opinion. That position was supported by the view of the national government department (letter from the Home Office referred to at paragraph 19) but not reflected by the majority of local political representatives on this committee in Humberside. In Devon and Cornwall by contrast there are independent councillors as members on the Police Authority. One from Cornwall and one Isles of Scilly. The political parties here clearly take a different view about the groups that should be represented.<sup>39</sup>

In various areas of Government policy there is a clear trend of taking accountability away from democratic local institutions in the name of increasing local control, whether this is done directly by central Government or by new public bodies. Concern over the centralising effect of Government local government policy have been prominent in media reports.<sup>40</sup> Examples can be found across the spectrum of organisations, for example from the

---

<sup>35</sup> D. Galligan, "Regulating Pre-Trial Decisions", in I. Dennis (ed.) *Criminal Law and Justice* (1987) p.198.

<sup>36</sup> (2002) 66 *JCL* 178.

<sup>37</sup> *R (Secretary of State for the Home Department) v Humberside Police Authority* [2004] EWHC 1642. See Reid (2005) pp.240-242.

<sup>38</sup> *R. v Joint Committee for the Purpose of Making Appointments to the Humberside Police Authority Ex p. East Riding of Yorkshire Council* (2001) 3 *L.G.L.R.* 46, para.31. Transcript accessed via the Westlaw database.

<sup>39</sup> Thank you to Sarah Henley of Devon and Cornwall Police Authority for providing the most up to date information.

<sup>40</sup> For example see "Councils seek control of their own destiny" *The Times*, *Public Agenda* supplement, 5 July 2005, p.3; P. Hetherington "Comment extra" p.9 *The Guardian*, *Society Guardian* supplement, 6 July 2005, and cf M. Dean "Opinion" p.5.

NHS a local dispute over an appointment to the Liverpool Women's Hospital Council.<sup>41</sup>

Potential legal and political obstacles to the creation of a national police force are considered below.

***The Shift from Accountability to Management.***

The 'left' in British politics traditionally campaigned in support of greater local control and political accountability of the police.<sup>42</sup> For example Jack Straw, the first Home Secretary in Tony Blair's cabinet, put forward two bills in support of greater democratic control - in 1979 and in 1980.<sup>43</sup> The current Labour Mayor of London supported radical policies relating to the police when he was Leader of the Greater London Council in the mid-1980s.<sup>44</sup> Residual vestiges of that traditional support for local accountability have largely been replaced by managerial and results led concern to deliver progress in actual and perceived public safety. For example in the police reform agenda the Government were not interested in the traditional Labour and Liberal policy to remove unelected magistrates from police authorities. This was illustrated when Liverpool City Council (controlled by the second opposition political party, the Liberal Democrats) passed a resolution to lobby Government "to drastically reduce the number of non-Councillor members of Police Authorities and thereby reduce the current democratic deficit". John Denham MP (then Minister for Police Reform) wrote in a detailed and thoughtful reply:

"On the point of the composition of police authorities, we have no plans to introduce legislation to alter the current pattern. We are, as you know, engaged on a major programme of police reform with the aim of both reducing crime and the fear of crime. I do not think it would help if we added a further major element of change to the already significant developments we have in train."<sup>45</sup>

New ways of charting police performance were introduced. The Audit Commission can evaluate the Best Value Performance Plans produced by each Police Authority under the Local Government Act 1999. They issue an annual audit letter and liaise with Her Majesty's Inspectorate of

<sup>41</sup> Considered at Liverpool City Council's Executive Board, 10 June 2005, item 3. Government research can be found in Office of the Deputy Prime Minister *New Localism- Citizen Engagement, Neighbourhoods and Public Services: Evidence from Local Government*. (ODPM, 2005) and an official view in ODPM News Release 2005/0140, 20 July 2005, "Further measures to cut burden of red tape".

<sup>42</sup> M. Simey, "Police Authorities and Accountability: The Merseyside Experience" in D. Cowell, *et. al.*, *Policing the Riots* (1982). E. McLaughlin, *Community, policing and accountability: the politics of policing in Manchester in the 1980s* (1994).

<sup>43</sup> See Jack Straw *H.C. Debs*, Vol. 322, Col. 784 15 December 1998. S. Spencer, *Called to Account*, (NCCL, 1984), especially chaps. 3, 5 & 6.

<sup>44</sup> G. Marshall and B. Loveday, "The Police: Independence and Accountability" chap.11 in J. Jowell & D. Oliver (eds.), *The Changing Constitution*, 3rd ed. (1994) p.311.

<sup>45</sup> Letter to David Henshaw, Chief Executive Liverpool City Council, 19 July 2002, responding to motion moved by Cllr. Paul Clein 24 April 2002 and subsequent correspondence.

Constabulary and can produce national or local themed reports including joint reports.<sup>46</sup> HMIC inspects individual police forces and parts of police forces (geographical Basic Command Units or particular sections) as well as carrying out themed reports. Most recently Baseline Assessment was introduced by HMIC / Home Office in 2003 - 04.<sup>47</sup>

Political concern to deal with real and perceived crime and disorder has been the key feature of Labour policy relating to the police. This has involved the police in greater partnership working, conscious that the police cannot tackle social problems alone. It has led to direct political intervention in areas of greatest public concern, for example concerning street robbery.<sup>48</sup> More significantly year on year it is targeted at two levels. The police and other agencies locally, supported by Government, dealing with the amorphous concept of 'anti-social behaviour' and nationally the police concentrating on serious and organised and transnational crime.<sup>49</sup>

This article assumes that SOCA would remain separate to the new national police force with the same remit amended to include support to and work with the national police force. The national police force would concentrate on domestic crime, policing and community safety issues while officers would work with SOCA on tackling serious, organised and transnational crime. This article also envisages that the 'national' police force would be for England and Wales only. Policing is largely a devolved matter in Scotland.<sup>50</sup> In Northern Ireland reforms were an integral part of the peace process following the Good Friday Agreement and the Patten Report.<sup>51</sup> Therefore legislation of a constitutional significance would be needed to change those settlements by merging the police forces in Scotland and the Police Service of Northern Ireland (PSNI) with the police forces in England and Wales. The Scottish Executive (though not it appears Parliament) have

---

<sup>46</sup> For example the first *Avon and Somerset Police Authority External Audit 2002-03 Annual Audit Letter*, p.22 (Audit Commission, London, November 2003).

<sup>47</sup> For an explanation of baseline assessment see *The Role of Her Majesty's Inspectorate of Constabulary (HMIC, 2004)* pp.6-8 available at <<http://www.homeoffice.gov.uk/hmic/hmic.htm>> as at 15/12/04.

<sup>48</sup> "Problem-solving street crime: practical lessons from the Street Crime Initiative" N. Tilley *et. al.*, (Home Office, London, 2004) p.2; K. Reid "Policing the railways and related legal issues" (2003) 67 *Journal of Criminal Law* 495 p.506-07.

<sup>49</sup> A recent useful summary of the distinction between high and low policing is found at the start of "'Eye Spy Private High' Re-Conceptualizing High Policing Theory" C. O'Reilly & G. Ellison (2006) 46 *Br J Criminol* 641.

<sup>50</sup> Scotland Act 1998 ss.28-30, schs.4 and 5. See also the Police (Scotland) Act 1967 as amended by the Police and Magistrates' Courts Act 1994 and Police Reform Act 2002. The devolution of power to Scotland largely recognised the existing separate criminal laws of Scotland. See G. Gordon, *Renton & Brown: Criminal Procedure*, 6<sup>th</sup> ed. (W Green & Son Ltd., Edinburgh, 2001 update), chap. 1 and *ibid.*, Sch.5 Part II, particularly Head B.

<sup>51</sup> See *A New Beginning: Policing in Northern Ireland. The Report of The Independent Commission on Policing for Northern Ireland* (1999) available at <<http://www.belfast.org.uk/>> at 22 July 2005; The Police (Northern Ireland) Act 2000; K. Starmer and J. Gordon "Monitoring the Performance of the Police Service in Northern Ireland for Compliance with the Human Rights Act 1998" [2005] EHRLR 233; M. Tomlinson & P. Hillyard "Patterns of Policing and Policing Patten" (2000) 27 *J. Law & Soc.* 394.

considered creating a single Scottish police force.<sup>52</sup> They decided to keep the current eight forces after a review in 1999 - 2000. The review concluded:

“The creation of a national police force would be the most radical option but while viable it would raise significant controversy, not least in terms of local accountability and civil liberties issues. . . . the current forces are well established and are working effectively. . . . The sub-group therefore favours retaining the existing 8 force structure.”<sup>53</sup>

There is no reason of legal principle however why they could not decide to have a single force – whether or not this is done in England and Wales. More detail on the Scottish work is considered below. It can be argued creating a national police force in any of the jurisdictions of the UK would be a change of constitutional significance, perhaps necessitating a referendum. On the other hand it appears anachronistic today – even comical – that there were 120 police forces in England and Wales prior to the Police Act 1964 and reorganisation in 1974 reducing the number to 43. There may be nostalgic affection and support for the old Rutland, Flintshire or City of Liverpool Constabularies but it would untenable to argue today that each small area have its own separate force (though the Government wish to convince the public as to the importance of local policing, below). It is possible that in the future the idea of the UK not having had a national police force or forces will appear equally historically daft. This author finds it impossible to suggest that if Robert Peel were to appear today with the idea of setting up a police force that this would prove so controversial Parliament would be asked to agree to set up a police force for London only, or that it would take a decade to allow rural areas to establish modern police forces.<sup>54</sup>

### ***The Scottish Model v The SOCA Model.***<sup>55</sup>

Work in Scotland from 2001 to date has centred on establishing a single body to run common police services. These include the Scottish Police College (SPC), Scottish Criminal Record Office (SCRO) and Scottish Police Information Strategy (SPIS) which are already in existence and a new national forensic science service for Scotland. *Supporting Police, Protecting Communities: Proposals for Legislation*, chapter 2, set out proposals for the

---

<sup>52</sup> See Scottish Office News Release 1167/99 9 June 1999 “No hidden agenda on force restructuring Wallace tells Chief Constables”; Scottish Executive News Release SE2853/2000 6 November 2000 “Strengthening Police Services”. Useful discussion of the position in Wales is found in Sullivan *loc. cit.* p.469, who also raises present day concerns about regionalisation.

<sup>53</sup> *Review of Police and Fire Services, Police Review: Interim Report* (Scottish Executive, Edinburgh, 2000) paras.56-57. Thanks to Laura Duffy, Police Division, for supplying a copy of this report.

<sup>54</sup> Though the increasing use of police against peaceful protesters may resonate given that rural forces were set up to control the pro-democracy Chartist movement. Metropolitan Police Act 1829 established a police force in London. County Police Act 1839 allowed rural areas to create police forces. For detailed study see C. Emsley *Crime and Society in England 1750-1900*, 1<sup>st</sup> ed. (1987) chap.8.

<sup>55</sup> Much information in this section is taken from the Scottish Executive website and newsletters of the project team and programme board published May 2004 - June 2005. Available at <www.scotland.gov.uk> as at 21 July 2005.

structure and governance of the new body.<sup>56</sup> This consultation paper on the proposed Police Bill made it clear that the tripartite system of accountability would be reflected in the new structure. A Service Authority would provide the common police services and maintain the Scottish Drug Enforcement Agency (SDEA). This very much based on the NCS / NCIS model but with the Scottish Government proposing a greater level of democratic local input than retained in the former bodies prior to their merging.<sup>57</sup> In England and Wales at the same time the creation of SOCA by national Government removed any residual vestige of the tripartite system being reflected in the national structure as there is no division between officers and scrutiny body, instead all members sit together as the Board of the Agency.<sup>58</sup>

Two useful different perspectives on the establishment of SOCA are by Harfield and by Bowling and Ross.<sup>59</sup> Harfield states bluntly two of the most important issues “its creation begs a number of questions about priority setting and accountability.”<sup>60</sup> In both of these areas the existing national control is consolidated. In a sensationalist but compelling conclusion to an overall fairly balanced article Bowling and Ross highlight:

“Never before has central government commanded such a high degree of control over police agents, who have traditionally been independent . . . There will be no police authority or independent monitoring commission for this agency, nor any prospect of democratic accountability to local communities.”<sup>61</sup>

This neatly summarises the trends and concerns explained by this and other authors cited previously. The way that SOCA has been established contrasts with developments in Scotland that retain more connection to the traditional tripartite structure. The control and governance of SOCA abandons the traditional British constitutional notions of separation of power and checks and balances in pursuit of shared work against crime. Rather than establish a body and scrutiny element the structure emphasises the team working together to achieve the organisation’s objectives. Arguably it is legitimate for Government to assert that there are shared common goals in our society that all can agree with including the fight against serious and organised crime but

---

<sup>56</sup> Scottish Executive, Edinburgh, 2005. See paras.2.11–2.29.

<sup>57</sup> These changes were enacted by the Police, Public Order and Criminal Justice (Scotland) Act 2006. The Scottish Police Services Authority (SPSA) comes into operation on 1 April 2007, bringing together the police training, criminal records, information systems development and forensic science service mentioned. The renamed Scottish Crime and Drug Enforcement Agency (SCDEA) is responsible to the SPSA for operational matters; the new name reflects increased emphasis on tackling serious and organised crime. Some details taken from the Scottish Executive website and <http://www.sdea.police.uk/aboutus.htm> (06/03/06).

<sup>58</sup> For composition of the Board of SOCA see Serious Organised Crime and Police Act 2005 Sch.1, Part 1.

<sup>59</sup> C. Harfield “Soca: A Paradigm Shift in British Policing” 2006 (46) *Br J Criminol* 2006 743; “The Serious Organised Crime Agency - should we be afraid?” B. Bowling & J. Ross [2006] *Crim LR* 1019.

<sup>60</sup> *Ibid.* p.743.

<sup>61</sup> *Op. cit.*, p.1032-33. The authors appear unduly pessimistic about the ability of a SOCA Director-General to stand up to political interference by a Home Secretary, pp.1026-27.

the lack of safeguards in this more politicised system gives cause for concern due to the reasons safeguards are introduced in the first place.

### Specific Issues in Creating a National Force

Many features of the current system readily lend themselves to being incorporated as parts of a national police force system. For example the national and local policing plans. By the Police and Magistrates' Courts Act 1994 the Secretary of State may set objectives for the policing of the areas of all police authorities, (section 37) and set performance targets (section 38). Police authorities can set local policing objectives (section 7) provided they are not inconsistent with the national ones.

The Police Reform Act 2002 introduced the National Policing Plan. "The single place where the Government's priorities, performance indicators and plans for new development come together." (Cm S326, para. 7.21) The plan sets out "strategic national priorities for the police service and the indicators against which the performance of the service will be judged."<sup>62</sup> In the third plan the liaison between the Home Office and senior police officers is explicit:

"The Home Secretary's key priorities for the police service for 2005-08 have taken account of the Association of Chief Police Officers' (ACPO) National Strategic Assessment (see 2.4 – 2.5). That Assessment, and this Plan, set the framework for policing in England and Wales against which forces and authorities should undertake their planning."<sup>63</sup>

The Government set out five priorities for policing at a national level. Locally there are three year strategy plans, introduced by the Police Reform Act 2002, section 92. There is no reason why these various systems could not continue substantially unchanged with a national police force. That is true with the replacement of the National Policing Plan after the Police and Justice Act 2006 (Schedule 2). This takes account of the need to recognise that policing is a partnership activity not just to be left to the police.

Instead measures are contained in the November 2006 updated *National Community Safety Plan 2006-2009* published by the Home Office. The measures in the Act also allow for potentially less prescription in objective setting and the requirements for plans imposed on local police authorities by giving the Home Secretary greater discretion.

Increased managerialism and control through audit have been controversial since the 1980s, with greater significance after the introduction of Best Value by the Local Government Act 1999.<sup>64</sup> The emphasis on targets and evaluation would make merging police forces across the whole country more straightforward as they are used to substantially the same inspection regimes.

---

<sup>62</sup> Para. 1.2. *The National Policing Plan 2003-2006* (Home Office November 2002).

<sup>63</sup> *National Policing Plan 2005-08*. (Home Office, London, 2004), p.5.

<sup>64</sup> This as with policy themes such as citizen as consumer and centralisation (above) have been equally evident in other areas of national policy such as education and in health, the latter charted in part by Professor Harrington "Medical Law and the Changing NHS: A Study in Rhetoric" inaugural lecture, University of Liverpool 5 March 2007.

A similarity is that the PSNI is currently inspected by HMIC as are the English and Welsh forces.<sup>65</sup> Her Majesty's Inspectorate of Constabulary for Scotland carry out the same wide range of work as their comparators in England and Wales. This similarity would make integration of inspection a relatively straightforward matter to still be undertaken largely at levels below the national police force level.<sup>66</sup> Therefore there would still be local and national targets and performance indicators (considered further below).

***Leadership of the Police Force at National Level: Symbolism; The Intelligence Function***

Keeping the Chief Constable title for the head of the national force might not reflect the scale of the change in establishing the new body. Possibly the head of a national police force could be called a Commissioner. The Metropolitan Police in effect carry out some national functions at present and the Commissioner is in charge of by far the largest force in the country. This could distinguish the title of the national head from the local heads of police areas (it is suggested below that the latter could still be called Chief Constables). On the other hand the head of the national policing bodies already established are Director Generals. The head of the national police force might logically therefore also be called a Director General, however this may lead to real or perceived rivalry with SOCA.

The fundamental importance of intelligence led policing driving SOCA's work is highlighted by Harfield.<sup>67</sup> Of particular importance would be the role of Special Branch in supporting SOCA and the security services at national level and the police at a lower level. The recent reorganisation of Special Branch to enable more national coordination and regional cooperation should ensure that the work and organisation of Special Branch could integrate easily into a new national structure with regional or county sub-divisions.<sup>68</sup> Local police intelligence has been of great importance in supporting the work of the National Criminal Intelligence Service and the National Crime Squad. With a single national police force with dedicated points of contact it could be easier for local officers to pass on relevant intelligence. For example neighbourhood officers might raise suspicions about individuals and institutions that would support the criminal intelligence work of SOCA on curbing money laundering and offences related to the proceeds of crime.<sup>69</sup> Clear systems could be put in place to enable this. There is no natural dichotomy between local and national intelligence – the two are inextricably interlinked both up and down. This point was spelt out by the

---

<sup>65</sup> Sections 41 and 42 Police (NI) Act 1998 as amended by Sch.6 Police (NI) Act 2000 and s.3 Police Reform Act 2002.

<sup>66</sup> See *Her Majesty's Inspectorate of Constabulary for Scotland Corporate Plan 2003-2006* (HMIC, 2003) and *Inspection Programme 2005 – 2007*, both available at <<http://www.scotland.gov.uk/Topics/Justice/Police/15403/2058>> 23 July 2005.

<sup>67</sup> *Loc. cit.* at p.746-7.

<sup>68</sup> On changes to the organisation of Special Branch see Cm. 6167 p.26 and Reid, *loc., cit.* (2003) 746-747 at pp.504-07.

<sup>69</sup> For background see R. Stokes and A. Arora "The Duty to Report Under the Money Laundering Legislation Within the United Kingdom" [2004] *Journal of Business Law* 332; C. Walker *Blackstone's Guide to the Anti-Terrorism Legislation* (OUP, 2002) 69-74.

Merseyside Police Chief Constable, Bernard Hogan-Howe, writing about gun crime:

“There’s also a vital part to play in dismantling the illegal importation and supply of weapons. We need the Serious and Organised Crime Agency to take this issue as a top priority. Currently their plan targets serious criminals who use firearms. Again in my view, any criminal who has a gun is a serious criminal. It’s the minor disputes between younger, disorganised criminals that lead to many of our urban shootings.”<sup>70</sup>

### ***Leadership and Management of the Police Force below National Level***

There is no reason why the local heads of police areas could not continue to be called Chief Constables in each local area. There will still be a need for senior management structures below national and indeed regional level. These could be at the level of one or more counties. Possibly the strongest benefit of a good local Chief Constable is the image and practice of local leadership, this would still be essential if police officers on the ground are not going to feel remote from their senior management. The Crown Prosecution Service operates with a Chief Crown Prosecutor at each local level, there is no reason why local police area Chief Constables could not be similar in status to local Crown Prosecutors. However the financial benefits of creating a national police service would presumably not be great unless there were far fewer than the 43 police force areas (in England and Wales) at present. This could lead to opposition from existing police chiefs as the opportunities for senior roles and the status that they carry will be more limited than at present. It can be suggested that “the fairly hostile reaction from [some] Chief Constables to the now defunct plan to amalgamate a number of smaller UK forces can be attributed in part to a perceived loss of professional autonomy.”<sup>71</sup> A related organisational issue is that regional points of contact will still be needed with SOCA, as has been the case with NCS and its structure of regional offices. If SOCA regional offices are located co-terminus with police regions that could make liaison easier and more effective than at present.

### ***Police Training and Equipment***

It can be argued that a national police force would hinder the need for police training to take account of local diversity and conditions. However, this would be done during the in force parts of the training as at present. This could also be done to some extent at regional level, as at present. In this respect the future role of Centrex is significant in that there has been an increased emphasis by the ‘national’ police training body towards more local as against regional training. Centrex, the Central Police Training and

---

<sup>70</sup> The *Daily Telegraph*, 26 February 2007. On the broader links see *Transnational Organised Crime: Perspectives on Global Security*, A. Edwards & P. Gill (eds.) (2003).

<sup>71</sup> A point more clearly articulated by the journal’s anonymous referee quoted here than me. Hogan-Howe has proposed the creation of regional Commissioners. *The Times* 19 September 2006.

Development Authority, announced in the Summer of 2005 that it was closing three of its nine regional training centres, in Kent, Cheshire, and Gwent. This decision was because of “the migration from the current Probationer Training Programme (PTP) which was delivered regionally, to the new Initial Police Learning & Development Programme (IPLDP), designed for local delivery of probationer training in force.”<sup>72</sup> It was said that in line with Home Office policy the principle of the IPLDP is “that the main responsibility for the training of new officers should rest with forces. Officers will be trained more closely within the communities they will ultimately serve, with less emphasis on long periods of residential training.”<sup>73</sup> In Scotland decentralisation of other parts of training from the Scottish Police College to forces has been considered and “[t]here are no current plans to change the overall balance of police training between the College and individual forces.”<sup>74</sup>

In a recent development the National Policing Improvement Agency (NPIA) is created by the Police and Justice Act 2006. Coming into operation on 1 April 2007 the NPIA will replace and take on much of the work of Centrex and PITO. In an alarming development and emulating what was done with SOCA the Chair of the new Agency was appointed before the Agency had been approved by Parliament. This appears to show a shocking contempt for Parliamentary democracy.<sup>75</sup> The NPIA can be seen as a further development in enhancing the professionalism of the police and encouraging high professional standards, following measures like introducing the *Code of Professional Standards for police officers*.<sup>76</sup> To some extent the shift towards emphasis on quality management of officers by police leaders has also helped increase professionalism.<sup>77</sup>

It can be argued that it would be easier to address issues of discrimination in use of police powers, both in training and in management if there was a national structure rather than 43 different police forces. The well documented wide disparity of use of stop and search powers is a particular cause for concern.<sup>78</sup> Greater national influence in some areas of policy and training may help avoid infringement of rights by the officers of a national force. (On complaints investigation see below). Multiculturalism and integration of minority ethnic groups are key areas of political debate with all main parties

---

<sup>72</sup> Centrex News Release “Ashford, Bruche & Cwmbran Police Training Centres to close in May 2006” 21 July 2005.

<sup>73</sup> *ibid.* By contrast Morris and Hawkins in the USA advocated adopting the British regional training approach in 1970. *Loc. cit.* at pp.96-98.

<sup>74</sup> Review of Common Police Services website as above, Frequently Asked Questions, Question 13, dated 7 March 2005.

<sup>75</sup> Peter Holland (a Board member of Centrex) was appointed as the first chair (designate) of the NPIA in September 2006. Press release 7 September 2006. <<http://www.centrex.police.uk/>>. See also <<http://www.npia.police.uk/>>.

<sup>76</sup> Home Office consultation, 27 February 2006.

<sup>77</sup> Centrex Chief Executive Norman Bettison for example was recognised by the Chartered Management Institute. Centrex press release 29 July 2005.

<sup>78</sup> L. Lustgarten “The future of stop and search” [2002] *Crim LR* 603. P. Waddington, K. Stenson & D. Don “Race, and Police Stop and Search” (2004) 44 *Brit J Criminol* 889.

supporting both. A national police force may make it easier to spread best practice on how the police can help rather than hinder these processes.<sup>79</sup>

Police tactics and equipment change to meet the threats they may have to face. Changes in equipment and tactics might also change the situations in which the police may come into contact with members of the public. Training is extremely important in ensuring that new equipment is used in a way which reflects officers' right to use reasonable force in carrying out their duties. Police equipment has changed greatly in the past decade which raises old legal issues in innovative situations. While firearms are not routinely deployed (confounding past pessimists), defensive body armour is now commonplace. There has been an increase in equipment that can be both offensive and defensive. New side handled batons introduced in 1995, or an alternative metal telescopic extendible truncheon replaced the traditional truncheon. The deployment of CS spray after trials in 1996; pepper spray has been trialled (for example by Sussex Police in 2001); plastic baton rounds deployed to all forces (apparently without any local consultation or democratic debate) in 2001 and electric stun gun 'tasers' deployed as well after trials in 2003 - 2004, these latter in an attempt to minimise use of lethal force when police officers would previously have had no alternative. Amnesty International is opposed to any relaxation in the rules regarding use of tasers because of research from the United States.<sup>80</sup> Given the deployment of controversial equipment such as plastic baton rounds being sanctioned by the Home Secretary it can be argued that a paramilitary police force would be more likely if decisions on all equipment are made centrally rather than there being local choice about such issues (as with deployment of cs spray and types of batons and tasers).<sup>81</sup> There appears no problem at present with different forces trialling equipment and best practice being spread from the results of those trials. Ormerod and Roberts, citing Lord Fowler, point out that excessive central direction could "inhibit individual forces from developing pioneering approaches".<sup>82</sup> On the other hand reduced cost of equipment being purchased centrally and dissemination of best practice in training, as well as reducing cost of training, could be arguments in favour of a national force.<sup>83</sup>

Call handling is a particular burden for the police – essential to do the job but leading to dissatisfaction and sometimes complaint if the large volumes of

---

<sup>79</sup> See D. McGoldrick "Multiculturalism and its Discontents" (2005) 5 HRLRev 27; *Improving Opportunity, Strengthening Society: The Government's strategy to increase race equality and community cohesion* (Home Office, London, 2005); HOPR "Tackling Extremism Together: Working groups report back to Home Secretary" 22 September 2005.

<sup>80</sup> Press Release 30/11/04; *United States of America - Excessive and lethal force? Amnesty International's concerns about deaths and ill-treatment involving police use of tasers*. The IPCC welcomed tasers but supported Amnesty's concerns cf press releases 30/11/2004 and 15/09/2004.

<sup>81</sup> For example in Wales three forces have deployed tasers at different times and one not introduced them yet. "Wales-wide backing for Taser guns" BBC News Online <<http://news.bbc.co.uk>> 22/08/2005.

<sup>82</sup> *Loc. cit.* p.145.

<sup>83</sup> For background *Safer Restraint* (Police Complaints Authority, London, 2002); B. Rappert "Constructions of Legitimate Force: The Case of CS Sprays" (2000) 42 *Brit. J. Criminol.* 689; Bailey *et. al.* pp.400-410 (also 4<sup>th</sup> ed., 1995, 169-77).

telephone calls from the public to the police do not result in the desired response.<sup>84</sup> With a huge increase in volume of calls public dissatisfaction with call handling (and subsequent response) are an area where the usually popular British police are criticised. The Government are considering introducing a national non-emergency number (to be telephone number 101, piloted in several local authorities from Summer 2006).<sup>85</sup> This should divert some of the many calls not about urgent matters (or police matters at all) from police switchboards allowing police operators and officers to concentrate on more serious reports. If such a number were introduced the public would see no change in this area if a national force were then created.

#### ***Local Accountability: Scrutiny v Accountability***

Arguments about accountability and governance reoccur over time. Definitions of terms may overlap. Lustgarten points out that “there is no necessary connection between democracy and any particular mode of organisation and control of the police.” He asserts “what is really at issue is the degree of control various political institutions are to have over the police.”<sup>86</sup> Marshall and Loveday believe that there are three forms of control: “administrative, judicial, and political”. They argued that

“more effective accountability of the police may most appropriately be found not in extension of political control but in more effective complaints and consultation machinery and in the acknowledgement of a wider scope for questioning and debating the exercise of police powers”.<sup>87</sup>

There have been great developments on the first two but it appears very little scrutiny by the majority in Parliament or media of the last.

Regardless of local or national accountability methods local scrutiny will be required to ensure that the police is operating efficiently and effectively at a local level. Without this the force could not meet the national policing objectives and it has been suggested above that local objectives would still be needed. Inspection of the police locally would continue as above with inspection more easily possible at regional as well as national level without having to pick individual forces as building blocks to use as the subject for any inspection above county force level as at present. This however is about scrutiny rather than accountability and may not satisfy those concerned with policy and political priorities for the police.<sup>88</sup>

---

<sup>84</sup> See *First Contact - A Thematic Inspection of Police Contact Management* (HMIC, 2005).

<sup>85</sup> See David Blunkett’s speech to Superintendents’ Association Annual Conference HOPR “Turning The Police Service Into A Public Service” 14 September 2004.; *Building Communities, Beating Crime: A Better Police Service for the 21<sup>st</sup> Century* (Home Office, London, 2004); Local Government Association report to Safer Communities Board, item 2 Appendix A, 17 July 2006.

<sup>86</sup> L. Lustgarten, *The Governance of the Police*, (1986) p.1. For illuminating discussion of accountability and governance see chap. 10.

<sup>87</sup> *Loc. cit.* p.304 and p.296 respectively. *Cf* discussion at 4<sup>th</sup> ed., 2000 p.ix.

<sup>88</sup> For a critique of police authorities from a police chief and debate on force structures see I. Oliver, *Police, Government and Accountability* (1987) Part V.

The 2004 White Paper gave an indication here as to how police could be held to account at local level – even under a national structure – more than happens universally at present. Some forces have pioneered local problem solving groups at neighbourhood or local authority ward level, some in the form of tasking groups across a collection of wards which make up a police neighbourhood. These will usually involve community groups, housing associations, possibly business, and local district councillor representatives meeting with the responsible police neighbourhood or community Inspector or a sergeant and constable on their team.<sup>89</sup> An example from one city is the ‘Anfield, Everton & County Policing Initiative Steering Group Meeting’. This monthly steering group meeting covers three Council wards in north Liverpool. The format of meetings includes matters arising, a police report reviewing work since the last meeting, and issues to be addressed in the next period raised for each ward by those attending.<sup>90</sup> Similar teams are being established on Council ward basis in the London Borough of Camdem. Eight out of eighteen wards have teams.<sup>91</sup> Forces also have inter-agency groups at basic command unit (BCU) level, and district council level, usually under Crime and Disorder Act structures. These structures in place in some forces, that the Government is encouraging, could be the building blocks of scrutiny and cooperation with the police, albeit not direct political accountability, under a new national structure. The Home Secretary, Charles Clarke, gave a speech to the Police Federation Annual Conference in June 2005 stressing themes such as these.<sup>92</sup> This was repeated in his response to the HMIC report in September 2005. Charles Clarke said:

“These local teams will form part of a basic command unit, where a senior officer will be able to set unique priorities for their patch to address problems in that area.” He continued “with local accountability for tackling crime delivered by neighbourhood policing, bigger, more strategic constabularies will mean we have forces ready and equipped for policing in the 21<sup>st</sup> century.”

Edwards argues there is a potential flaw in this approach:

“Unless genuine decision-making powers is devolved, the devolution of authority to middle management does no more than create potential scapegoats within the intermediate ranks.”<sup>93</sup>

---

<sup>89</sup> Refer to: *Confident Communities in a Secure Britain: The Home Office Strategic Plan 2004-08 Summary* (Home Office, London, 2004), pp.10-12. The November 2003 Consultation Paper *Policing: Building Safer Communities Together* contained discussion on many of these issues (Home Office, London, 2003).

<sup>90</sup> Referred to in Liverpool City Council report: “North Liverpool Neighbourhood Manager report to the Anfield, Tuebrook & Stoneycroft and Old Swan Neighbourhood Committee”, 30 June 2005, agenda p.21.

<sup>91</sup> See M. Eley “Policework returning to normal after bombs” *Hampstead & Highgate Express* 26 August 2005, p.25.

<sup>92</sup> HOPR Reference: Police Fed, 3 June 2005.

<sup>93</sup> *Op. cit.*, p.319.

The direct involvement of Government in tackling street crime in the worst areas does appear to have been a success in 2002-2003.<sup>94</sup> However Merseyside Police have reportedly stated that a rise in robberies in 2005 followed a Home Office decision to switch attention from street crime to tackling anti-social behaviour.<sup>95</sup>

A further element of elected involvement and integration for the present system would be achieved by the addition of the local authority executive member for community safety as an *ex officio* member of the police authority. Would there still be any need or role for a local police authority with a single force? There could still be political involvement on this level in addition to those outlined above except that the role of any such area body could be either purely advisory, subject to the ideas below, or have statutory remit to take certain decisions as co-decisions. For example the equivalent police area authority could be consulted on the local plans and targets or it could have a legal role whereby the area authority and the police chief at that level had to both agree the local plans and targets.<sup>96</sup>

### ***Complaints Investigations***

Establishing a national police force would appear to strengthen arguments in favour of a single independent national body to investigate police complaints. At present there are different systems in England and Wales, Northern Ireland and Scotland. In England and Wales the Independent Police Complaints Commission; in Northern Ireland the Police Ombudsman and in Scotland investigation by the police themselves or by the Area (formerly Regional) Procurator Fiscal independent of the police if an allegation that an officer on duty has committed a crime.<sup>97</sup> While the systems appear very different they are all similar in that it is only the most serious complaints that are investigated independently of the police.<sup>98</sup> In Scotland the Procurator Fiscal service is in charge of prosecutions, that may give the impression that they work too closely with the police to be independent. The *Supporting Police, Protecting Communities* paper includes proposals for an independent police complaints body in Scotland while retaining the role of the Procurator Fiscal service after strong support in the

---

<sup>94</sup> See Reid (2003) p.506-507.

<sup>95</sup> See "Robberies on the rise" *South Liverpool Mersey mart*, 8 September 2005, p.2.

<sup>96</sup> By contrast the opposition Conservative Party argued for a completely different policy in their manifesto for the 2005 General Election. "To give local people a real say, we will replace appointed Police Authorities with directly-elected Police Commissioners – directly accountable to their local communities." Like the Government they supported more neighbourhood policing. *Action on Crime: Conservative Manifesto 2005* chap.2, p.5. Available at <<http://www.conservatives.com>> as at 6 July 2005.

<sup>97</sup> For information on the IPCC see Reid (2005) *loc. cit.*, at 233-235. On Northern Ireland refer to: <<http://www.policeombudsman.org/>> viewed at 30 July 2005. On the Scottish system see "Complaints Against the Police" leaflet, Scottish Executive, Edinburgh 2003 (available at <<http://www.scotland.gov.uk/Topics/Justice/Police>> viewed at 8 March 2007).

<sup>98</sup> For other jurisdictions and comparative analysis see A. Goldsmith and C. Lewis (eds.) *Civilian Oversight of Policing* (2000).

consultation.<sup>99</sup> Arguably this would not be sufficiently independent. The fact that different systems exist in the three jurisdictions would not prevent the three police forces becoming part of a single force. The IPCC has no jurisdiction in Scotland at present, including over English and Welsh officers deployed there for mutual aid, an issue that arose in relation to complaints about the G8 Summit in July 2005. This necessitated the IPCC publishing a statement on its website to this effect on 7 July 2005. Similarly and confusingly it cannot investigate complaints against SOCA relating to Scotland which must appear inconsistent. While different systems could remain if there was a single force the complaints system could logically be modernised and brought under a single heading (certainly for Great Britain) at the same time.

In some cases where the police investigate themselves it is not appropriate for the same police force to carry out that investigation. Therefore the complaint is investigated by officers from a different force. In these cases there need be no change to the present system except instead of an officer from an outside force involved in the investigation it would be officers from a different geographical area of the police that would be appropriate to carry out any investigation of a complaint.

### **Interaction with National and International Bodies**

It can be argued that cooperation with international bodies should still be through the national body responsible if that is the current situation. For example that was NCIS on liaison with Europol and is now SOCA. SOCA is the liaison with several other international bodies as well including the International Criminal Police Organisation (better known as Interpol). The UK National Central Bureau of Interpol was part of NCIS. There may also be direct operational contact between British and other European police forces at present. This work could be more effectively carried out and supervised by a national police force and be more transparent and accountable.

Bowling and Ross mention “It is implicit in the government’s current programme of reform that SOCA represents an opportunity to raise UK transnational policing to a new level of efficacy.”<sup>100</sup> This they point out must be judged by success in dealing with harm caused locally. With intelligence work integrated in a national police service as discussed above this efficacy could be increased further.

### ***The European Dimension***

European Union co-operation in the area of Home Affairs has been most high profile concerning measures against terrorism introduced since 2001 - 2002 but this has been based on wider criminal law co-operation. Furthermore many of the most high profile signs of increased EU co-operation against terrorism pre-date September 11. For example Eurojust had been proposed by the European Council at Tampere. The Commission issued a report supporting such a body in November 2000 to:

---

<sup>99</sup> *Loc. cit.*, part 9. The Police, Public Order and Criminal Justice (Scotland) Act 2006 establishes a Police Complaints Commissioner for Scotland.

<sup>100</sup> *Loc. cit.*, p.1032.

“reinforce the fight against serious organised crime, this unit shall have the task of facilitating the proper co-ordination of national prosecuting authorities and of supporting criminal investigations in organised crime cases in particular on the basis of analyses conducted by Europol”.<sup>101</sup>

However this was when established specifically to be wider than just serious organised crime or terrorism. The Council decision came into force on 6 March 2002, at this point Eurojust had been operating provisionally since March 2001 on cases of terrorism, money laundering, trafficking in human beings, trafficking in stolen vehicles, serious fraud (including tax fraud), internet fraud; and forgery of documents.<sup>102</sup>

“Each of the 15 member states has contributed either a senior prosecutor, judge or police officer to Eurojust to improve the co-ordination of investigations, prosecutions and judicial co-operation on EU cross-border serious crime.”<sup>103</sup>

Specifically in relation to terrorism the Committee on Citizens’ Freedoms and Rights, Justice and Home Affairs published its *Report on the role of the European Union in combating terrorism* on 12 July 2001.<sup>104</sup> This built on the constitutional provision for Member States to cooperate against terrorism at European level contained in Article 29 of the Treaty on European Union and the equivalent provision relating to a minimum harmonisation of constituent elements of criminal acts contained in Article 31(e). The report begins by listing four pages of provisions or resolutions relevant to cooperation on crime and terrorism over more than 40 years. These include the Europol convention establishing the European Police Office.<sup>105</sup> The report highlights a number of factors that show the necessity for international cooperation. These include identification of a “new form of terrorism” that

“stems from the activities of networks operating at international level, which are based in several countries and exploit legal loopholes arising from the geographical limits of investigations” (page 9 paragraph G).

This is a very accurate description of Al Qaeda.

‘Computer terrorism’, ‘environmental terrorism’ and the risk of terrorism using chemical, biological and toxic substances are specifically identified (page 11 paragraphs W and Y).

International cooperation is clearly needed to deal with these threats but there appears to be very limited accountability of such work. Article 34 of the Treaty on European Union specifically provided for cooperation between Governments.

---

<sup>101</sup> European Union *On the Establishment of Eurojust* 22 November 2000 COM(2000) 746 final, p.2.

<sup>102</sup> 2002/187/JHA (*Official Journal L* 63).

<sup>103</sup> HOPR 181/2002, 28 June 2002.

<sup>104</sup> European Union, 2001.

<sup>105</sup> OJ C 316, 27 November 1995, p.1. For other sources see Council of Europe *The Fight Against Terrorism: Council of Europe Standards* (Council of Europe Publishing, Strasbourg, 2003).

Given that co-operation is through the Council accountability in relation to any relevant decisions and structures established can only be at the national political level with no direct accountability to democratic institutions. Concern can be raised about the accountability both of Europol and generally of policing and police cooperation at European level. Cooperation in police operations across Europe was increasingly important in the second half of the 1990s and has been given increased impetus following the events of 11 September 2001. British involvement in cooperation at European level is entirely outside of the traditional framework of accountability of the police in the UK. As cooperation increases it is therefore appropriate to consider who does scrutinise and control European cooperation. The Home Secretary plays a direct role in meetings of the Council of Ministers and is accountable to Parliament for that. The Council appoints the Director and the Deputy Directors of Europol and adopts the budget. However arguably most important in the political structure for the scrutiny of the EU's Executive (and of EU wide bodies) are the Committees of the European Parliament. The EU Committee on Citizens' Freedoms and Rights, Justice and Home Affairs has responsibility for

“closer cooperation among police forces, customs authorities and other competent authorities in the Member States, both directly and through the European Police Office (Europol), in accordance with Articles 30 and 32 of the EU Treaty”.<sup>106</sup>

That scrutiny is necessarily going to be limited. Europol does submit an annual report to the European Parliament. It also has its own Management Board composed of one representative of each Member State. This though is about running of the organisation not necessarily accountability. On the other hand there is a Joint Supervisory Body with the task “to review the activities of Europol in order to ensure that the rights of the individual are not violated by the storage, processing and utilization of the data held”.<sup>107</sup> The creation of a national police force with a clear system of accountability could at least make more transparent the British role in European police cooperation both on information and operationally.

Anderson and Den Boer made the point in 1994 as to how European police cooperation could impact on citizens: it is about many things “civil liberties, data protection, criminal law procedures, accountability and the raw struggle for power, influence and resources”.<sup>108</sup> This was before the concrete structures that exist today had been put in place. Den Boer predicted the expansion of Europol to an operational role in 1994.<sup>109</sup> That appears increasingly likely today in terms of Europol becoming directly involved in coordinating police operations against international crime rather than just transferring and analysing information. Accountability does not appear to

---

<sup>106</sup> Rules of Procedure of the European Parliament 15th ed. - February 2003. Renamed Committee on Civil Liberties, Justice and Home Affairs, July 2004 with similar remit.

<sup>107</sup> Europol website <<http://www.europol.eu.int/index.asp?page=home&language=>> viewed at 17 September 2003).

<sup>108</sup> M. Anderson and M. den Boer (eds.) *Policing Across National Boundaries* (1994), Preface, p. x.

<sup>109</sup> *Supra*, p.175.

have matched the growth of structures. The draft EU Constitution did not give Europol any wider role but development could continue organically as now. In relation to the proposed EU Constitution Professor Monar argued that police cooperation is “One of the few areas where the Convention managed to simplify the treaties”. Monar made the point that if Europol had been given an operational role then the accountability structures at EU level would have to have been increased.<sup>110</sup> At present there are only the national structures regarding any cooperation of police forces on operational matters. There should be more emphasis on accountability at both Member State and European level. In the UK how does one know what international police operations have taken place? One cannot scrutinise without knowing what work has been done. There appears to be no method or requirement for publicly reporting on this at any level of the political structure in Britain.<sup>111</sup> This could be incorporated if a national police force is established.

### **The Obstacles to a National Police Force**

It has already been noted that there is nothing in international principles or jurisprudence that requires local police forces and local accountability. Problems with local accountability in this context have also been highlighted above. There are theoretical or metaphysical concerns that mitigate against a national police force. The fear of dictatorship is perhaps the most powerful. It can be argued that this is about police powers rather than control. The police have been given sweeping powers in recent years that could be readily abused if not used strictly in accordance with the legal limitations on them.<sup>112</sup> Notable are dispersal orders and anti-social behaviour powers; extended detention without charge; Terrorism Act stop and search powers; and restrictions on public assembly. The extensive use of Terrorism Act stop and search powers against peaceful protesters is particularly worrying. There is no evidence that abuse is widespread or happening systematically, although the police appear to be systematically using anti-terrorist powers when it is questionable whether there is any specific terrorist threat with little protection provided by the courts.<sup>113</sup> However the extension of power of arrest potentially for all offences gives police officers much greater scope to interfere with individuals than before. Under a more authoritarian Home Secretary and less tolerant and professional police force the collective abuse of such powers – even to the extent of a slight change in emphasis – could be used to further an autocratic Government nationally or in the regions.

The history, tradition and diversity of areas today could lead to emotional resistance to a national force. However apart from former officers it is

---

<sup>110</sup> Europe in the World Centre seminar, University of Liverpool, 16 December 2004.

<sup>111</sup> Considered further in Reid (2005) at 253 - 254.

<sup>112</sup> Similar developments can be charted in Ireland. E. Campbell “Organised Crime and the Culture of Control in Ireland” conference paper, SLSA Liverpool, March 2005.

<sup>113</sup> See Liberty briefing “The Right to Protest” as at 31 August 2005. *Casualty of War: 8 Weeks of counter terrorism in rural England* (2003). <<http://www.liberty-human-rights.org.uk/>> *R. (on the application of Gillan & Quinton) v Commissioner of Police of the Metropolis* [2006] UKHL 12, HL 8 March 2006 (the Law Lords taking a notably more liberal stance however than the Court of Appeal).

inconceivable that there would be much call today for reinstatement of old forces such as the City of Liverpool Police, although older residents might like to see again operational police stations in the heart of each community as existed in the city under that force.<sup>114</sup> Less abstract Chief Constables and other senior officers are not going to want to give up their status and operational independence. There is a more significant argument that the existence of independent county based police forces at the moment protects police recognition of, understanding of and suitable approaches to policing the diversity of different parts of the country. It can seriously be argued that insufficient attention would be given to some areas and parts of the country under a national police force concerned with population and cost driven statistics. This concern may be particularly prevalent in rural areas. There could be a natural tendency to concentrate on the large urban centres of population.

“The Metropolitan Police Service is the largest force, accounting for 21 per cent of all officers on 31 March 2004. The eight Metropolitan forces (Greater Manchester, City of London, Merseyside, Metropolitan Police, Northumbria, South Yorkshire, West Midlands and West Yorkshire) accounted for 45 per cent of all officers.”<sup>115</sup>

However it should be borne in mind that even ‘urban’ forces such as Merseyside and West Yorkshire are not homogenous but include extensive areas of suburban, small town and countryside or rural areas and that these forces do have experience of policing widely different types of area.

There may be further concern that a national police force could be London centric given as noted above that “[t]he Metropolitan Police Service is the largest force, accounting for 21 per cent of all officers on 31 March 2004”. However nearly 80% of officers would not be London officers, giving other centres of gravity in any internal force lobbying for resources or influence.

If Home Office forces are to be merged this would also be a logical time to abolish most of the non Home Office forces and to integrate them into the national force. This could apply for example to the British Transport Police (which operate throughout Great Britain already), Port of Dover Police and Mersey Tunnels Police. This would follow the start made in London by the Government in 2005. The Royal Parks Constabulary was abolished by section 161 of the Serious Organised Crime and Police Act. There was no explanation as to why this was connected to serious and organised crime. Members of the public presumably wanted parks police to deal with less serious and more disorganised crime.

---

<sup>114</sup> See W. Cockcroft *From Cutlasses to Computers: The Police Force in Liverpool 1836-1989* (S.B. publications, Market Drayton, Shropshire, 1991), particularly pp.78 - 81.

<sup>115</sup> Home Office Statistical Bulletin 13/04 29 September 2004 - *Police Service Strength England and Wales, 31 March 2004* O. Christophersen & J. Cotton (Home Office, London) para.(f), p.5.

### ***The Cost of Establishing a National Force***

There may be very large initial start up costs, more if it was not just for England and Wales. These could inhibit any Government establishing a national force. However this paper assumes that there will also be significant savings – in procurement of equipment and technology, vehicles and uniforms for example and in reduced administration costs by the standardisation of procedures across forces. A national force could benefit from significant economies of scale. Reduction from 43 to just 1 if only England and Wales is covered should lead to significant administrative savings by the standardisation and simplification and reduction of administrative procedures at local, regional and national levels. Management and administrative jobs could be cut. These savings would reduce start up costs. Further, there is a great deal of standardisation at present, limiting increased costs of having to change systems, equipment and other supplies.

The vast majority of police funds comes from central Government directly or indirectly but a significant if small percentage is raised by local taxation. Central Government may be unwilling to provide the extra amount to pay for a national force from taxation revenue (putting up direct taxes is not a policy of the British Labour Government or Conservative Opposition). Local authorities may be unwilling to continue to pay a levy from local taxation (Council tax in England and Wales) to the cost of a police force over which they retain no authority. The levy could be paid for by ‘top slicing’ local authority grants, as was previously done with the police grant to pay for NCS and NCIS, however the amount taken from each authority may bear no relation to the local policing services provided by the national force. A form of minimum guarantee of services could be one measure adopted to placate local authority opposition.

### ***The Pensions Issue***

One of the biggest practical problems for establishing a national police force is the cost to current police authorities of pension payments for retired officers. There is no invested pension fund for police officers and therefore the payment of pensions is a very significant proportion of police authority expenditure. For example for Merseyside payment of pensions amounts to 17% of the police authority expenditure.<sup>116</sup> For England and Wales in 2003/04 nearly 1/3 of the amount spent on police pay was spent on pensions for retired officers.<sup>117</sup> Creation of a pension fund for the national force would require a large amount of money to be put aside for current payments or invested by the Treasury for future payments or both. Government would then need to bear costs to make this politically acceptable.

This issue was reviewed at national level with a police pension consultation in 2003-2004.<sup>118</sup> The review covered both the creation of a new pension scheme and the financing of pension expenditure. A new scheme was put

---

<sup>116</sup> Merseyside Police Authority Press Release on Budget, 17 February 2005.

<sup>117</sup> *Government proposals for a New Police Pension Scheme for Future Entrants*. A consultation document issued by the Home Office, the Scottish Executive and the Northern Ireland Office. December 2003. p.85.

<sup>118</sup> *ibid.* See also Summary of responses August 2004.

into place with effect from April 2006.<sup>119</sup> It was intended that the new pension scheme would include all the UK (and it does take account of transfers between UK jurisdictions) and therefore this would facilitate a national force by removing one of the biggest current practical obstacles.

Personnel issues are often contentious due to the personal implications for staff involved. There is much recent experience in dealing with the personnel issues that would arise in amalgamating forces because of the formation of SOCA and the Scottish review of common police services.<sup>120</sup> The trend of increasing the Home Secretary's powers to standardise regulations for all forces will have limited the amount of changes that would have to be made to terms and conditions for officers and civilian staff in different forces and it is suggested greatly reduced any employment law issues that could have been significant legal obstacles to amalgamation. Further standardisation of personnel procedures should also reduce costs. Recruitment of officers has been standardised by a national application form for recruiting introduced in forces in England and Wales (*National Policing Plan Annex A*).

Management strategies across forces and objectives for and appraisal of individual staff must be consistent with national guidance from the Home Office Police Standards Unit, drawn up with the umbrella bodies of the tripartite partners ACPO and the APA.<sup>121</sup> The *National Policing Plan* makes clear that performance related pay for police chiefs, and appointment of police chiefs, will depend on their staff performance at local level meeting the national objectives and force targets. (Paragraph 4.9). Therefore little change would be needed for managing staff performance under a national force.

### ***What Would a Bill Look Like?***

A 'National Police Force' Bill could be very simple indeed. As with much recent criminal justice legislation the detail could be left to regulations to be decided upon later by the Minister. The Bill would simply abolish the local police forces and create a new Police Service. This would follow the pattern in Northern Ireland where the Police Service of Northern Ireland was created and the title of service rather than force would reflect New Labour emphasis on citizens and consumers.

It could be titled 'A Bill to abolish existing police forces in England and Wales and create a new Police Service for England and Wales.'

At present officers and civilian staff are employed by the Police Authority. They could all be transferred instead to the employment of the body the Police Service for England and Wales. Regarding legal liability in civil cases the Chief Constable currently has vicarious liability for the torts and other unlawful conduct of his or her employees. This could simply be

---

<sup>119</sup> See the Police Pensions Regulations 2006 SI 3415, and *Explanatory Memorandum*.

<sup>120</sup> See *Review of Common Police Services Newsletter* June 2005 p.4–5. <<http://www.scotland.gov.uk/Resource/Doc/1101/0015389.pdf>> viewed at 21 July 2005.

<sup>121</sup> *Managing Police Performance: A Practical Guide to Performance Management*, September 2004.

transferred to the Director General or such head of the Police Service for England and Wales. There is no need to change but this would be a logical time to end this anomaly whereby the police Chief is technically liable, though the Police Authority pays any damages.<sup>122</sup> Liability could be transferred to the national police force as a body rather than onto the head personally. Legal responsibility for health and Safety issues would be transferred from the local Police Authorities to the Police Service for England and Wales (see current legislation as amended by s. 95 Police Reform Act 2002). All assets and property of the individual forces would be transferred to the new Police Service. Existing Chief Constables could simply be made Chief Constables for areas under the new force, although this article has suggested the number of sub-national force areas would need to be reduced. Their current reporting obligations to the Home Secretary and local Police Authority could be replaced by reporting obligations to the Director General. However it would be cumbersome to keep the entire framework of the Police Act 1996, as it is still clearly modelled on the tripartite structure in the Police Act 1964. The Police Act 1996 is arguably due for consolidation due to the number of changes since then. The new Bill could repeal it in its entirety, giving the civil servants a chance to draft a new piece of governance legislation applicable for a new national force in the 21<sup>st</sup> Century.

### **Conclusion**

This article has sought to identify, consider and analyse the legal issues that would arise if Government planned to introduce a national police force. It appears to be the case that this could be done with minimal legal difficulty and with much continuity. Members of the public would arguably see and experience little change. There are philosophical and political arguments – the latter national, local and anti-authoritarian – against such a development. It would also go against nearly two centuries of tradition of British policing which has always been about policing as a local function but it would consolidate the trend of recent decades. Given the great influence now over policing by the Government – over appointments and removal of senior officers, regulations and training, targets and performance indicators and finance – the creation of a national force could simply formalise what is to a significant extent the *de facto* position in Britain today. It would certainly be a more honest policy for the Government to take significant responsibility as well as significant control rather than keeping an illusion of local police and local accountability which is more and more removed from the actual situation with police governance.

---

<sup>122</sup> S.88(1) Police Act 1996 as amended by s.102 Police Reform Act 2002.

## **MORTGAGE DEFAULT AND REPOSSESSION: PROCEDURE AND POLICY IN THE POST- NORGAN ERA**

*Lara McMurtry, Lecturer in Law, Keele University*

It is a remarkable feature of contemporary mortgage law that the principal statutory protection for borrowers in short term financial difficulties is still to be found within the narrow confines of section 36 of the Administration of Justice Act 1970 (as amended). This provision bestows upon the court the discretion to temper the otherwise unfettered entitlement of a mortgage lender to possession of the mortgaged property. It serves as a counterweight to the common law right of a mortgagee to, “go into possession before the ink is dry on the mortgage unless there is something in the contract, express or by implication, whereby he has contracted himself out of that right”.<sup>1</sup> In possession cases, section 36 permits the court to adjourn proceedings, stay or suspend the execution of the judgment or delay the date for delivery of possession. This jurisdiction is, however, hedged with restrictions. By virtue of section 36(2), the discretion can be exercised only when ‘the mortgagor is likely to be able within a reasonable period to pay any sums due under the mortgage or to remedy a default consisting of a breach of any other obligation arising under or by virtue of the mortgage’. Unfortunately, Parliament has failed to elaborate on the meaning to be given to its chosen phraseology and omitted to offer any guidelines as to how the court is to undertake this socially and economically sensitive task. To compound the difficulties facing the court, the drafting of section 36 is lamentable and has generated a variety of practical and interpretational difficulties.<sup>2</sup> It is, therefore, against a backdrop of legislative imprecision and judicial temerity that the key decision of the Court of Appeal in *Cheltenham & Gloucester Plc v Norgan*<sup>3</sup> falls to be evaluated.

The *Norgan* case establishes the general rule that the remaining lifetime of the mortgage will offer the best guide from which to calculate ‘a reasonable period’ within which to repay sums due. This marks a radically different approach than that adopted previously and maximises the relief offered to the borrower. Few could sensibly object to this element of latitude as the *Norgan* approach applies only to cases where the security is not in jeopardy and the mortgagor can demonstrate an ability to discharge arrears by periodic payments. By way of reinforcing the notion that the economic interests of the lender are not to be relegated, the borrower must present a viable financial plan which demonstrates that the arrears (and future payments as they fall

---

<sup>1</sup> Per Harman J in *Four-Maids Ltd v Dudley Marshall (Properties) Ltd* [1957] Ch. 317 at 320.

<sup>2</sup> See, e.g. *Ropaigealach v Barclays Bank Plc* [2000] QB 263 (no discretion exists when the borrower is already out of possession); *Western Bank v Schindler* [1976] 2 All ER 393 (the discretion exists even when there is no borrower default) and *Halifax Building Society v Clark* [1973] Ch. 307 (meaning of ‘any sums due’ sufficiently wide to include the entire mortgage debt).

<sup>3</sup> [1996] 1 All ER 449.

due) can be managed by increased monthly payments over the remainder of the mortgage term. It was, moreover, anticipated that, once given the benefit of any judicial doubt, the borrower would be offered no further chance to clear the arrears. A breach of the terms of any suspension was not to be condoned and would result in the enforcement of the possession order. While representing the high water mark of borrower protection, the *Norgan* approach is based upon a commonsensical and commercially intuitive interpretation of section 36. In this way, the Court of Appeal attempted to promote social policy, preserve a family home for the borrower and ensure that the lender still receives the fruits of its bargain.<sup>4</sup> The decision indubitably marks an attractive coalescence of otherwise competing interests.

The post-*Norgan* era is one characterised by historically low levels of repossession. A combination of reduced interest rates, a strong economy and labour market and a proliferation of competitive mortgage products have contributed to a prolonged period of significant growth in mortgage borrowing and consumer confidence. In the wake of this economic stability, the courts have been less troubled by the exercise of the section 36 discretion. The radical approach heralded by *Norgan* has, therefore, been marginalised during this period of economic prosperity. Unfortunately, this is set to change. Recent statistics reveal that the current level of repossessions is higher than at any point during the last six years<sup>5</sup> and this is a trend that is likely to increase. Hence, a re-evaluation of the judicial treatment of mortgagors in temporary financial difficulties is particularly apposite in the current climate.

The impetus for such a review is irresistible. The effect of *Norgan* must be measured by evidence of consistency and fairness to both lenders and borrowers over a sustained period of time. Following the lapse of more than a decade, an analysis of intervening case law developments (such as they are) provides a necessary insight. Furthermore, the avowed refusal of the courts in Northern Ireland to embrace the *Norgan* ethos has fashioned some opportunity for comparative study. Underpinned by an alternative policy agenda, the Northern Ireland approach has become distinctive and entrenched.<sup>6</sup> Nevertheless, and in light of adopted industry practice, this stance is clearly out of line with consumer expectation across the remainder of the United Kingdom. In addition, the policies and procedures of mortgage lenders have been the subject of major regulatory reform by the Financial Services Authority.<sup>7</sup> The FSA Handbook, 'Mortgages: Conduct of Business Sourcebook' (MCOB)<sup>8</sup> imposes new procedural requirements on institutional

---

<sup>4</sup> As Lord Denning MR famously remarked in *Davis v Johnson* [1979] AC 264 at 274, "Social justice requires that personal rights should, in a proper case, be given priority over rights of property".

<sup>5</sup> The latest CML statistics record 17,000 properties taken into possession in 2006, which marks a 65% increase on 2005 figures; see further <http://cml.org.uk/cml/statistics>.

<sup>6</sup> See, e.g. *National & Provincial Building Society v Lynd* [1996] NI 47.

<sup>7</sup> This is pursuant to the Financial Services and Markets Act 2000. The mortgage specific provisions have been in full force since October 31, 2001.

<sup>8</sup> See <http://fsahandbook.info/FSA/html/handbook/MCOB>. From April 2007, the sourcebook is to become known as the 'Mortgages and Home Finance: Conduct of Business Sourcebook' (MCOB).

lenders entering 'regulated mortgage contracts' on or after October 31, 2004.<sup>9</sup> Most pertinently, the Sourcebook contains specific rules and guidance on dealing with cases of arrears and repossession.<sup>10</sup> These flagship industry standards introduce a new dynamic into the interrelationship between the regulatory and the substantive statutory safeguards for the borrower. In a like vein, the enactment of the Consumer Credit Act 2006 provides an opportune moment for reflection. It is, however, to be appreciated that the 2006 Act maintains a distinctive regime for secured borrowing within its purview.<sup>11</sup> In a context where proposals for the reform of the substantive law of mortgages remain shelved,<sup>12</sup> the lack of a unified set of rules concerning the relief of the borrower is, arguably, intolerable and, most certainly, unjustifiable.

## Background

The history leading up to the enactment of section 36 is well documented elsewhere<sup>13</sup> and needs no in depth examination here. Nevertheless, in order to understand the present jurisdiction it is necessary to have some understanding of past judicial and Parliamentary machinations. A convenient starting point is the Practice Direction of 1936 which explicitly afforded the Chancery discretion to adjourn a summons. The discretion applied where possession was sought because the borrower was in arrears with instalments. It extended to cases where the High Court Master was of the opinion that the mortgagor ought to be given an opportunity to pay off the arrears. The creation of this discretion was reflective of societal change and arose from the perception that buying with the aid of a building society advance could expose homeowners to the risk of temporary financial difficulties.<sup>14</sup> Unfortunately, this tenderness towards the borrower failed to give due weight to the commercial dynamic underlying the modern day mortgagee's need for possession as a pre-requisite of sale. The immediacy of the mortgagee's inherent right to take possession was subsequently to be rekindled by the High Court in *Birmingham Citizens Permanent Building Society v Caunt*.<sup>15</sup> There Russell J reasserted the mortgagee's common law position and signalled the end of the liberal discretionary approach previously adopted in the Chancery court.

The decision in *Caunt* dismantled established practices and reduced the capacity for equitable intervention to a bare minimum. Indeed, relief was then available only to ensure that a mortgagor was not to be turned out of

---

<sup>9</sup> A contract is a 'regulated mortgage contract' where the obligation of the borrower to repay is secured by a first legal mortgage and at least 40% of the land is used, or intended to be used, as or in connection with a dwelling: Financial Services and Markets Act 2000 (Regulated Activities) Order, Art. 61(3).

<sup>10</sup> MCOB 12, 13.

<sup>11</sup> See, e.g. the availability of time orders under s.129.

<sup>12</sup> See *Transfer of Land – Land Mortgages*, Law Com No.204 (1991); *Land Mortgages*, Law Com Working Paper No.99 (1986).

<sup>13</sup> See M. Haley, "Mortgage Default: Possession, Relief and Judicial Discretion" (1997) 17 LS 483.

<sup>14</sup> The development of a liberal judicial practice was, as Nourse J. commented in *Mobil Oil Co Ltd v Rawlinson* (1982) 43 P. & C. R. 221 at 224, "no doubt assisted by the benevolent attitude which the Legislature had by then assumed towards tenants faced with eviction by their landlords".

<sup>15</sup> [1962] Ch. 883.

possession immediately without having the opportunity to repay the entire debt. The case for statutory reform was overwhelming. Consequently, the Payne Committee was established to consider, “whether the courts should have power otherwise to postpone the operation of an order for possession of the mortgaged property”.<sup>16</sup> In doing so, it became necessary to determine whether, “the practice which was frequently adopted by the masters for some years after 1936 should be restored and, if so, whether it should be enlarged, restricted or otherwise modified”.<sup>17</sup>

The Committee was charged to ensure that any judicial interference with the exercise of the right of possession was to be placed upon a statutory and contemporary footing. In the face of vehement resistance by the Building Societies’ Association, the Committee recommended reform. This change was geared to minimise any undue hardship experienced by a mortgagor in transient financial difficulties.<sup>18</sup> Accordingly, the Committee devised a discretion that would, in appropriate cases, allow the courts to adjourn a summons for possession for a reasonable period so as to allow the borrower to remedy the default. Although the Committee envisaged that a period of six months would normally be sufficient to protect the mortgagor, it declined to impose a limit to the period of suspension or postponement.

The absence of Parliamentary guidance as to the exercise of discretion was to prove particularly problematic in relation to the period of postponement allowed. Despite the Payne Committee’s view that a six-month period would usually suffice, the courts were to take a different tack. Although it was quickly established that the court had no jurisdiction to postpone possession proceedings for an indefinite period,<sup>19</sup> the judiciary did not share the Committee’s sense of restraint. The reasonableness of the selected time frame was to depend upon the circumstances of each individual case and relief tailored accordingly. Accordingly, the exercise of discretion necessarily hinges upon the evidence that the court accepts and the weight to be given to it. It is, therefore, ironic that the court traditionally did not insist upon formal evidence of the borrower’s ability to discharge the arrears and, moreover, was not obliged to offer reasons for its decision.<sup>20</sup> This judicial tendency was dismissed by Haley as, “broad brush and conveniently impressionistic”.<sup>21</sup> A brace of cases serve well to support his observation.

---

<sup>16</sup> Report of the Committee on the Enforcement of Judgment Debts (1969) Cmnd 3909 at para.1345.

<sup>17</sup> *ibid.*, at para.1378.

<sup>18</sup> As the Payne Report concluded, “Any man’s income or earnings can fall suddenly through no fault of his own, and he should be able to look to the court for any protection he may need against onerous claims arising out of the change of his means and circumstances” (*ibid.*, at para.1386(b)).

<sup>19</sup> *Royal Trust Co of Canada v Markham* [1975] 1 WLR 1416 at 1423; but see the *obiter* of Buckley LJ in *Western Bank v Schindler* [1976] 2 All ER 393 at 400 to the effect that, where a mortgagor is not in default under the mortgage, it may be appropriate to postpone possession for an indefinite period.

<sup>20</sup> See *Cheltenham & Gloucester Building Society v Turnbull* (January 30, 1996 (CA) unreported).

<sup>21</sup> M. Haley *op.cit.*, p.492.

First, in *Cheltenham & Gloucester Building Society v Grant*<sup>22</sup> an order for possession was suspended to be reviewed in twelve months on mortgage payments being made by the Department of Social Security. This was so even though the benefit payments left a monthly shortfall of £135 and ensured that arrears would continue to accrue. The borrower had sought to convince the court of his prospects for employment, but it was argued on appeal that the evidence placed before the judge had been flimsy in the extreme. The Court of Appeal made clear, however, that it would only interfere with the exercise of discretion in circumstances where it was unquestionably wrong. Although Nourse LJ expressed grave doubts as to whether the same decision would have been reached by the appellate court, he declined to stigmatise it as being plainly wrong.<sup>23</sup>

Secondly, in *Bristol & West Plc v Dace*<sup>24</sup> the borrower built up arrears of £37,000, having made no repayments for almost three years. A total of four adjournments were granted before a possession order was eventually issued. Thereafter, a total of ten adjournments were granted, including four orders for suspension, each one of which had been specifically breached. Analysing the history of the case, Simon Brown LJ felt that relief had been afforded to the borrower even though the preconditions to the exercise of the section 36 discretion could not possibly have been satisfied. There was simply no evidence that the borrower could meet his monthly instalments, never mind making any repayment of the arrears. Although welfare benefits covered almost half of the current instalments, the borrower was not in a financial position to meet the shortfall. This incautious use of discretion by the lower court had the consequence of protracting litigation and increasing the borrower's overall indebtedness. In such circumstances, the provision of relief to the borrower was neither justified nor meritorious.

### **The Norgan Guidance**

In the light of such aberrational decision making, specific guidance from the higher courts was required to rein in what Thompson calls "the wide degree of latitude"<sup>25</sup> given to the trial judge. Such guidance emerged from the Court of Appeal in *Cheltenham & Gloucester Building Society v Norgan*.<sup>26</sup> There the appellate court sought to dispel complacency concerning the exercise of discretion and to introduce principle, formality and thoroughness into the decision-making process. The appellate court also attacked the tendency of the county court to standardise the period of postponement as falling somewhere between two and four years. Instead, the starting point from which to determine a reasonable period was presumed to be the remaining period of the mortgage term.

A decade hence, the utility of the *Norgan* guidance is necessarily to be appraised in light of intervening judicial practices. It is, therefore,

---

<sup>22</sup> (1994) 26 HLR 703.

<sup>23</sup> Nourse L.J. explained, "It may well be that another judge would have taken the opposite view. But the discretion in this case was entrusted to this judge" (*ibid.*, at 708).

<sup>24</sup> October 2, 1998 (CA) unreported.

<sup>25</sup> M. P. Thompson [1995] Conv. 51, p.53.

<sup>26</sup> [1996] 1 All ER 449.

unfortunate that the higher courts have been afforded scant opportunity to develop and refine the section 36 jurisdiction. Nevertheless, the liberal approach as to what constitutes a reasonable period for the repayment of arrears has undoubtedly strengthened the statutory safeguard for those borrowers hoping to retain possession of the family home. Although the decision in *Norgan* represents what the Grays describe as, “a new willingness to reconstruct the repayment terms of a mortgage”,<sup>27</sup> the policy parameters of the discretion are readily discernible. The mortgagor is to be afforded, “as much protection against eviction as possible, but only if, and for as long as, the mortgagee’s investment is safeguarded”.<sup>28</sup> The acid test, of course, is whether consistency and fairness has become a more commonplace feature of possession cases.

In a dense summary, Evans LJ in the *Norgan* case took pains to isolate the key matters to be addressed by the court in the exercise of its section 36 discretion.<sup>29</sup> In this respect, the guidance provided is susceptible to the criticism that it fails to prioritise the relevant considerations and gives the impression of being no more than a random list of relevant associated issues. Evans LJ identified the following factors which are to be taken on board in the decision making process. The court must consider how much the borrower can reasonably afford to repay, both now and in the future. If the borrower has a temporary difficulty in meeting his obligations, the court must investigate how long that difficulty is likely to last and take account of the reasons why the arrears have accumulated. The court must also examine the relevant contractual terms and identify what type of mortgage is in issue. In particular, it must deduce when the principal due is to be repaid. Put simply, a decision must be reached as to whether the case is one when the court should exercise its power to disregard accelerated payment provisions under section 8 of the Administration of Justice Act 1973. The court must also decide whether it is reasonable to expect the lender, in the present circumstances, to recoup the arrears of interest either over the whole of the mortgage term or within a shorter (or, indeed, longer) period. The court must, moreover, consider whether it is reasonable for the lender to capitalise the interest or not. In addition, regard must be had to any reasons affecting the security that should influence the length of the period for payment.

The danger attendant to such a general checklist is that a mere consideration of one or more of the listed factors can be relied upon by the court to justify a desired outcome.<sup>30</sup> Indeed, the marked reluctance of the appellate courts to interfere with the exercise of discretion in the lower courts, save in cases where the exercise is plainly wrong, caters for a diversity of approach on similar sets of facts. Accordingly, it is open to district judges to continue to suspend possession only for limited periods. Others, however, may be prepared to adopt a more flexible approach. For example, the use of stepped

---

<sup>27</sup> K. Gray & S. Gray, *Elements of Land Law*, (2005), p.1695.

<sup>28</sup> M. Haley *op.cit.*, p.494.

<sup>29</sup> [1996] 1 All ER 449 at 463.

<sup>30</sup> As Auld LJ explained in *Bristol & West Building Society v Ellis* (1996) 73 P. & C.R. 158 at 162, “It all depends on the individual circumstances of each case, though the important factors in most are likely to be the extent to which the mortgage debt and arrears are secured by the value of the property and the effect of time on that security”.

orders, whereby the level of monthly payments is gradually increased, can be of considerable help to borrowers, but it is by no means a universal practice. Hence, and despite Evans LJ's catalogue of relevant considerations, the degree of mercy shown to a borrower in default may vary greatly between county courts. Where there is sympathy for the borrower, the court can exercise its discretion to adjourn proceedings to manufacture an initial 'wait and see' period within which there may emerge a realistic prospect of the mortgagor paying the sums due within a reasonable period. This was felt to be a proportionate response in the case of a student working to obtain qualifications, which in turn would create an employment opportunity and an ability to pay off mortgage arrears.<sup>31</sup> Where, however, the arrears cannot be discharged by periodic payments and sale is inevitable, the court is unlikely to favour the borrower. In such a situation, the *Norgan* approach clearly has no resonance. Instead, the court will usually decline to defer realisation of the security,<sup>32</sup> sometimes give the borrower a short period of grace<sup>33</sup> or, rarely, delay possession for a prolonged period, possibly for over one year.<sup>34</sup> It is a major irony that the discredited practices operating in the pre-*Norgan* world offered more uniformity than is currently discernible.

The liberality promoted in the *Norgan* case opens the way, at least in principle, for maximum leniency within the confining parameters of section 36. Not surprisingly, the decision has been generally welcomed as favourable to the borrower in temporary financial difficulties.<sup>35</sup> Nevertheless, some commentators have sounded a surprising note of negativity. Smith, for example, continues to highlight the danger that lenders will tend towards earlier possession actions, in the knowledge that subsequent default will trigger immediate possession.<sup>36</sup> This is not, however, wholly convincing as it is equally possible that the mortgagee could delay proceedings so as to allow the indebtedness to grow beyond that which can be discharged by periodic payments. Sparkes is also critical and accuses the Court of Appeal of, "deliberately flouting existing county court practice ... making one feel sorry for the lender".<sup>37</sup> This reasoning, perhaps, underplays the point that *Norgan* applies only when there is sufficient equity in the property and disregards the financial reality that the mortgagee will charge interest on the arrears and enforcement costs to generate even more profits from the transaction. It is, moreover, to be appreciated that the lender in the majority of repossession cases will seldom be as well protected as on the facts of *Norgan*. There the mortgage term had thirteen years remaining, the outstanding arrears amounted only to £7,000 on a loan of £90,000 and the equity in the property was estimated at around £225,000. Put simply, there can be a no more

---

<sup>31</sup> *Skandia Financial Services Ltd. v Greenfield* [1997] CLY 4248.

<sup>32</sup> In *Mortgage Service Funding plc v Steele* April 10, 1996 (CA) unreported, Nourse LJ had little sympathy for the borrower, "Unless there is firm evidence that a particular sale is about to be completed, it is not the practice of the court to prevent the mortgagee from enforcing his remedy of obtaining possession and exercising his own power of sale over the property".

<sup>33</sup> In *Cheltenham & Gloucester Plc v Krausz* [1997] 1 WLR 1558, *e.g.* the borrower was allowed a period of 28 days.

<sup>34</sup> See *National & Provincial Building Society v Lloyd* [1996] 1 All ER 630.

<sup>35</sup> See, *e.g.* M. Haley, *op. cit.*, p.496.

<sup>36</sup> R. Smith, *Property Law*, (2003), p.585.

<sup>37</sup> P. Sparkes, *A New Land Law*, (2003), p.671.

convincing case for the adoption of the lifetime of the mortgage as the reasonable period in which to discharge the arrears. This, at least in part, may explain the infrequency with which the domestic courts have been called upon to revisit *Norgan*.

### The Northern Ireland Approach

It is interesting that the *Norgan* decision has also been subject to criticism by the Northern Ireland courts. There, and in marked contrast to England and Wales, the limits of this aspect of borrower protection have been tested regularly and variously in the last ten years. In particular, the courts have grappled with the power to stay in the case of a compromise consent order,<sup>38</sup> the jurisdiction of the Master (Enforcement of Judgments) to stay or adjourn enforcement in mortgage possession cases<sup>39</sup> and the concept of a reasonable period to allow the borrower to negotiate a private sale of the property.<sup>40</sup> It was *National & Provincial Building Society v Lynd*,<sup>41</sup> however, that marked a significant and protracted departure from the practice of the courts in England and Wales.<sup>42</sup> In an overt criticism of *Norgan*, Girvan J explained, “The inference of a presumption in favour of the length of the term of the mortgage being *prima facie* the relevant period is not in my respectful view a logical or justifiable inference to be drawn from the inherent context of the legislation”.<sup>43</sup> He pointed out that, until the decision in *Norgan*, the Northern Ireland approach had been to follow the restrictive practices of the English courts. For example, in *National & Provincial Building Society v Williamson and Humphrey*<sup>44</sup> a reasonable period was regarded as a ‘relevantly limited’ period with an outer limit of between four and five years. In the *Lynd* case, Girvan J appreciated the checklist drawn up by Evans LJ and accepted that the lifetime of the mortgage may well be a reasonable period in the circumstances of a given case.<sup>45</sup> Nevertheless, he argued that the Court of Appeal had overstepped the mark in promoting a general presumption in favour of the full term of the mortgage.

This approach is clearly more exacting than that applying to borrowers in England and Wales. It is not simply that the *Norgan* presumption of a reasonable period is viewed as being an erroneous starting point. The courts in Northern Ireland also require of the defaulting borrower, his “best realistic proposals” for paying off arrears.<sup>46</sup> The court then assesses the appropriateness of the suggested figures against the particular circumstances

<sup>38</sup> *Northern Bank Ltd v Jeffers* [1997] NI 497.

<sup>39</sup> *Halifax plc v Seawright* [2000] NIJB 71; see D. Capper, “The Enforcement of Judgments for Possession of Land” (2002) 53 *NILQ* 90.

<sup>40</sup> *Northern Bank Ltd v Mallett* [2001] NICh 7.

<sup>41</sup> [1996] NI 47. On the facts, the Lynds had been offered a series of opportunities to repay mounting arrears totalling almost £9,400 on an outstanding loan of £24,800 repayable over 17 years.

<sup>42</sup> See H. Wallace (1986) 37 *NILQ* 336 for a general discussion of mortgagees and possession as they relate to Northern Ireland.

<sup>43</sup> [1996] NI 47 at 58.

<sup>44</sup> [1995] NI 366.

<sup>45</sup> On this point Girvan J was able to “respectfully agree” with Evans LJ, holding that his statement of relevant considerations, “correctly in view, impresses on the court the need to look at all the circumstances of the case” (above at 56).

<sup>46</sup> *National & Provincial Building Society v Lynd* [1996] NI 47 at 60.

of the individual case. Given the clear breach of the contractual agreement between the parties, the Northern Ireland approach seeks to avoid a case where the borrower pays less over a longer timeframe merely because it suits him to do so.<sup>47</sup> This seemingly overlooks both the policy and practicality of *Norgan*, which, when applied, allows the court to stem multiple applications under section 36 and, thereby, save court time. In *Norgan*, Waite LJ remarked of the case before him that the parties had been before the court with depressing frequency with the costs incurred in relation to those attendances being borne by the borrower. In adopting at the outset the period of time most favourable to the borrower, he emphasised that section 36, “should not be employed repeatedly to compel a lending institution which has already suffered interruption of the regular flow of interest to which it was entitled under the express terms of the mortgage, to accept assurances of future payment from a borrower in whom it has lost confidence”.<sup>48</sup> This entails that the borrower has a single opportunity to get back on track with mortgage repayments and that, on any subsequent default, the sympathy of the court will evaporate. Hence, its effect is to limit the escalation of indebtedness arising from multiple applications under section 36 and the corresponding charges and interest levied by lenders in such circumstances.

Such an approach would have benefited all parties in *Halifax Plc v Seawright*,<sup>49</sup> where a succession of extended opportunities were offered to the borrowers to meet their repayment obligations despite repeated failures by them to honour their past repayment promises. Not surprisingly, on appeal, Girvan J expressed dissatisfaction with the progress of the enforcement proceedings and the manner in which the case had been handled, lamenting the lengthy delays and the overt failure to enforce the High Court's order for possession. As regards section 36, Girvan J drew from Northern Irish case law the principle that, where the court is exercising its section 36 discretion, it must be satisfied that there is a likelihood of the arrears being paid off within a fairly limited period.<sup>50</sup> Without mention of *Norgan* or allusion to the lifetime of the mortgage, he concluded that the period of fifteen years, which it would have taken for the arrears to be cleared, could not be construed as reasonable. It has been suggested that the decision in *Lynd* represents a “pragmatic and balanced approach”.<sup>51</sup> The inference to be drawn from such suggestions is that *Norgan* is too borrower-friendly and based upon the unsteady foundation that most borrowers are honourable in their intentions to meet their mortgage repayments. It is contended that, without the *Norgan* presumption, the court would be more able to consider what is fair and just for both parties. Such arguments are, however, questionable. Given the social importance attached to the preservation of the family home, and the compelling argument that the mortgagee receives “substantially what he bargained for, albeit at a later

---

<sup>47</sup> Girvan J noted *ibid.*, that this may be attractive to the borrower even though interest continues to be payable on arrears.

<sup>48</sup> [1996] 1 All ER 449 at 460.

<sup>49</sup> [2000] NIJB 71.

<sup>50</sup> Namely *National and Provincial Building Society v Williamson* [1995] NI 366 and *National and Provincial Building Society v Lynd* [1996] NI 47.

<sup>51</sup> H Conway and S Grattan, “Northern Ireland: Falling Behind or Forging Ahead?” in E Cooke (ed.) *Modern Studies in Property Law* (vol. 2, 2003), p.214.

date”,<sup>52</sup> surely it is not inappropriate to cater, where possible, for the repayment of arrears over the lifetime of the mortgage. Furthermore, the lesson from post-*Norgan* case law is that the presumption is readily displaced when there is a real threat to the lender’s security. The case of *Realkredit Danmark v Brookfield House*,<sup>53</sup> for example, clearly demonstrates that where the debt has spiralled out of control, there is nothing that the court can or will do for the borrower. In the context of a property valued at £1.5 million and an amount due under the mortgage of £2,175,000, the borrower was unable to provide evidence of an income sufficient to meet the mortgage repayments. The Court of Appeal emphasised that, in such circumstances, it would be unreasonable to take the remainder of the mortgage as an appropriate period in which arrears should be repaid.

### Practice and Policy

It is noteworthy that in both *Norgan* and *Lynd* the courts were well aware of the industry standards to which lenders subscribed and, notwithstanding the divergence of judicial approach, prepared to gauge the conduct of the mortgagee against these adopted statements of good practice. The judgment in *Norgan* is clearly underpinned by the explicit policy directive from the Council of Mortgage Lenders that mortgagees should seek possession only as a last resort. This direction influenced Waite and Evans LJ as to their perception of the logic and spirit of the legislation so as to justify the interference with the sanctity of the contractual agreement and to achieve a realignment of the parties’ competing claims. Indeed, Evans LJ was, in particular, confident to assert that, “given these statements of policy ... it cannot be wrong or unreasonable to consider what the prospects are of the borrower paying the arrears of interest in full by the end of the term”.<sup>54</sup> The pursuit of possession only as a last gasp measure offered the appellate court a licence to exploit favourable factual circumstances for the benefit of Mrs Norgan. Nevertheless, in *Lynd* Girvan J believed that this approach did not have sufficient regard of the effectiveness of self-regulation. He claimed that institutional lenders, “do not lightly resort to the court and usually only do so after they have attempted to follow through the guidelines set out in the CML statement”.<sup>55</sup> Accordingly, by the time the case reaches court, “there is a serious history of default and broken promises”.<sup>56</sup> In *Lynd*, it was the assumption that all lenders follow these best practice guidelines which led to the conclusion that a reasonable period should only be a relatively short period.

Despite the clear divergence in orientation and outcome, both decisions demonstrate that the stated policies of institutional lenders are to be employed to inform the exercise of judicial discretion. Unsurprisingly, therefore, the best practice prescription for mortgage lenders has assumed a much greater currency during the last decade for judges, commentators and regulators alike. One noteworthy illustration of the judicial focus upon the published practices of lenders can be found in *Governor & Co of the Bank of*

---

<sup>52</sup> J. Morgan “Mortgage Arrears and the Family Home” (1996) 112 *LQR* 553, p.556.

<sup>53</sup> January 21, 1999 (CA) unreported.

<sup>54</sup> [1996] 1 All ER 449 at 462.

<sup>55</sup> [1996] NI 47 at 62.

<sup>56</sup> *ibid.*

*Scotland v Ladjadj and Haya Tal*.<sup>57</sup> In this case, the Court of Appeal launched a scathing attack upon the inconsistent, unclear and unfair manner in which some lenders craft their contractual dealings with the consumer. In an effort to calculate the true extent of the borrowers' contractual indebtedness, Laws LJ bemoaned that, "the respondents' documentation is disgracefully sloppy and well capable of creating confusion". In his eyes, the contract before him constituted an, "arithmetical maze", causing disagreement between lender and borrowers as to the arrears deficit. Remarkably, the divide between the respective calculations was in the region of £40,000.<sup>58</sup> Laws LJ regarded it as, "nothing short of scandalous that a major lending institution should foist this jigsaw puzzle of a contract on the borrowing public". Robert Walker LJ agreed and felt it "deplorable that the defendants' right to their home should depend on the interpretation and combined effect of no fewer than four contractual documents, which do not use, as they should, a clear and consistent terminology". Although this is no more than a specific case law example, the scope for an inconsistency of the treatment of borrowers is readily apparent. On a more general level, the absence of uniformity in the published policies of lenders has also been exposed as a formidable obstacle to consistency and fairness in the enforcement process. As Whitehouse observes:

"Some lenders will seek a court order immediately upon default. Others will wait for up to 18 months after default before initiating court action. This leads to inconsistency in the treatment of mortgagors in default, with some borrowers being allowed the opportunity to clear their arrears without court action and additional court costs, and others being subject to court proceedings immediately upon default".<sup>59</sup>

In light of the varied exercise of judicial discretion and the disparate and often unhelpful policies of lenders, it is instructive to consider the impact of the recent statutory regulation of mortgages. From October 31, 2004, the acquisition mortgage market has fallen under the regulatory supervision of the Financial Services Authority. The imposition of a new framework has been long awaited. In July 1999, the Government issued 'Regulating Mortgages', a preliminary consultation document, which sought comments on the extent to which mortgages should be regulated. The Government proceeded in January 2000 to announce its intention to pursue a policy of statutory regulation of mortgage lending. Two consultation papers were produced.<sup>60</sup> In December 2001, the Government set in train plans to extend the scope of regulation to include mortgage arranging and advice, entailing that those aspects of the draft rules required re-evaluation. Following further

---

<sup>57</sup> January 28, 2000 (CA) unreported.

<sup>58</sup> It is of note that mediation was put forward as a recommended means by which the parties should sort out their differences. Laws LJ described the alleged refusal of the lender to take part as being, if substantiated, "wholly lamentable".

<sup>59</sup> L. Whitehouse, "The Right to Possession: The Need for Substantive Reform" in P. Jackson, D. C. Wilde, *The Reform of Property Law* (1997), p.161.

<sup>60</sup> *Mortgage Regulation: The FSA's high level approach* (CP70) was published in November 2000 and preceded CP98 *The Draft Mortgage Sourcebook, including policy statement on CP70*, published in June 2001.

consultation<sup>61</sup> and additional policy statements,<sup>62</sup> the Financial Services Authority published its final conduct of business rules.<sup>63</sup> Its modern manifestation adopts the guise of the ‘Mortgages: Conduct of Business Sourcebook’ (MCOB).<sup>64</sup> In the light that some of the duties imposed on ‘responsible lenders’ are relevant to the process of enforcing residential mortgages, an improvement to the adequacy of protection for borrowers was a reasonable prospect. Two aspects of these mortgage specific rules are of relevance: first, the provision of arrears information and, secondly, the policy and procedure for dealing with arrears.

### Provision of Arrears Information

The Glossary to the Financial Services Handbook ascribes a particular meaning to the concept of ‘arrears’.<sup>65</sup> Where the mortgage involves a regular payment plan, a consumer is considered to be in arrears when two regular payments have been missed. As regards a mortgage that does not involve a payment plan (for example, a secured overdraft), a consumer will be in arrears where, say, the agreed overdraft limit has been exceeded for longer than one month or the borrower remains in breach for more than one month. When a customer is in arrears, new requirements are imposed in relation to the provision of prescribed information by the lender.<sup>66</sup> The obligation is to act as soon as possible or, in any event, within fifteen working days of becoming aware that the customer is in arrears.<sup>67</sup> By way of initial response, the customer should be provided with the current FSA information sheet on mortgage arrears and a list of the payments that have been missed or merely paid in part. Information should cover the total sum of the payment shortfall, any charges incurred as a result and “an indication of the nature (and where possible the level) of the charges” that the customer is likely to incur as a result of remaining in arrears. If the customer’s account had previously fallen into arrears within the preceding 12 months, but the earlier arrears had been discharged, the lender must either issue a new initial response or provide a written statement of the payments due, the actual payment shortfall, any charges incurred and the total outstanding debt.<sup>68</sup> The customer should in the

---

<sup>61</sup> CP 146 *The FSA’s Approach to Regulation Mortgage Sales* (August 2001); CP186 *Mortgage Regulation: Draft Conduct of Business Rules and Feedback on CP 146* (May 2003).

<sup>62</sup> *Feedback on CP 98 (The Draft Mortgage Sourcebook)* (August 2002); *Regulating Mortgage Sales: Final Conduct of Business Rules – Feedback on CP186 and Made Text*, vol. 1, (October 2003).

<sup>63</sup> *Regulating Mortgage Sales: Final Conduct of Business Rules – Feedback on CP186 and Made Text*, vol. 2, (October 2003).

<sup>64</sup> This has been incorporated into the Financial Services Handbook: see *Mortgages: Conduct of Business Sourcebook Instrument 2003*, [http://www.fsa.gov.uk/handbook/legal\\_instruments\\_2003/200371.pdf](http://www.fsa.gov.uk/handbook/legal_instruments_2003/200371.pdf). The Sourcebook is soon to be subject to further amendment: see *Mortgages: Conduct of Business Sourcebook (Home Reversion and Home Purchase Activities) Instrument 2006*.

<sup>65</sup> See also *Feedback on CP 98 (The Draft Mortgage Sourcebook) op. cit.*, para.4.28.

<sup>66</sup> MCOB 13.4.1R.

<sup>67</sup> The original timeframe of five working days was increased following the consultation process.

<sup>68</sup> MCOB 13.5.1R.

latter case (but not, seemingly, the former) be warned at this stage that repossession is amongst the possible consequences of remaining in arrears.

Where the arrears are attracting charges, the lender must send the customer a regular written statement of payments due, the actual payment shortfall, the charges actually incurred and the total debt.<sup>69</sup> The requirement to furnish a written statement will still apply even when a repayment plan has been agreed between the parties and the borrower is abiding by it.<sup>70</sup> Before commencing an action for repossession a lender must provide a written update of arrears information and a clear statement of the action the lender intends to take regarding repossession.<sup>71</sup>

The early detection and treatment of arrears should produce clarity and reliability, in addition to the speedier resolution of minor cases of default. More specifically, the new regulatory requirements should go some way to eradicate the, at times, woeful inadequacies of lenders' policies and practices as highlighted by the courts in recent times.<sup>72</sup> At the very least, the borrower should be provided with accurate details as to on-going liability and the enforcement steps to be taken by the lender. Nevertheless, a mere knowledge of the consequences of liability hardly empowers a borrower who is facing the potential loss of the family home.

### **Policy and Procedure for Dealing with Arrears**

It is a fundamental requirement that lenders have in place written policies and procedures for dealing fairly with customers in arrears.<sup>73</sup> Not surprisingly, lenders are expected to operate in accordance with these published guidelines.<sup>74</sup> The policy and procedures must oblige the lender to use reasonable efforts to reach an agreement with a customer over the method of repaying any payment shortfall, having regard to the desirability to agreeing with the customer an alternative to taking possession of the property.<sup>75</sup> Where relevant, the lender must liaise with the borrower's financial adviser regarding the payment shortfall.<sup>76</sup> The lender should, moreover, adopt a reasonable approach to the time span over which arrears should be repaid, having particular regard to the need to establish a repayment plan that is practical in terms of the circumstances of the customer. In the 'Draft Mortgage Sourcebook', specific reference was made

---

<sup>69</sup> *ibid.* Although provision was made for a monthly statement in the *Draft Mortgage Sourcebook*, *op. cit.*, this requirement has been relaxed to a minimum of "at least once a quarter".

<sup>70</sup> MCOB 13.5.2G(3).

<sup>71</sup> MCOB 13.4.5R. A lender must also ensure that a customer is informed of the need to register for housing with the local authority.

<sup>72</sup> See, for example, *Governor & Co of the Bank of Scotland v Ladjadj and Haya Tal* above.

<sup>73</sup> See generally MCOB.13.3.2E(1).

<sup>74</sup> MCOB. 13.3.1.R(2).

<sup>75</sup> This entails that customers should be given a reasonable period of time to consider any proposal for payment: MCOB 13.3.4(1).

<sup>76</sup> The formulation of this sub-paragraph has been altered from that proposed in the *Draft Mortgage Sourcebook*, which obliged the customer merely to 'request' rather than arrange, and specified, moreover, that the third party source of advice should be free to the customer: CP98, June 2001, Annex B, MORT 12.3.2E(1)(b).

to *Cheltenham & Gloucester Building Society v Norgan*. It was clearly anticipated by the Financial Services Authority that the *Norgan* approach would be followed in the determination of what might be a reasonable repayment period.<sup>77</sup> This ethos also pervades the MCOB where it is made explicit that, “In appropriate cases this will mean that repayments are arranged over the remaining term of the regulated mortgage contract”.<sup>78</sup> Unless it has good reason not to do so, a lender should additionally grant a customer’s request to a change to the date on which, or the method by which, payment is due. If it refuses this request, the lender must give the customer a written explanation of its reasons.<sup>79</sup> Finally, the repossession of the property should occur only where all other reasonable attempts to resolve the problem of arrears have failed.<sup>80</sup>

The regulatory reforms concerning the policy and procedure for dealing with arrears are disappointing and limited. The overriding concern is that a lender should give proper consideration to arrears issues, follow a documented approach and ensure that proper internal systems are put in place for the fair treatment of customers.<sup>81</sup> Such goals are purely matters of form and operational procedure. As to the substantive rules governing borrower protection, there is nothing that is innovative (at least in England and Wales) in the expectation that firms should have regard to the practicality of any repayment plan or that, in appropriate cases, repayments might be rescheduled over the remaining term of the loan. This regulatory response adds nothing to that adopted by the judiciary over the last ten years and does not operate to increase further the protection of borrowers in temporary financial straits. It is ironic that, instead, it might cause judicial sympathies to sway in favour of the institutional lender. First, it is possible that judges will be better disposed towards lenders who evidence the alteration of the terms of the mortgage contract in the prescribed ways. Secondly, it is likely that far fewer cases will come before the courts when the postponement of possession is a probable outcome. Thirdly, it is likely that more borrowers will have already benefited from a *Norgan* style repayment plan before the case ever reaches court. Of course, where there is little evidence of a desire on the lender’s part to adhere to the spirit of the regulation, judicial sympathies will understandably shift towards the borrower. Nevertheless, it is only when the circumstances fall within the parameters of the *Norgan* liberality that the court will be able to maintain a roof over the borrower’s head. As those parameters are likely to have already been reached, it is difficult to see how such sympathy can translate into effective relief.

There is no question that MCOB will lead to increased transparency. More questionable is whether the rules will produce an equivalence of treatment for different borrowers in regulated contracts with different lenders following different enforcement policies. It is to be regretted that there remains scope for the adoption of highly divergent approaches and the standard expected cannot, in any sense, be regarded as exacting. A range of voluntary industry

---

<sup>77</sup> See C.P. 98 at para.15.7.

<sup>78</sup> MCOB 13.3.6G.

<sup>79</sup> MCOB 13.3.2E

<sup>80</sup> *ibid.*

<sup>81</sup> MCOB 13.3.3G.

standards have long been published<sup>82</sup> and the Conduct of Business rules draw heavily upon such past precedents.<sup>83</sup> While statutory, as opposed to voluntary regulation, would mark an advance in consumer protection, there is broad industry opposition to this proposal. It is thought that Parliament should not dictate the credit management policies that individual lenders are to adopt. The Consultation Paper, which sets out to explain the policy underlying the rules, makes it abundantly clear that the aim is merely to set minimum standards surrounding the treatment of customers and not to intervene substantially in management issues.<sup>84</sup> Hence, there is no intention to dictate the enforcement policies of lenders. A telling example is to be found in the MCOB suggestions as to alternatives to repossession that might be considered. These options remain the same as those already embraced by the Council of Mortgage Lenders, that is, to extend the term or change the type of regulated mortgage contract; to defer payment of interest due or to treat the payment shortfall as if it was part of the original amount borrowed. The wording, moreover, is wholly bereft of obligation. The guidance reads that, “depending on the individual circumstances, a firm may wish to do one or more of the following ...”.<sup>85</sup> The need persists for a standardised enforcement policy, procedure and process that apply to all mortgage lenders. While increased regulation concerning the provision of information and the promotion of transparency is to be welcomed, these changes alone are woefully insufficient to safeguard effectively the interests of the borrower in default.

### Conclusion

Over the preceding decade, the UK mortgage market has become increasingly diverse and competitive. This is evident from the range of products offered and the type of consumer to which those products are aimed. These years have also witnessed staggering increases in bankruptcy and personal indebtedness, together with the continued and unparalleled demand for secured and unsecured borrowing. The proliferation of mortgage products, in combination with a growth in the volume of ‘non-conforming’ mortgages (such as buy to let, lifetime and adverse credit mortgages), serves to accentuate the need to reconsider what is the most appropriate framework for borrower protection. This is plainly demonstrated by the practice of adverse credit lending (*i.e.* lending to borrowers who have previously experienced credit difficulties<sup>86</sup>), which is estimated by the Council of

---

<sup>82</sup> *E.g.* the Council of Mortgage Lenders adopted a statement of practice on the handling of arrears and repossessions and employed a voluntary agreement on the recovery of mortgage shortfall: see <http://www.cml.org.uk>.

<sup>83</sup> The repossession of property ‘only where all other reasonable attempts to resolve the position have failed’ (MCOB 13.3.2E(1)(f)) is a simple reformulation of the Council of Mortgage Lender’s established policy to take possession only as a last resort.

<sup>84</sup> CP98, para.15.2. The rules are drafted, “in such a way that firms are able to adopt alternative approaches” (*Feedback on CP 98 (The Draft Mortgage Sourcebook) op. cit.*, para.4.31).

<sup>85</sup> MCOB 13.3.4G(1).

<sup>86</sup> This can include, *e.g.* borrowers with a history of County Court Judgments, bankruptcy or individual voluntary agreements, default, and poor credit or loan arrears.

Mortgage Lenders to now account for around at least 5-6% of gross industry advances.<sup>87</sup> The advent of such mortgages has introduced and helped sustain home ownership for those borrowers who could not otherwise afford but, significantly, it exposes the consumer to an increased likelihood of future repayment problems. Indeed, as the Council of Mortgage Lenders acknowledge, “Adverse credit lending carries a higher risk profile than prime lending, and this is reflected in a worse default performance. The rapid growth in consumer demand for such lending over recent years has contributed to the overall deterioration in arrears and possessions at the industry level”.<sup>88</sup> It is estimated, moreover, that around two-thirds of borrowers who obtain an adverse credit mortgage do so not as a means to access home ownership, but to consolidate debts or to recover from previous debt difficulties.<sup>89</sup>

The procedural regulation of mainstream institutional lenders marks a noteworthy development of the post-*Norgan* era. The new regime introduces standards applying to a broad spectrum of activities linked to advice and lending, and aims to treat fairly customers with mortgage payment problems. It is apparent that this regulation will undoubtedly temper the approach of lenders to aspects of enforcement, such as their treatment of customers in arrears and the taking of possession. This code of behaviour will see a new threshold against which the conduct of lenders will be measured in possession actions, perhaps most notably in the Northern Ireland context.

It cannot be denied, however, that the interests of the Financial Services Authority lie in the governance of service standards rather than the structural development of mortgage law. To this extent, MCOB was never intended to cover either the fairness of the mortgage relationship or the assertion and exercise of rights and remedies. Hence, the omission by Parliament to implement long-standing Law Commission recommendations, as to the strengthening of the substantive law, is to be regretted. It is regrettable also that there is no single regulatory context in which all mortgage lending is considered. The Consumer Credit Act 1974 (as amended) continues to regulate borrower protection in the second mortgage market.<sup>90</sup> In stark contrast to the protections afforded to mortgagors under the general law, and the apathy in respect of substantive law reform, borrowers caught within this different regulatory framework will now benefit from enhanced protection in the grant of time orders as a result of a Government initiative. The Government has, moreover, long planned to encourage the increased use of time orders as part of its wider strategy of tackling over-indebtedness.<sup>91</sup> The strategic priority of the Government is to achieve, “a reduction in the number of debt cases brought to court, with improved engagement between parties leading to the earlier resolution of debt problems”<sup>92</sup> and, as regards matters

---

<sup>87</sup> CML Housing Finance, Issue 10, 2006, p.4.

<sup>88</sup> *ibid.*, p.1.

<sup>89</sup> *ibid.*, p.6.

<sup>90</sup> The abolition of the £25,000 financial ceiling (section 2) will see more loans fall under CCA regulation.

<sup>91</sup> The Task Force on over indebtedness was established in October 2000 to address issues relating to the level of consumer debt in British Society.

<sup>92</sup> DTI, “Tackling Overindebtedness”, Annual Report, 2006, London, p.11.

that can only be resolved through the courts, “improvements in the efficiency and speed with which cases are handled”.<sup>93</sup>

The availability of the time order extends to a mortgagor an opportunity to apply to the court for a rescheduling of payments due under a Consumer Credit Act regulated agreement. A time order may be granted where possession is sought by the lender or, alternatively, on the express application of a borrower. Although a parallel between the time order and the discretion afforded under Administration of Justice Acts is easy to draw, there exist key differences. In particular, the court may make a time order where it considers it just to do so and, unlike section 36, it is not concerned with whether the borrower is likely to repay within a reasonable period.<sup>94</sup> Unlike under section 36, the court is also permitted to amend the terms of the agreement where it is just to do so by extending the term of the agreement or altering the rate of interest to be paid.<sup>95</sup> Section 129 of the 1974 Act (as amended) extends to the debtor the opportunity to apply for a time order on receipt of a notice of sums in arrears.<sup>96</sup> Under section 129A, a debtor must give notice in writing to signal the intention to make the application for a time order. The debtor must also outline the details of any proposal as regards the making of payments under the agreement. If no agreement can be reached between the parties within 14 days of the service of the notice, the debtor may then make an application to the court.<sup>97</sup>

The availability of time orders demonstrates that, when the political will is present, Parliament can put in place effective, flexible and practical safeguards to protect borrowers who are in default. Unfortunately, as regards the reform of mainstream mortgage law that will is presently non-existent. In the absence of such reforms, the *Norgan* approach will continue to represent the last hope of the mortgagor in temporary financial straits.

---

<sup>93</sup> *ibid.*

<sup>94</sup> The possibility of overlap between these provisions has always been apt to cause uncertainty: see *First National Bank v Syed* [1991] 2 All ER 250, where an order of the lower court was mistakenly made under the auspices of the Administration of Justice Acts and required reclassification by the Court of Appeal as a time order under the Consumer Credit Act.

<sup>95</sup> Consumer Credit Act 1974, s.136; see also *Fair, Clear and Competitive: The Consumer Credit Market in the 21<sup>st</sup> Century*, (Cm 6040, 2003, DTI) at para.5.73.

<sup>96</sup> As required under the new sections 86B, 86C.

<sup>97</sup> This requirement has no application to debtors in receipt of default notices under s.87 of the 1974 Act.

## **BOUNDARIES, CORPORATE DECISION-MAKING AND RESPONSIBILITY\***

*Alice Belcher, University of Dundee*

### **Background**

In the realm of corporate decision-making and responsibility boundaries are both important and difficult. The importance of the boundaries of the firm was discussed by Belcher:<sup>1</sup>

“Boundaries are of the utmost importance because they establish size and shape. In so far as changes in the law affect the elements making up the boundaries of the firm, such changes can be expected to have an impact on the size and structure of firms. Theories which are capable of explaining how operations within the firm are different from those outside can be used to draw the boundaries of the firm and so to define its essence or nature.”

Difficulties concerning the boundaries of the company are perhaps best exemplified by English case law on the lifting of the corporate veil between group companies. This article re-examines both the importance and difficulties of corporate boundaries. Without taking away from the importance of corporate boundaries, various different types of boundary are considered. The idea of corporate outsiders and insiders is one that has been used in corporate governance. One of the difficulties explored in this article is that some “key participants in companies”<sup>2</sup> are for some purposes insiders, but for other purposes outsiders.

As a starting point, the article takes various theoretical positions drawn from different disciplines and designed to answer different questions about the nature of the firm or the company. First in relation to corporate legal theory, a theory of the company is needed in the context of corporate criminal responsibility in order to answer the questions “how does a company act?” and “how does a company think?”, and a theory of the company is needed in the context of corporate regulation to answer the question “how much mandatory corporate law or regulation is optimum”? Second in relation to economics, a theory of the firm is needed to answer the question “why does production occur in firms”? Finally, in relation to management work on competitive advantage, normative propositions have been put forward to answer the question “what can a company do to gain or maintain a competitive advantage over others”?

---

\* I am grateful to the Arts and Humanities Research Council for funding this research under leave award AH/D500370 / 1.

<sup>1</sup> A Belcher “The Boundaries of the Firm: The Theories of Coase, Knight and Weitzman”, *Legal Studies*, 1997, 17, (1), 22-39.

<sup>2</sup> This phrase is used by B. Cheffins *Company Law: Theory, Structure and Operation* (Oxford, Oxford University Press, 1997) to cover shareholders, creditors, employees, directors and management. This article does not cover creditors as a category.

There are large volumes of work both supporting and disputing the opening positions taken in this article. However, it is not the aim of this article to cover these debates in detail. For the present purposes it is more important to demonstrate the coherence of three initial theoretical propositions that come from three different disciplines. In terms of corporate criminal responsibility theory, this article takes a “realist” position. The argument of the “realists” is that a company is best thought of as something beyond the individuals involved in it. This position does not map directly onto a single corporate legal theory, but it is perhaps furthest from legal theories based on the company as a nexus of contracts and closest to theories based on the company as a social entity.<sup>3</sup> In terms of economic theory the article draws on explanations of the nature of the firm found in Coase’s famous article on that subject and on Knight’s ideas on decision-making under conditions of true uncertainty.<sup>4</sup> In terms of management theory the article uses ideas labelled the resource- or knowledge- based view of the firm that have their roots in the work of Penrose.<sup>5</sup>

The article covers a wide set of ideas with the aim of examining both their coherence and their implications for existing company law and its future development. In section 2 the three chosen theoretical strands are set out and their coherence in the context of a single company is examined. In section 3 some theoretical boundary problems are explored. The applicability of the theories to groups of companies, in a UK legal setting, is investigated in section 4. This includes consideration of the UK law on lifting the veil of incorporation. Section 5 provides some conclusions and indicates directions for some further work.

The main object of this work is to tell a coherent story about what companies can do, the decision-making background to these capabilities and the responsibilities that flow from their use. The article sees the company as an entity capable of real action. Decision-making within a company is described as occurring under two distinct sets of conditions; conditions of risk and true uncertainty. In the risk-based framework the company is seen as using information efficiently, weighing expected costs against expected benefits, and minimising transactions costs in the way envisaged by Coase.<sup>6</sup> Under conditions of true uncertainty, which Knight identifies as something of a distinctly different character from conditions of risk,<sup>7</sup> the company is seen as a place where difficult decisions are made, and it is in making these

---

<sup>3</sup> J Dine, *The Corporate Governance of Groups* (Cambridge; Cambridge University Press, 2000), 26.

<sup>4</sup> R H Coase “The Nature of the Firm”, *Economica*, 1937, 386-405; F. Knight *Risk Uncertainty and Profit* (New York: Houghton Mifflin & Co, 1921). 232; and Belcher, 1997 *op.cit.*

<sup>5</sup> E. Penrose, *Theory of the Growth of the Firm*, (Oxford; Basil Blackwell, 2<sup>nd</sup> ed. 1980) first published 1959. For work on the resource-based view of the firm see B Wernerfelt, “A resource-based view of the firm” *Strategic Management*, 1984, 5, 171-80; JB Barney, “Strategic factor markets” *Management Science*, 1986, 32, 1231-41 and JB Barney, “Firm Resources and Sustained Competitive Advantage” *Journal of Management*, 1991, 17, 99-120.

<sup>6</sup> R. Coase, *op. cit.*

<sup>7</sup> A. Belcher ““Something distinctly not of this character”: How Knightian uncertainty is relevant to Corporate Governance” 2007, paper presented at the SLISA conference, University of Kent., April.

decisions well that successful companies create business knowledge<sup>8</sup> and gain their competitive edge. The advantage of the corporate form as a vehicle for successful decision-making is seen as flowing from at least two sources. First, there is the authority, bounded but real, that the employment contract gives employers over employees coupled with the harnessing of employees' intrinsic motivation if they are trusted to be part of the creation of business knowledge. Second, there are the powers given to directors under the normal corporate constitution which requires shareholders to entrust directors with responsibility for the majority of the corporate decision-making.<sup>9</sup>

### Three Theoretical Strands

#### *Corporate Legal Theory*

The chosen theoretical approach under this heading has been labelled "realist" or "holistic". Many expositions of corporate legal theory are directed towards solving the issue of how much company law there should be and of what character. However, the basis of the "realist" strand of theory employed in this article is corporate criminal responsibility. It is a theory that first and foremost acknowledges that a company is both a separate legal person and an entity capable of "real" action. Dine has put it this way: "The difficulty is not in whether or not it [the company] can act but in determining how its decision is to be ascertained."<sup>10</sup> In the field of corporate criminal responsibility the realist approach can be contrasted with the nominalist approach that has held sway until the recent Australian and UK developments. Commonwealth jurisdictions have traditionally approached corporate criminal responsibility using the nominalist approach that treats the company as a collection of individuals and locates its criminal culpability derivatively through the culpability of individual actors:

"The two widely accepted common law bases of corporate responsibility – vicarious liability (whereby the corporation is held liable for the conduct of all its officers, employees or agents acting within the scope of their employment or authority) and the 'identification approach' (under which the actions and mental state of certain individual actors are treated as the company's own) – both proceed from the nominalist conception of the 'company' as a fiction, unable to be conceived as blameworthy in itself."<sup>11</sup>

However critics of the nominalist approach have pointed out how it fails to fit with public perceptions of companies. In relation to the sinking of the car ferry *Herald of Free Enterprise* Wells reported that "the relatives [of the deceased] were keen to see the company properly punished but not the

---

<sup>8</sup> A. Belcher "The Evolution of Business Knowledge in the Context of Unitary and Two-tier Board Structures" with Till Naruisch, *Journal of Business Law*, 2005, July, 443-472.

<sup>9</sup> For an analysis see A. Belcher "Trust in the Boardroom" (2006) paper presented at the SLS conference, University of Keele, September.

<sup>10</sup> Dine *op. cit.* 25.

<sup>11</sup> M. Wilkinson, "Corporate Criminal Liability – The Move Towards Recognising Genuine Corporate Fault", *Canterbury Law Review*, 9, 142-178 at 142.

particular individuals whose misfortune it was to be operating the ferry that . . . night.”<sup>12</sup> It also fails to capture the fact that organisations such as companies function as real entities that are not reducible to propositions about the individuals that compose them. Holistic theories have been developed that locate genuine corporate fault in the culture of the company.<sup>13</sup> It is these theories that have been given legislative force in the Australian Corporate Criminal Code Act 1995 and are the basis of the Corporate Manslaughter and Corporate Homicide Bill currently before the UK Parliament.<sup>14</sup> The result is to locate a company’s criminal culpability in its culture. This is done explicitly in the Australian legislation which defines culture as: “an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place”.<sup>15</sup> It is done implicitly in the UK the offences of corporate manslaughter (England and Wales) and corporate homicide (Scotland) that are to be based on the concept of “senior management failure”<sup>16</sup> which could be evidenced by “attitudes, policies, systems or accepted practices within the organisation”<sup>17</sup> if they were likely to have encouraged the failure at the root of the crime. The explanatory notes to the UK Bill state that:

“The organisation must be in breach of [the] duty of care as a result of the way in which certain activities of the organisation were managed or organised by its senior managers. *This introduces an element of “senior management failure” into the offence*”

and senior management failure:

“. . . looks at how in practice managers organised the performance of a particular activity, rather than focusing on questions of individual culpability, and *enables management conduct to be considered collectively* as well as individually.”<sup>18</sup>

There has so far been no test of the evidence required to establish “attitudes, policies, systems or accepted practices”. One suggestion is that the evidence of meetings may be important:<sup>19</sup>

---

<sup>12</sup> C. Wells, *Manslaughter and corporate crime*, 138 *NLJ* 931 (1989) at 931 cited *ibid.*

<sup>13</sup> M. Wilkinson, *op. cit.*

<sup>14</sup> The Bill passed its third reading in the House of Lords 28.2.07. For analysis see A. Belcher “Imagining how a company thinks: what is corporate culture?” *Deakin Law Review*, 2006, (2).

<sup>15</sup> Australian Criminal Code Act 1995 part 2.4, s.12.3(6).

<sup>16</sup> Corporate Manslaughter and Corporate Homicide Bill, clause 1 (3).

<sup>17</sup> *ibid.*, clause 8.

<sup>18</sup> Corporate Manslaughter and Corporate Homicide Bill, Explanatory Notes, 2006, para.14, emphasis added (Eng. and Scotland) and *ibid.* at para.15 emphasis added. The idea of collective responsibility is explored in more detail in section 3 below. It also connects with the idea of the company as a collectivity found in G. Teubner “Enterprise Corporatism: New Industrial Policy and the ‘Essence’ of the Legal Person” *American Journal of Comparative Law* (1988) 36, 130-155.

<sup>19</sup> See Belcher *Deakin Law Review*, 2006 *op. cit.*

“Schwartzman states that ‘meetings are significant because they are the organisation or community writ small’.<sup>20</sup> Weick argues that ‘meetings define, represent, and reproduce social entities. . . . Because action that occurs in the meetings is organizational action, this must mean that there really is an organization. Momentarily, at least during the meeting, there appears to be an organization, and this appearance is reconstituted whenever meetings are constituted.’<sup>21</sup>

The approach of building a case from evidence of corporate decision-making based on meetings of committees and decisions of corporate officers was taken in the failed Scottish prosecution of Transco plc for culpable homicide following a fatal gas explosion.<sup>22</sup> The prosecution failed when the identification principle was applied, but its approach to collecting and presenting evidence may well be revived in the context of the new corporate killing offences. Overall this theoretical strand claims that the company functions as a real entity with decision-making capabilities. These capabilities are not reducible to propositions about the individual actors and may be evidenced in attitudes, policies, systems or accepted practices within the organisation.

### *Economic Theories*

The second theoretical strand is economic theory. At first blush the chosen corporate legal theory may appear to be in tension or even disagreement with economic theory in general. However, the particular economic theories that have been chosen are both old enough to be expressed primarily as narratives rather than in mathematical form and it is submitted that the two narratives can be read together with a realist approach to the company. The article takes the position that the ideas of Coase and Knight continue to be valuable contributions to the theory of the firm.<sup>23</sup>

“For Coase<sup>24</sup> the boundary is drawn in terms of the price mechanism. Outside the firm the price mechanism operates in all transactions and when the firm deals with the outside world it is ruled by the price mechanism. In contrast, within the firm operations are controlled by the direction of the entrepreneur. Direction by the entrepreneur, by avoiding costs, can be more efficient than using the price mechanism. The usual costs associated with use of the price mechanism include information costs involved in finding buyer or seller, costs of

---

<sup>20</sup> H.B. Schwartzman, “The significance of meetings in an American mental health center” *American Ethnologist*, 1987, 14, 271-294, 288.

<sup>21</sup> K.E. Weick, *Sensemaking in Organizations*, (Thousand Oaks CA, 1995), 143.

<sup>22</sup> See *Transco plc minuters / appellants v Her Majesty’s Advocate respondent* 2004 SCCR 1 at 22 (Scotland Appeal Court, High Court of Justiciary, March 2003) for the trial judge’s analysis of how the prosecution could have proceeded under Scots law – a decision later reversed.

<sup>23</sup> This follows A. Belcher “The Boundaries of the Firm: The Theories of Coase, Knight and Weitzman”, *Legal Studies*, 1997, 17, (1), 22-39.

<sup>24</sup> R H Coase (1937) ‘The Nature of the Firm’, *Economica*, pp.386-405

making transactions and costs of monitoring and/or enforcing contracts once they are made.”<sup>25</sup>

In contrast, Knight draws the boundary of the firm in terms of uncertainty:

“It is this true uncertainty which by preventing the theoretically perfect outworking of the tendencies of competition gives the characteristic form of ‘enterprise’ to economic organization as a whole and accounts for the peculiar income of the entrepreneur.”<sup>26</sup>

For Knight the decision-making system within the firm that made it particularly suited to conditions of true uncertainty was embodied in the individual entrepreneur. Today, the decision-making system within a company, or group, that deals with conditions of true uncertainty is more likely to be embodied in a number of talented individual leaders sometimes deciding and acting independently (*e.g.* as executive directors within their delegated authority) and sometimes working and deciding collectively (*e.g.* as the board of directors). In order to read Coase and Knight together in a coherent way it is necessary to go more deeply into Knight’s claim about the character of true uncertainty.<sup>27</sup> Once risk and true uncertainty are clearly defined in a way that highlights the crucial difference between them, Coase’s cost-benefit analysis can be applied to conditions risk and Knight’s ideas to conditions of true uncertainty. A final link is to connect abstract theorising with some exemplars of the two types of conditions.

Knight distinguished risk from true uncertainty and defined uncertainty as relating to situations where:

“. . . there is no possibility of forming *in any way* groups of instances of sufficient homogeneity to make possible quantitative determination of true probability, Business decisions, for example, deal with situations which are far too unique, generally speaking, for any sort of statistical tabulation to have any value for guidance. The concept of objectively measurable probability or chance is simply inapplicable.”<sup>28</sup>

The distinct difference between risk and true uncertainty can be seen in the mathematics needed to deal with the two sorts of conditions. Risk is dealt with by probability theory, but uncertainty is modelled using topography; a branch of mathematics that encompasses three forms of bifurcation theory; chaos theory, catastrophe theory and fractal geometry.<sup>29</sup> Probability theory is rooted in an essentially deterministic world, associated with the work of Laplace.<sup>30</sup> In this world extra information is in general useful and helps to

<sup>25</sup> Belcher 1997 *op. cit.*

<sup>26</sup> F Knight *op. cit.*, 232.

<sup>27</sup> For more detail see A. Belcher 2007 *op. cit.*

<sup>28</sup> F. Knight, *Risk, Uncertainty and Profit* (New York, Houghton Mifflin & Co, 1921), 231.

<sup>29</sup> For an accessible description see I. Ekeland *Mathematics and the Unexpected* (Chicago and London; University of Chicago Press, 1988). See also Belcher (2007) *op. cit.*

<sup>30</sup> For a description see W. Lee *Decision Theory and Human Behaviour* (New York, John Wiley, 1971) 49.

model or predict. In contrast, topography and bifurcation theories can be traced back to the work of Poincaré in the late nineteenth century. Where a mathematical model bifurcates, proceeding one way may be seen as a smooth transition in a known direction, proceeding on the other path may involve a discontinuous jump or “catastrophic” change. What is important about these models is that a known past history will not determine which of the two paths is actually taken at the bifurcation.

Conditions of risk and true uncertainty can also be described in terms of different tomorrows.<sup>31</sup> The first three descriptions that follow fall under the heading of risk. The final description is a way of thinking about true uncertainty without referring to the technicalities of bifurcation models. First, tomorrow can be risky, and the decision-maker can know the range of possible tomorrows and know the probability of each occurring, but not know which of them will occur. Second, tomorrow can be risky and the decision-maker can be limited. Possible tomorrows are knowable, but the search for knowledge of all possibilities and the computation of all possible consequences can be costly. So far, the decision-maker’s problems can be reduced by good estimation. Third, tomorrow can be a set of possibilities of which only some are known and therefore a probability of each one occurring cannot properly be formed until others are known. The way to improve prediction in this framework is to discover more of the, essentially knowable, possible tomorrows. The second and third tomorrows can be connected with the concept of bounded rationality:

“The term ‘bounded rationality’ is used to designate rational choice that takes into account the cognitive limitations of the decision-maker – limitations of both knowledge and computational capacity.”<sup>32</sup>

This is an idea of decision-making found in the work of Simon who first put forward the suggestion of decision-making behaviour as satisficing rather than optimising. “most human decision-making whether individual or organizational is concerned with the discovery and selection of satisfactory alternative.”<sup>33</sup> Simon later developed this into theories of bounded rationality. Economists reacted strongly to Simon’s ideas because models that are easily tractable and produce straightforward results under the assumption that behaviour is optimising become more difficult and messy in a satisficing world. However, Langlois pointed out that

“. . . if all that’s at stake is some constraint on information-processing and computational capacity, then one’s satisficing alternative quickly collapses into substantive rationality –

---

<sup>31</sup> S.C. Littlechild “Three types of market process”, pp.27-39 in R. N. Langlois (ed.) *Economics as a Process* (Cambridge, Cambridge University Press, 1986).

<sup>32</sup> E. Sent “Sargent versus Simon: bounded rationality unbound” (1997) *Cambridge Journal of Economics*, 21, 332. For early work on bounded rationality see J.G. March and H.A. Simon, *Organizations*, (New York, John Wiley, 1958); H.A. Simon “A behavioural model of rational choice” *Quarterly Journal of Economics*, 1955, 69, 241-260 and for a more recent description see H.A. Simon, *Models of My Life*, (New York, Basic Books, 1991).

<sup>33</sup> March and Simon, 1958, *op. cit.*, 140-141.

satisficing is actually the optimal course in view of costly computational resources.”<sup>34</sup>

Finally, tomorrow can be not so much unknown as non-existent or indeterminate at the time of the decision. The decision-maker's task is then not to estimate or to discover but to *create*.

“He (sic) must exercise imagination. The agent is aware of the flimsiness of his conjectures about the future and the vulnerability of his plans to the independent imagination of other agents.”<sup>35</sup>

This final view of tomorrow is a description of decision-making under conditions of true uncertainty. It is submitted that the very broad decision-making powers vested in directors encompass decision-making under both risk and true uncertainty.

When directors engage in decision-making under risky conditions the assumption that they will operate in a rational way, or at least in line with the Simon's ideas of bounded rationality, is not unreasonable. This sort of decision-making fits with Coase's idea of the firm as a place where organisation costs can be recognised as lower than transaction costs. Coase chose as exemplar of this potential the ability to organise that is at the heart of the employment contract. However, a criticism of Coase's 1937 “Nature of the Firm” article is that he relies on the idea of authority in the employment relationship without explaining how that authority can arise. One possible answer to this problem was offered by Simon. Before he moved on to work on his ideas on satisficing behaviour and bounded rationality, he published a formal model of the employment relationship containing a rational explanation of why two parties may agree that one of them should have authority to direct the other.<sup>36</sup> In Simon's model (where there is risk, but not true uncertainty) the employer, “boss”, is given the power to decide which task the employee, “worker”, has to do, but the range of possible tasks is agreed when the bargain is made; that is when the employee is hired. The employer can, within limits, select an employee's tasks without further reference to the price, that is the wage. Simon's model of the employment relationship is important because it shows that it is possible to construct a mathematical model that incorporates rational grounds for choice between an employment contract and a contract of the ordinary kind. His model shows that under some conditions (conditions of risk rather than certainty) it may be advantageous to both the rational worker and the rational boss to choose an employment contract over a sales contract. The essence of an employment contract is that it confers on the employer the power to decide; it gives the employer authority. It should also be noted that Simon's model provides an entirely economic explanation for the existence of the employment relationship in which there is no need to refer to institutional, historical or sociological factors. It was, however, this very purity that Simon saw as the model's main limitation. He stated that it was “. . . a model of hypothetically

---

<sup>34</sup> R.N. Langlois, *Economics as a Process* (Cambridge, Cambridge University Press, 1986), 226.

<sup>35</sup> Littlechild, *op. cit.* 29.

<sup>36</sup> H Simon “A formal theory of the employment relationship” *Econometrica*, 1951, 19, 293-305.

rational behaviour in an area where institutional history and other nonrational elements are notoriously important"<sup>37</sup> and he concludes the paper as follows: "The most serious limitations of the model lie in the assumptions of rational utility-maximising behaviour incorporated in it."<sup>38</sup> As already pointed out, Simon's work since this relatively early (1951) paper has been concerned with the limits of rationality and the concept of bounded rationality.

Simon's model of the employment contract reveals how transaction costs can be reduced through the employer's authority to direct or organise. If employment as an activity is a good exemplar of low organisation costs, research and development as activities are good exemplars of a tomorrow being created. Research and development can be an express business activity, but the creation of tacit business knowledge can also be a more subtle and invisible process. In the corporate form directors are entrusted not only with routine business decisions, but also with creative and strategic decision-making. If Knight was correct, it is these creative and strategic decisions made under conditions of true uncertainty, that are the ones most likely to make the difference between success and failure in business. This links well with current management thinking on the evolution of business knowledge.

### **Management Theory**

Over the last two decades or so the resource-based view of the firm and the associated knowledge-based view of the firm have been developed by some management researchers:

"The origins of the knowledge based approach can be found in Penrose's 1959 book *The Theory of the Growth of the Firm*.<sup>39</sup> Other important works that inform the approach are the Richardson's article on the organization of industry<sup>40</sup> and Nelson and Winter's book on evolutionary economics.<sup>41</sup> A general, resource-based, approach has been offered by Wernerfelt<sup>42</sup> and Barney.<sup>43</sup> In the resource-based view, the firm is seen as a bundle of resources and comparative advantage is explained by the possession of a bundle with particularly valuable attributes. Resources are posited to be particularly valuable if they are rare and hard to imitate. This has meant that; 'most interest has centred on internally accumulated resources, such as routines and capabilities, rather

---

<sup>37</sup> *ibid.*, 302.

<sup>38</sup> *ibid.*, 305.

<sup>39</sup> Penrose, *op. cit.*

<sup>40</sup> G.B. Richardson, "The Organization of Industry" *Economic Journal*, 1972, 82 883-96.

<sup>41</sup> R.R. Nelson and S.G. Winter, *An Evolutionary Theory of Economic Change*, (Cambridge MA: The Belknap Press, Harvard University Press, 1982).

<sup>42</sup> B. Wernerfelt, "A resource-based view of the firm" *Strategic Management*, 1984, 5, 171-80.

<sup>43</sup> J.B. Barney, "Strategic factor markets" *Management Science*, 1986, 32, 1231-41 and "Firm Resources and Sustained Competitive Advantage" *Journal of Management*, 1991, 17, 99-120.

than those that can be purchased on factor markets.<sup>44</sup> This centring on knowledge and skills as key resources focuses the resource-based view of the firm down into the more specific knowledge-based approach.<sup>45</sup>

Various factors have been proposed as producing or influencing a firm's ability to create valuable business knowledge that cannot readily be purchased on the market. Nonaka, Toyama and Nagata suggest that organisational structure, corporate culture and incentive systems are crucial.<sup>46</sup> These are all matters which would properly be decided upon or influenced at board level. Coriat and Dosi state that there are

“. . . tradeoffs between performance control and learning. While the former is likely to imply rigid task specification, the latter generally involves a lot of experimentation, trial-and-error, 'deviant' behaviors"<sup>47</sup>

Also, O'Reilly found that innovation benefited when employees were given permission to try and fail.<sup>48</sup> Where the company is positioned on the spectrum that runs from rigid task specification to permitted deviance by employees depends on the combination of organisational structure, corporate culture and incentive system put in place by the board. The choice to operate at the less rigid end of the spectrum also has significant trust requirements. This strand of academic thinking can be seen as link between legal responsibility based on corporate culture and the economic idea of the company as a place particularly suited to decision-making under conditions of true uncertainty where tomorrow has to be created. Through the legal, economic and management strands this article has drawn a picture of the company as a place where corporate culture, trust and uncertainty are conceptually important. Corporate culture will increase in importance once its elements become the basis of liability for corporate killing. The fact that directors are entrusted with the running of a company can be seen as one of the defining features of the corporate form. Finally, true or Knightian uncertainty is an important concept to highlight as it is the company's ability to make good decisions under uncertainty, decisions where tomorrow has to be created, that could be its source of competitive advantage. It is submitted

---

<sup>44</sup> K. Foss and N. Foss "The Knowledge-Based Approach and Organizational Economics" in N. Foss and V. Mahnke (eds.) *Competence, Governance, and Entrepreneurship* (Oxford: Oxford University Press, 2000), 62-65, 65.

<sup>45</sup> Belcher and Naruisch *op. cit.*

<sup>46</sup> I. Nonaka, R. Toyama and A. Nagata "A Firm as a Knowledge-creating Entity: A New Perspective on the Theory of the Firm" *Industrial and Corporate Change*, 2000, 1-20, 12

<sup>47</sup> B. Coriat and G. Dosi "Learning how to Govern and Learning how to Solve Problems: On the Co-Evolution of Competences, Conflicts and Organizational Routines" 103-133 in A.D. Chandler, P. Hagstrom and O. Solvell (eds) *The Dynamic Firm* (Oxford, Oxford University Press, 1998) 110-111. For a description of a professional event exploring the tensions between Enterprise and Governance as they appeared immediately following the publication of the Cadbury Code of Best Practice see A. Belcher "Gendered Company: Enterprise and Governance at the Institute of Directors", *Feminist Legal Studies*, 1997, 5, (1), 57-76.

<sup>48</sup> C.A. O'Reilly, "Corporate Culture Consideration Based on an Empirical Study of High Growth Firms in Silicon Valley" *Economia Aziendale* 1989, 3, 305.

that these concepts hang together in the picture of a single company and are ingredients in explaining the boundary of the company.

### Fuzzy Boundaries

The mathematics of uncertainty has already been mentioned as a branch of mathematics distinct from probability theory. It is also the place in mathematics that deals with fuzziness at boundaries:

The mathematics that is being used to capture the idea of uncertainty is bifurcation theory which covers both catastrophe theory (for large discontinuities) and chaos theory (for small discontinuities). Discontinuities are usually observed at sharply defined boundaries but some such boundaries "... consist of elements from both sides, as with a slush layer between water and ice that really consists of both ... Such mushy boundaries may be dealt with by using 'fuzzy set' theory."<sup>49</sup>

An economic example of this idea is the per capita income at the US / Mexico border. This section of the article explores some of the difficulties in defining the boundary of the company by exploring the inside and the outside from a legal point of view. The decision of the House of Lords in *Salomon v Salomon*<sup>50</sup> established the company's separate legal personality, in particular that the company is an entity separate from its shareholders. However, another line of legal reasoning effectively equates the company with the shareholders. Whilst the test of whether decisions have been taken "bona fide in the interests of the company as a whole" can in some circumstances mean the interests of the company as a commercial entity, in other circumstances it must be understood not in relation to the "a commercial entity, distinct from the corporators" but in relation to "the corporators as a general body".<sup>51</sup> These points reveal fuzziness on the issue of whether shareholders are inside and part of the company or outside and separate from the company. In *R v Howe (Engineers) Ltd*,<sup>52</sup> the Court of Appeal held that the level of fines imposed generally for health and safety offences is too low, that fines need to be large enough to bring home the health and safety message "not only to the company but also to its shareholders." This suggests that for the purposes of punishing the company for its criminal acts the shareholders are to be thought of as a legitimate target for the economic pain imposed.

This fuzziness can also be seen in relation to directors. Directors are normally seen as corporate insiders. Before the reform of the *ultra vires* principle, the rule in *Royal British Bank v Turquand* offered protection for outsiders dealing with a company for defects in its internal management.<sup>53</sup> In *Mahony v East Holyford Mining Co* this was termed the "indoor

---

<sup>49</sup> J. Barkley Rosser Jr *From Catastrophe to Chaos: A General Theory of Economic Discontinuities* (Boston and London, Kluwer, 1991) 3.

<sup>50</sup> [1897] AC 22

<sup>51</sup> Test set out in *Allen v Gold Reef of West Africa* [1900] 1 Ch 656 at 671; interpretation taken from *Greenhalgh v Arderne Cinemas Ltd* [1951] Ch 286 at 291

<sup>52</sup> [1999] IRLR 434

<sup>53</sup> (1855) 5 E & B 248.

management rule” and applied to directors’ decisions that were beyond their actual power, but were ostensibly within the power of the company when viewed from outside.<sup>54</sup> However, as corporate governance best practice has developed over the past 15 years the inside/outside boundary has become less clear. At the heart of good corporate governance under the Combined Code is the idea of systems that can provide control and monitoring of directors who might otherwise abuse or misuse their considerable power. However, a major tool employed by these systems is non-executive directors both individually and in governance committees such as the audit, nomination and remuneration committees. The Higgs Report was on the one hand a ringing endorsement of the unitary board, but on the other hand was a report based on the idea of the very special and independent governance roles to be played by non-executive directors. In the unitary board the directors are equal corporate insiders, but the governance role given to non-executive directors requires them to be independent and in this role they are sometimes called “outside directors”.<sup>55</sup> References to outside directors are mostly to be found in a US context. For instance, following the Sarbanes-Oxley Act 2002 Backer stated: “The public corporation has become an entity under surveillance by gatekeepers (outside directors, lawyers and auditors) and government” and “outside directors are meant to be part of this contingent of outside monitors”<sup>56</sup>

A third fuzzy boundary concerns the company’s employees. For some legal purposes the employees are deeply embedded inside the company. Employment law certainly imposes stronger duties of care and liabilities in relation to employees as opposed to independent contractors and vicarious liability in tort holds the company liable for many acts done by employees. However, in relation to corporate criminal responsibility the issue of where a corporate culture stops and a corporate sub-culture begins has not yet been tested in Australian or UK law. An organisation may have not only an overall culture but also sub-cultures at work within it. A functionalist view of organisational culture suggests that culture is something that can be chosen and shaped by management. An interpretive view of organisational culture suggests that culture is something not under management’s control. The idea that senior management can know and influence corporate culture is implicit in the proposition that a company should be held responsible for its culture. There remains the issue of how far a company should be held responsible for its sub-cultures. In the Australian context, Baxt has suggested that the requisite criminality could be attributed to a company as a whole “where one mutinous branch or subdivision was in the practice of engaging in unlawful conduct in defiance of corporate policy.”<sup>57</sup> The explanatory notes to the UK Bill state that it

---

<sup>54</sup> (1875) LR 7 HL 869

<sup>55</sup> A. Belcher “The Unitary Board: Fact or Fiction?” *Corporate Ownership and Control*, 2003, 1, (1), 139-148.

<sup>56</sup> Larry Cata Backer “Corporate Surveillance after Sarbanes-Oxley” *Company Lawyer*, 2005, 26(1), 3-9, 6.

<sup>57</sup> R Baxt, *Ascribing Civil and Criminal Liability for Company Employees and Directors — Who Carries the Corporate Can?* (Paper presented at Penalties; Policy Principles & Practice & Government Regulation, Sydney, 9 June 2001), 4. – cited in ALRC 95.

“ . . . attributes liability to the organisation only for failures in the way on organisation’s senior managers managed or organised an activity. This is intended to focus the offence on the overall way in which an activity was being managed or organised by an organisation and to exclude more localised or junior management failings as a basis for liability (although these might provide evidence of management failings at more senior levels)”<sup>58</sup>

It is submitted that the wording of the UK Bill leaves it open for a prosecutor to argue that a problem sub-culture in itself provides evidence of the requisite senior management failure.

A final boundary issue that has so far commanded little attention is the individual/collective boundary in decision-making at board level. Higgs’ first recommendation is that a description of the role of the board should be incorporated into the UK’s Combined Code. Higgs states:

“The board is collectively responsible for promoting the success of the company by leading and directing the company’s affairs.”<sup>59</sup>

A key question is how the UK law recognises the collegiate nature of the board and its collective responsibility. However, this issue has been mentioned very rarely by the courts. In *Re Westmid Packing Services Ltd, Secretary of State for Trade and Industry v Griffiths*<sup>60</sup> the Court of Appeal accepted the following:

“ . . . The collegiate or collective responsibility of the board of directors of a company is of fundamental importance to corporate governance under English company law. That collegiate or collective responsibility must however be based on individual responsibility. Each individual director owes duties to the company to inform himself about its affairs and to join with his co-directors in supervising and controlling them. . . . A board of directors must not permit one individual to dominate them and use them as Mr Griffiths plainly did in this case.”<sup>61</sup>

Boards reporting compliance with the Combined Code of Best Practice should have drawn up a list of matters that they reserve to themselves. This list may not itself define the extent of a board’s collective responsibility as there may be a gap between the matters which a board should, in the view of a court, reserve to itself and the matters it does so reserve. Higgs recommended that individual boards should publish in the annual report a statement describing how the board operates and that this should include a high level statement of which decisions are taken by the board and which are delegated to management.<sup>62</sup> Overall it can be concluded that collegiate

---

<sup>58</sup> Corporate Manslaughter and Corporate Homicide Bill, Explanatory notes 2006, para.15

<sup>59</sup> Higgs, 2003, summary of recommendations.

<sup>60</sup> [1998] 2 BCLC 646

<sup>61</sup> *ibid.*, at 653

<sup>62</sup> Higgs, 2003, para.4.8

responsibilities in the boardroom is an area that has not yet been fully worked through in the UK courts.

### **Boundaries and Groups**

The final boundary issue that is explained in this article is in company law a more fundamental one, namely the boundary of the company in the context of corporate groups. Before moving on to the major legal issue of lifting the veil of incorporation, it is worth noting that Combined Code already sets out corporate governance best practice in relation to risk management in the language of the group rather than the individual company:

“The directors should at least annually conduct a review of the effectiveness of the *group’s* system of internal control and should report to shareholders that they have done so. The review should cover all controls, including financial, operational and compliance controls and risk management.”<sup>63</sup>

Lifting the veil has been called the most uncertain part of company law. It is an area of the law that has been developing in the US, so much so that there are calls for a halt to its expansion.<sup>64</sup> Despite an overall lack of success in recent UK attempts to lift the veil it is an issue that is alive and continues to be debated.<sup>65</sup> The analysis in this article is brief as much of it is familiar ground to company lawyers and is framed around a set of tests applied by UK courts in deciding whether to lift the veil: justice requires it; sufficient control of one company by another; a sham company; and impropriety.

### ***Justice Requires It***

This test can be glimpsed in the decision in *DHN Food Distributors and Others v London Borough of Tower Hamlets*.<sup>66</sup> This case involved three companies forming a group with the parent company wholly owning two subsidiaries. DHN, the parent company, owned the business; a subsidiary, Bronze, owned the land; and another subsidiary, Transport, owned the vehicles. The issue to be decided was whether business disturbance compensation was payable when the land owned by bronze was the subject of a compulsory purchase order. Claims for business disturbance compensation require the claimant to have an interest in the land being purchased under the compulsory purchase order. Introducing the case Lord M.R. Denning said; “. . . one group three companies. For the moment I will speak of it as ‘the firm’”.<sup>67</sup> Thus, at the outset there was a willingness to look at the group as a whole. But:

“If each member of the group is regarded as a company in isolation, nobody at all could have claimed compensation *in a*

---

<sup>63</sup> Combined Code, internal control provision (emphasis added)

<sup>64</sup> S.M. Bainbridge “Abolishing LLC Veil Piercing” *University of Illinois Law Review*, 2005, (1), 77-106; B. Sahni, “The Interpretation of the Corporate Personality of Transnational Corporations” *Widener Law Journal* 2005, 15, (1), 1-45.

<sup>65</sup> M. Moore “‘A Temple built on faulty foundations’: Piercing the corporate veil and the legacy of *Salomon v Salomon*”, *Journal of Business Law*, 2006, Mar, 180-203.

<sup>66</sup> [1976]3A11E.R. 462.

<sup>67</sup> *ibid.*, 464.

*case which plainly calls for it. Bronze would have had the land but no business to disturb; DHN would have had the business but no interest in the land.*<sup>68</sup>

The claim succeeded partly on the basis that there was a need to look at the realities of the situation because the technical provisions produced injustice.<sup>69</sup> However, Goff L.J. made it clear in his judgment that this would not in itself be sufficient reason for the court to lift the veil.<sup>70</sup> The idea of using the “justice requires it” test was taken forward in *Creasey v Breachwood Motors Ltd*:

“The power of the court to lift the corporate veil exists. The problem for a judge of first instance is to decide whether the particular case before the court is one in which that power should be exercised, recognising that this is a strong power which can be exercised to achieve justice where its exercise is necessary for that purpose, but which, misused, would be likely to cause not inconsiderable injustice.”<sup>71</sup>

However, this case that was overruled in *Ord v Belhaven Pubs Ltd*<sup>72</sup> where, on appeal, the court refused to lift the veil because no impropriety was alleged and because:

“There is no facade that was adopted at any stage; there was not concealment of the true facts. . . . it was just the ordinary trading of a group of companies under circumstances where, . . . the company is in law entitled to organise the group's affairs in the manner that it does; and to expect that the court should apply the principles of *Salomon v Salomon* in the ordinary way.”<sup>73</sup>

It follows that the veil cannot now be lifted simply because justice requires it.

### ***Control***

Another factor in the DHN decision to lift the veil was the level of control present. As already indicated, in DHN the two subsidiaries were both wholly owned and had no separate business operations whatsoever.<sup>74</sup> This was interpreted in later cases as a need to establish control. The result was that DHN appeared at first to free the courts to look at the realities including the level of ownership and control, in a group situation, but it was later distinguished on the grounds of control in both *Woolfson v Strathclyde*

<sup>68</sup> *Per Shaw L.J., ibid., 473* (emphasis added).

<sup>69</sup> For instance: “They are left behind on the quay because of the technical provisions of our company law”, *per Lord Denning M.R., ibid. 466*; “. . . this is a case in which one is entitled to look at the realities of the situation”, *per Goff L.J., ibid., 468*; and the words of Shaw L.J., *ibid., 473* given in the text above.

<sup>70</sup> *ibid., 468*, this is the judgment which has been most approved in the later cases.

<sup>71</sup> [1992] B.C.C. 638 at 647.

<sup>72</sup> [1998] B.C.C. 607 at 615.

<sup>73</sup> *ibid.*

<sup>74</sup> [1976]3A11 E.R. 462 at 468.

Regional Council<sup>75</sup> and National Dock Labour Board v Pinn & Wheeler Ltd and others.<sup>76</sup> In National Dock Labour Board it was held that:

“ . . . the measure of control and ownership by that company of the other two was in analysis tighter than that apparent in the *Woolfson* case. But by the same token in my judgment the position did not approach that set out in *DHN*.”<sup>77</sup>

If the facts in *DHN* are used as the measure of the ownership and control which must be in place before the veil can be lifted it will be a rare occurrence indeed.

### ***Sham Company***

In *Trustor AB v Smallbone* (No.4)<sup>78</sup> assets were transferred by a managing director from the company he directed and worked for to a sham company that had only nominee directors and was controlled by the managing director. Transfers were in breach of the director’s fiduciary duty. It was held that the corporate veil would be pierced so as to treat receipts by the sham company as receipts of the managing director. This decision follows on from the much older authority of *Guilford Motor Co v Horne*.<sup>79</sup> The courts can be seen refusing to lift the veil in the absence of a sham or façade, for instance in *Brookes v Borough Care Services*<sup>80</sup> a case where the court was asked to lift the veil to overcome the statutory limitations of the Transfer of Undertakings (Protection of Employment) Regulations 1981. They can also be seen lifting the veil where there is a sham, for instance in *Buckinghamshire CC v Briar*<sup>81</sup> a case concerning liability for clean up costs on land where it was held that the corporate veil would be lifted to make B liable when B had transferred the land to a subsidiary, L, and then on to another company, D that had no genuine officers and was a sham. These facts were concealed from the Land Registry and the transfer to D was also held to constitute a fraud on the Land Registry. The criteria for piercing the corporate veil as per *Trustor AB v Smallbone* were therefore satisfied.

### ***Impropriety***

An important case on liabilities within groups is *Adams v Cape Industries plc*.<sup>82</sup> In order for the plaintiffs to gain access to the assets of the UK company, Cape Industries, it was necessary to show that it was either present within the US or that it had submitted to the jurisdiction there. If the veil of

---

<sup>75</sup> (1978) 38 P. & C.R. 521

<sup>76</sup> [1989] B.C.L.C. 647.

<sup>77</sup> *National Dock Labour Board, op.cit.*, 650.

<sup>78</sup> [2001] 1 W.L.R. 1177 [2001] 3 All E.R. 987

<sup>79</sup> [1933] Ch 935.

<sup>80</sup> [1998] I.C.R. 1198 [1998] I.R.L.R. 636

<sup>81</sup> [2002] EWHC 2821 [2003] Env. L.R. 25.

<sup>82</sup> [1990] Ch. 433 [1990] 2 W.L.R. 657 [1991] 1 All E.R. 929. This case considered a variety of approaches that may have resulted in Cape being present in the US – including the “single economic unit argument and the agency argument. At 822 the case also makes reference to contractual or statutory interpretation as a way of reaching the parent’s assets. These two approaches can be seen in *Ringway Roadmarking v Adbruf Ltd* [1998] 2 B.C.L.C. 625 and *The Epyo Agnic* [1988] 1 W.L.R. 1090 respectively.

incorporation could be lifted, the group as a whole could be seen as present in the US in the shape of a subsidiary company. If the corporate veil remained in place, the subsidiary would be seen as present in the US, but not the UK parent. The decisions in *Adams v Cape Industries plc* and *Trustor AB v Smallbone* were most recently considered in *Raja v Van Hoogstraten*:

“A narrow reading of . . . *Adams v Cape Industries plc* ... suggested that the corporate veil would only be lifted in circumstances in which the corporate structure had been established for the purpose of avoiding a known and existing, or confidently predicted liability. . . . However, the dividing line could not be so clearly drawn when the corporate structure had been designed for the purpose of avoiding future liabilities. It was possible that a dishonestly constructed corporate arrangement designed to conceal both the true nature of assets and the true beneficiary of the exploitation of those assets, and furthermore to minimise the liability of that individual, could . . . give rise to a successful application to lift the corporate veil.”<sup>83</sup>

Also, the court held that based on *Trustor AB v Smallbone*, the essential element was impropriety.

In the first part of this article the main thrust of the argument was that law, economics and management can be read together in a coherent way. It is submitted that this reading remains conceptually sound, but that the legal problems encountered in the “lifting of the veil” add in a more major way to the fuzzy boundary issues described in section 3 above. The direct conflict between the principle that a company is a separate legal entity and the reality of the corporate group as an economic entity is a seemingly intractable problem for the law. From the judgment in *Ord v Belhaven Pubs Ltd* there is the statement that in the ordinary trading a group of companies is “in law entitled to organise the group's affairs in the manner that it does; and to expect that the court should apply the principles of *Salomon v Salomon* in the ordinary way.”<sup>84</sup> This opens the way for a group to organise, for instance, its most uncertain activities within a subsidiary thus obtaining the protection of the legal, corporate boundary, so long as it achieves this structure by operating within the definition of “ordinary trading”. This idea could be taken forward in the future as a the basis for a hypothesis that is empirically testable.

### Conclusion

Overall, this article had broad and ambitious aims in relation to the theoretical background to corporate capabilities, decision-making and responsibility. It brings together three theoretical strands from corporate legal theory, economic theory and management thinking. It also highlights three key concepts. First, the recognition in the Corporate Manslaughter and Corporate Homicide Bill of the ingredients of corporate culture is important. The Bill acknowledges their existence and recognises them as legitimate

---

<sup>83</sup> [2006] EWHC 2564.

<sup>84</sup> [1998] B.C.C. 607 at 615.

places to locate corporate criminal responsibility. Second, in relation to economic theory there is the explanation in Simon's employment model that under conditions of risk it can be rational to make contracts that give authority to another. Behind this is the need for a degree of trust to be present.<sup>85</sup> The third important concept is decision-making under conditions of true uncertainty. Directors are entrusted with decision-making in the company. For some of that decision-making a risk-based approach is appropriate, but for decision-making under conditions of true uncertainty a risk-based approach will not be appropriate. Finally, the idea that companies are responsible corporate culture can be linked to directors' decision-making about the company's internal structures.

It is submitted that these ideas do work if read together. Issues relating to Fuzzy boundaries, including the major issues of legal liabilities in groups and legal responsibilities and liabilities for collective decision-making, have been identified, but remain significant problems.

---

<sup>85</sup> For an description of calculative trust (the trust that comes from considering probabilities and expectations) and behavioural trust (the trust that cannot be calculated and is established through human interaction) see A. Belcher "Trust in the Boardroom" (2006) paper presented at the SLS conference, University of Keele, September. Note also that in employment the duty to maintain mutual trust and confidence is a relatively new, and still developing, duty.

## THE CHARACTER OF THE ORIENTAL DESPOT IN CLASSICAL JURISPRUDENCE

*Piyel Haldar, School of Law, Birkbeck College, University of  
London\**

### Introduction

Banal it may seem, but the crucial problem that colours western jurisprudence regarding the types of behaviour that ought to be permitted and those that ought to be subject to censure actually gives rise to much more interesting issues than those of morality. The proposition pursued in this article is that a close reading of Plato's foundational texts that give expression to these jurisprudential concerns suggests a much more complex contribution to Western notions of statecraft and despotic regimes. Jurisprudence in this sense means more than the care or guardianship of the law. Rather, taken at the level of broader political and legal theory, classical jurisprudence places under scrutiny the care of the state and the emotional welfare of its subjects. That is to say that what an ideal state permits of its subjects must be such that each individual subject should be able to say 'I am happy'. And collective happiness, in turn, strengthens both the social bonds within the state and the very nature of that polity itself. As such, certain *pleasures* must be allowed. The current debates surrounding casinos, late night licences for pubs and so forth are determined not simply by economic factors. They are also embedded in a fine jurisprudential tradition that has regard for 'pleasure' as a central component of all strong societies.

A fine tradition it may be, and it is tempting (even incumbent) to embrace such thinking 'to the max'. But the component of pleasure brings about a further and difficult concomitant problem regarding the types of behaviour that exceeds pleasure. For the purposes of this article this zone of what lies beyond pleasure will be labeled 'excessive enjoyment'. It is here, in attending to these differences between mere pleasure and excess enjoyment, that juristic wisdom places under interrogation not simply different types of behaviour, but the character and reputation of different systems of interdiction and styles of government. For Plato, 'excessive enjoyment' is not that which is indulged in, or permitted, by liberal states. Far otherwise, it is seen to be a characteristic fault of the most fiercely despotic states. What will be argued is that Plato inaugurates a structural link between despotic regimes and excess enjoyment. Moreover, these regimes, for Plato and thus for the whole of Western legal and political theory, are fantasised as being located in the East. The term 'fantasy' is intentionally chosen and, as shall be explained, points to the limits of legal language; but the word should not blind us to the ineludible structure of this link between despotism and excess

---

\* P.haldar@bbk.ac.uk. I owe a debt of gratitude to Linda Mulcahey and Sally Wheeler. Thanks also to Shaun McVeigh and Lyndsay Farmer provided comments on a much earlier draft. This article forms an explanatory backdrop of sorts to a wider study of Oriental Excess that is to be published under the title of 'The Jurisdiction of the Lotus-Eaters' (2007).

enjoyment. The preliminary point to note, however, is that what emerges from Plato's jurisprudential motif of pleasure is nothing other than an influential and forcible strand of Orientalism. Put differently, Orientalism emerges as a specific question of legal doctrine.

The broad synoptic structure of the argument pursued in this article might be rendered as follows. First, the proposition that pleasure is a central component in the jurisprudence of state concerns will be expanded upon. Here, we will examine both the key texts of Plato and the manner in which this theory has informed a broad range of literature concerned with the examination of a particular, and seemingly innocent, aspect of social regulation. The second part of this article consequently examines the problem of excess enjoyment that inheres in Plato's theory of pleasure. It is here that we note the emergence of a strong link between excess enjoyment and Oriental non-legality. Again, it seems pertinent to examine the extent to which Plato's Orientalism structures a number of disparate elements of social thought and attitudes towards the East. By way of conclusion, this article proposes that a return to Plato's texts offers us a non-interdisciplinary account of the manner in which law is inherently and automatically already engaged with issues of Orientalism and colonialism.

### Plato's Doctrine of Pleasures

In book two of the *Laws*, Plato writes of the educational benefits of drinking parties which, he tells us, do not necessarily stimulate us into 'bacchic frenzies'. On the contrary, the ideal legislator has to permit among his people a degree of pleasure essential to their happiness. The art of enjoying oneself is essential to the moral salvation of society and pleasure ends up doing the work of law. Transgression is encouraged. For the Athenian, the primary goal of legislation should be to promote and enable self control which is basic to the management of friendship and larger social groupings. A degree of inebriation is valuable since resisting temptation when mildly drunk enables men to acquire the self control necessary for the moral well being of the soul and the community. Control trains and directs the soul towards an idea of the 'good that is beyond essence' (conceived in philosophical terms as *agathon*).<sup>1</sup> "The individuals attitude towards himself. . . and, the form of supremacy he maintained over himself were a contributing element to the well-being and good order of the city."<sup>2</sup>

An additional argument concerns the physical state of happiness. The animal 'man', he says, is born with essential and profound gymnastic energy; "born into the world completely mad: it bawls uncontrollably, and as soon as it can get on its feet it jumps with equal abandon."<sup>3</sup> When Dionysus presented the world with wine his intention was not to seek revenge by driving men insane, but to provide us with a medicinal cure. By drinking wine the body is reminded of its natural gymnastics and is incited to sing and dance! Drink awakens the natural rhythm and harmonies with which man was born. The

---

<sup>1</sup> The principle of *agathon* as 'the good beyond essence,' is discussed by Jean Luc Nancy, 'Gift, Desire, *Agathon*' in J. Librett tr. *Sense of the World*, (1988) p.50.

<sup>2</sup> Michel Foucault, *The Use of Pleasure; The History of Sexuality* volume 2 Robert Hurly tr. (1985) at p.70.

<sup>3</sup> Plato, *The Laws*, (1986) 2:672.

child and the drunk thus indulge in the same pleasure which might be described as the pleasure of self-discovery, self-control and prudence. The gymnastic torsions common to both is simply indicative of the process of getting to know ones own self. The body becomes its own object that must be known, appropriated, colonised.

The ability to master the correct forms of singing and dancing during these drinking parties not only leads to physical fitness (an essential feature of self control), but leads to a well developed sense of judgement through which the individual may distinguish between the merits and demerits of musical form or the rectitude of tradition. Furthermore, it aligns us with the harmonious forces of nature. Even in its cultic form, Dionysian energy educates, harmonises and cures. This ‘pharmaceutical’ side of Dionysius is given stronger expression by Euripides:

“His powers are manifold;  
But chiefly, as I hear, he gave to men the vine  
To cure their sorrows; and without wine, neither love  
Nor any pleasure would be left for us.”<sup>4</sup>

For Euripides, it should be noted, Dionysius helps man reconcile the two opposing sides to his nature. On the one side exists the rational and civil qualities that stabilize communities. On the other side lies *daimon* life; the life of spirit and instincts that liberates man from tedious responsibility. Both are essential qualities, both exist as ‘undeniable fact.’ The wages of failing to recognise this are high. The *Maenads*, those women possessed of the Bacchic spirit, become repulsive and bestial only when we ignore the life of pleasures, when we concentrate solely on the conventional, and when we assume the sovereignty of civility:

“Bulls, which one moment felt proud rage hot in their horns  
The next were thrown bodily to the ground, dragged down  
By hands of girls in thousands; and they stripped the flesh  
From the bodies faster than you could wink your royal eyes.”<sup>5</sup>

Such cultic considerations are not lost on Plato. Throughout the corpus of Plato’s work pleasures provide a theory and a practice of ethical conduct and an essential element of social order. The *Philebus*, for example, provides the most sustained philosophical engagement with the question of pleasure, by employing a dialectical method in order to synthesise pleasure and knowledge into the ingredients of a good life and a life of dignity. In the *Symposium*, the pleasures afforded by the drinking party sets the backdrop against which the discourse on friendship emerges. Pleasures are not, therefore, antithetical to the law.<sup>6</sup> Justice does not wrestle Eros into defeat and so, in this respect, it would be wrong to characterise law as being ‘dead from the waist down’. For Plato, law neither exists in a state in which

---

<sup>4</sup> Euripides, *The Bacchae*, (1986) lines 797-799

<sup>5</sup> Euripides, *The Bacchae*, lines 745-748.

<sup>6</sup> While this proposition constitutes an ethical theory of conduct it should not be confused with hedonism. Although. It should be noted that for Epicurus, pleasure must be guided by reason and prudence.

passions are absent (*apatheia*), nor in a state of indifference towards them (*adiaphora*). All that remains is for the nocturnal council to draw up category of approved acts (*kathekonta*).

Moreover, the treatment of pleasure as an essential social energy does not dry up even in invectives directed against hedonism. Cicero, for example, famously barks at the egoism inherent in the Epicurean pursuit of pleasures. Yet, even in his most morally vituperative work, *De Finibus*, he cannot help but recognise a fundamental relationship between justice and pleasure:

“[Affection] which, coming into existence immediately upon our birth, owing to the fact that children are loved by their parents and the family as a whole . . . gradually spreads to influence beyond the home, first by blood relations, then by connections through marriage, later by friendships, afterwards by the bonds of neighbourhood, then to fellow citizens and political allies and friends, and lastly by embracing the whole of the human race. This sentiment . . . is termed justice.”<sup>7</sup>

The role such pleasures continue to have in cultivating and regulating the subject’s relationships to himself, to others and to the general well-being of society, can be traced across the broad range of literature that deals with the place of pleasure and entertainment within modern society. Stephen Orgel’s examination of the importance of the spectacle during the English renaissance claims that the illusion of theatre had a specific impact on audiences by exemplifying the princely virtues of magnificence and munificence.<sup>8</sup> The pleasures associated with masques and balls expressed both power and the principle of magnanimity as a political virtue. These were images of the good to which participants and spectators should aspire. In terms of the project of colonialism (which, in fact, forms the background concern of this article) the range of pleasures attached to Imperial rule could also be noted. Riding, polo, pig sticking, hunting, shooting etc., were diversions that both constituted British social life in India and helped to vest the participants with authority and qualities of bravery, power, and heroism.<sup>9</sup> The importance of the Hill stations as a location where power and entertainment mixed should not be underestimated. These were cool summer retreats, restorative areas of leisure, which nevertheless, re-invented the idea of a colonial ruling class with all the attached privileges.

Such pleasures, however, are embedded even deeper into the social strata of existence, and the idea that they are essential to the governance of social order has been pursued most famously by Mikhael Bakhtin.<sup>10</sup> For Bakhtin,

---

<sup>7</sup> Cicero, *De Finibus*, (1999) 5:23.

<sup>8</sup> Stephen Orgel, *The Illusion of Power: Political Theatre in the English Renaissance*, (1991).

<sup>9</sup> There are of course a number of accounts. Among the more frequently referenced are Captain Thomas Williamson, *Oriental Field Sports being a Complete, Detailed and Accurate description of Wild Sports of the East* (1805); Charles Doyley, *The European in India*, (1813); R.V. Vernede (ed), *British Life in India* (1997). Charles Allen, *Plain Tales from the Raj* (1975). For more analytical accounts see, Denis Kincaid, *British Social Life in India 1608-1937* (1973); Dale Kennedy, *The Magic Mountains: Hill Stations and the British Raj* (1996).

<sup>10</sup> Mikhael Bakhtin, *Rabelais and His World* tr Helene Iswolsky (1993).

the carnival is a vestige of pre-modern urges which nevertheless survive modernizing programmes. Yet again, the carnival is not anti-thetical to the law. On the one hand, it provides a social safety-valve in order to release a build-up of tensions between those in authority and those subject to that authority. The carnival creates an illusion of freedom by permitting an enunciative platform from which to criticise or satirize wrong-headed authority. Thus, on the other hand, carnivals might simply propose an alternative social structure by calling for the re-ordering of wealth according to fairer principles of equity. The power of the quotidian to effect reform and their potential to reorganise the 'republic' for the better have been well analysed. Furthermore, these licensed festivities, that are always in danger of 'kicking-off', regenerate power and authority in order to re-legitimise them. Or, as Stallybrass and White argue, the energies of the carnival have become sublimated, turned into a spectacle providing "voyeuristic glimpses of a promiscuous loss of status and decorum which the bourgeoisie had had to deny as abhorrent in order to emerge as a distinct and 'proper' class."<sup>11</sup> In this sense, modern carnivals share with the more carnivalesque rituals of early modern Europe, the staging of a symbolic fight between desires and thought, between appetites and temperance. Such carnivals typically render extra-vulgar the desires associated with the lower body; belly, food, genitals, cod-pieces.<sup>12</sup>

We see similar ideas to those expressed above, behind the medieval office known as the 'King of Misrule', more tellingly known in Scotland as the 'Abbot of Unreason.' These mock dignitaries were appointed in all royal and mayoral courts, and, often, in houses of noblemen along with a retinue of officers and musicians. Their duties, which were to direct festivities and symbolically ritualised horse-play, derived from the ancient Roman saturnalia where public businesses, the law courts and the schools closed for the duration of the holiday. These festivities, encouraged and sanctioned in all rule based societies and communities, such as universities, schools, the inns of court and modern offices, provided more than freedom from restraint. These revelries should not be thought of merely as a release from the pressures of work. They were designed to the opposite effect in order to re-establish moral and social bonds and in order to give meaning to prohibitions and interdictions. Indeed, from an anthropological and somewhat trans-historical perspective, ritual licence makes obvious the human horror of nature and the carnality of birth. Rituals lend themselves to repetition. They give communities a sense of history. They thus mark a distance from animal life. What is celebrated is man's entry into a civilised, legislated and symbolic order in which he emerges as autonomous and independent from the filth of the bestial.

In addition to these legislative functions, the idea of a doctrine of pleasures has had more obvious impact on the numerous theories of capitalist economy. As Georges Bataille argues, while it may seem that pleasurable indulgences are useless and deprive the worker of his ability to participate in the production of labour, it nevertheless produces satisfaction and "this satisfaction in its collective form, determines the value of wealth, and thus

---

<sup>11</sup> Stallybrass and White, *The Politics and Poetics of Transgression*, (1986) at p.292.

<sup>12</sup> Edward Muir, *Ritual in Early Modern Europe*, (1997).

the nature of economy.”<sup>13</sup> Whatever the theory, the carnival and other licensed forms of pleasurable activity, survive as an authorised form of transgression with specific legislative and social functions and effects.

All in all, pleasure gathers together a number of activities that cohere social life so that at least one commentator (Huizinga) has designated man as *Homo Ludens*.<sup>14</sup> Aside from the anthropological connotations of this term, the collection of mischief makers, carnival characters and so forth are bona fide legal figures; they might be described as Law’s darlings. To be certain, such figures are deficient, they insult, provoke, fuss and bother, but, nevertheless, they possess a productive efficiency, accidentally discovering things, inventing fire, re-inventing reason, determining rules or provoking the most essential of decisions. Above all, like a proud parent overlooking his cheeky daughter, these forms of transgression are in fact nothing more than the emergence of a sometimes fiercely independent autonomous subject trying to forget her genealogy and do things for herself.

In this sense, the court jester, the office fool, or, indeed, the mischievous child belong to a group of institutional favourites in a tradition that dates back to Plato. In embodying specific pleasures, around which whole communities play, they become the very personification of the law. Indeed it is obvious that for Plato (or, at least to the Plato who wrote the *Laws* rather than the *Republic*), the moral and social benefits of pleasure are not made available simply through partying. The pleasure offered by a work of art, for example, has an effect on moral character since individuals are fixed by a desire to imitate the good represented in plastic forms. The pleasure of art is the pleasure of the virtuous. The artist becomes a law-giver, and as law-giver, must take pains to ensure that injustice is never portrayed as a means toward happiness. What binds the community spirit, establishes friendship, and trains good judgement, are not the positive forms of regulation, but those forms of almost innocent misconduct sanctioned and carefully managed by the law. Inculcating prudence and self control, as the primary aim of legislation, is achieved neither through repression nor censorship, but through the cultivation of moderate indulgence and harmless pleasures. The specific pleasures to be enjoyed when, temporarily, the law *seems* to suspend itself is what enables a sense of autonomy and self control.<sup>15</sup>

### **The Despotism of False and Unlimited Pleasures**

Nevertheless, for Plato, the danger of exceeding the normative limits of pleasure persists, and such over-indulgence is in danger of contributing to the demise of social stability. Plato’s sense of enjoyment is one which by necessity has to be limited and a moderate, if not, austere economy of pleasures soon emerges. If the ideal citizen has to exercise self control (via the use of pleasures), the question arises as to what constitutes the normative zone and what constitutes an excess. He concludes book two of the *Laws* by warning future legislators against treating drink as “recreation pure and simple [where] anybody who wants to can go drinking and please himself

---

<sup>13</sup> Georges Bataille, *The Accursed Share*, vol. I, (1991) at p.119.

<sup>14</sup> Johan Huizinga, *Homo Ludens* (1970) at p.198.

<sup>15</sup> Slavoj Zizek *The Metastases of Enjoyment*, (1994) p.55.

when and with whom he does it, and do whatever he likes at the same time.”<sup>16</sup> Drinking must be directed towards social justice and the happiness of all. It cannot become an unfettered and useless means of recreation.

Similarly, in the *Republic*, Socrates warns his interlocutors that the use of pleasure has to be moderated:

“The drone-type will, as we said, be swayed by a mass of such unnecessary pleasures and desires, gets a taste of the drones’ honey and gets into brutal and dangerous company, where he can be provided with every variety and refinement of pleasure.”<sup>17</sup>

On the one hand, excess enjoyment is both physically and psychologically harmful; “pleasures that exceed by their force and intensity [drive] foolish people to near madness and to shrieks of frenzy.”<sup>18</sup> A fierce bestial nature takes over when the reasonable part of us is asleep and relaxed, when we are completely unaware of sense and shame. A man possessed by animal nature, for example, does not “shrink from attempting intercourse (as it supposes) with a mother or anyone else, man, beast or God, or from murder or eating forbidden fruit.”<sup>19</sup> On the other hand, therefore, what Plato finds so offensive about extreme hedonism is not simply the manner in which it corrupts natural bodies, but the manner in which it distances human action from the sphere of reality. Thus, in the *Philebus* the enjoyment of a presumed state of affairs are deemed to be profoundly misjudged since such forms of enjoyment are illusory and directed at appearances and deceptions. They are described as *phantasmata*, and properly belong to the Platonic class of the unlimited and to the series of simulacra; those bad copies that falsely claim affiliation to the ideal. As we shall see, the paradigm figure who indulges in these phantasmatic pleasures is that of the tyrant or despot: “The philosopher’s pleasures are the most real of all pleasures: all others are to some extent mixed with pain and therefore illusory, particularly the pleasures of the tyrant.”<sup>20</sup>

A distinction has therefore to be drawn between *pleasure* on the one hand and *excess enjoyment* on the other. Where pleasure is essential to the composition of the legal subject (who is self aware, able to control himself, able to conduct himself in social gatherings, and able to live in friendship with others), excess enjoyment is simply and profoundly useless. Where one is innocent and moderate, the other is dangerous and extreme. Where one performs a law-like function, the other exceeds the law. Thus, the democratic character is one who “restrains himself from those [excess enjoyments] that lead to expense rather than profit.”<sup>21</sup> And, in the more

---

<sup>16</sup> Plato *The Laws*, *op. cit.*, n.3 at 2: 674.

<sup>17</sup> Plato, *The Republic*, (1987) at 9:8:7, paras.559 d-e.

<sup>18</sup> Plato *Philebus*, (1993) at 45d-e. Also, “The desire for a more varied and luxurious diet is . . . physically harmful and psychologically damaging to intelligence and self-discipline.” *The Republic*, *op. cit.*, n.17 at 9:8:7, para.559b.

<sup>19</sup> *The Republic*, *op. cit.*, n.17 at 9:8:9, para.571 c.

<sup>20</sup> *The Republic*, *op. cit.*, n.17 at 9:8:9, para.583.

<sup>21</sup> *The Republic*, *op. cit.*, n.17 at 9:8:7, para.558 d. In the *Philebus*, *op. cit.*, n.18, Plato distinguishes between pleasures which are ‘unmixed’ or which have not

philosophical terms set out in *Philebus*, pleasure must always be in the process of becoming, “it comes to be for the sake of some being.” Excess enjoyment, on the other hand, is absurd since it is pleasure that exists only for its own sake.<sup>22</sup> The point to stress, is that the type of enjoyment we are concerned with here is not simply an aberrant criminal energy that can be put right. It is not the notion of civic vices as the opposite of civic virtues. Rather, these are phantasms and deliriums that haunt Plato from beyond any comprehension.

Even the Epicureans who admitted to the primordially of particle chaos as the condition of all life, and celebrated friction as the cause of fires and galaxies, recognised the dangers of excess. For Lucretius, a man satiated with sex would be thwarted in love. The violence of excessive passion “destroys the normal gentleness of what we find pleasing; it destroys what is ordinary, regular and domestic.”<sup>23</sup> By extending the bodily sensations beyond the confines of sanctioned pleasure, excess enjoyment explodes and disrupts the norms characteristic of liberalism. Such behaviour marks out an illicit domain where everything is in excess, where there is too much excitement and stimulation, where the superabundant vitality of individuals marks the collapse of society.<sup>24</sup> And, its illusory quality threatens identity.

The prohibition of excessive enjoyment is, therefore, not simply one which is designed to maintain a healthy body (whether the body natural or the body politic). It is necessary for the very faith and respect required for laws to work in the first place. Since Plato, institutional life and the legislative state, cannot help but rest on this fundamental interdiction. The same is implied in Freud’s analysis of the myth of totem and taboo, which he uses to show the emergence of guilt, “of social organization, of moral restrictions and of religion.”<sup>25</sup> The murderous behaviour of the ‘primal horde’ is a reaction against what they perceive to be the excessive polygamous enjoyments of the *urvater*. It is only once prohibitions are installed to prevent the horde gaining access to the wives of the murdered father and therefore to their own enjoyment, that order re-establishes itself. The respect shown for the law is subsequently played out in annual rituals honouring the dead father (thus, in Freudian terms, phantasies of what are forbidden are essential in positioning a focal point around which identity is established).

A further theme has yet to emerge and, in this sense, Freud’s assertion that the *urvater* is a tyrannical and violent father figure alerts us to a key factor in the interdictions against excess. For Plato, it is not merely the citizenry who should be forbidden a life of excessive indulgence. It is more important, in fact, that government officials, political leaders, legislators and monarchs should abstain from such behaviour. Moderation is associated with justice. And so, since Plato, the idea of excessive enjoyment has become inextricably

---

been preceded by a sense of craving, and those which are mixed, or which satisfy the appetite.

<sup>22</sup> Plato *Philebus*, *op. cit.*, n.18 at 52e.

<sup>23</sup> Lucretius, *De Rerum Natura*, (1995) bk V.

<sup>24</sup> “enjoyment as such emerges only in this surplus, because it is constitutively an excess. If we subtract surplus we lose enjoyment itself.” Slavoj Žižek, *Sublime Object of Ideology* (1989), at p.52.

<sup>25</sup> Sigmund Freud, ‘Totem and Taboo,’ in *The Origins of Religion* (1990), p.203.

linked to the mischief of unqualified authority and to the political concepts of tyranny and despotism. For Plato, the tyrannical character is one who is superficially similar to the criminal type insofar as he “combines the characteristics of drunkenness, lust and madness. Life is a round of extravagant feasts and orgies”<sup>26</sup> But the madness and criminality are merely subsidiary passions (‘an extra crop of desires’) that he has to employ in order to “plunder from all available sources [or else] his life will be torment and agony.”<sup>27</sup> The tyrant is in fact subject to a greater force, and he has to feed his ‘master passion’ with all the pleasures of a dissolute life.

It ought to be noted then that for Plato, the tyrant is neither one who breaks nor rises above the law, but one who obeys another law. He may be an unconstitutional sovereign, or an absolute power unlimited by the law, but he is nevertheless one who has surrendered himself to a different supremacy. Tyranny cannot be judged according to specific acts. The extreme enjoyment being described here is not, as some classical scholars would claim, an aberrant erotic energy that can be re-educated towards civic virtue.<sup>28</sup> Rather, it is phantasmatic enjoyment itself that is tyrannical and that characterizes tyranny and that compels an individual to tyrannize others. This as a ‘master passion’ is therefore another more extreme version of the law-like function performed by pleasure. “His [master passion] tyrannizes over him, a despot without restraint or law, and drives him (as a tyrant drives a state) into any venture that will profit itself.”<sup>29</sup> To indulge in extreme enjoyment means to be possessed by another law of a completely different (xeno)genesis, and this in itself puts into question the very idea of law.

The theme of self-control inculcated through Plato’s recommended drinking parties, is therefore, paradoxically characterised as a freedom. The practice of innocent pleasures helps save man from acting in servitude to *aphrodisia* and the more excessive forms of desire. In mastering the base appetites, the citizen avoids being tyrannised by excess desires and the leader avoids the exercise of tyrannical government. As Foucault puts it; “in order not to be excessive, not to do violence, in order to avoid the trap of tyrannical authority over others, the exercise of political power required, as its own, principles of internal regulation, power over oneself.”<sup>30</sup> A state of ‘ethical negativity’ exists in being passive to the base and dangerous appetites.

The argument may be pursued upon more psychoanalytical grounds. If institutions inscribe pleasures as a means of self-regulation, they do so at the level of the unconscious. As the French Legal Theorist, Pierre Legendre argues, our desires are determined by our subjection to the law. Consequently, studies of transgression are to be located “at the level of the relationship between enjoyment and law.”<sup>31</sup> Transgression, art, the poetics of rebellion, non-violent protest and the efficacy of the subaltern voice – all

---

<sup>26</sup> Plato *The Laws*, *op. cit.*, n.3. 2: 573 d-e).

<sup>27</sup> Plato *The Laws*, *op. cit.*, n.3. 2: 573 d-e).

<sup>28</sup> See for example, Waller R. Newell, *Ruling Passions; The Erotics of Statecraft in Platonic Political Philosophy* (2000). Leo Strauss, *On Tyranny* (1968).

<sup>29</sup> Plato, *The Laws*, *op. cit.*, n.3 at 2: 575 a.

<sup>30</sup> Michel Foucault *op. cit.*, n.2 at p.81.

<sup>31</sup> Pierre Legendre in Peter Goodrich ed. *Law and the Unconscious: A Legendre Reader*, P.Goodrich, A. Pottage, and A. Schutz tr. (1997) at p.113.

these forms of defiance are conditioned by law and contained within a pre-established zone of pleasure. It is unclear, from reading Legendre what price there is to pay for exceeding this limit of pleasure. At times, he suggests there is no possibility of excess. Elsewhere any excess release of energy is “paid for dearly in the currency of guilt.”<sup>32</sup> And yet, further on, he claims what lies beyond the zone is madness; “a basic maxim of the western tradition suggests that the enemies of the faith are both mad and delirious (*dementes vesanosque*).”<sup>33</sup>

### **Oriental Jurisdictions**

What is clear, however, is that as a consequence of a properly instituted legal subjectivity, the sensation of extreme enjoyment is unimaginable and, as we have already noted, illusory. Or, to use Plato’s own terminology, extreme enjoyment is *phantasmatic*. One cannot think about the idea of enjoyment that disrupts conventions without succumbing to those conventions circumscribed by language and the law. It is beyond experience, language and law and this is precisely why it is phantasmatic and beyond the ‘correct’ apprehension of reality. Indeed, an excess of enjoyment is what we can only imagine and fantasise to be had by others. The importance of this last observation is that enjoyment is something that happens to others elsewhere than at home. In Plato’s case, those others turn out to be the Persians. In book three of the *Laws*, Plato has the Athenian characterise the Persian monarchs as tyrannical since they lived a riot of debauchery and unbridled pleasure.<sup>34</sup> While they granted liberties to their subjects, allowed free speech, and listened to opinion on policy matters, the monarchs never considered the benefits of correct education and handed their children over to a “womanish education” conducted by the royal harem. This education was one of extreme luxury and unsuitable in acquiring traditional Persian skills required to produce hardy shepherds and soldiers. So that, when these children succeeded to the throne, driven out of their senses on liquor and lacking self-control, all they knew was how to live a life of unrestrained debauchery. It was through a lack of education in the delicate art of pleasure and abstinence, that the Persian monarchy was to fall from grace:

“So, when [his children] succeeded to their inheritance on the death of [King] Cyrus, they were living in a riot of unrestrained debauchery. First, unwilling to tolerate an equal, one of them killed the other; next, he himself, driven out of his senses by liquor and lack of self control, was deprived of his dominions by the Medes and the Eunuch.”<sup>35</sup>

In this respect, it is interesting to note how the Persian monarchy continued to be demonised by the early Christian church, in terms of excessive enjoyment. The early church fathers, Tertullian and Minucius Felix, both express their shock that “the Persians consort with their mothers..[and laugh]

---

<sup>32</sup> Pierre Legendre, *op. cit.*, n.31 at p.127.

<sup>33</sup> Pierre Legendre, *op. cit.*, n.31 at p.127.

<sup>34</sup> Plato, *The Laws*, *op. cit.*, n.3, 3:5.

<sup>35</sup> Plato, *The Laws*, *op. cit.*, n.3, 3:5: 695.

at the tragedy of *Oedipus*.<sup>36</sup> It is around such fantasies that classical Orientalism revolves.

The theme of de-territorializing and locating excess enjoyment elsewhere is one that is repeated again and again throughout the history of what might be termed ‘minor jurisprudential’ works on pleasure and enjoyment. What Freud’s myth of Totem and Taboo shares with Plato’s doctrine is the idea that such enjoyments belong to other communities, and other, usually Eastern, cultures. It is always primitive, or foreign communities such as Persia which mark the domain of illicit enjoyment. On the surface of it, this observation may be contradicted by pointing out that in *the Republic* even democratic governments, in their thirst for liberty, may produce prohibited and anti-social behaviour since the democratic character is one for whom all types of pleasures hold equal value:

“If anyone tells him that some pleasures, because they spring from good desires, are to be encouraged and approved, and others, springing from evil desires, to be disciplined and repressed, he. . . says all pleasures are equal and should have equal rights. . . one day it’s wine, women and song, the next water to drink and a strict diet; one day it’s hard physical training, the next indolence and careless ease.”<sup>37</sup>

However, (in spite of Plato’s famously anti-democratic sentiments) the democratic character is not yet on a par with the licentious and libidinous tyrant; “when he was still democratically minded and under the influence of the laws and his father, [this swarm of pleasures] only appeared in his dreams.”<sup>38</sup> His vice is corrupted by virtue. To be purely licentious, he has first to mix with brutal and dangerous company and *then to leave home*. He has to cut the paternal tie, and become a foreigner. Such characters, Plato emphasises, “will emigrate and take service with a tyrant elsewhere,”<sup>39</sup> and “the young man of unnecessary pleasure goes off to live with the lotos-eaters.”<sup>40</sup> The accusation of an excessive life lived elsewhere is here given the sanction of myth. The lotos-eaters, it ought to be remembered, feature briefly in Homer’s *Odyssey*. Living in “state of dreamy forgetfulness and luxurious ease” they enticed visitors to their Island. Having fed on the honey-sweet’ *Lotos* plant, even Odysseus’s men, had cause to forget their friends and homes, preferring “to dwell for ever with the lotos-eating me, feeding upon lotos and letting fade from their minds all memory of home.”<sup>41</sup> The fantasy of excess has a location but only on what Tennyson in his poetic adaptation of the myth of the Lotos-eaters calls the ‘alien shores’ where ‘slumber is more sweet than toil.’<sup>42</sup>

At the risk of merely compiling a dossier on this particular aspect of classical Orientalism, it need only be noted how this theme of the ‘location-elsewhere’

---

<sup>36</sup> Tertullian, *Apologeticus de Spectaculis*, (1984) 9: 16. See also Minucius Felix, *Octavius*, 31.3 (1984).

<sup>37</sup> Plato, *The Republic*, *op. cit.*, n.17 at 9: 8: 561 c.

<sup>38</sup> Plato, *The Republic*, *op. cit.*, n.17 at 9: 9: 574 e.

<sup>39</sup> Plato, *The Republic*, *op. cit.*, n.17 at 9: 9: 575 b.

<sup>40</sup> Plato, *The Republic*, *op. cit.*, n.17 at 9: 8: 560 b.

<sup>41</sup> Homer, *The Odyssey*, T.E. Lawrence tr. 1991) Bk 9.

<sup>42</sup> Alfred, Lord Tennyson, ‘The Lotos-Eaters’ in *Poems* (1947) pp.45-50.

of enjoyment is repeated in, and structures, the works of both Pliny and Quintilian. As George Didi-Huberman has shown, for Pliny, unproductive expenditure, excess or transgression is linked to the aesthetic concept of *luxuria*. *Luxuria* threatens “the immemorial quality of an autochthonous juridical world but also the theoretical model of a genealogically conceived resemblance.”<sup>43</sup> The origins of this heinous threat to the juridical and familial order lies, again, somewhere in Asia. It was “the conquest of Asia that first introduced luxury into Italy.”<sup>44</sup> A similar contra-distinction between acceptable and unacceptable uses of ornament, or embellishment, in forensic speech is made by Quintilian. Asian rhetoric is exuberant, frivolous, degraded effeminate and excessive. It exceeds the pleasures afforded by the beauty of a properly measured rhetoric. By overindulging in the use of ornament, Asian rhetoric lacks any function or cognitive value. Attic rhetoric, on the other hand, is virile and noble.<sup>45</sup>

To suggest that there is a strand of juridical or philosophical thought that seeks to establish excess enjoyment as belonging elsewhere, and as having no place here at home, may seem a little trite. Is this after all, not the same distinction that distinguishes between sinful heathens and Christians, between savages and those who are more civilized? Immorality, or sin, however problematic as concepts, belong to the philosophically, religious and criminologically defined category of ‘experience’. These are instances of behaviour that lend themselves, at least in theory, to empirical measure. Excess, on the other hand, is characterised as breaking away from juridical order of genealogy, and of being phantasmatic. As phantasy, excessive enjoyment, belongs to an area closed off to inquiry. It is foreign both to ‘our’ way of thinking and to thought itself.

### **Aristotle’s Domestication of the Despot**

One of the consequences, listed by Plato, of the effects of excessive enjoyment, is that those who find themselves surrendering to the phantasmatic law of excess enjoyment are forced to plunder their fathers wealth. In terms of the law, the repercussions are profound. This is no ordinary crime of theft. What is at stake in following the imperative of despotic enjoyment is the interruption to the principle of paternity. Roman law would eventually install a dogmatic logic of reproduction according to which paternity itself would determine the very cycle of life in terms of subjectivity, power, ownership and rights. Law, by regarding itself as the

---

<sup>43</sup> Georges Didi-Huberman, ‘The Molding Image: Genealogy and the Truth of resemblance in Pliny’s Natural History, Book 35, 1-7. in Costas Douzinas and Lynda Nead, eds., *Law and the image: The authority of Art and the Aesthetics of Law* pp.71-88 (Chicago 1999).

<sup>44</sup> Pliny, *Natural History*, bk33, para.148 cited in Didi-Huberman *op. cit.*, n.46 at p.86.

<sup>45</sup> Piyel Haldar, ‘The Function of the Ornament in Quintilian, Alberti, and Court Architecture’ in Douzinas and Nead, *Law and the Image op. cit.* n.43. See also, Roland Barthes ‘the Old Rhetoric: an aide-Memoire’ in *The Semiotic Challenge* (New York: Hill and Wang, 1988) at p.29.

progenitor of subjective life, claims the status of paternity. To steal from the father would be to confound the juristic order of genealogy.<sup>46</sup>

This introduces a crucial difference between Plato's Orientalism and what might be termed Aristotle's domestication of despotism. The essential differences between the Platonic and Aristotelian formulations of despotic enjoyment can be summarised as follows. Where, Plato has the despot cutting the familial and paternal ties, Aristotle has the despot actually occupying the place of fatherhood. It is paternity itself which, for Aristotle, raises the very possibility of despotism. It is the father figure that determines the zone of pleasure, and as such, it is capable of defining the contours of licit pleasures far too widely. Indeed, for Aristotle, the despot is the head of the domestic household. Despotic enjoyment is treated as a domestic problem, and is located, in the first instance, at the level of household management. It characterises the relationship between master and slave, husband and wife, or fathers and children. The exercise of rule over the domestic slave is despotic in so far as it exists only for the benefit of the master and not for the good of the community or the *polis*. The father rules over slaves and not free men.<sup>47</sup> Despotism, the relation between master and servant, is based on force and, the tyrant rules "without any form of accountability, and with a view to his own advantage rather than that of his subjects."<sup>48</sup> Yet, the enjoyment of despotic power for Aristotle is not transgressive; the tyrant is still capable of attaining a state of 'half goodness'.<sup>49</sup> And, of the master-slave relationship, Aristotle maintains that it is possible to exist in "a community of interest, and a relation of friendship."<sup>50</sup> Indeed, just as the King is prone to tyranny, so the tyrant is capable of honour and aiming (however partially) at what is good.

By analogy, this corrupt form of mastery over slaves, might be used to describe a tyrannical government which exercised power without considering the good of the community. But this power need not break the law. It is a form of government that "is conducted in obedience to the law."<sup>51</sup> It is also a form of government that can be exercised over consenting subjects. For, it is always possible to rule over consenting subjects as a master rules over his slaves if that rule is exercised with a view to personal advantage. Kingship and tyranny overlap. Where a King aims at what is good, the despot grasps at wealth. But, Kings are subject to passions and so are prone to tyranny. All forms of sovereignty are capable of despotic injustice. For Aristotle, it is unnecessary to seek examples away from the Greeks. The tyrants of *Politics*, like Pisistratus, all reside at home. In this Aristotelian sense, the surplus enjoyment of the *Politics* may be equivalent to the surplus-value determined by the law of capitalism.<sup>52</sup> Here excess may be described as a surplus that can be commodified and exchanged, stolen and retrieved.

---

<sup>46</sup> On the juridical question of genealogy see generally the works of Pierre Legendre, *Law and the Unconscious op. cit.*, n.34.

<sup>47</sup> Aristotle, *Politics*, George Barker tr., (1998) at 1:3.

<sup>48</sup> Aristotle, *Politics*, *op. cit.*, n.47 at 5:11.

<sup>49</sup> Aristotle, *Politics*, *op. cit.*, n.47 at 5:11.

<sup>50</sup> Aristotle, *Politics*, *op. cit.*, n.47 at 1:6.

<sup>51</sup> Aristotle, *Politics*, *op. cit.*, n.47 at 5:10.

<sup>52</sup> Slavoj Žižek, *On Belief*, (2001).

This form of enjoyment, however, is markedly different to the transgressive enjoyment of Plato's fantasies of the Persian monarchs, or Homer's Lotos-eaters. It already obeys a recognisable law and is both a measured and a measurable excess; "one could know in principle, if Ajax, Antigone, or Creon, Caesar or Brutus surpassed the measure and one could know which measure was being exceeded."<sup>53</sup> This enjoyment is already something different to the phantasmatic and unimaginable fantasy of enjoyment that Plato uses to distance other cultures.

### Conclusion

What does it mean then to concentrate on Plato's formulation of Oriental despotism and excess enjoyment?. Two answers propose themselves.

Law, as an institution, has an in-built attitude towards the East that revolves around differences in political rule. The question as to what forms of behaviour are best suited to civilised society are measured against a suspicion that the Orient developed forms of behaviour that were not simply aberrant but unimaginable in their excess. The torrid zone demarcated by the East came to be regarded as everything the West was not, or, ought not to be. This suspicion or set of fantasies continued and remained influential throughout the history of Orientalism. Classical jurisprudence, or indeed any line of thought that treats the moderation of behaviour is implicit in this set of fantasies. Consequently, an appreciation of a broad range of discourses and disciplines (Orientalism; the history of colonialism, postcolonial theory, globalization, development studies, etc) that deal with the relationship between East and West must surely be obliged to take into account the abstractions of legal thought. Moreover, any legal or state sanctioned reckoning of proper modes of conduct (especially civilised forms of pleasure) must also take into account the idea that such conduct is regulated by the fantasy of what is radically improper. In the most abstract terms, the East and Oriental excess might be regarded as having some sort of determinative and tutelary function. As a result of its negation by Occidental jurisprudence, the fantasy of the Orient paradoxically performs a crucial and indispensable function.

At the level of least abstraction, this article hopes to illuminate the relevance of Orientalism to the study of law. Every domain on the law school curriculum has, to some extent or other been touched by the influence of cultural or critical studies. None more so than the study of jurisprudence. The most erudite courses are now capable of teaching students about the centrality of western concepts of law to questions of gender, race or to the history of oppression and colonialism. In spite of the sometimes ulcerative responses elicited by students and scholars these questions remain crucial without too much of a drift in focus. However, part of the argument that has been attempted here is that one need not borrow from other disciplines in order to make the doctrinal point about the relevance of Orientalism to the study of law. Jurisprudential debates about correct forms of government and regulation are always already implicit in Orientalist fantasies. These fantasies borne in the foundational texts of Western jurisprudence determine what Occidental forms of legality, administration and governmentality ought

---

<sup>53</sup> Jean-Luc Nancy, 'Human Excess' in *Being Singular Plural*, (2000) at p.180.

not to be. Law, therefore, is always already implicit in the Orientalist encounter with the East. At a time when the relationship between East and West is fragmenting, at a time when the relationships between secular and religious orders needs urgently to be examined, lawyers need to enter debates fully informed of the manner in they have been shaped by jurisprudential concerns. Never before has the dichotomy between theory and practice in Jurisprudence seemed so false.<sup>54</sup>

---

<sup>54</sup> Georges Pavlakos, 'Theory and Practice in Jurisprudence: A False Dichotomy' in *55 NILQ* 337.