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**IRISH STUDENT
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Editorial

We are delighted to present the fourteenth volume of the Irish Student Law Review. In the tradition of previous volumes, this Review maintains a high level of scholarly legal analysis of pertinent and diverse issues. Useful for the practitioner, academic and student, it delves into an array of topics, a number of which constitute developing areas of law in this jurisdiction.

The Editorial Board this year benefited from huge interest from potential authors from many legal institutions, granting us a wealth of material from which to choose. The arduous task of selecting a small proportion of articles from some sixty submissions fell to a dedicated and enthusiastic Editorial Board. The first-rate choices they made are illustrated by the richness of the current volume. Covering a wide spectrum of legal discourse, from commercial law to human rights, environmental, criminology and public interest law, the reader has an invaluable key into contemporary Irish law.

There have been many people involved in this year's publication. We would like to thank the Friends of the Irish Student Law Review who provided not only the vital financial assistance for this year's Review, but also welcome encouragement. The administrative back-up of the Honorable Society of the King's Inns has considerably assisted us in the practicalities of publishing a scholarly journal. In particular, warm thanks are due to the Under Treasurer of the King's Inns, Camilla McAleese, whose support has been unfailing. We would also like to extend our gratitude to the Honourable Mrs Catherine McGuinness for launching this volume and devoting her time to the particularly challenging task of judging the best article. Finally, the Review would not be the quality publication it is without the members of the Editorial Board. Their dedication, hard work and expertise willingly volunteered over the past nine months has ensured the publication of this Review.

Claire Bruton and Patricia Sheehy Skeffington
Co-Editors

DEATH'S DWINDLING DOMAIN: TAMING AMERICA'S DEATH PENALTY

GERARD H. KELL*

Introduction

The death penalty is one of the most divisive political and constitutional issues in the United States today. In a famous statement, unrelated to capital punishment, but appropriate in a very true sense, the 3rd President of the United States, Thomas Jefferson, remarked of the institution of slavery, that:

We have the wolf by the ears; and we can neither hold him, nor safely let him go. Justice is on one scale and self-preservation is on the other.¹

The Civil War demonstrated that Jefferson's concerns of the difficulties of abolishing slavery were well justified. However, 21st century America is riven by the same contradictions in connection with the death penalty. As Karl Wedekind observes:

We suffer it to exist because we are anxious about our own lives in tumultuous times, and we want something to be done about crime. We are told to be tough on crime, we must execute murderers.²

The death penalty remains, as Justice Arthur Goldberg once described it, "a kind of tribal rite, a symbolic palliative for the fear of crime".³ Middle America continues to be somewhat sceptical of the death penalty, but to abolish it, would be a step into the unknown, a Russian roulette-style

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¹ Partington ed., *The Oxford Dictionary of Quotations* (4th ed., Oxford University Press, 1996), at 364.

² Wedekind, *The Second Grave: A Case for the Abolition of the Death Penalty* (The Kentucky Coalition for the Abolition of the Death Penalty, 2000), at 149.

³ Goldberg and Dershowitz, "Declaring the Death Penalty Unconstitutional" (1970) 83 *HarvLR* 1773.

gamble with law and order.⁴ Nonetheless, recent years, in particular, have resulted in a significant reduction in the scope of death penalty statutes, which will later be discussed in depth.

In 1972, following the landmark judgment in *Furman v. Georgia*, which held that the death penalty, as then administered, was unconstitutional, death penalty statutes were reformed.⁵ Many abolitionists believed the judgment represented the penultimate step on the journey towards abolition.⁶ The Supreme Court ruled that the prevailing pattern of arbitrary imposition of the death penalty violated the Constitution. “These death sentences”, Justice Potter Stewart elaborated, “are cruel and unusual in the same way that being struck by lightning is cruel and unusual”.⁷ Accordingly, the Supreme Court commuted the sentences of all 629 people on death row. However, such predictions that the death penalty was nearing its end did not come to pass and it soon became clear that *Furman* condemned only death penalty statutes as then drafted, but not the death penalty *per se*. This interpretation was confirmed in *Gregg v. Georgia* when the Supreme Court revisited the matter and accepted that the modifications which Georgia’s State Legislature crafted were sufficient to correct the Supreme Court’s concerns that the death penalty was being administered in an arbitrary and capricious manner.⁸ Georgia had introduced a guided discretion scheme, outlining mitigating and aggravating factors for the benefit of the jury. The Georgian scheme further provided for a bifurcated trial, whereby a jury determine first whether the accused is guilty, before a separate jury decide whether the death penalty is appropriate. A similar statutory framework has now been adopted by all retentionist states. Moreover, the Supreme Court, whilst emphasising that aggravating factors must be specifically stated in statute, has also held that the jury cannot be “precluded from considering as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of

⁴ Middle America remains somewhat sceptical of the advantages of the death penalty. As Scott Turow, a lawyer and writer who served as a member of the Illinois Governor’s Commission on Capital Punishment, notes, “Public support for capital punishment has waxed and waned throughout our history”, Turow, *Ultimate Punishment: A Lawyer’s Reflections on Dealing With the Death Penalty* (Picador, 2004), at 20-24.

⁵ 408 US 238 (1972), See <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=408&invol=238>>. Hereafter referred to as *Furman*. Immediate analysis of this judgment varied as to its long-term impact.

⁶ Indeed, prominent abolitionist, Jack Greenberg, remarked that, “There will no longer be any more capital punishment in the United States”. See Sarat, “Recapturing the Spirit of *Furman*: The American Bar Association and the New Abolitionist Politics” (1998) 61 *Law and Contemporary Problems* 5, at 7.

⁷ 408 US 238 (1972).

⁸ 428 US 153 (1976), See <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=428&invol=153>>. Turow, *op. cit.*, at 20-24.

the offence that the defendant proffers as a basis for a sentence less than death.”⁹

Since the death penalty gained constitutional imprimatur in *Gregg* almost 750 people have been put to death. In 1999 the execution rate in the United States reached a peak at 98 executions and has declined slightly since then. As has been accepted by many legal scholars in the United States, and indeed abolitionists:

Polls consistently indicate that a substantial majority of Americans advocate executions of felons convicted of egregious crimes. Results of a 1981 Gallup Poll indicated that two-thirds of Americans approved the death penalty. In 1985, the approval rate rose to 72%; in 1991, to 76%; and in 1994, to 80%.¹⁰

However, in 2000, opinion polls registered a significant decline to 67% in support for the death penalty, which by 2004 had only partially recovered to 71%.¹¹ Nonetheless, it is widely accepted that irrespective of fluctuations in the polls, most Americans remain supportive of the death penalty. Austin Sarat has perceptively noted the political effect of such popular demands for harsh justice, remarking that, “[p]oliticians of every stripe do not want to be caught on the “wrong side” of the death penalty debate”.¹² Profound ethical, religious, legal and constitutional issues are raised by the existence of the death penalty and the processes by which it is implemented. Indeed, many ardent supporters of the death penalty have resigned themselves to the reality that, however desirable it may be, it is impossible for capital punishment to meet the standards of fairness and consistency required by the Constitution.¹³ Very real and genuine fears over the execution of innocent individuals,¹⁴ and the contested deterrent

⁹*Lockett v. Ohio* 438 US 604 (1978), See <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=438&page=604>>. Hereafter referred to as *Lockett*.

¹⁰ Rasnic, “The US Constitution, the Supreme Court and Capital Punishment: Should the USA Put the Death Penalty to Death” (1999) 50 *NILQ*. 50, at 51.

¹¹ Clark County, Indiana, Prosecuting Attorney’s Office, *Public Opinion and the Death Penalty* <<http://www.clarkprosecutor.org/html/death/opinion.htm>> (visited 15 June 2006).

¹² Sarat, *loc. cit.*, at 7.

¹³ Supreme Court Justice Harry Blackmun is perhaps the best example of this perspective. Having authored the leading opinion in *Gregg*, Justice Blackmun accepted shortly before retiring from the bench in *Callins v. Collins* 510 US 1141 (1994), at 1151-1152 that he “no longer shall tinker with the machinery of death”. He further added, “I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed”.

¹⁴ Such fears over the execution of innocents are disturbingly valid and have a sound basis. “Since 1973, 117 wrongfully convicted people have been freed from death row in the US, some after spending more than 20 years in solitary confinement”. See “Sister of Mercy”, *Irish Times Magazine*, 18 June 2005, at 18-19. The article discussed the abolitionist crusade of Sr. Helen Prejean, author of *Dead Man Walking* (Vintage, 1994). Taryn Simon has put the number of

effect of the death penalty¹⁵ has also ensured that, in spite of the seemingly secure position of America's modern death penalty statutes, a voice of compassion and change remains.¹⁶

However, the last 10 years have witnessed huge strides forward towards the final abolition of the death penalty in a number of countries. Many have abolished the death penalty entirely,¹⁷ many more have implemented a *de facto* abolition, banning the death penalty for all but

Pressure for the abolition of capital punishment, it would seem, is operating on two levels, both internally and externally. Internally, insofar as the death penalty is no longer available for the expansive range of offences for which it was imposed only half a century ago. Furthermore, the global trend towards abolitionism has accelerated with each passing year and it is submitted that this can be said to represent a significant external pressure on the United States. Life-long abolitionist, Hugo Adam Bedau, has commented, "Progress in abolishing the death penalty has proved to be very slow, intermittent and fragmentary".²¹ However, whilst progress on the road to abolition is painfully slow, it now seems clear that at least it is no longer static. Indeed, Prof. J.R. Broughton has gone so far as to remark that "capital punishment in America is withering towards its death - slowly, gradually, incrementally, but surely nonetheless".²²

Indeed, where once the death penalty was meted out with relative ease for a wide range of offences, the evolving nature of the Supreme Court's Eighth Amendment jurisprudence has today restricted the use of the death penalty to the crime of murder.²³ Whilst theoretically capital punishment is available for an ever-expanding range of homicide offences, in truth the death penalty is imposed in only a confined number of cases. In fact, there is a murder in the United States every 32.6 minutes, which calculates to over 16,000 murders every year.²⁴ However, as Hugo Bedau has observed:

Of the 8,000 or so persons convicted [of murder every year], a small number, perhaps as many as 250, will be sentenced to death. Of these few, an unknown number will eventually be executed sometime during the next decade. This year perhaps two or three a month will enter the execution chamber. With more than 15,000 murders, there will be fewer than 100 executions.²⁵

²¹ Bedau, *Killing as Punishment: Reflections on the Death Penalty in America* (Northeastern University Press, 2004), xi.

²² Broughton, "The Second Death of Capital Punishment" (Social Science Research Network, 2006), at 3. See Social Science Research Network, *The Second Death of Capital Punishment* <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=878244> (visited 16 March 2006).

²³ *Trop v. Dulles*, 356 US 86 (1958). In this case the Supreme Court held that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society". Hereafter referred to as *Trop*. In *Weems v. United States*, 217 US 349 (1910), the Supreme Court had already ruled that the Eighth Amendment was of an "expansive and vital character".

²⁴ Federal Bureau of Investigation, *Crime in the United States 2004* <http://www.fbi.gov/ucr/cius_04/summary/crime_clock/index.html> (visited 21 June 2006).

²⁵ Bedau, *Killing as Punishment: Reflections on the Death Penalty in America*, *op. cit.*, at 21.

Whilst the death penalty is still on the statute books of 36 states, it is the exception rather than the norm, even for the ultimate crime of murder.²⁶ The oft-cited “eye for an eye” mantra seems quite hollow, when considered in light of Bedau’s factual account. When it is also observed that “the leading cause of death on death row is actually natural causes”,²⁷ it becomes apparent that the death penalty system is failing, even by its own standards as an efficient and effective form of punishment.²⁸ Indeed, the recent trial of Zacarias Moussaoui has also served to focus further attention on the death penalty. In May of this year, a federal jury deadlocked over whether Moussaoui, a French citizen and the so-called 20th hijacker in the terrorist attacks on the United States of 11 September 2001, should receive the death penalty.²⁹ The jury instead recommended sentencing Moussaoui to life imprisonment without the possibility of parole.³⁰ Some scholars reacted furiously to the decision; Prof. John Eastman, observing that “[i]f a terrorist involved in the most heinous attack in the US history doesn’t deserve the death penalty, who does?”³¹ However, the particular facts of the case are of great significance. Moussaoui had been arrested prior to the attacks and the Federal government had sought to contend that by lying and not exposing the plot while being interrogated, he was responsible for the bombings. Under Federal law, three of the six counts with which Moussaoui was charged are death-eligible, though, not mandatory.³² It would seem that had Moussaoui been more proximately involved in the actual hijacking, it is not unreasonable to suggest that the jury might well have concluded differently.

²⁶ It should be noted that until recently the death penalty was legally available in 38 states. However, death penalty statutes in New York and Kansas were declared unconstitutional by the respective states’ Court of Appeal and Supreme Court in 2004. Since then legislation reactivating the death penalty has not been pursued with any great vigour.

²⁷ Bryson, *Notes From a Big Country* (Doubleday, 1998), at 284.

²⁸ It is relevant to note that as of 1 November 2005, there were 3,415 inmates on death row. See Death Penalty Information Centre, *Fact Sheet* <<http://www.deathpenaltyinfo.org/FactSheet.pdf>> (visited 11 November 2005).

²⁹ Demleitner, “The Death Penalty in the United States: Following the European Lead” (2002) 81(1) *Oregon Law Review* 131, at 147. Moussaoui’s trial further strained relations with France, when Attorney General, John Ashcroft refused a request by the French Government asking the United States not to seek the death penalty.

³⁰ The death penalty in the United States is administered through a mechanism referred to as the “bifurcated trial”. In essence, a determination of guilt is first made, and then a jury decides whether the death penalty is an appropriate punishment.

³¹ Editorial, “Life for Moussaoui: A Justifiable Verdict” *Orange County Register*, 4 May 2006.

³² In *Woodson v. North Carolina* 428 US 280 (1976), the mandatory death penalty was deemed unconstitutional. See *infra* 9.

Restricting the “Machinery of Death”³³

Since reauthorising the death penalty in *Gregg*, the United States Supreme Court has endeavoured to craft a framework for capital punishment which satisfies the demands of the Constitution. The twin requirements of consistency across cases and attention to the unique characteristics of each case have created a morass of conflicting opinions and rules. Indeed Justice Blackmun expressed serious reservations whether the competing demands of consistency and fairness can ever be reconciled.³⁴ In *Callins v. Collins*, Justice Blackmun emphasised that:

[O]ver the past two decades, efforts to balance these competing constitutional commands have been to no avail. Experience has shown that the consistency and rationality promised in *Furman* are inversely related to the fairness owed the individual when considering a sentence of death. A step toward consistency is a step away from fairness.³⁵

He further added that “the decision whether a human being should live or die is so inherently subjective - rife with all of life’s understandings, experiences, prejudices, and passions - that it inevitably defies the rationality and consistency required by the Constitution”.³⁶ Since the *Gregg* decision, a bitterly divided Supreme Court has issued a barrage of lengthy concurring and dissenting opinions rife with casuistry and contradiction. Little coherence is evident from what Justice Scalia has described as “the fog of confusion that is our annually improvised Eighth Amendment, ‘death is different’ jurisprudence”.³⁷ Other commentators have succinctly concluded that “the Eighth Amendment is a jurisprudential train wreck”.³⁸ However, as Robert Burt has observed, “the unremitting internal conflict that has characterised the Court’s death penalty adjudication mirrors concerns about polarised hostility in American society generally”.³⁹

Nonetheless, it is important to note that the Supreme Court has heavily restricted the use of the death penalty. Only a matter of decades

³³ *Callins v. Collins* 510 US 1141 (1994), at 1151-1152, per Justice Blackmun.

³⁴ Prejean, *The Death of Innocence: An Eyewitness Account of Wrongful Executions* (Random House 2005), at 219-21, where the author provides a comprehensive overview of Justice Blackmun’s growing disillusionment with the Supreme Court’s capital punishment jurisprudence. This disillusionment culminated in his decision in *Callins v. Collins*.

³⁵ 510 US 1141 (1994), See <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=U10343>. Hereafter referred to as *Callins*.

³⁶ *Ibid.*

³⁷ Banner, *The Death Penalty: An American History* (Harvard University Press, 2002), at 304.

³⁸ Wittes, “What is ‘Cruel and Unusual’?” *Policy Review*, January 2006.

³⁹ Burt, “Disorder in the Court: The Death Penalty and the Constitution” in Sarat ed., *Capital Punishment: Volume II* (Ashgate Publishing Ltd., 2005) 1741, at 1742.

ago, the death penalty was available for a range of various offences, today it is restricted purely to homicide, albeit within an expansive range of factual circumstances. In *Coker v. Georgia*, the Court concluded that the death penalty was not a constitutionally permissible punishment for rape.⁴⁰ In a 7-2 decision, Justice White writing for the majority conceded that rape is a serious and reprehensible crime which deserves a serious punishment. However, he concluded that to execute the defendant would be too severe a punishment because the victim had not lost her life. He explained that:

Life is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair. We have the abiding conviction that the death penalty, which 'is unique in its severity and irrevocability', is an excessive penalty for the rapist who, as such, does not take human life.⁴¹

Interestingly, Justice Powell, who sided with the majority, concurred only on the facts of the present case. He observed that:

In a proper case a more discriminating inquiry than the plurality undertakes might well discover that both juries and legislatures have reserved the ultimate penalty for the case of an outrageous rape resulting in serious, lasting harm to the victim.⁴²

However, Justice Powell's opinion is something of a curiosity, given the particular facts of this case: the defendant, Ehrlich Coker, had brutally raped three women in as many years, killing one and seriously injuring another, and had a long list of felony convictions, ranging from kidnapping to armed robbery. It is difficult to envisage a more heinous factual matrix. Nonetheless, it is important to note that Justice Powell's qualification and the dissent of Chief Justice Burger and Justice Rehnquist in the case could well provide fresh impetus to reviving the death penalty for serious non-homicidal felonies in an appropriate case. It is to be observed that a number of states retain statutes authorising the death penalty for the rape of a child. Indeed, Louisiana has recently enacted such a statute.⁴³ In June 2005, revelations relating to child sex abuse by a Satanic sect in Louisiana raised the serious possibility that the local District Attorney would feel compelled

⁴⁰ 433 US 584 (1977), See <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=433&invol=584>>. Hereafter referred to as *Coker*.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ Prejean, *op. cit.*, at 228.

to seek the death penalty.⁴⁴ Of course, whether the United States Supreme Court would feel inclined to authorise such a dramatic expansion in the use of the death penalty is quite another matter. However, in theory at least, it is entirely possible that the particular mode of constitutional interpretation, the originalist perspective, favoured by a number of justices but advocated most strongly by Justice Scalia would not prevent such an expansion in the application of the death penalty.⁴⁵

Whilst some residual doubt may remain as to the status of the death penalty for rape in particularly heinous circumstances, it seems more assured that the imposition of a mandatory death penalty is beyond all constitutional redemption. In *Woodson v. North Carolina* a narrowly divided Supreme Court determined that laws mandating the death penalty for specific crimes failed to take into account the character and record of the individual and the circumstances of the particular offence, both of which were “a constitutionally indispensable part of the process of inflicting the penalty of death”.⁴⁶ Delivered on the same day as the Court’s judgment in *Gregg*, the majority’s reasoning reveals a desire to retain some degree of individualised sentencing. In *Furman*, the particular defect in

Unfortunately, all this experimentation and ingenuity yielded little of what *Furman* demanded. It soon became apparent that discretion could not be eliminated from capital sentencing without threatening the fundamental fairness due a defendant when life is at stake. Just as contemporary society was no longer tolerant of the random or discriminatory infliction of the penalty of death, evolving standards of decency required due consideration of the uniqueness of each individual defendant when imposing society's ultimate penalty.⁴⁷

The Eight Amendment and Evolving Standards of Decency

Perhaps the most significant aspect of the Supreme Court's restriction of capital punishment since the turn of the century has been its willingness to remove certain categories of persons from the scope of death penalty statutes. Under the Eighth Amendment, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted". However, the Supreme Court has determined that this Amendment is of an "expansive and vital character".⁴⁸ Furthermore, in *Trop v. Dulles*, the plurality opinion of the Court, written by Chief Justice Warren, elaborated that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society".⁴⁹ This doctrine allows the concept of cruel and unusual punishment to evolve over time, depending upon what "civilized society may accept or reject."⁵⁰ Furthermore, this assessment clearly leaves open the possibility that capital punishment may well be considered unconstitutional at some point in the future and it is on the basis of this yardstick that the execution of the mentally retarded and the execution of juveniles have both been abolished.

Whilst such an interpretation may initially seem strange given the fixed nature of the text of the Constitution and particularly so with the American Constitution, John P. Conrad has emphasised that given such great social change, the understanding of the Eighth Amendment cannot remain static, defined solely by the standards of the American Republic in its infancy.⁵¹ Moreover, if the Eighth Amendment were to be interpreted

⁴⁷ *Ibid.*

⁴⁸ *Weems v. United States*, 217 US 349 (1910), See <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=217&invol=349>>. Hereafter referred to as *Weems*.

⁴⁹ 356 US 86 (1958), See <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=356&invol=86>>. Hereafter referred to as *Trop*. The Supreme Court accepted that modifications made by the State legislatures

⁵⁰ 487 US 815 (1988), per Justice Stevens. Hereafter referred to as *Thompson*.

⁵¹ Conrad and van den Haag, *The Death Penalty: A Debate* (Plenum Press, 1983), at 162.

solely by reference to the norms prevalent in late Eighteenth Century America, such logic could be applied to justify the reintroduction of ear-cropping, branding and nose splitting, all of which were popular and acceptable forms of punishment during that period and which survived the enactment of the Constitution. Yet today, in the 21st century, such sanctions clearly could not be tolerated. Furthermore, as David Richards has explained:

Matters of constitutionally relevant and controlling fact and value may evolve so that applications unimaginable earlier may become reasonable, and earlier applications may become unreasonable. To bind interpretation to historic referents would impute to the constitutional design the unreasonable intent to apply abstract language counterfactually, by ignoring changes in relevant factors which would lead reasonable persons to apply the relevant language differently.⁵²

The Abolition of the Death Penalty for the Mentally Retarded

Since the turn of the century, two leading Supreme Court judgments based on the United State's evolving standards of decency have dramatically reduced the scope of the death penalty.⁵³ Debate for some time had focused on the sensitive issue of executing vulnerable adults such as the mentally retarded and the decision of then presidential nominee, Bill Clinton, to return to Arkansas during campaigning in 1991 to personally oversee the execution of convicted murderer Ricky Ray Rector further brought this issue to the fore.⁵⁴

However, in *Penry v. Lynaugh* the Supreme Court narrowly determined that the Eighth Amendment did not prohibit the execution of a mentally retarded person.⁵⁵ Justice O'Connor, writing for the majority held that "there was insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offences for us to conclude that it is categorically prohibited by the Eighth Amendment".⁵⁶

⁵² Richards, "Constitutional Interpretation: History and the Death Penalty" in Bedau ed., *The Death Penalty in America: Current Controversies* (Oxford University Press, 1997) 214, at 218.

⁵³ *Atkins v. Virginia* 536 US 304 (2002), where a 6-3 majority determined that the execution of a mentally retarded person was proscribed by the Constitution; and *Roper v. Simmons* 543 US 551 (2005), where a closely divided Supreme Court, split 5-4, held that the execution of minors also violated the Eighth Amendment of the Constitution.

⁵⁴ Parenti, *Lockdown America: Police and Prisons in the Age of Crisis* (Verso, 2000), at 76. See also Frady, "Death in Arkansas" (1993) 69(1) *New Yorker* 105.

⁵⁵ 492 US 302 (1989), See <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=492&invol=302>>. Hereafter referred to as *Penry*.

⁵⁶ *Ibid.*

Furthermore, Justice O'Connor determined that the prisoner's mental retardation was irrelevant, since he had been afforded constitutional protections through the availability of the modern insanity defence. The opinion also observed that only one state, Georgia, had in fact prohibited the death penalty for the mentally retarded.⁵⁷ Nonetheless, the minority judgment raised significant constitutional questions as to the appropriateness of capital punishment for a mentally retarded offender. Justice Brennan, with whom Justice Marshall concurred, emphasised that:

The impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional.⁵⁸

Justice Brennan further highlighted that “killing mentally retarded offenders does not measurably further the penal goals of either retribution or deterrence”.⁵⁹

Nonetheless, the reasoning of the *Penry* majority held sway in constitutional law for a further thirteen years before the Supreme Court revisited the matter in *Atkins v. Virginia*.⁶⁰ The judgment of Justice O'Connor in *Penry* was suggestive that she might well revise her position on the execution of the mentally retarded if a sea change in American opinion on the matter were presented to her. Justice Scalia and Chief Justice Rehnquist, however, who even dissented in the more moderate parts of Justice O'Connor's judgment, were unlikely to embark on the Road to Damascus.

Atkins v. Virginia represented a landmark decision and effectively signalled the beginning of a new abolitionist campaign which focused on achieving the incremental prohibition of the death penalty. The majority decision in *Atkins* reflected growing unease with the death penalty in the United States and more specifically the application of the death penalty to the mentally retarded. Justice Stevens, who delivered the majority opinion, provided a revealing account of the pace of this change:

Much has changed since [*Penry*]... Given the well-known fact that anticrime legislation is far more popular than legislation providing

⁵⁷ Rasnic, *loc. cit.*, at 60.

⁵⁸ 492 US 302 (1989), See
<<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=492&invol=302>>.

⁵⁹ *Ibid.*

⁶⁰ 536 US 304 (2002), See
<<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=00-8452>>.

protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition.⁶¹

American society's evolving standards of decency, the yardstick set in *Trop* for interpreting "cruel and unusual punishments" under the Eighth Amendment, were deemed to have evolved sufficiently to hold that the execution of a mentally retarded individual was repugnant to the Constitution. Justice O'Connor joined with the majority, leaving only Chief Justice Rehnquist, Justice Scalia and Justice Clarence in dissent. Justice Scalia was exceptionally candid in his criticism of the reasoning of the majority, commenting:

Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.⁶²

Justice Scalia's remarks reveal the passionate nature of the ongoing question of the death penalty in the United States and show that the Supreme Court, rather than being immune from such passion, is in fact often the forum for the most intensive debate on the matter. Robert Burt has suggested that this "disorder" within the Court is not conducive to a permanent resolution of the issue of capital punishment. Indeed, it is fair to remark that it has in fact resulted in the patchwork of complicated judgments which now form the Court's Eighth Amendment jurisprudence. Burt has commented that:

⁶¹ *Ibid.* Justice Stevens stated that Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina and the Federal Government had all enacted legislation prohibiting the execution of the mentally retarded. It should also be noted that this is in addition to the 12 states which have abolished the death penalty entirely.

⁶² *Ibid.* Justice Stevens stated that Maryland, Kentucky, Tennessee, New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, South Dakota, Arizona, Connecticut, Florida, Missouri, North Carolina and the Federal Government had all enacted legislation prohibiting the execution of the mentally retarded. It should also be noted that this is in addition to the 12 states which have abolished the death penalty entirely.

Only one lesson can be drawn from the Supreme Court's prolonged experience with capital punishment. The Justices have provided this lesson, though unwittingly, by embodying their conception of American society: In conflicts among implacably opposed adversaries, nothing is ever sensibly resolved or learned.⁶³

Professor Burt's observation is apposite and the discord about which he writes was also a feature which characterised the Court's protracted tussle over the constitutionality of juvenile executions.

The Abolition of the Death Penalty for Juveniles

Whilst the American public have remained supportive of the death penalty itself, successive polls have revealed great public unease over the execution of juveniles.⁶⁴ The fact that a person had not attained their majority at the time of the offence was held to be a mitigating factor in *Eddings v. Oklahoma*. However, this is merely one consideration which can be counterbalanced by other aggravating factors, such as the egregious nature of the crime or the recidivism of the offender.⁶⁵ In *Thompson v. Oklahoma* the Supreme Court determined that the execution of minors below the age of 16 at the time of commission of the offence was prohibited by the Constitution.⁶⁶ Nonetheless, the selection of 16 was considered an arbitrary choice and the continued application of death penalty statutes to 16 and 17 year olds remained a focus for abolitionist activity.

In 2003 Oklahoma executed Scott Allen Hain who was only 17 at the time of committing double murder.⁶⁷ The execution brought a wave of international condemnation, with the European Union expressing its "deepest regret" that the United States chose to proceed with the execution.⁶⁸ Furthermore domestic and international news coverage exposed the United States as one of only a handful of countries which

⁶³ Burt, *loc. cit.*, at 1819.

⁶⁴ Smith, *Public Opinion of the Death Penalty for Youths*, National Opinion Center, University of Chicago <http://www.norc.uchicago.edu/issues/Death_Penalty.pdf> (visited 10 January 2006). This report was cited with approval by Justice Stevens, Justice Ginsberg, Justice Breyer and Justice Souter in their dissent in a case denying a juvenile on death row a writ of habeas corpus, holding that his execution would be unconstitutional. See *In Re Kevin Nigel Stanford*, 537 US 0009 (2002), available at <<http://www.supremecourtus.gov/opinions/02pdf/01-10009.pdf>>.

⁶⁵ 455 US 104 (1982). Hereafter referred to as *Eddings*.

⁶⁶ 487 US 815 (1988).

⁶⁷ Zamparutti and Zammit eds., *Hands Off Cain: The Death Penalty Worldwide 2005 Report* (Notizie Radicali, 2005), at 28.

⁶⁸ The EU and OSCE Permanent Council, *EU Statement on Death Penalty* <http://europa.eu.int/comm/external_relations/osce/stment/dep100403.htm> (visited 10 January 2005).

continued to execute minors.⁶⁹ Saudi Arabia, Pakistan and Yemen were not the usual company in which the United States expected to find itself. However, more serious and substantial arguments were also raised against the continued constitutionality of juveniles' executions. Scientific research has indicated that the decision-making area of the brain, the frontal lobe, can often only fully develop late in adolescence. Neuropsychologist Ruben Gur of the University of Pennsylvania supports such analysis and has stated that the last parts of the brain to develop are those controlling "impulsivity, judgement, planning... and other characteristics that make people morally culpable".⁷⁰ His comments echo similar observations by members of the Supreme Court. In *Thompson*, Justice Stevens asserted that:

Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.⁷¹

Indeed it is true of Justice Stevens to note that society does not trust juveniles with many privileges and responsibilities which are constitutionally endowed upon adults. The right to vote is only extended to those above 18 years old. Furthermore, juveniles can neither purchase alcohol or tobacco products, nor can they join the military.⁷² In most states restrictions exist on access to pornographic material, driving and gambling. It is therefore unsurprising that even the retentionist Governor of Arkansas, Mike Huckabee, termed such blatantly unjust double-standards "inconceivable" and "inconsistent".⁷³ Nonetheless, in *Stanford v. Kentucky*, where a narrow Supreme Court majority upheld the constitutionality of juvenile executions, Justice Scalia delivered a cutting rebuke to those who sought to draw comparisons between the minimum age set for the imposition of the death penalty and the minimum age for drinking, voting and other social privileges and responsibilities.

⁶⁹ Hood, *op. cit.*, at 89, where the author examines international progress towards the abolition of the death penalty for juveniles.

⁷⁰ Fisher, "Executing Children is the Case Now Before Virginia", *Washington Post*, 14 January 2003. See <http://www.justice4all.org/files/news/Articles/2003-01-14_Washington_Post_-_Executing_Children_Is_the_Case_Now_Before_Virginia.htm> (visited 10 January 2005).

⁷¹ 487 US 815 (1988), at 835.

⁷² Fisher, "Executing Children is the Case Now Before Virginia" *Washington Post*, 14 January 2003.

⁷³ American Civil Liberties Union, *Death Penalty Issues: Juveniles* <<http://www.aclu.org/capital/juv/10578prs20010327.html>> (visited 10 January 2005).

It is, to being with, absurd to think that one must be mature enough to drive carefully, to drink responsibly, or to vote intelligently, in order to be mature enough to understand that murdering another human being is profoundly wrong, and to conform one's conduct to that most minimal of all civilized standards.⁷⁴

In March 2005, the Supreme Court delivered its much anticipated judgment in *Roper v. Simmons* declaring that the death penalty was unconstitutional for persons under 18 years of age at the time of the commission of the offence.⁷⁵ This case, regarding Christopher Simmons, who was only 17 when he committed felony murder, had presented the Court with a fresh opportunity to examine the issue of juvenile executions. The similarities with the execution of the mentally retarded were striking and Justice Kennedy, writing the majority opinion observed that “[j]ust as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*”, adding that, “[t]he beginning point is a review of objective indicia of consensus”.⁷⁶ Whilst Justice Kennedy considered the pace of change in abolishing juvenile executions as “less dramatic” than that regarding the execution of the mentally retarded, he nonetheless, deemed it “significant” and determined that the “consistent direction of the change” was an influential factor. Furthermore, Justice Kennedy proffered a simple, though convincing, explanation for the seemingly slower rate of change:

When we heard *Penry*, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier than the impropriety of executing the mentally retarded.⁷⁷

Justice Kennedy reiterated the findings made in *Thompson* that juveniles are, by nature, less developed than adults and less capable of controlling their emotions and surroundings. Thus, “[t]heir own lack of vulnerability

⁷⁴ 492 US 361 (1989), at 374. Hereafter referred to as *Stanford*. The Court declined to extend the scope of *Thompson* which had been decided the previous Term to all minors thereby ensuring that the threshold for death eligibility would remain 16 years of age. As with so much of the Supreme Court's death penalty jurisprudence, the decision was by majority, 5-4.

⁷⁵ 553 US 551 (2005), See <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=03-633>.

Hereafter referred to as *Roper*.

⁷⁶ *Ibid.*

⁷⁷ *Ibid.*

and comparative lack of control over their immediate surroundings mean that juveniles have a greater claim than adults to be forgiven".⁷⁸ In an unusually explicit reference to foreign case law, Justice Kennedy accepted that "[i]t is proper to acknowledge the overwhelming weight of international opinion against the juvenile death penalty".

The dissent of Justice Scalia, with whom Chief Justice Rehnquist and Justice Clarence concurred, questioned the heart of the reasoning of the majority's opinion. Justice Scalia, reverting to a truly originalist interpretation of the Constitution, challenged the "evolving standards of decency" yardstick for the Eighth Amendment and questioned in particular the determination that "a national consensus which could not be perceived in our People's laws only 15 years ago now solidly exists". He further elaborated that it was inappropriate to consider the views of abolitionist states when determining what constitutes a national consensus, as this "is rather like including old-order Amishmen in a consumer-preference poll on the electric car."⁷⁹ This reasoning, however, is open to challenge at the most elementary level. To understand what truly represents a *national* consensus, surely it is relevant to have regard to considerations from across all fifty states. Indeed, it seems rather disingenuous to raise concerns relating to the majority's method of arriving at a national consensus, when Justice Scalia's own proposition only includes the views of retentionist states.

In any event, *Roper* has considerably moved the abolitionist agenda forward onto new terrain. However, having achieved the abolition of the death penalty in the more questionable of cases, it now remains to be seen what effect this may have on the wider abolitionist movement. It could provide renewed vigour to constitutional efforts to persuade the Supreme Court to rule that the entire death penalty apparatus is unconstitutional, since the current Court has proven amenable to overrule quite recent Eighth Amendment case law. Prof. J.R. Broughton has suggested that *Atkins* and *Roper* "are helping to incrementally erode capital punishment, though in a manner distinct from the *Furman*-era dismantling".⁸⁰

Nonetheless, *Atkins* and *Roper* could equally result in reinforcing the death penalty's place in the criminal justice system, by removing those aspects of it which were most reprehensible and open to criticism. In much the same way in which the ongoing sanitation of capital punishment has served to shield the public from many of the most brutal aspects of it and thereby contribute to the maintenance of popular support, prohibiting the applicability of death penalty statutes to the mentally retarded and juveniles

⁷⁸ *Ibid.*

⁷⁹ *Ibid.*

⁸⁰ Broughton, "The Second Death of Capital Punishment" (Social Science Research Network, 2006), at 8. See Social Science Research Network, *The Second Death of Capital Punishment* <<http://ssrn.com/abstract=878244>> (visited 16 March 2006).

may steal the abolitionist movement's thunder. However, with countries across the world embracing abolition and some members of the Supreme Court showing an increasing interest in foreign case law, it is open to debate whether the United States can insulate itself entirely from these international influences. Indeed, Prof. Daniel Givelber has suggested that prevailing international standards may well develop a more central role in Eighth Amendment jurisprudence.

As the Supreme Court of the United States continues to undertake Eighth Amendment analysis under the rubric of evolving standards of decency, an emerging consensus among nations with mature legal systems that capital punishment offends basic norms of human rights may, at some future point, become a significant consideration in this analysis.⁸¹

Furthermore, some commentators have emphasised that the relevance of international considerations to Eighth Amendment analysis is in fact self-evident from the concepts underlying the doctrine. Corina Gerety has aptly observed that:

Civilized society does not begin and end at the US border. Nor does the United States have a monopoly on decency. Likewise, human justice and human dignity are universal concepts. In determining whether it is constitutionally permissible to kill a juvenile, the majority of the Court in *Roper v. Simmons* was legally correct in looking outside this country for guidance.⁸²

International Trends Towards Abolition: The Way Forward?

In recent years, there has been a creeping, though discernible, tendency amongst some members of the Supreme Court to give greater prominence to foreign jurisprudence; particularly it would seem, in the realm of capital cases. For example, in *Roper*, Justice Kennedy referred to the growing international consensus against executing juveniles. In 1999, in *Knight v. Florida*, Justice Breyer protested at the Court's refusal to hear the appeal of a prisoner who argued that spending more than two decades on death row amounted to cruel and unusual punishment, and thus violated the Eighth

⁸¹ Givelber, "Innocence Abroad: The Extradition Cases and the Future of Capital Litigation" (2002) 81(1) *Oregon Law Review* 161, at 167.

⁸² Gerety, "*Roper v. Simmons* and the Role of International Laws, Practices and Opinions in the United States Capital Punishment Jurisprudence" (2005) 4(2) *Chinese Journal of International Law* 565, at 582.

Amendment.⁸³ Quoting legal opinions from Jamaica, India, Zimbabwe and the European Court of Human Rights, Justice Breyer observed in a dissenting opinion that “a growing number of courts outside the United States... have held that a lengthy delay in administering a lawful death penalty renders ultimate execution inhuman, degrading or unusually cruel”.⁸⁴ However, referring to foreign precedent as an interpretative aid, tentatively referred to as cosmopolitanism in some quarters, has been subject to trenchant criticism by other members of the Supreme Court and leading American scholars.⁸⁵ Failed Supreme Court nominee, Judge Robert Bork, has remarked:

Our judges are said to be involved in a worldwide constitutional conversation. It more closely resembles a worldwide constitutional convention.⁸⁶

Justice Scalia has also rejected as irrelevant the notion that foreign laws may provide some guidance in interpreting the American Constitution.⁸⁷ Nonetheless, the growing interest of a minority of the Supreme Court in having regard to foreign case law and the fact that most recently a majority of the Court (in *Roper*) was persuaded by this reasoning, raises the question of what the United States can learn from the recent experiences of other Western democracies with capital punishment?

A. Europe

In Europe, the only blemish on an otherwise death penalty-free continent is Belarus, where 5 people were put to death in 2004. The republic has continued to execute its citizens regularly, unlike many of the former Soviet bloc states.⁸⁸ It is perhaps also no mere coincidence that Belarus has been described as “Europe’s last dictatorship”.⁸⁹ In the 21st century, however, the European Union has established itself as the vanguard of the global abolitionist movement. The abolition of the death penalty is now a

⁸³ 528 US 990 (1999), See <<http://straylight.law.cornell.edu/supct/pdf/98-9741P.ZD>>. Hereafter referred to as *Knight*.

⁸⁴ *Ibid.*, at 4.

⁸⁵ Toobin, “Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court” (2005) 81(27) *New Yorker* 42, at 50.

⁸⁶ *Ibid.* Circuit Judge Bork served on the United States Court of Appeal for the District of Columbia from 1982-1988 before resigning.

⁸⁷ Indeed, in *Roper* Justice Scalia was dismissive of the legitimacy of using foreign case law as an interpretative aid. He observed that: “The basic premise of the Court’s argument - that American law should comport to the laws of the rest of the world - ought to be rejected out of hand. What these foreign sources ‘affirm’ is their own notion of the how the world ought to be, and their diktat that it shall be so henceforth in America”.

⁸⁸ Zamparutti and Zammit, *op. cit.*, at 38.

⁸⁹ Zarakovich, “Where Tyranny Rules: Is Belarus, Europe’s Last Dictatorship, Ripe for a People’s Revolution” (2005) 166(24) *Time Europe* 25.

prerequisite for countries seeking EU membership.⁹⁰ Furthermore, the Charter on Fundamental Rights, adopted at Nice in 2000, categorically states that “No one shall be condemned to the death penalty, or executed”.⁹¹ In 2005, the UN Commission on Human Rights approved, for the ninth consecutive year, a resolution proposed by the EU calling for a worldwide moratorium on executions.⁹² A new record of 81 co-sponsors was reached, reinforcing the case for the presentation of a similar resolution at the UN General Assembly in New York.⁹³ The ongoing efforts of the EU to actively canvass for the abolition of capital punishment present a considerable challenge to the United States.⁹⁴ The repeal of death penalty laws in Europe, however, was also a painstakingly long process. Portugal led the way in 1867, immediately followed by the Netherlands.⁹⁵ Sweden and Denmark joined this movement after the First World War, whilst after the Second World War, Italy, Austria and Finland did likewise.

Ireland’s abolition of the death penalty was an equally gradual process. In 1954, Michael Manning was executed for the murder by asphyxiation of Catherine Cooper, an elderly nurse. Manning had a low IQ bordering on mental disability and was extremely drunk when his assault turned into murder.⁹⁶ By 1964, however, the death penalty had been abolished for all but capital murders. The death penalty was removed from the statute books in 1990 and replaced by a mandatory 40-year sentence for capital murder. In the Seventies and Eighties, two instances had arisen where defendants were convicted of the capital murder of a member of An Garda Síochána.⁹⁷ However, in both cases the capital sentences were

⁹⁰ Commissioner for External Relations, *The EU’s Human Rights and Democratisation Policy* <http://ec.europa.eu/comm/external_relations/human_rights/adp/index.htm> (visited 19 June 2006).

⁹¹ Charter on Fundamental Rights of the European Union, Article 2.2.

⁹² Zamparutti and Zammit, *op. cit.*, at 173.

⁹³ *Ibid.*

⁹⁴ For example, co-operation against terrorism has been undermined by the United States’ continued commitment to capital punishment. In the aftermath of the attacks of 11 September 2001, France and Spain announced that they would not extradite terrorist suspects to the United States unless given specific assurances that prosecutors would not seek the death penalty. Furthermore, following controversy relating to the trial of French-born terrorist suspect, Zacharias Moussaoui, where Attorney General John Ashcroft sought a capital sentence, the French Government announced that it would no longer share intelligence information which would assist the Federal Government in the prosecution. *See Demleitner, loc. cit.*, at 146.

⁹⁵ Delegation of the European Commission to the United States, *EU Policy on the Death Penalty* <<http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm>> (visited 23 January 2006).

⁹⁶ McNally, “Last Hanging in State 50 Years Ago Today” *The Irish Times*, 20 April 2004.

⁹⁷ Noel and Marie Murray were convicted of the capital murder of Garda Michael Reynolds following an armed robbery in Dublin in 1975. However, the capital conviction was overturned by the Supreme Court and the sentence commuted to life imprisonment. The last to be sentenced to death were Noel Callen and Michael McHugh for the murder of Garda Patrick Morrissey after a robbery in Co. Louth in 1985. The sentence was commuted to forty years.

replaced with a sentence of life and 40 years respectively. As Eamon Leahy SC has explained:

There was at that time and I think throughout the Seventies, a feeling that where there was an unarmed Garda force in particular, that society had to be seen to stand strongly behind them. I don't think that feeling has particularly changed, but I think the public in general would feel that it's appropriate that a significant prison sentence as opposed to death be the deterrent that's used to protect Gardaí.⁹⁸

All references to the death penalty in the Irish Constitution were finally removed by the Twenty-First Amendment in 2001 ensuring that capital punishment cannot be reactivated in Ireland without the approval of the Irish people by referendum. By removing the references to the death penalty which remained in the Constitution, the Irish State has demonstrated that the country values all human life. Furthermore, it allows Ireland to sincerely promote moves for the abolition of the death penalty worldwide.

By the early 1990s few European countries had retained the death penalty and most had not applied it in decades. Furthermore, many European countries, such as West Germany, abolished capital punishment against the grain of popular opinion.⁹⁹ However, as Sangmin Bae has noted:

The experience of Western Europe suggests that once the abolitionist policy becomes embedded in the national consciousness, public sentiment in favour of the death penalty gradually diminishes in the general population and pressure to reinstate it weakens.¹⁰⁰

Whilst periodically agitation to reinstate the death penalty may occur, this tends to be a direct response to a specific crisis or event.¹⁰¹ Indeed, as Judge

⁹⁸ RTE News Interactive, *Death Penalty Referendum* <<http://www.rte.ie/news/features/referenda/death/tonyconnelly1.html>> (visited 21 June 2006).

⁹⁹ Finnegan, "A Fondness for the Gallows" (1992) 78(41) *New Yorker* 4. The author observes that when West Germany abolished the death penalty in 1949, polls suggested 74% of the people approved of it. However, by 1980, the proportion in favour had slumped to only 20%. Richard L. Nygaard is Senior Justice of the United States Court of Appeals for the Third Circuit.

¹⁰⁰ Bae, *loc. cit.*, at 61.

¹⁰¹ For example, the former Commissioner of the London Metropolitan Police, Lord Stevens of Kirkwhelpington called for the reintroduction of the death penalty in the UK in the wake of the slaying of PC Sharon Beshenivsky in November 2005. Lord Stevens suggested that the death penalty should be restored in a limited number of cases: "Those who can incontrovertibly be proved to have murdered a police officer should be killed". He added that he perceived this to be "the only way" that police officers could be protected in the discharge of their duties. *See*

Nygaard has observed, “Among people who don’t grow up with it, capital punishment comes to be seen as a barbaric relic, like slavery or branding”.¹⁰²

In 2003, Protocol No. 13 to the European Convention for the Protection of Human Rights and Fundamental Freedoms came into force. This protocol is the first international treaty that bans the death penalty in all circumstances and has already been ratified by 32 countries.¹⁰³ Prior to this, the Sixth Protocol to the Convention prohibited the death penalty, save “in time of war or imminent threat of war”.¹⁰⁴ The jurisprudence of the European Court of Human Rights has further developed the abolitionist spirit of the Convention. In *Soering v. United Kingdom*, the applicant, a German national, was accused of murdering his girlfriend’s parents in Virginia.¹⁰⁵ After he was arrested in Britain, the US government requested his extradition to stand trial for the killings, for which he faced the possibility of the death penalty. The European Court of Human Rights ruled that prolonged detention on death row violates the prohibition against inhuman and degrading treatment, and that the United Kingdom would violate the European Convention if it extradited Soering to Virginia because he would suffer from what it termed the “death row phenomenon”. Whilst ultimately Soering was extradited to the United States, it was only after Virginia gave an undertaking not to seek the death penalty.¹⁰⁶ Long ago European countries, either in practice or in law, made a choice for humanity, abolishing the death penalty and thus fostering respect for human dignity. It is also a path which Europe’s leaders have frequently invited the United States to tread.¹⁰⁷

B. South Africa

Whilst the European experience with capital punishment is instructive, perhaps the most important and recent abolitionist example is that of South Africa, where the Constitutional Court struck down the death penalty as

Stevens, “I Never Believed in the Death Penalty... Until This Evil” *News of the World*, 20 November 2005.

¹⁰² Finnegan, *loc. cit.*, at 4.

¹⁰³ Zamparutti and Zammit, *op. cit.*, at 164.

¹⁰⁴ Demleitner, *loc. cit.*, at 137.

¹⁰⁵ (1989) 11 EHRR 439. Hereafter referred to as *Soering*.

¹⁰⁶ De la Vega, “Going it Alone” (2004) 15(7) *The American Prospect* A22, at A23. The Canadian Supreme Court in the recent case of *United States v. Burns and Rafay* [2001] 1 SCR 283 ruled that it was unconstitutional to extradite an individual to the United States without assurances that the death penalty would not be sought, citing with approval the European Court of Human Rights’ decision in *Soering*. Revelations of wrongful convictions were also a forceful influence, with the Court emphasising that, “[t]he unique feature of capital punishment is that it puts beyond recall the possibility of correction”. See Givelber, *loc. cit.*, at 163-167.

¹⁰⁷ Delegation of the European Commission to the United States, *EU Policy on the Death Penalty* <<http://www.eurunion.org/legislat/deathpenalty/eumemorandum.htm>> (visited 23 January 2006).

incompatible with the country's new Constitution. This bold move ensured that a culture of life would permeate the Constitution from its birth. It is also noteworthy to observe that the Court chose capital punishment as the subject of its first major judgment. Furthermore, South Africa's long struggle with racism perhaps makes the South African experience more directly relevant to the United States.

In *State v. Makwanyane and Mchunu*, the Constitutional Court considered the sentence of death imposed on two individuals who, with four others, had attempted to rob a bank security vehicle in Johannesburg in 1990.¹⁰⁸ During the robbery, two occupants of the vehicle were killed and a third seriously injured. In a subsequent exchange of fire with police three members of the gang and two police officers were killed. A further member of the gang escaped and Thembo Makwanyane and Mavusa Mchunu were the only two defendants at the subsequent murder trial. The two were sentenced to death and the Appellate Division later considered that death "was the only proper sentence". However, the Appellate Division referred the case to the Constitutional Court for a determination of whether the death penalty was consistent with the Constitution.

The newly constituted eleven member court determined that the right to life and dignity is the most basic of all human rights and the source of all other personal rights in the Bill of Rights.¹⁰⁹ Sachs J. declared, "Everyone, including the most abominable of human beings, has a right to life, and capital punishment is therefore unconstitutional".¹¹⁰ In a strong show of support for the ruling, each of the court's justices issued a written opinion backing the decision. The Court was adamant to emphasise that the issue of the death penalty was not one which rested on democratic majorities. Indeed, Chaskalson P. conceded "the majority of South Africans agree that the death sentence should be imposed in extreme cases of murder".¹¹¹ However, Chaskalson P. further explained the importance of the rights of minorities and the role of the Constitutional Court in protecting these rights:

¹⁰⁸ Case No. CCT/3/94. Available at http://www.alrc.net/doc/mainfile.php/cl_safrica/218/ (visited 19 August 2006).

¹⁰⁹ More specifically the death penalty was found to breach Section 9 of the Constitution which protects life and Section 10 which protects human dignity. A number of justices, however, also expressed their view that the death penalty was contrary to the historical background and ethos of the Constitution. For example, Mahomed J. observed, "The postamble to the Constitution gives expression to the new ethos of the nation by a commitment to 'open a new chapter in the history of our country', by lamenting the transgressions of 'human rights' and 'humanitarian principles' in the past, and articulating a 'need for understanding, but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimization'". See CCT/3/94, at para. 263.

¹¹⁰ *Ibid.*, at para. 392.

¹¹¹ *Ibid.*, at para. 87.

[T]he issue of the constitutionality of capital punishment cannot be referred to a referendum, in which a majority view would prevail over the wishes of any minority. The very reason for establishing the new legal order, and for vesting the power of judicial review of all legislation in the courts, was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.¹¹²

Several other members of the Court also specifically addressed the relevance of public opinion in determining such constitutional matters, and whilst some accepted that regard could be had to public opinion, all eleven justices rejected any notion that public opinion should be the decisive or predominant factor. It is, at this point, appropriate to recall that American jurisprudence dictates that the interpretation of the Eighth Amendment should reflect “evolving standards of decency”. This would seem to necessitate some inquiry into the *vox populi*, though the relative constitutional weight given to the outcome of such an inquiry is a matter for judicial determination.

The Constitutional Court also specifically rejected the argument that the death penalty possessed a greater deterrence value.¹¹³ O’Regan J. stated “the deterrent effect of the death penalty remains unproven, perhaps unprovable”,¹¹⁴ whilst Kriegler J. further emphasised that “no empirical study, no statistical exercise and no theoretical analysis has been able to demonstrate that capital punishment has any deterrent force greater than that of a really heavy sentence of imprisonment”.¹¹⁵

Makwanyane, however, also drew heavily on international experiences of capital punishment. The approach adopted by the Court embraced comparative constitutionalism, examining case law from several continents to assist the Court in its interpretation of the South African Constitution. American death penalty jurisprudence, in particular, was highly influential. Sachs J., who charted with great detail the historical experience of capital punishment in South Africa, observed:

¹¹² *Ibid.*, at para. 88.

¹¹³ *Ibid.*, at para. 116 - 127, where Chaskalson P. examines in great detail the concept of deterrence in relation to capital punishment. He rejected that it possessed a greater deterrent value than imprisonment and concluded “[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished”, a conclusion also reached by Beccaria 240 years earlier.

¹¹⁴ *Ibid.*, at para. 340.

¹¹⁵ *Ibid.*, at para. 212.

Germany after Nazism, Italy after Fascism, and Portugal, Peru, Nicaragua, Brazil, Argentina, the Philippines and Spain all abolished capital punishment for peacetime offences after emerging from periods of severe repression. They did so mostly through constitutional provisions.... It is not unreasonable to think that similar considerations influenced the framers of our Constitution as well.¹¹⁶

The "New York Times" recognised the importance of the *Makwanyane* judgment for the United States and commented:

[This] courageous decision leaves the United States in a dwindling company of democratic countries with the dubious distinction of executing their citizens.... The opinion of the Court's President, Arthur Chaskalson, and ten concurring opinions owe much to the writings of American liberal justices, but they also have much to teach the United States.¹¹⁷

Tellingly, a decade later the United States has made substantial progress towards abolition. The death penalty is now considerably more restrictive: both in terms of those who may be subjected to it, and the crimes for which it is available. Recent years have also witnessed a sharp decline in the overall usage of the death penalty. As Zamparutti and Zammit have highlighted:

The 2004 data relative to the United States alone confirms the trend towards a diminished use of the death penalty. There were fewer executions, less death sentences and less people on death row. Executions were down from 65 in 2003 to 59. The 2004 total is a remarkable 40% less than the 1999 total, which was the record year for executions since the reintroduction of the death penalty in 1976. As has been mostly the case since 1976, executions took place prevalently in Southern states: 85% of the total.¹¹⁸

It is clear, however, that the United States can learn much from the South African experience. The fact that both countries have a long and bitter history of segregation and racial tension makes *Makwanyane* all the more relevant to the United States today. Chaskalson P. noted, "It cannot be gainsaid that poverty, race and chance play roles in the outcome of capital

¹¹⁶ *Ibid.*, at para. 387.

¹¹⁷ Editorial, "South Africa Shows the Way" *New York Times*, 10 June 1995.

¹¹⁸ Zamparutti and Zammit, *op. cit.*, at 26.

cases”.¹¹⁹ It also cannot be denied that this remains the case in the United States. As Hugo Bedau has observed:

Injustice in punishment, which for our purposes is injustice in sentencing, is an injustice to the guilty offender only when the sentencing disparities are explained by factors that have nothing to do with the desert of the offender. Clearly, sentencing disparities based on gender, race, color, or nationality of the offender, as well as the arbitrary outcomes of a fair lottery, are irrelevant to the offender’s desert. Every guilty offender has a right that his sentence not be determined by factors irrelevant to his desert.¹²⁰

The South African Constitutional Court recognised this reality in *Makwanyane*. However, the continued striking disparities within America’s capital punishment system must lead one to wonder whether the United States has fully embraced this truth.

Conclusion

Since the earliest recorded American execution in 1608, more than 16,000 people have been executed in the United States.¹²¹ It is difficult to predict whether this long experience with capital punishment is now finally drawing to a close. Certainly the death knell has sounded for mandatory executions, juvenile executions and the execution of the mentally retarded. It would seem also that the death penalty is beyond resurrection for the crime of rape. Prof. J.R. Broughton has referred to this as the “modern incrementalist strategy for killing capital punishment”.¹²² Whereas “*per se* challenges to capital punishment are unlikely to succeed, death penalty opponents today instead target narrow and discrete death penalty practices primarily through litigation, creating seemingly small but significant court victories that, over time, slowly erode the scope and availability of death sentencing.”¹²³ Increasingly, it appears “America’s seeming infatuation with the death penalty looks about an inch deep and a good deal less than a mile wide.”¹²⁴

¹¹⁹ CCT/3/94, at para. 51.

¹²⁰ Bedau, “A Reply to van den Haag”, *loc. cit.*, at 461.

¹²¹ Huang, “Hanging, Cyanide Gas, and the Evolving Standards of Decency: The Ninth Circuit’s Misapplication of the Cruel and Unusual Clause of the Eighth Amendment” (1995) 74 *Oregon Law Review* 995, at 997.

¹²² Broughton, “The Second Death of Capital Punishment” (Social Science Research Network, 2006), at 6. See Social Science Research Network, *The Second Death of Capital Punishment* <<http://ssrn.com/abstract=878244>> (visited 16 March 2006).

¹²³ *Ibid.*

¹²⁴ Bedau, “Death’s Dwindling Dominion” (2004) 15(7) *The American Prospect* A3.

As Justice Blackmun accepted in *Callins*, three decades of experimentation with the death penalty has not produced the requirements of consistency and individual fairness, demanded by successive Supreme Court decisions. Importantly, Justice Blackmun did not object to the death penalty on the moral or ethical grounds often evident in the writings of Justice Brennan and Justice Marshall. He rather simply concluded that procedural irregularities meant “the death penalty could not be administered in accord with our Constitution”.¹²⁵ It is clear also that the death penalty is riven with all the shortcomings of a system which represents the worst of human frailties. As President Abdoulaye Wade of Senegal has observed:

The death penalty often smites the people who are without defences, without resources and without resorts. It is sometimes pronounced at the end of procedures that do not present guarantees of a fair trial, with possible legal errors which have irreparable consequences for the family and for society.¹²⁶

Moreover, the international community is swiftly abandoning support for capital punishment. As Connie de la Vega has highlighted, the United States’ “failure to follow the trend toward abolition has begun to affect America's influence in the international arena”.¹²⁷ For example, in 2001 the United States was voted off the Commission on Human Rights for the first time in that body's 54-year history. Whilst that action may be blamed on many factors, America’s record on the death penalty was at least one point of contention among the nations that failed to support the United States’ re-election. Furthermore, the United States is one of only two countries, the other being Somalia, which has failed to ratify the UN Convention on the Rights of the Child, the most widely ratified human rights treaty in history.¹²⁸ The Convention prohibits juvenile executions, and the commitment of some US states to this practice, until the landmark *Roper* decision banned such executions, represented a significant impediment to full compliance with the Convention. In 2004, the United States was ranked sixth in the world having executed 59 people.¹²⁹ North Korea ranked just above it, Uzbekistan below it. By its continued use of the death penalty, the United States has found itself within the ranks of a dwindling number of countries, most of which are governed by authoritarian regimes.

¹²⁵ *Callins v. Collins* 510 US 1141 (1994).

¹²⁶ Zamparutti and Zammit, *op. cit.*, at 8-9.

¹²⁷ De la Vega, *loc. cit.*, at A22.

¹²⁸ *UN Convention on the Rights of the Child*, <<http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp>> (visited 24 June 2006).

¹²⁹ Zamparutti and Zammit, *op. cit.*, at 176.

However, it is to be hoped that the United States may soon join the rest of the liberal democratic world by moving decisively towards abolition. As Elizabeth Linehan has explained, capital punishment is no longer a necessity:

Nations could probably not do without a system of criminal punishments; however, most Western nations manage without the institution of capital punishment. I believe the United States could as well and that, therefore, the risk of executing the innocent is an avoidable one.¹³⁰

Moreover, uncertainty over the necessity of capital punishment has existed since the First Congress debated the Bill of Rights. Mr. Livermore spoke of the importance of ensuring that existing punishments were not prohibited by the Eighth Amendment. However, revealingly, he also added:

If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it.¹³¹

Indeed, as John P. Conrad has noted, when the Bill of Rights was adopted “[t]he modern police department had yet to be organised [and] there were no prisons”.¹³² Furthermore, as Scott Turow has noted, “retaining the death penalty seems to be a road to breeding disrespect for the law, because it exposes so many of its shortcomings”.¹³³ In view of the manifold flaws of capital punishment, the time has now surely come for the death penalty to be recognised as a relic of the past and finally consigned to history, unnecessary in the United States in the 21st century.

¹³⁰ Linehan, "Executing the Innocent" in Brinkmann ed., *Ethics, Volume 1: The Proceedings of the Twentieth World Congress of Philosophy* (Bowling Green State University, 1999). The text of the paper available online at, Boston University: Paedia Project Online, Human Rights <<http://www.bu.edu/wcp/Papers/Huma/HumaLine.htm>> (visited 7 March 2006).

¹³¹ See *Furman v. Georgia* 408 US 238 (1972), See <<http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=408&invol=238>>, per Justice Marshall. Original reporting is contained in 1 *Annals of Congress* 754 (1789).

¹³² Conrad and van den Haag, *op. cit.*, at 162.

¹³³ Turow, *op. cit.*, at 115.

THE EQUALITY PRINCIPLE IN EU LAW: TAKING A HUMAN RIGHTS APPROACH?

CLAIRE MCHUGH*

Introduction

One of the most striking aspects of the European Union's constantly evolving political and legal identity has been the progressive development of its human rights and social dimension, thus creating a Europe of citizens rather than a Europe of States. The precise scope and impact of the Union's involvement in human rights requires ongoing assessment, given the unique legal experiment which it entails. One fundamental right, the right to equality, has longstanding roots in Community law, and has undergone significant changes and expansion in recent years.¹ This article aims to assess some of these developments in equality law, focusing on the importance of the Article 13 Directives in advancing the Community vision of equality; first, as a fundamental social right and secondly, as embodying a commitment to substantive, and not merely formal, equality. Formal equality is largely content with *prohibiting* unlawful discrimination, in accordance with the Aristotelian maxim that "justice demands that equals be treated equally and unequals be treated unequally." In contrast, substantive equality requires a proactive approach, taking positive steps to *promote* equality, based on the recognition that identical treatment may fall short of what true equality in fact requires. The latter approach would have far-reaching consequences for the interpretation and application of EU equality Directives. Moreover, such a development can be viewed as part of a wider emerging concept of European social citizenship, with attendant human rights protections.²

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¹ See for example More, "The Principle of Equal Treatment: From Market Unifier to Fundamental Right?" in Craig and de Búrca eds., *The Evolution of EU Law* (Oxford University Press, 1999) 517; Waddington, *The Expanding Role of the Equality Principle in European Union Law*, EUI Robert Schuman Centre of Advanced Studies Policy Papers 2003/04, and McCrudden, "Theorising European Equality Law" in Costello and Barry eds., *Equality in Diversity: The New Equality Directives* (Irish Centre for European Law, 2003) 1.

² See Shaw, "Constitutional Settlements and the Citizen after the Treaty of Amsterdam" in Neunreither and Wiener eds., *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, 2000) 290.

This article aims to consider the evidence marshalled in favour of the view that a shift to a more substantive approach to equality has emerged in the Community legal order. Part I briefly sets out the concepts of formal and substantive equality. Part II discusses the status of equality as a fundamental right in Community law, considering whether the principle of equality, originally premised on economic considerations, has evolved into a free-standing human right. The impact of the Treaty of Amsterdam, particularly Article 13, and more recent developments concerning the European Constitution and the Charter of Fundamental Rights are discussed here. Part III considers particular legislative and Treaty provisions which incorporate elements of substantive equality, namely Article 141(4) EC, the Article 13 Directives, and the Constitution's provisions on positive obligations. The aim of this discussion is to discern if, overall, a new approach to equality, premised on human rights rather than market concerns, has emerged in the Community legal order. The final Part considers the potential impact of a substantive approach to equality. We ask what, in effect, a human rights-based vision of equality demands that a market-based understanding does not? Furthermore, what is the scope for the European Court of Justice (ECJ) to actively advocate substantive equality? Two recent sets of proceedings concerning the application of the Framework Directive are analysed as evidence of the possible (even competing) approaches that may be taken to the new generation of Community equality legislation.

I. Formal and substantive equality

Before assessing whether Community law has shifted from a formal to a substantive understanding of equality, it is necessary to discuss the meaning of these concepts. There are a variety of different (and frequently overlapping) concepts of equality which have been identified by commentators.³ This analysis shall sketch the broad contours of these concepts, which lie at the heart of the current debate on whether European equality law has in fact evolved.

Formal equality

Formal equality is focused on justice for the individual and requires that persons in a similar situation should be treated equally, and persons in unlike situations should be treated in an unlike manner, unless there is objective justification for not doing so. This vision of equality was concisely expressed by the Court of Justice in *A v Commission*: “the principle of equal treatment is breached when two categories of persons

³ McCrudden identifies five different meanings which may attach to the legal concept of equality. *loc. cit.*, at 19.

whose factual and legal circumstances disclose no essential difference are treated differently or where situations which are different are treated in an identical manner.”⁴ The essential premise of this model of equality is that considerations such as race and gender should play no role in decision-making. Consequently, this principle is diametrically opposed to forms of positive action which entail the use of such criteria as a basis for preferential treatment.⁵ This model of individual justice formed the cornerstone of the 1976 Equal Treatment Directive, which relied on individual women bringing litigation to challenge unlawful discrimination.⁶

The formal equality principle has been frequently attacked for its inherent limitations, particularly its failure to adequately tackle institutional and structural forms of discrimination, which are not directed at specific individuals but disadvantage certain groups.⁷ Briefly, its principal shortcomings are the following:

(i) the choice of a comparator⁸ is frequently determinative of the claim that inconsistent treatment has in fact occurred, and is by no means uncontroversial. Fredman comments that, in this respect, formal equality is “based on an assumption of conformity to a given norm, and therefore of assimilation.”⁹

(ii) formal equality creates only negative obligations of non-discrimination, and does not involve any obligations to adjust structures to accommodate diversity. The principle is a static one, and fails to recognise that the circumstances may merit proportionately better treatment.¹⁰

⁴ Case T-10/93, *A v Commission* [1994] ECR II-179, para. 42.

⁵ See further Fenwick, “From Formal to Substantive Equality: the Place of Affirmative Action in EU Sex Equality Law” (1998) 4 *European Public Law* 507. Positive action is the taking of specific measures to actively ensure greater equality. It is controversial as it involves taking into account the very differences that traditional anti-discrimination laws forbid taking into account. An example (of an equality of results form of positive action) would be the adoption of a quota to ensure a greater representation of women on a company’s board, thus addressing imbalances in its decision-making which may disadvantage women. ‘Softer’ forms of positive action, such as providing crèche facilities to female employees, would fall within an equality of opportunity model of positive action. See the discussion of substantive equality *infra*.

⁶ Waddington and Bell, “Reflecting on inequalities in European equality law” (2003) 28 *European Law Review* 349, at 351.

⁷ See Fredman, “Combating Racism with Human Rights: The Right to Equality” in Fredman ed., *Discrimination and Human Rights: The Case of Racism* (Oxford University Press, 2001) 9.

⁸ A comparator is a person in similar circumstances, but not falling within the alleged ground of discrimination, whom the Court uses to assess whether the complainant did in fact receive unequal treatment. For example, in an equal pay claim based on gender, the appropriate comparator is a person of the opposite sex doing the same or like work.

⁹ Fredman, “Combating Racism with Human Rights: The Right to Equality”, *loc. cit.*, at 16.

¹⁰ Barrett, “The Concept and Principle of Equality in European Community Law – Pouring New Wine into Old Bottles” in Costello and Barry eds., *op. cit.*, 99, at 106.

(iii) formal equality is overly reliant on individual justice as a means of enforcing the right to equality. A remedy is only provided to the individual victim of discrimination who succeeds in a claim; there is no attempt to address embedded discrimination.

A symmetrical or formal approach to equality was markedly evident in much of the ECJ's gender equality jurisprudence. One example is the much-criticised decision of *Stadt Lengerich v Helmig*,¹¹ a case brought by part-time (predominantly female) workers who did not receive the higher rate of overtime pay until they worked in excess of the normal working hours for full-time workers. The Court held that no discrimination occurred, as workers were treated equally hour for hour. This decision ignored substantial differences in reality between the position of full-time and part-time workers – working more than the agreed part-time hours was likely to be especially disruptive of the family arrangements of the latter.

Substantive equality

While formal equality is best understood as a procedural guarantee of fairness in decision-making (i.e. arbitrary factors such as sex and race are impermissible considerations), substantive equality moves beyond a concern with the process to address the outcomes of the decision-making process itself. This model, also described as the group justice model, seeks to redress structural causes of discrimination and entrenched forms of disadvantage which affect individuals as members of a group.¹² Two forms of substantive equality may be distinguished: equality of opportunity, and equality of results.

Equality of opportunity is less controversial than equality of results, as it is less subversive of the requirement of consistent treatment of individuals embodied in the formal equality principle. Fredman describes it in the following terms: “It is maintained that true equality cannot be achieved if individuals begin the race from different starting points. An equal opportunities approach therefore aims to equalise the starting point, accepting that this might necessitate special measures for the disadvantaged group.”¹³ In theory, this approach does not seek to guarantee a particular outcome. It merely allows all competitors to compete on equal footing, unimpeded by disadvantages linked to membership of a particular group. The Opinion of AG Tesouro in *Kalanke* is typical of an equal opportunities focus. He suggested that the achievement of gender equality in employment required measures to remove barriers to women's participation in the workforce, such as flexible working time and access to adequate childcare

¹¹ (1994) ECR I-5727

¹² See Barnard and Hepple, “Substantive Equality” (2000) 59 *Cambridge Law Journal* 562.

¹³ Fredman, “Affirmative Action and the European Court of Justice: A Critical Analysis” in Shaw ed., *Social Law and Policy in an Evolving European Union* (Hart Publishing, 2000), 175.

facilities.¹⁴ This approach was adopted by the Court in *Lommers*.¹⁵ It upheld an employer's scheme providing subsidised nursery places to female employees in a workplace where women were heavily under-represented, stating "an insufficiency of suitable and affordable nursery facilities is likely to induce more particularly female employees to give up their jobs."¹⁶

Equality of results entails a redistributive approach to equal treatment, focusing not only on guaranteeing equal starting points, but in equalising the outcome of the process. The extent of this equalisation varies according to the type of instrument adopted. In its weaker form, it may involve obligations to monitor the composition and diversity of a workforce,¹⁷ or a positive duty to promote equality.¹⁸ More explicitly results-oriented (and more controversial) measures may entail the setting of goals or quotas to change the composition of the workforce, or a preference for minority-owned businesses in granting contracts.¹⁹ This approach presents particular difficulties for a legal system which accords high status to the right of individuals to equal treatment. It involves a challenge to the notion of consistent treatment, based on factors which are usually considered to be arbitrary considerations.²⁰

In practice, the theoretical distinction between equality of results and equality of opportunity may be an illusory one – most substantive equality model will contain elements of both.²¹ Despite this difficulty, the permissibility of positive action in Community law was previously delineated by this distinction. Article 2(4) of the original Equal Treatment Directive stated the Directive is "without prejudice to the right of Member States to adopt or maintain in force *measures to promote equal opportunity* for men and women."²² (This is amended by the Second Equal Treatment Directive, which inserts a new provision Article 2(8), allowing Member States to maintain or adopt measures within the meaning of Article 141(4)

¹⁴ Case C-450/93, *Kalanke v Freie Hansestadt Bremen* [1995] ECR I-3051.

¹⁵ Case C-476/99, *Lommers v Minister van Landbouw* [2002] ECR I-2891.

¹⁶ Para. 37.

¹⁷ Legislation has existed in Northern Ireland since 1989 creating positive obligations for employers to achieve fair participation of Catholic and Protestant employees in the workplace. See Part VII, Fair Employment and Treatment (Northern Ireland) Order 1998.

¹⁸ For example, section 74 of the Northern Ireland Act 1998 and section of the Race Relations (Amendment) Act 2000 create a statutory duty for public authorities in Northern Ireland and the United Kingdom to promote equality of opportunity in the exercise of their functions.

¹⁹ *Fullilove v Klutznick* 448 US 448 (1980).

²⁰ Barrett, *loc. cit.*, at 108.

²¹ Strauss, "The Illusory Distinction between Equality of Opportunity and Equality of Result" in Devins and Douglas eds., *Redefining Equality* (Oxford University Press, 1998) 51, at 61.

²² Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L39/40. Emphasis added.

EC).²³ The current state of the Community law provisions on positive action is discussed below.

II. Equality as a fundamental human right

Gender equality and fundamental rights

It may seem anomalous to speak of equality *now* emerging as a fundamental human right in the Community legal order, given that the European Court of Justice has long regarded the principle of equality as a fundamental right which serves a social as well as an economic function.²⁴ This was, however, confined to equality between men and women, on the basis of Article 119 of the founding Treaty, which enshrined the principle of equal pay for equal work. Article 119's inclusion was not due to a concern for fundamental rights, but was intended to prevent distortions of competition in the internal market which might have resulted from wage differentials in men and women's labour.²⁵ Through a process of judicial transformation and an expanding body of legislation on sex equality, Article 119 eclipsed its modest beginnings to become "an integral part of one of the most fundamental principles of the Union's constitutional code."²⁶

However, this principle of equality served a largely rhetorical function. Due to the limited competences of the European Community, equality was not available as a free-standing, directly effective right but required another Community legal basis to latch onto e.g. a specific legally enforceable right conferred by a directive. The Court adopted an expansive interpretation of sex equality in *P v S*, where it held that the principle of equal treatment between men and women enshrined in the Equal Treatment Directive applied to transsexuals.²⁷ However, the limitations of the Court's willingness, and indeed its ability, to extend equality protections on the basis of fundamental rights were illustrated by the subsequent case of *Grant*, where the Court held that the principle of non-discrimination did not apply to differences of treatment based on a person's sexual orientation.²⁸ It

²³ Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002, amending Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, [2002] OJ L269/15.

²⁴ Case C-43/75, *Defrenne v SABENA II* (1976) ECR 455.

²⁵ See Barnard, "The Economic Objectives of Article 119" in Hervey and O'Keeffe eds., *Sex Equality Law in the European Union* (Wiley & Sons, 1996) 321.

²⁶ Mancini and O'Leary, "The New Frontiers of Sex Equality Law in the European Union" (1999) 24 *European Law Review* 331, at 333.

²⁷ Case C-13/94, *P v S and Cornwall County Council* [1996] ECR I-2143.

²⁸ Case C-249/96 *Grant v Southwest Trains* [1998] Industrial Relations Law Reports 165. See Barnard, "The Principle of Equality in the Community Context: *P*, *Grant*, *Kalanke* and

was clear that legislative action would be necessary to extend equality guarantees to other grounds.

Fundamental rights: the impact of the Treaty of Amsterdam

Human rights had long been recognised by the ECJ as ‘general principles’ of Community law, despite the absence of any express reference to human rights in the Treaty of Rome.²⁹ This development was intended to offset the conflict between the pursuit of European economic integration, and domestic constitutional protections which were threatened by the Community principles of direct effect and supremacy. Thus, human rights originally functioned as a catalogue of negative and unwritten rights, imposing normative limits on EC institutions when they acted and on Member States acting in the field of EC law.³⁰ A ‘hard law’ reference was first made to human rights by the Treaty of Maastricht, which committed the Union to respect human rights as general principles of Community law.³¹ This was coupled with the first appearance of the concept of European citizenship in Article 8 EC.

The adoption of the Treaty of Amsterdam in 1997 conferred actual powers and competences on the European Union in the field of human rights. This was part of a broader shift in the European project from negative to positive integration in achieving its goals.³² Recognition of the relevance of human rights to the Union followed upon a more sophisticated understanding of the measures necessary to achieve deeper integration and a truly unified single market. It was gradually realised that freedom from discrimination was central to ensuring effective enjoyment of rights of free movement, and to ensure Europe’s competitiveness by removing barriers to labour market participation.³³

Marschall: Four Uneasy Bedfellows?” (1998) 57 *Cambridge Law Journal* 352.

²⁹ See Case 29/69, *Stauder v City of Ulm* [1969] ECR 419 and Case 11/70, *Internationale Handelsgesellschaft* (1970) ECR 1125.

³⁰ De Búrca, *Human Rights: The Charter and Beyond*, New York University, Jean Monnet Working Paper No. 10/01, at 9.

³¹ Article F, Treaty on European Union.

³² Alston and Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, New York University, Jean Monnet Working Paper No. 1/99, at 7. Several expert reports in the late 1990’s have greatly influenced the development of the European Union’s human rights agenda: *For a Europe of Civic and Social Rights: Report by the Comité des Sages* (1996), *Leading By Example: A Human Rights Agenda for the European Union for the Year 2000: Agenda of the Comité des Sages and Final Project Report* (1998), and *Affirming Fundamental Rights in the European Union: Report of the Expert Group on Fundamental Rights* (1999).

³³ Shaw, “Constitutional Settlements and the Citizen after the Treaty of Amsterdam” in Neunreither and Wiener eds., *European Integration after Amsterdam: Institutional Dynamics and Prospects for Democracy* (Oxford University Press, 2000) 290, at 311. See also European Commission, *European Social Policy: A Way Forward for the Union*, COM (94)333, 27th July 1994.

The keystone of the Treaty of Amsterdam's engagement with a rights agenda is Article 6 TEU, which states that the EU is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law. This commitment is strengthened by Article 6(2), which pledges the Union to respect fundamental human rights as guaranteed by the ECHR and the constitutional traditions of the Member States as 'general principles of Community law.'³⁴ The reference to the ECHR is significant here, as it allows litigants to invoke the Strasbourg jurisprudence on equality and non-discrimination in proceedings before the ECJ. Moreover, Community acts and acts of the Member States when they are implementing EU law may be reviewed by the ECJ for non-compliance with the provisions of the ECHR, thus widening the body of constitutional protection available to EU citizens. Article 14 of the Convention confers a general right of non-discrimination in the exercise of other substantive Convention rights, and expressly mentions some grounds not covered by Article 13: language, political or other opinion, national or social origin, property, birth or other status.³⁵ This may complement the specific equality protections conferred by the EU's own *acquis*.³⁶

Article 6 is a fitting counterpart to the development of the EU's social dimension by the Treaty, through the introduction of a Title on Employment (Article 125-130 EC) and a Title on Social Policy (Articles 136-145 EC).³⁷ Several other provisions of the Treaty contain principles and mechanisms designed to enhance the status and efficacy of protection of fundamental rights as a constitutional principle of the Union.³⁸ These are not within the scope of the present discussion, which will concentrate on those provisions of the Treaty which broadened and deepened the reach of the equality principle.

³⁴ This codifies the European Court of Justice's jurisprudence on protection of fundamental rights in the Community legal order. See Case C-260/89, *ERT* (1991) ECR I-1759.

³⁵ Protocol 12 to the Convention will transform Article 14 ECHR into a free-standing equality right, once ratified by ten Member States.

³⁶ See Ellis, *EU Anti-Discrimination Law* (Oxford University Press, 2005) 315 on the significance of the general principles of Community law, particularly the ECHR, for anti-discrimination protection.

³⁷ The coincidence of Europe's social and economic objectives in the area of equality can be seen in the extension of the principle of equal treatment to part-time and fixed-term work by Council Directives 97/81/EC and 99/70/EC respectively. However, Fredman questions whether these Directives reflect a genuine synthesis of social and economic concerns, pointing that the Directives do not confer substantive rights on the non-standard worker, merely the right not to be treated in a less favourable manner than the comparable standard worker. Fredman, "Transformation or Dilution: Fundamental Rights in the EU Social Space" (2006) 12 *European Law Journal* 41, at 48.

³⁸ See Lenaerts, "Respect for Fundamental Rights as a Constitutional Principle of the European Union" (2000) 6 *Columbia Journal of European Law* 1.

Gender equality provisions of the Amsterdam Treaty

First, Article 119 EC, now Article 141 EC (guaranteeing equal pay for equal work), was revised: (i) it guaranteed equal pay for work of equal value in the Treaty for the first time, (ii) it conferred a broad power on the Council to adopt legislation guaranteeing sex equality in the employment field, and (iii) it gave a Treaty basis to the adoption of positive action measures aimed at achieving “full equality in practice” between men and women.

Article 2 EC specified that the task of the Community includes, *inter alia*, the promotion of “a high level of employment and social protection, equality between men and women...and economic and social cohesion and solidarity among Member States.” Furthermore, Article 3(2) was inserted to require the Community to eliminate inequalities, and to promote equality, between men and women in all its activities referred to in Article 3. This was a unique inclusion of a commitment to gender mainstreaming among the “agenda-setting” provisions of the Treaty.³⁹ Article 137 EC specified that the Community should support and complement (including by the adoption of directives) activities of the Member States aimed at, among other fields, the integration of persons excluded from the labour market and equality between men and women with regard to labour market opportunities and treatment at work.

Article 13 EC – combating discrimination on new grounds

The most dynamic provision in the field of equality was undoubtedly Article 13 EC, which shifted the focus of Community anti-discrimination law beyond gender equality to other grounds for the first time. It conferred a power on the Council to “take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, age, disability and sexual orientation.”⁴⁰ This is not confined to the employment sphere, unlike Article 141. The Council has adopted three Directives on the basis of Article 13: the Racial Equality Directive,⁴¹ the Framework Employment Directive,⁴² and the new Gender Equal Treatment Directive.⁴³

³⁹ Waddington, *The Expanding Role of the Equality Principle in European Union Law*, *op. cit.*, at 13. Mainstreaming as an equality strategy is discussed further *infra*.

⁴⁰ It is important to bear in mind that Article 13 is not a fundamental rights provision and does not enjoy direct effect in Community law. (See, however, the later discussion in this article of the ECJ’s decision in *Mangold*). Furthermore, it is subject to the requirement of unanimity in the Council and is expressly stated to be “without prejudice to the other provisions of this Treaty and within the limits of the powers conferred [on the Council] by this Treaty.” Bell comments that this dependency of Article 13 on the limits of Community competence draws it back to a market integration rationale, rather than a social policy one. Bell, *Anti-Discrimination Law and the European Union* (Oxford University Press, 2002), at 144.

⁴¹ Council Directive 2000/43/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, [2000] OJ L180/22.

⁴² Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation, [2000] OJ L303/16.

Article 13's adoption can be linked to the development of a 'thicker' concept of European citizenship in the Treaty of Amsterdam, based around the principles of democracy, individual rights, solidarity and equal opportunity contained in the European social model.⁴⁴ This followed a gradual recognition that the solidarity and integrity of European integration would be threatened by the alienation of other sub-groups of citizens (not just EU citizens resident outside their own Member State) from the process. Article 13 can therefore be read as part of a wider attempt to guarantee the viability of European integration through a model of social citizenship conferring a portable set of rights.

The Article 13 Directives signal the advancement of Community equality law beyond concerns with marketplace integration to a more fundamental social policy in several respects.⁴⁵ One of their most striking features (with the exception of the Framework Directive) is their widened material scope – the Race Directive encompasses not only employment, but also social protection, social advantages, education and access to and supply of goods and services.⁴⁶ The new Gender Equal Treatment Directive extends the principle of equality between men and women to the supply of goods and services. Waddington suggests that “[t]his sweeping material scope...is more reminiscent of constitutional equality provisions which are not restricted to specific fields, such as employment, but permeate all policy areas.”⁴⁷

This new departure, into areas traditionally the preserve of Member States' social policy, can be seen as enhancing the concept of European citizenship, by offering guarantees of economic and social rights in the horizontal, and not merely the vertical, sphere. In this manner, it aims at the human rights 'goal' of an inclusive society.

The European Constitution and Charter of Fundamental Rights

In addition to the flurry of legislative activity in the area of non-discrimination, the European Union's proposed Constitution, incorporating the EU Charter of Fundamental Rights, offers another broader basis for a possible human rights approach to equality issues.⁴⁸ At the time of writing (July 2006), the intended ratification by all Member States of the

⁴³ Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, [2004] OJ L373/37.

⁴⁴ Shaw, “Constitutional Settlements and the Citizen after the Treaty of Amsterdam”, *loc. cit.*, at 311.

⁴⁵ See Bell, *Anti-Discrimination Law and the European Union*, *op. cit.*, above at 193.

⁴⁶ Article 3 of the Race Directive.

⁴⁷ Waddington, *The Expanding Role of the Equality Principle in European Union Law*, *op. cit.*, at 14.

⁴⁸ Treaty establishing a Constitution for the European Union, [2004] OJ C310/1, 16th December 2004. The Treaty was signed in Rome on 29th October 2004.

Constitution by November 2006 had been derailed by referenda in France and the Netherlands resulting in a negative vote on the Constitution. The European Council decided upon a period of reflection in the immediate aftermath of these negative results.⁴⁹ The Council also called for the continuation of the ratification process, while accepting that the original timetable may require alteration as appropriate to each Member State. Fifteen Member States have now ratified the Constitution. The EU's "period of reflection" was recently extended at its June 2006 summit. Following extensive consultations with the Member States, a report will be delivered by the Presidency of the Union in the first half of 2007.⁵⁰ This means that, for the time being, the Constitution has been effectively shelved and any eventual formal adoption of the document is unlikely to occur before 2008 at the earliest.

This places a shadow of uncertainty over the eventual form and substance in which the European treaties will be amended.⁵¹ Nevertheless, it is likely that the equality provisions of the Constitution and the Charter will largely survive in their present form, so they receive comprehensive discussion here.

The status of the Charter prior to incorporation

Before embarking on that discussion, it is useful to revisit the Charter's current status while it awaits legal incorporation.⁵² In formal terms, the Charter is not yet a legally binding document and merely enjoys the status of a political declaration, having been 'proclaimed' at the Nice European Council in December 2000.⁵³ However, it already enjoys significant political, legal and constitutional force. In March 2001, the Commission decided that all proposed Community legislative and regulatory provisions should be examined for compliance with the Charter.⁵⁴ Nor has the judicial sphere been immune to the pre-incorporation spread of the Charter. Several Advocates General of the European Court of Justice, as well as the Court of First Instance itself, have expressly referred to provisions of the Charter in

⁴⁹ SN 117/05, Declaration of the Heads of State or Heads of Government of the Member States of the European Union on the Ratification of the Treaty Establishing a Constitution for Europe, European Council 16 and 17 June 2005.

⁵⁰ Presidency Conclusions of the Brussels European Council, 15/16 June 2006.

⁵¹ Some countries have called for a complete renegotiation of the Constitutional Treaty, while others suggest modification of the existing text. See www.euobserver.com for recent information.

⁵² For detailed background and analysis of the Charter, see the following: De Búrca, "The Drafting of the European Union Charter of Fundamental Rights" (2001) 26 *European Law Review* 126; Goldsmith, "A Charter of Rights, Freedoms and Principles" (2001) 38 *Common Market Law Review* 1201; Peers, and Ward eds., *The EU Charter of Fundamental Rights* (Hart Publishing, 2004).

⁵³ [2000] OJ C364/8.

⁵⁴ Communication, SEC (2001) 380/3.

identifying fundamental rights to be protected.⁵⁵ A frequently cited example is the Opinion in *BECTU*, a case concerning the working time Directive and the right to paid annual leave. Advocate General Tizzano attached enormous significance to the express inclusion of this right in the EU Charter, and stated:

[I]n proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.⁵⁶

The Charter's relevance in determining the scope of EU human rights was summarised by one Advocate-General in the following terms: "I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order."⁵⁷

The European Court of Justice has yet to pronounce on the Charter, and it is possible that the Court may refrain from making substantive use of the Charter until its status is definitively settled.

However, it is evident that, in practical terms, the absence of formal incorporation of the Charter's provisions into the Union's founding treaties has not prevented its legal diffusion. The Charter is increasingly viewed as a source of guidance on the scope of fundamental rights protection in the European Union.⁵⁸ Its likely incorporation as a formal legal source of Community law will codify this task, and add greater weight to the rights guaranteed.

⁵⁵ These instances are usefully summarised by the House of Lords Select Committee on the European Union, *Report on the Future Status of the EU Charter of Fundamental Rights* (Stationery Office, 2003), 13-14.

⁵⁶ Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU) v Secretary of State for Trade and Industry*, Opinion of Advocate General Tizzano, 8 February 2001, at para. 28.

⁵⁷ Case C-20/00, *Booker v Aquaculture* (2003) ECR-I 7411, Opinion of Advocate-General Mischo, 20th September 2001, at para. 126.

⁵⁸ Jacobs, "Human Rights in the European Union : the role of the Court of Justice" (2001) 26 *European Law Review* 331.

The equality provisions of the Constitution

To return to the substantive provisions for discussion in this section, Article I-2 of the Constitution states the Union's values as "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to a minority." This express statement of equality as a founding value of the Union enhances its status as a constitutional principle underlying the European integration process. This is also reflected in the Constitution's statement of the Union's objectives in Article I-3, which include combating social exclusion and discrimination, and the promotion of social justice and protection and equality between men and women. The promotion of equality between men and women has been an objective of the Union (Article 2 EC) since the Amsterdam Treaty. However, the general reference to combating discrimination is new. While no specific grounds are listed, it is reasonable to assume that the grounds set out in Article 13 EC would fall within its scope. Two other objectives set out in Article I-3(3) of the Constitutional Treaty are also relevant, namely the "promotion of solidarity between generations" (may require combating age discrimination)⁵⁹ and respect for the Union's "cultural and linguistic diversity." However, the generality of these provisions and their extensive scope may undermine the potential strength of their contribution to the EU's policy and legislative agenda.

The equality provisions of the Charter

The Charter of Fundamental Rights constitutes Part Two of the Constitution. It includes a chapter on equality,⁶⁰ reflecting its status as a key fundamental right in the European Union. However, it is difficult to draw any settled conclusions regarding whether the Charter in fact strengthens the right to equality in formal legal terms. The difficulty lies in the differing approaches taken to various grounds of discrimination. At the outset, the equality chapter contains two horizontal provisions of general application. Article II-80 states that "everyone is equal before the law" and Article II-81 contains a general principle of non-discrimination "based on any ground." This includes a list of seventeen grounds. However, freedom from nationality-based discrimination does not appear to fall within this general prohibition, as it receives separate treatment in the subsequent paragraph of Article II-81: "Within the scope of application of the Constitution and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited." This highly ambiguous provision is addressed by the explanatory memorandum, which

⁵⁹ McCrudden and Kountouros, *Human Rights and European Equality Law*, University of Oxford Legal Studies Research Paper No 8/2006, at 15.

⁶⁰ See Bell, "Equality and the European Union Constitution" (2004) 33 *Industrial Law Journal* 242.

states that it is restricted to Community nationals.⁶¹ This undermines the Charter's attempt to establish a general right to equality.

In addition to the two horizontal provisions, the Charter contains five vertical articles addressing specific grounds (cultural, religious and linguistic diversity, equality between men and women, rights of the child and elderly people; and the integration of disabled people). With the exception of gender equality, these articles seem to embody merely vague, aspirational commitments on the part of the Union. In several instances, the language of the Charter steps away from directly conferring individual rights, employing instead the formulation that the Union should 'recognise and respect' particular rights.

Waddington consequently assesses the Articles of the Charter as reflecting a diverse approach to equality, with some rights being cast in traditional terms while others are more aspirational. "The Charter's failure to embrace a single concept of equality, covering all individuals and groups, could be regarded as arguing against a movement towards the constitutionalisation of the equality principle."⁶² This is probably a result of the consensus-driven approach to drafting the Charter: dilution of potentially controversial rights, particularly those which impact on social policy, was most likely inevitable to secure agreement on their inclusion.

Nonetheless, the Charter may have a significant symbolic (and even interpretative) resonance in recognising the right to equality as a core right of the person, expressed in the constitutional document of the Union. McCrudden suggests that "European equality is in the course of being subsumed within a broader human rights discourse."⁶³ There is certainly increasing scope for human rights principles to permeate the Community law concept of equality.

III. New elements of substantive equality in Community law

New provisions on positive action –Article 141(4) EC and the Article 13 Directives

The most striking examples that the Community legislator has embraced a concept of substantive equality in the anti-discrimination regime are the new provisions governing positive action in the European Union. As stated above, the adoption of the Amsterdam Treaty involved a new clause on positive action in the field of gender equality, Article 141(4). As well as conferring a Treaty basis for positive action measures, this provision is

⁶¹ Praesidium, "Text of the explanations relating to the complete text of the Charter as set out in CHARTE 4487/00 CONVENT 50", CHARTE 4473/00 CONVENT 49, Brussels, 11 October 2000, 23.

⁶² Waddington, *The Expanding Role of the Equality Principle in European Union Law*, *op. cit.*, at 23.

⁶³ McCrudden, *loc. cit.*, at 9.

significant in its wording, which departs significantly from the Equal Treatment Directive:

With a view to achieving full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the under-represented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

The Race and Framework Directives contain similar provisions on positive action:

With a view to ensuring full equality in practice, the principle of equal treatment shall not prevent any Member State from maintaining or adopting specific measures to prevent or compensate for disadvantages [linked to any of the discriminatory grounds covered by the Directives].

This wording has also been adopted by the recent Directive on gender equality in access to goods and services.⁶⁴ These provisions are regarded as conferring greater freedom on Member States in the field of positive action.⁶⁵ First, positive action is no longer expressed as a derogation from equal treatment but forms part of the overall aim of achieving full equality. In reconceptualising positive action in this manner, Community law has arguably moved beyond the pursuance of individual equality as an abstract end in itself, without reference to its social and economic context. The reference to “full equality in practice” recognises that mere consistency of treatment may be insufficient to remove inequalities. Secondly, the reference to preventing or compensating for disadvantages clarifies that persons other than identified victims of past discrimination may be the subject of preferential treatment. Thirdly, the removal of any reference to “equal opportunities” arguably allows some scope for results-oriented measures. Furthermore, the new provisions implicitly accept that inequality and disadvantage is a group experience. McCrudden states that these relatively open-ended provisions “clearly [incorporate] a collective conception of group disadvantage dispensing with a requirement of actual or direct harm and allowing for both retrospective and prophylactic measures.”⁶⁶

⁶⁴ Article 6 of Directive 2004/113/EC.

⁶⁵ Chalmers, “The Mistakes of the Good European” in Fredman ed., *Discrimination and Human Rights: The Case of Racism*, *op. cit.*, 193, at 213.

⁶⁶ McCrudden, *loc. cit.*, at 24, quoting McInerney, “Equal Treatment Between Persons Irrespective of Racial or Ethnic Origin : A Comment” (2000) 25 *European Law Review* 317, at

*Other aspects of substantive equality in the Article 13 Directives:**Reasonable accommodation*

An asymmetrical approach to equality can also be identified in the provision of reasonable accommodation for persons with disabilities⁶⁷ contained in Article 5 of the Framework Employment Directive. It imposes a positive duty on employers to take steps to reasonably accommodate disabled persons, unless this would result in a “disproportionate burden” to the employer. Reasonable accommodation is not phrased in terms of an exception, but as central to “guaranteeing compliance with the principle of equal treatment in relation to persons with disabilities.” This affirms the Directive’s commitment to substantive equality: reasonable accommodation is required to ensure that persons with disabilities are not disadvantaged by ‘equal’ treatment with non-disabled persons. ‘Appropriate measures’ are defined as measures which are ‘effective and practical to adapt the workplace to the disability.’⁶⁸ The reasonable accommodation provision is context-specific, requiring the employer to accommodate the particular characteristics and circumstances of an individual disabled person.⁶⁹ In judging whether the accommodation is reasonable, the effectiveness of a measure in adapting the workplace to the disabled person’s needs will be an important consideration.

The Directive does not specify in detail what the duty of reasonable accommodation entails. The experience of other jurisdictions may provide guidance. The United States, Canada and Australia have all imposed duties of reasonable accommodation on employers. In the US, the Americans with Disabilities Act, 1990 (ADA) provides that a failure of an employer to make reasonable accommodation for an otherwise qualified person with a disability constitutes discrimination. The US Equal Employment Opportunities Commission (EEOC) regards reasonable accommodation as “a means by which barriers to the equal employment opportunity of an individual with a disability are removed or alleviated.”⁷⁰ Specific examples of reasonable accommodation are set out in s.101(9), ADA and include: making facilities available to disabled users, job restructuring, modified work schedules, reassignment, provision of readers or interpreters and acquisition or modification of equipment or devices. Recital 20 of the Framework Directive takes a similar approach, referring to adapting premises and equipment, patterns of working time, the distribution of tasks

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⁶⁷ This involves taking special measures to accommodate disabled persons, by adapting the workplace to their needs e.g. providing interpretative aids, adjusting working hours, making premises accessible to disabled persons.

⁶⁸ Recital 20 of the Preamble to the Directive.

⁶⁹ Wells, “The Impact of the Framework Employment Directive on UK Disability Discrimination Law” (2003) 32 *Industrial Law Journal* 253, at 264.

⁷⁰ Cited in Smith, “Disability, Discrimination and Employment: A Never-Ending Legal Story?” (2001) 23 *Dublin University Law Journal* 148, at 153.

or the provision of training or integration resources, as examples of reasonable accommodation. Recital 21 establishes a relative test in determining if the reasonable accommodation sought would impose a disproportionate burden on the employer.⁷¹ The factors to be considered are: the financial or other costs entailed, the scale and financial resources of the organisation or undertaking, and the possibility of obtaining public funding or any other assistance.

Reasonable accommodation, essential to ensuring true equality for persons with disabilities, is *not* a specialised form of positive action. Rather, it exists to ensure that uniform assumptions about the needs of the population as a whole are not blindly applied to disabled persons, resulting (though unintentionally) in continued marginalisation and disadvantage. This is illustrated by the Canadian case of *Eldridge v British Columbia (Attorney General)*.⁷² The plaintiffs challenged the failure of provincial hospital legislation to provide medical interpretation services to deaf patients as a violation of the equality guarantee in s.15 of the Canadian Charter. The Supreme Court of Canada unanimously found that s.15 required the hospital legislation to ensure effective communication with deaf persons, in order for them to receive equal advantage from their healthcare. This decision, viewing interpretative services for deaf persons as an essential part of healthcare and not an ancillary service, is noteworthy for refusing to privilege able-bodied methods of delivering healthcare in its assessment.⁷³ This is precisely the aim of reasonable accommodation provisions: ensuring substantive equality for persons with disabilities by accommodating their needs, rather than adhering to norms favouring the dominant group.

The Framework Directive's provisions on reasonable accommodation, linking this concept to the achievement of real equality for disabled persons, illustrate the shift in European law from formal to substantive equality. Employers are now obliged to accommodate disability-based differences in order to avoid discrimination. This leveling-up approach, focused on individual dignity and worth, is consistent with an underlying human rights rationale.⁷⁴ Nevertheless, the Directive's limitations on the duty, in particular the threshold of disproportionate burden, may undermine its impact. There is also the danger that the general derogation in Article 2(5) for "[national] measures... necessary for [inter

⁷¹ This mirrors the approach taken in several other jurisdictions, and decision-makers may benefit from examining comparative jurisprudence on the relative test. See Quinn, McDonagh and Kimber, *Disability Discrimination Law in the United States, Australia and Canada* (Oak Tree Press, 1993).

⁷² (1997) 151 DLR (4th) 577.

⁷³ See Mayerson and Yee *The ADA and Models of Equality*, paper published by the US Disability Rights Education and Defense Fund, 2000.

⁷⁴ See Apostolopoulou, *Equal Treatment of People with Disabilities in the EC: What does 'Equal' mean?* New York University Jean Monnet Working Paper 09/04, 2004.

alia] the protection of health and for the protection of the rights and freedoms of others” may be abused at national level as a convenient escape clause to avoid making reasonable accommodation. Wells suggests that “the lack of detail in the Directive leaves scope for judicial development of the concept of reasonable accommodation, and the destiny of this concept lies to a great extent in the hands of the European Court of Justice. A proactive Court...may choose to push forward the boundaries of disability equality law and reject far-reaching national restrictions on the duty of reasonable accommodation.”⁷⁵

Enforcement

The Directives’ provisions on enforcement, while remaining within the paradigm of individual enforcement, reflect a deeper understanding of the complexities of discrimination, in particular the difficulties faced by individuals in challenging structural discrimination. In this respect, the Directives introduce: a less strict test for indirect discrimination; a provision for the burden of proof to shift to the respondent where the complainant has established a *prima facie* case of discrimination; protection against victimisation as a result of having brought an equality claim, and a requirement on Member States to allow representative organisations with a legitimate interest to bring an action either on behalf of, or in support of, a complainant.⁷⁶ Similar definitions of concepts and provisions on remedies and enforcement have been adopted by the two recent gender equality Directives.⁷⁷ Some of these provisions codify judicially developed principles on effective protection of Community gender equality rights, others are new measures aimed at addressing the weaknesses of an adversarial system of individual enforcement. Overall, they confer more substantive equality obligations on the Member States.

In addition, Article 13 of the Race Directive mandates the creation of a body for the promotion of equal treatment on this ground in the Member States. These bodies must be capable of assisting individuals in bringing claims of discrimination, as well as serving a broader societal function of conducting independent surveys, publishing independent reports, and making recommendations concerning discrimination.⁷⁸ This requirement is replicated by the new gender equality Directives,⁷⁹ but not in the Framework Directive, though Member States may of course choose to create equality bodies covering the latter’s grounds. Equality bodies may play a vital role in securing effective implementation of the equality

⁷⁵ Wells, *loc. cit.*, at 266.

⁷⁶ See Higgins, “Enforcement and the New Equality Directives” in Costello and Barry eds., *op. cit.*, 391.

⁷⁷ Directives 2002/73/EC and 2004/113/EC.

⁷⁸ Article 13, Race Directive.

⁷⁹ Article 8a of Directive 76/207/EC, as inserted by Directive 2002/73/EC and Article 12 of Directive 2004/113/EC.

legislation, by promoting knowledge of its provisions, supporting claimants, and encouraging systematic responses to the legislation.⁸⁰

Mainstreaming

Mainstreaming is a strategy that seeks to promote equality by including equality considerations in formulating mainstream policies, programmes, practices and decision-making at all stages of their development and implementation.⁸¹ This obligation requires that government and public authorities include considerations of equality and non-discrimination in decision-making across all spheres of government. It involves both a focus on the side-effect of ordinary policies on particular groups, their participation in decision-making processes, and consideration of the implications of policies for equality.

Gender mainstreaming was adopted at EU level as a policy tool for ensuring equality between men and women, and was given constitutional footing in Article 3(2) EC. The amended Equal Treatment Directive extends this strategy to national level, requiring Member States to “actively take into account the objective of equality between men and women when formulating and implementing laws, regulations, administrative provision, policies and activities” in the areas covered by the Directive.⁸² While the EU has begun to extend its mainstreaming strategies to other grounds, such as race and disability, gender remains its predominant focus.⁸³ This is reflected in the existing equality Directives, and it is regrettable the opportunity was not taken to extend a mainstreaming duty to the other protected grounds.

Mainstreaming has potentially far-reaching implications for the pursuit of equality. This strategy is unique in that it applies to both ‘hard’ and ‘soft’ forms of regulation, regardless of the domain in which the Member State is acting. It signals a clear concern for substantive equality, as it seeks to ensure the participation of groups in determining laws and policies that affect them.

⁸⁰ Crowley, “Engaging in Change: The Equality Authority’s Approach to Promoting Equality and Combating Discrimination”, Irish EU Presidency Conference, *Closing the Gap: Systematic Approaches to Promoting Equality and Diversity in Europe*, 27-28 May 2004, Limerick, Ireland.

⁸¹ It is difficult to provide a comprehensive working definition of mainstreaming, given its cross-cutting nature. It should also be noted that while the current legislative and analytical focus is mainly on public authorities and government, who have pioneered this approach, a modified version may be suitable for operation as a private sector duty.

⁸² Article 1, Directive 2002/73/EC [OJ L 269/15].

⁸³ See European Commission, *Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities* (COM (96) final); Pollack and Hafner-Burton, “Mainstreaming Gender in the European Union” (2000) 7 *Journal of European Public Policy* 432; Shaw, *Mainstreaming Equality in European Union and Policy-Making*, European Network Against Racism, April 2004.

Despite this laudable objective, mainstreaming strategies have several limitations. The most obvious and remediable flaw is the *ad hoc* nature of many mainstreaming initiatives, particularly those undertaken in fields other than gender. “Soft law” mainstreaming policies lack enforcement mechanisms, are unclear in what mainstreaming requires and are dependent on political will for their implementation. Even where a statutory mainstreaming duty is adopted, these may be insufficiently specific, leaving a broad margin of discretion to public bodies as to the method of consultation and implementation. O’Cinnéide points out the danger that the model of consultation adopted may be an “expert-bureaucratic” one, relying on specialist units to incorporate equality perspectives into decision-making.⁸⁴ This is a poor substitute for a “participative-democratic” model of consultation with community and civic groups.⁸⁵ Furthermore, mainstreaming obligations are frequently uncertain in their goals and the extent of a public authority’s duties. The cornerstone of this strategy is the integration of equality matters into ongoing policy-making, without any concurrent obligation to eliminate existing structures of discrimination. Consequently, institutionalised discrimination may escape the net of equality duties.

Substantive equality in the Constitution

As noted above, the Constitution does not embrace a single vision of equality, but employs varying and divergent provisions on equality in different contexts. Consequently, the Constitution cannot be said to rest on either a purely formal or a purely substantive equality model; it contains elements of both. This is inevitable, given that equality appears as “simultaneously a value, an objective, a fundamental right, a positive duty and a legal competence.”⁸⁶ The Constitution emphasises the broad nature of equality as a general constitutional principle of neutral equal treatment, by prohibiting discrimination on a long list of non-exhaustive grounds. Nevertheless, a more substantive vision of equality is clearly evident in the Constitution’s approach to positive obligations aimed at securing equal treatment. As noted above, Article I-3 specifies that the Union shall combat social exclusion and discrimination, and shall promote equality between

⁸⁴ O’Cinnéide, “Beyond the Limits of Equal Treatment: The Use of Positive Duties in Equality Law”, paper delivered to Equality Authority of Ireland Conference, *Mainstreaming Equality: Models for a Statutory Duty*, Dublin, 27 February 2003.

⁸⁵ A ‘participative-democratic’ model of mainstreaming has emerged in Northern Ireland under s.75 of the Northern Ireland Act, 1998. In placing a statutory duty on public authorities to mainstream equality of opportunity, the legislation specifies that there shall be a consultation process between public authorities and the wider community. The adoption of this model largely reflects the origins of s.75, namely the mobilisation of civic groups around the need for a statutory mainstreaming duty. See Donaghy, “Mainstreaming: Northern Ireland’s participative-democratic approach” (2004) 32 *Policy and Politics* 49, and McCrudden, “Mainstreaming Equality” (1999) 22 *Fordham International Law Journal* 1696.

⁸⁶ Bell, “Equality and the European Union Constitution”, *loc. cit.*, at 244.

men and women. This relatively strong language represents a clear shift in the Union's focus from purely negative prohibitions of discrimination to a more active equality agenda.

This is reinforced by two provisions which appear in Part III of the Constitution concerning the policies and functions of the Union. Article III-116 is modelled on the existing Article 3(2) EC, and states "In all the activities referred to in this Part, the Union shall aim to eliminate inequalities, and to promote equality, between men and women." A similar, though slightly weaker, commitment in respect of the other grounds is contained in Article III-118 which states "In defining and implementing the policies and activities referred to in this Part, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation." These provisions create a commitment on the part of the Union to a mainstreaming approach to equality issues. This will hopefully entail building on existing initiatives, mainly undertaken in the field of gender.⁸⁷

The Constitution's provisions on positive action are less favourable to the development of substantive equality in the Community legal order. Gender is the only ground which benefits from a specific authorisation of positive action. This occurs in Article III-214(4), which replicates the existing Article 141(4) EC, and in Article II-83 (the Charter). The former is constrained to "working life", while the latter provision (possessing a broader material scope) refers only to "measures providing for specific advantages in favour of the under-represented sex" and jettisons any reference to the objective of securing full equality in practice. None of the other enumerated grounds of prohibited discrimination receive a similar constitutional basis for positive action. This is surprising, given that the Article 13 Directives allow for positive action on all of the grounds.

Bell suggests that "overall, the formal equality concept tends to dominate the equality provisions of the Constitution...[which] presents a diluted commitment to substantive equality concepts."⁸⁸ The positive aspects of the Constitution's equality provisions are unfortunately largely premised on a 'soft law' approach, which fails to challenge the traditional concept of equality as formal identical treatment. Moreover, its differentiation between gender and other grounds, with higher levels of protection being afforded to gender, reinforces a fragmented vision of equality at the EU level. This is hard to reconcile with a constitutionalised principle of equal treatment, especially where there is little apparent basis for distinguishing the grounds in this manner.

⁸⁷ See Communication from the Commission, "Incorporating Equal Opportunities for Women and Men into all Community Policies and Activities", COM (1996)007 FINAL. See also Council Decision 2000/750/EC of 27th November 2000 establishing a Community action program to combat discrimination (2001-2006), [2000] OJ L303/23.

⁸⁸ Bell, "Equality and the European Union Constitution", *loc. cit.*, at 250.

IV. The Way Forward: The Impact of a Human Rights Approach

What does a human rights approach to equality entail?

The objective of this article was to assess whether the principle of equality has shifted from its original market underpinnings to enjoy the status of a fully-fledged human right at EU level. In light of the evidence presented above, we see that the concept of equality is now located within a broader EU human rights culture. Equal treatment is no longer guaranteed merely in order to facilitate the functioning of the internal market: it has new foundations based on the Union's respect for human rights and democracy, which necessarily involves combating discrimination. It is thus appropriate to consider what the implications of such a shift might be. What does a human rights approach require from equality that a market-based vision does not?

First, viewing equality through the lens of human rights has implications for the meaning of 'equal treatment.' Formal identical treatment of individuals, the Aristotelian notion of equality, is unlikely to suffice. Schiek suggests that "From a human rights perspective, non-discrimination has to serve more (and more ambitious) goals than from the internal market perspective. As human rights, equality and non-discrimination are not restrained to some technical comparative right, but are instituted to sustain an inclusive society."⁸⁹ The Article 13 Directives reflect this alternative rationale of equality, by employing the language of positive rights and emphasising values of individual dignity and social inclusiveness. However, Fredman points out that the human rights standard is itself "compatible with a range of different approaches to equality."⁹⁰ Nevertheless, it provides an opportunity for advancing beyond a formalistic vision of equality. First, it demands a real equality of treatment and not merely "equally bad" treatment.⁹¹ Secondly, equality can then be permeated by other human rights considerations so that it is not viewed as an end in itself, but linked to its social, political and economic context.

The human rights approach thus involves a substantive vision of equality, rather than a formal one. This holds particular promise for the interpretation and application of the Directives' provisions on indirect discrimination, positive action and reasonable accommodation.⁹² However, as pointed out earlier, the difficulty is that there is no single vision of

⁸⁹ Schiek, "A New Framework on Equal Treatment of Persons in EC Law?" (2002) 8 *European Law Journal* 290, at 293.

⁹⁰ Fredman, "Equality: A New Generation?" (2001) 30 *Industrial Law Journal* 145, at 155.

⁹¹ *Ibid.*

⁹² Though outside the scope of this article, it will be interesting to see how these positive equality duties interact in practice, and the implications that each will have for both negative and positive parallel duties. *See for example*, Stratigaki, "Gender Mainstreaming vs. Positive Action: An Ongoing Conflict in EU Gender Equality Policy" (2005) 12 *European Journal of Women's Studies* 165.

equality reflected in the Community treaties and legislation. The ECJ could greatly contribute to the EC equality framework by articulating a standard of substantive equality to inform the provisions of the Directives, particularly with respect to positive obligations.

Here, the Charter of Fundamental Rights (once its status is certain) may play an important role. A constitutionalised equality principle, enjoying political consensus, in a document which sets socio-economic rights alongside civil and political ones and makes specific reference to the rights of the most vulnerable groups in society, may be invoked as the anchor of a common vision of equality. Moreover, Costello suggests that the Charter ‘lets the cat out of the bag’ by revealing the constitutional nature of the ECJ’s task in reviewing national practices for compatibility with Community law. The Court will therefore be obliged to formulate a clearer standard of review in its equality decisions.⁹³ Several notes of caution, however, must be sounded. The first is that the Charter is but one source available to the ECJ in the interpretation of fundamental rights: both the European Convention on Human Rights and domestic constitutions remain valid reference points as well, and may embody diverse, and even

requires tailored approaches: a uniform application of existing principles is impossible given the diverse challenges they pose. The Court may draw on the broader human rights context established by the Charter (and the Constitutional Treaty assuming ratification), and by the progressive language and obligations of the Directives themselves, to give new impetus to European equality law. This would involve advancing beyond traditional concerns of market freedoms to recognise the independent value and importance of social rights.

There is some evidence that the Court is already undertaking this shift in two recent cases concerning the new grounds. *Mangold* concerned the application of the Framework Directive's prohibition of age discrimination in the (extended) period allowed for transposing the Directive's provisions on age discrimination into national law.⁹⁶ The ECJ held that the respondent Member State, Germany, was bound by the provisions of the Directive even before the deadline for transposition had passed. It based its decision upon two considerations (i) the duty of Member States under Article 18 of the Directive to report to the Commission on progress made before the extended period of transposition expired would be rendered redundant if Member States could act contrary to the provisions of the Directive before that deadline and (ii) the principle

general Community principle of non-discrimination applied in the absence of specific support for it in the Treaties.

Moreover, a reminder of the restrictions militating against Article 13's effect as support for a broad principle of equality was urged by Advocate General Geelhoed in his recent Opinion in *Chacón Navas*.⁹⁸ This case concerned whether a worker, dismissed while on sick leave for an illness, fell within the scope of the Framework Directive's prohibition of disability. (The meaning of disability is not defined by the Directive.) The Advocate General's Opinion, while reaching a reasonable conclusion, will offer little comfort to those seeking to tap Article 13's potential to give constitutional effect to the principle of equality. Pointing to Article 13's role as the juridical basis for the Framework Directive, the Advocate General stressed the need to interpret the provisions of the Directive "in light of the letter and spirit of that Article."⁹⁹ He continued by setting out the various textual limitations of Article 13: its reference to 'measures necessary', the exhaustive list of grounds promulgated, its curtailment by the principle of subsidiarity and the restriction to acting within the competences of the Community. He also pointed to the exceptions in Articles 4 (genuine and determining occupational requirements) and 5 (threshold of disproportionate burden for reasonable accommodation) as evidence that the Community legislator considered the "potentially very heavy economic and financial consequences" of an overly extensive application of the Directive.¹⁰⁰ Emphasising the need for the Court to have due deference both to the choices of the Community legislator in restricting the scope of the Directive, and to the national margin of appreciation in determining questions of social policy which will necessarily arise in implementing the Directive, (i) the Advocate General concluded that there is little scope to extend the material application of Article 13 EC under the cover of a general principle of equality and (ii) he expressly urged a more circumspect interpretation and application of the Framework Directive than that adopted by the ECJ in *Mangold*.¹⁰¹

The Advocate General's conclusions on the substantive questions raised were more encouraging, however. He accepted the need for a Community definition of disability to ensure the necessary level of unity and uniformity in applying the principle of non-discrimination. Pointing to ongoing developments in medical and social understandings of disability, the Advocate General wisely counseled against seeking to impose an exhaustive or definitive definition: rather, the ECJ should provide the

⁹⁸ Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, Opinion of Advocate General Geelhoed, 16th March 2006.

⁹⁹ *Ibid.*, para. 45. Please note that this, and later quotations, are an unofficial translation of the French text of the Opinion.

¹⁰⁰ *Ibid.*, paras 47-51.

¹⁰¹ *Ibid.*, paras. 53-56.

necessary criteria to allow national courts to determine if a particular situation falls within the personal scope of the Directive. According to him, a person would be ‘disabled’ for the purposes of the Directive if his or her abilities were seriously limited by physical, mental or psychological difficulties.¹⁰² The disability need not be permanent, but must be sufficiently long in duration. An illness is not a disability within this definition, unless the complainant can establish that the discriminatory treatment complained of was not attributable to the illness itself, but to permanent or long-term limitations on capacity which are a consequence of the illness.¹⁰³

The Advocate General’s comments on Article 13 signalled a discomfort with attempts to broaden the scope of the EU equality principle as a generalised human right. The distinction lies in how one chooses to approach the equality principle: Advocate General Geelhoed has approached it in a formal and isolated manner, examining Article 13 against the background of Community competences without any reference to other sources (international conventions, the Charter, the ECHR and the constitutional traditions of the Member States) which support a general principle of non-discrimination. The limitations on Article 13 which he mentions do undeniably exist: the mistake he makes is in choosing to read the Directive solely against this background, without any reference to its broader human rights rationale.¹⁰⁴ Reading the Community provisions on equality in this manner risks emptying many of these protections, particularly the positive obligations, of their potential to contribute to an understanding of equality based on human dignity rather than the dictates of the common market.

The Court reached the same conclusion as the Advocate General on the substantive issue.¹⁰⁵ It accepted the need for an “autonomous and uniform interpretation” of the concept of disability throughout the Community, having regard to the context and objectives of the Framework Directive. It stated that “the concept of ‘disability must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life.” Referring to the Directive’s provisions on reasonable accommodation, the Court inferred that the Community legislature had in mind situations in which such participation is hindered over a long period of time. Thus, it must be probable that a

¹⁰² « Les handicapés sont des personnes qui ont de sérieuses limitations fonctionnelles (handicaps) découlant des troubles corporels, mentaux ou psychiques. » *Ibid.*, para. 76.

¹⁰³ *Ibid.*, paras. 75-80.

¹⁰⁴ Note the references in the Recitals to the Framework Directive to Article 6 TEU, UN and ILO conventions prohibiting discrimination, the ECHR, and the European Social Charter. Similar references to non-discrimination guarantees are made by the Race Directive.

¹⁰⁵ Case C-13/05, *Chacón Navas v Eurest Colectividades SA*, Judgment of the Court, 11th July 2006.

limitation will last for a long time in order for it to fall within the scope of the Directive. “Sickness” cannot therefore be treated as a “disability” for the purposes of the Directive.¹⁰⁶

The Court went on to address the protection of disabled persons as regards dismissal. Emphasising an employer’s obligation of reasonable accommodation under Article 5, the Court stated that an employer cannot rely on the “essential functions” exception (whereby an employer is not required to maintain in employment a person who is not competent, capable and available to perform the essential functions of the job) in order to dismiss an employee, unless this obligation has first been fulfilled.¹⁰⁷ Regarding Article 13, the Court’s remarks were much sparser than the Opinion. In considering whether “sickness” could be regarded as an identifying attribute which is a prohibited ground of discrimination in addition to those listed in the Framework Directive, the Court recalled that the general principle of non-discrimination is one of the fundamental rights which form part of the general principles of Community law, and is thus binding on the Member States where the national situation falls within the scope of Community law. (This brings to mind the *Mangold* decision, discussed above). However, it pointed out that there is no established Community competence to combat discrimination on grounds of “sickness”, and thus the scope of the Framework Directive (whose list of grounds is exhaustive) should not be extended by analogy with this principle of non-discrimination.¹⁰⁸

The *Chacón Navas* decision reaches an unsurprising conclusion on the issue raised. It is certainly desirable, from the point of view of both uniformity and flexibility in implementing Directives, that there are Community-wide criteria to determine to what constitutes disability, while leaving necessary judicial discretion to assess diverse individual situations. Moreover, it would have been contrary to the spirit and purpose of the Framework Directive to allow illnesses which are temporary in nature, without more, to attract its protections. Such a development would have rendered the Directive’s aim to provide special protection for disabled persons in employment meaningless.

The Court attached significant weight to the reasonable accommodation provision in interpreting both the concept of disability and the scope of the employer’s obligation not to discriminate. This is encouraging, as it illustrates the Court’s willingness to engage with the positive obligations of the equality framework. Furthermore, its comments regarding dismissal of disabled persons clarify that the onus rests on an employer to show that he has satisfied the duty of reasonable accommodation before the “essential functions” provision can be invoked

¹⁰⁶ *Ibid.*, paras. 40-47.

¹⁰⁷ *Ibid.*, paras. 48-52.

¹⁰⁸ *Ibid.*, paras. 53-57.

as justification for such dismissal. This interpretation ensures a harmonious interplay between reasonable accommodation and the general principle of non-discrimination which the Directive gives effect to, and provides important protection in employment for disabled workers. The judgment makes it clear, however, that the “general principles of Community law” remain the only existing source of a generalised non-discrimination principle in the Community legal order, and any attempt to widen the scope of the Community’s “hard law” equality guarantees beyond the competences conferred by Article 13 will be strongly resisted.

Conclusion

It is axiomatic that the principle of equality is in a state of flux in the European Union. The principle of non-discrimination on the grounds listed in Article 13 has emerged as a general principle of Community law. With the adoption of the Directives giving effect to that principle, a fundamental and wide-ranging right of equality has emerged in the Community legal order. This is likely to be strengthened by the ‘constitutionalisation’ of such rights in the Charter. Equality has evolved from being a market-based guarantee of gender equality in employment, to a free-standing right of equality on several grounds which benefits from human rights considerations of protecting individual dignity and ensuring social inclusiveness. Consequently, equality must serve new aims and objectives to fulfil its function as a human right of EU citizens.

Moreover, the traditional distinctions of formal and substantive equality have become blurred. While the individual right to equal treatment remains prominent in the Community legal order, there is a new emphasis on addressing structural forms of discrimination and achieving “full equality in practice.” This is reflected in the language of the Article 13 Directives and in the positive duties they impose, namely greater scope for positive action, a duty on employers to reasonably accommodate persons with disabilities, and the imposition of a gender mainstreaming obligation. These legislative developments could be reinforced by the adoption of the Constitution, giving Treaty support for an active equality agenda.

The constitutional and legislative developments discussed above fluctuate between formal and substantive equality, varying according to both the ground of discrimination and the legal context of the provision. We cannot conclude that one approach has triumphed: both formal and substantive equality now have relevant roles to play in Community law. However, the Union’s recognition of the limitations of an individualistic method is a highly welcome development. Overall, a new approach based on human rights and individual dignity, rather than market concerns, has

objective of combating discrimination. This is in keeping with the Union's wider commitments to respect human rights, and is given concrete expression in Community equality law's new generation of positive duties.

Much of the impact of these positive obligations will be determined by the manner in which the Court of Justice chooses to interpret and apply them. There is wide scope for the Court to adopt a more substantive vision of equality, based on the wider context of EU human rights protection and the specific developments in anti-discrimination law that were outlined in this article. The recent decisions in *Mangold* and *Chacón Navas* suggest that the ECJ is willing to interpret and apply the new Directives in light of their human rights-based rationales and the positive obligations which they establish. The Court's articulation of a more nuanced principle of equality would be valuable in introducing a necessary counterweight to formal equality principles, and allowing substantive equality to play a meaningful role in guaranteeing human rights in Europe.

FROM *SIEBE GORMAN* to *SPECTRUM*: AN ANALYSIS OF CHARGES OVER BOOK DEBTS UNDER ENGLISH AND IRISH LAW

BRIAN TOBIN*

Introduction

On June 30th, 2005, the House of Lords gave judgment in *In re Spectrum Ltd (in liquidation)*¹ (hereafter *Spectrum*) and brought to a close the long-running debate concerning charges over present and future book debts by overruling the highly criticised case of *Siebe Gorman v. Barclays Bank Ltd.* (hereafter *Siebe Gorman*).² The House of Lords held that a charge over book debts where the chargor remains free to remove the charged assets from the chargee's security without its consent should, in law, be categorised as floating. This article will initially consider the concepts of fixed and floating charges and their application to book debts. It will then analyse the diverging body of case law that led from

assets is established although title in the property is not transferred from the debtor to the creditor.⁴

There are two principal categories of company charge, fixed and floating charges. A fixed charge connotes an immediate proprietary interest in a company's fixed assets, such as land or business premises, or, to a lesser extent, fixed plant and machinery, which may be transferred by the chargor-company to the chargee-bank so as to secure the repayment of a loan. A floating charge, by contrast, connotes an immediate, although unattached,⁵ proprietary interest in a company's circulating assets⁶, such as raw materials or stock-in-trade, which are replaced in the normal course of business and constantly changing. The hallmark of a floating charge, which distinguishes it from a fixed charge, is that the chargor-company may continue to use the charged assets and may even dispose of them in the ordinary course of its business until the occurrence of some particular future event, whereupon the charge will crystallise and attach itself to the charged assets. The chargee-bank may then exercise its enforceable interest in such assets for the same reason mentioned above, to secure the repayment of a debt. The clearest distinction between fixed or 'specific' and floating charges was, it is submitted, made by Lord MacNaghten in *Illingworth v. Houldsworth*⁷:

A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

Charges over Book Debts

A book debt may be described as an uncollected debt owed to a company and the realised proceeds of such a debt (i.e. the debt itself and the money once collected).⁸ It should be borne in mind that book debts are often the largest asset owned by a company, and this is why banks may endeavour to

⁴ See *In Re Bank of Credit and Commerce International SA (No.8)* [1998] AC 214, at 226, where Lord Hoffmann observes that a charge is a security interest created without any transfer of title.

⁵ See *Evans v. Rival Granite Quarries Ltd.* [1910] 2 KB 979, at 999, per Buckley L.J.

⁶ The early case of *Holroyd v. Marshall* (1862) 10 HLC 191 opened the way to the grant by companies of security over any class of circulating assets that they might possess.

⁷ [1904] AC 355, at 358.

⁸ See Hanlon and Heywood, "Spectrum Plus and Book Debts: The Final Chapter?" [2006] 1 *Web Journal of Current Legal Issues*. Available at <http://www.webjcli.ncl.ac.uk/>.

take, and companies may wish to grant, a charge over such debts.⁹ Whereas companies may prefer to grant a floating charge over book debts because of the obvious freedom such a charge confers upon them to continue to use the proceeds in the normal course of their business, the banks may prefer to take a fixed charge over such debts because it is a stronger form of security. It must be noted that often the bank will be in the better bargaining position and the company will have no choice but to grant a fixed charge, rather than a floating charge, over all of its book debts. The benefits of a fixed charge to creditors are numerous. In the unfortunate event of insolvency, a fixed charge holder has priority over all preferential creditors.¹⁰ Furthermore, unlike a floating charge, a fixed charge is not liable to be set aside where the company goes into liquidation within 12 months of its creation.¹¹ For these reasons, the issue of whether a charge over book debts is fixed or floating is clearly of major importance for creditors.

At this point it may be asked whether it is indeed feasible for a company to create a fixed charge over a fluctuating class of assets such as its present and future book debts? This question may be answered in the affirmative, for it is conceptually possible for a company to create a fixed charge over its present and future book debts.¹² In *Spectrum*, Lord Scott observes that there “was never any doubt that it was possible to create a fixed charge over a specific, ascertained book debt”¹³ and for well over a century it has also been accepted that “an assignment of future book debts would be effective to vest in the assignee an equitable interest in the future debts at the moment they became owing to the assignor”.¹⁴ This is because, as soon as a book debt is incurred and becomes owing to the chargor-company it constitutes an item of ‘ascertained and definite property or property capable of being ascertained and defined’ and qualifies as an object of a fixed charge. Therefore, as Lord Scott points out in *Spectrum*, a debenture¹⁵ expressed to grant a fixed charge over present and future book

⁹ *Ibid.*

¹⁰ In Ireland, see the Companies Act 1963, s.285 (2). In England, see the Insolvency Act 1986, sections 107, 115, 175 and 386. Floating charge holders will only be paid after preferential creditors. A fixed charge holder once enjoyed priority over the Revenue Commissioners. However, in Ireland, as we shall see, statute law (The Finance Act 1986, as amended by the Finance Act 1995) has in recent times given the Revenue Commissioners priority over fixed charge holders.

¹¹ In Ireland, see the Companies Act 1963, s.285 (7)(b). In England, see the Insolvency Act 1986, s.245. See also Courtney, *The Law of Private Companies* (2nd ed., Butterworths, 2002), at 1175.

¹² See *Siebe Gorman v. Barclays Bank* [1979] 2 Ll. Rep. 142, at 158, per Slade J. In the Irish case of *Re Keenan Bros. Ltd.* [1985] BCLC 302, Keane J. in the High Court accepted that it is possible to create a fixed charge over a company’s present and future book debts.

¹³ [2005] 3 WLR 58, at 92, per Lord Scott.

¹⁴ See *Tailby v. The Official Receiver* (1888) 13 App Cas 523.

¹⁵ The term debenture signifies an instrument or document creating or acknowledging indebtedness of some permanence. See *Levy v. Abercorris Slate and Slab Corporation* (1887) 37 Ch D 260, per Lord Chitty.

debts is indeed capable of creating a fixed charge over such debts as and when they accrue due to the chargor-company. Slade J. so held in *Siebe Gorman* and “no-one has suggested that in that respect he was wrong”.¹⁶

However, the fact that a valid fixed charge over present and future book debts is capable of being created does not mean that such a charge will be held to have been created in each and every case. As Lord Hope observes in *Spectrum*, “if [the assignment of present and future book debts] is to be effective as a fixed security everything depends on the way the security agreement ensures that the charge over the book debts is fixed.”¹⁷ A debenture that purports to grant a fixed charge over present and future book debts and prohibits the chargor-company from disposing of or charging such debts, yet allows it to collect the debts, pay the proceeds into its account with the chargee-bank, and draw as it wishes on that account will, in law, grant merely a floating charge over the book debts. This is because the charged book debts would be ‘ascertained and definite’ but their status as a security would be ‘ambulatory and shifting in its nature’, and therefore floating, unless and until the right of the chargor-company to collect and deal with the proceeds was effectively inhibited by the intervention of the chargee-bank.

The debenture in *Spectrum*, as we shall see, created but a floating charge over the book debts because it permitted the chargor-company to freely remove the proceeds from the account for its own business purposes until the chargee-bank intervened to prevent it from so doing, thereby causing the charge to crystallise. This is the essence of a floating charge. It will be ‘hovering over and floating’ with the proceeds, which the company is free to use in the ordinary course of its business, until the bank intervenes and seeks to exercise control over them, whereupon it will crystallise or ‘settle and fasten’ on the proceeds. Farrar,¹⁸ it is submitted, ably describes crystallisation as:

The process whereby the charge attaches specifically to all the items of the class of mortgaged assets which the company owns at that date or subsequently acquires if future assets are within the scope of this particular charge. The latter assets become subject to a fixed charge as they come into existence.

¹⁶ See *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 92, per Lord Scott.

¹⁷ *Ibid.*, at 75, per Lord Hope.

¹⁸ Farrar, “The Crystallisation of a Floating Charge” (1976) 40 *Conv NS* 397 at 398.

From *Siebe Gorman* to *Spectrum*

In the early case of

to collect such debts, pay the proceeds into its normal bank current account and draw as it wished on such account. Accordingly, Hoffmann J. held that the charge was, in law, a floating charge. He distinguished *Siebe Gorman* on the ground that the chargee in that case was a bank and the debenture had required the company to pay the proceeds of the book debts into a designated account with the chargee-bank. The chargee in *Re Brightlife Ltd.* was not a bank and the debenture lacked the requirement that the company was to pay the proceeds of the book debts into a separate bank account. Thus, the company was free to collect the proceeds and pay them into its own normal bank current account. Hoffmann J. observes that²⁸:

Once in the account, [the proceeds] would be outside the charge over debts and at the free disposal of the company. In my judgment a right to deal in this way with the charged assets is a badge of a floating charge and is inconsistent with a fixed charge.

It has also been noted that²⁹, in New Zealand, the High Court declined to follow *Siebe Gorman*. In *Supercool Refrigeration and Air Conditioning v. Hoverd Industries Ltd.*³⁰ (hereafter *Supercool Refrigeration*) Tompkins J. observed that “the relevant provisions of the securities in *Siebe Gorman* and the present case are, for practical purposes, the same” but he held that the charge over the company’s present and future book debts which, contrary to that in *Re Brightlife Ltd.*, yet akin to that in *Siebe Gorman*, was in favour of a bank, was a floating charge³¹:

It is my conclusion that a requirement to pay the proceeds of the book debts into the company’s account without any restriction on how the company may use those proceeds does not give effective possession of those proceeds to the bank. It does not, without more, fasten the charge onto those proceeds.

Furthermore, in clear contrast to Slade J. in *Siebe Gorman*, Tompkins J. in *Supercool Refrigeration* held that a bank’s right, *if it chose*,³² to assert its lien under the charge on the proceeds was insufficient to create a fixed charge over a company’s present and future book debts.³³

A number of years after the High Court’s decision in *Supercool Refrigeration* a most significant case was appealed to the Privy Council

²⁸ *Ibid.*, at 209. This passage was cited with approval by Lord Millett in *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710, at 723, a case more commonly known as “*Re Brumark*”.

²⁹ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 87, *per* Lord Scott.

³⁰ *Supercool Refrigeration and Air Conditioning v. Hoverd Industries Ltd.* [1994] 3 NZLR 300.

³¹ *Ibid.*, at 321, *per* Tompkins J.

³² Emphasis added.

³³ [1994] 3 NZLR 300, at 321, *per* Tompkins J.

from the New Zealand Court of Appeal; the infamous *In Re Brumark Investments Ltd; Commissioner of Inland Revenue v. Agnew*³⁴ (hereafter *Re Brumark*) which involved the controversial ‘hybrid charge’ that we now turn to discuss.

Hybrid Charges – The Best of Both Worlds?

It is undeniable that “credit is the lifeblood of the modern industrialised economy”.³⁵ However, as Lord Scott observes in *Spectrum*, it is in the nature of commercial lenders to want the most effective security that they can get.³⁶ Nevertheless, it is in the nature of commercial borrowers to want to be able to carry on the business for the purposes of which they are borrowing the money with as much freedom as possible. It is submitted that ‘the best of both worlds’ can, in theory, be achieved by the creation of a ‘hybrid charge’, i.e. a fixed charge whilst the book debts are uncollected and a floating charge when the proceeds of such debts have been collected and/or deposited in the designated bank account.³⁷ The ‘hybrid charge’ benefits both the chargor-company and the chargee-bank because, once collected and/or deposited in the designated bank account, the company is free to use the proceeds of the book debts, now subject to a floating charge, in the ordinary course of its business and, if the company becomes insolvent while the book debts remain uncollected, the bank’s fixed charge over such debts will have priority over any claim by the Revenue Commissioners and other preferential creditors.³⁸

In the groundbreaking case of *Re New Bullas Trading Ltd*³⁹, Nourse L.J. in the Court of Appeal, held that it was possible to create such a ‘hybrid charge’ over a company’s present and future book debts. Nourse L.J. believed that the contracting parties, of full age and competent understanding, could provide for a fixed charge on uncollected book debts and a floating charge on the proceeds of those debts.⁴⁰

³⁴ [2001] 2 AC 710.

³⁵ See the Report of the Cork Review Committee, *Insolvency Law and Practice*, (HMSO, Cmnd 8558, 1982) para.10. See also Ali, “Developments in Fixed and Floating Charges: Legal Principles, Policy Issues and Implications for Structured Financing” (2006) 13 (2) *CLP* 46.

³⁶ [2005] 3 WLR 58, at 91, *per* Lord Scott.

³⁷ Courtney, *op. cit.*, at 1182.

³⁸ Although in Ireland, as we shall see, statute law (The Finance Act 1986, as amended by the Finance Act 1995) has in recent times diluted the priority position traditionally enjoyed by fixed charge holders.

³⁹ *Re New Bullas Trading Ltd*. [1994] 1 BCLC 485.

⁴⁰ Nourse L.J., at 492, noted the question posed by Lord MacNaghten in *Tailby v. The Official Receiver* (1888) 13 App Cas 523, at 545, “Between men of full age and competent understanding ought there to be any limit to the freedom of contract but that imposed by positive law or dictated by considerations of morality or public policy?”

Although it was the subject of significant criticism⁴¹, the ‘hybrid charge’ proved popular with both lenders and borrowers, for obvious reasons and it came to be used in “innovatively drafted”⁴² debentures the world over.⁴³ However, Smart⁴⁴ is correct to point out that the Privy Council’s decision in *Re Brumark*:

[C]onclusively determined the fate of the drafting technique employed in *Re New Bullas Trading Ltd*, while reasserting the basic principle that the fixed/floating dichotomy must be resolved by ascertaining the freedom conferred upon the chargor to deal with the charged assets without the consent of the chargee.

As previously stated, the case of *Re Brumark* was on appeal from the New Zealand Court of Appeal, which had held that the ‘hybrid charge’, by providing for a fixed charge over book debts, yet excluding a fixed charge over the proceeds, thus enabling the company to use them in the normal course of its business, was in law a floating charge.⁴⁵

Lord Millett, giving the judgment of the Privy Council and upholding the New Zealand Court of Appeal’s decision, held that *Re New Bullas Trading Ltd* had been wrongly decided.⁴⁶ The charge in *Re Brumark* was virtually identical to that in *Re New Bullas Trading Ltd* in that it provided that as long as the book debts remained uncollected they were subject to a fixed charge, but as soon as they were paid into the designated bank account they became the subject of a floating charge. His Lordship commented on how the ‘hybrid charge’ distinguished between book debts and their proceeds, with the former being subject to a fixed charge and the latter a floating charge. In every previous case the debenture had treated book debts and their proceeds indivisibly.

Lord Millett engaged in a two-stage process to determine whether the charge was fixed or floating. Initially, he construed the charge, not to ascertain the intentions of the contracting parties, but to determine what rights and obligations they had conferred upon each other in respect of the charged assets. Once these rights and obligations were established, as a

⁴¹ Goode, “Charges Over Book Debts: A Missed Opportunity” (1994) 10 *LQR* 592 was, it is submitted, rightly concerned about the propriety of treating charges over book debts as being divisible from charges on the proceeds of book debts. See also Courtney, *op. cit.*, at 1183, who was justly concerned by the chargor’s ability to end the chargee’s fixed charge by collecting and/or depositing the proceeds of the book debts into a bank account.

⁴² Breslin and Smith, “The House of Lords Decision in *Spectrum Plus* – The Implications for Irish Banking Law” (2005) 12 (9) *CLP* 228, at 231.

⁴³ Courtney, *op. cit.*, at 1183.

⁴⁴ Smart, *loc. cit.*, at 331.

⁴⁵ *In Re Brumark Investments Ltd; Commissioner of Inland Revenue v. Agnew* [2000] 1 BCLC 354 at 364i, para [34] *per* Gault J.

⁴⁶ *Agnew v. Commissioner of Inland Revenue; In Re Brumark Investments Ltd*. [2001] 2 AC 710, at 730, *per* Lord Millett.

matter of law, he categorised the charge according to them. While the ‘hybrid charge’ may have prohibited the company from alienating its book debts, it nevertheless permitted it to deal with the proceeds in a manner that was inconsistent with the essence of a fixed charge. His Lordship, treating book debts and their proceeds indivisibly, said that⁴⁷:

A restriction on disposition [of a company’s book debts] which nevertheless allows collection and free use of the proceeds is inconsistent with the fixed nature of the charge; it allows the debt and its proceeds to be withdrawn from the security by the act of the company in collecting it.

Given that the company was free to deal with the proceeds and so withdraw them from the ambit of the charge without the bank’s consent, his Lordship felt that the charged assets were not sufficiently under the chargee’s control, and accordingly he held that the ‘hybrid charge’ actually created, in law, a floating charge over the chargor’s book debts.⁴⁸

Freedom of Contract

It should be noted that, in *Re New Bullas Trading Ltd* Nourse L.J. laid considerable emphasis on the labels that the parties to the debenture had chosen to attribute to the charge over book debts. Nourse L.J.⁴⁹ opined that it was incorrect to say that the charged assets ceased to be subject to a fixed charge at the chargor-company’s will, but rather that they ceased to be subject to a fixed charge because this was what the chargor-company and the chargee-bank, the contracting parties, had intended to happen in the debenture. Courtney believes that, objectively, there is nothing intrinsically wrong with Nourse L.J.’s reasoning and that in *Re Brumark*, Lord Millett, in finding that the intention of the parties as gleaned from the terms of the debenture contract should not prevail, was “primarily motivated by the policy considerations in the pecking order of priorities in an insolvency rather than the pursuit of conceptual possibility”.⁵⁰ Indeed, in the *Spectrum* case, Lord Walker points out that “there is a public interest which overrides unrestrained freedom of contract”. On the fixed/floating issue “it is ensuring that preferential creditors obtain the measure of protection which Parliament intended them to have”.⁵¹

⁴⁷ *Ibid.*, at 726, *per* Lord Millett.

⁴⁸ *Ibid.*, at 730, *per* Lord Millett.

⁴⁹ *Re New Bullas Trading Ltd* [1994] 1 BCLC 485, at 492, *per* Nourse L.J.

⁵⁰ Courtney, *op.cit.*, at 1185.

⁵¹ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 103, *per* Lord Walker.

It is arguable that this may indeed be a sufficient public policy justification for undermining the parties' freedom of contract. After all, the largest class of preferential creditors in insolvency is usually the company's employees, because the company may have deferred payments to them in order to create liquidity by preserving cash flows.⁵² However, in *Re Brumark*, it is the opinion of this author that Lord Millett's apparent subversion of the freedom of contract doctrine in favour of "an orthodox application of the law"⁵³ does seem entirely logical. It is submitted that the intention of the parties to the debenture contract, to provide for a fixed charge whilst the book debts were uncollected and a floating charge when the proceeds of such debts were collected and/or deposited in the designated bank account really could not have triumphed. This is not because, on public policy grounds it would have defeated the claims of the preferential creditors, but because it was an intention based on the incorrect

It is submitted that Lord Scott is correct, and that Lord Millett, in construing and categorising the ‘hybrid charge’ in *Re Brumark* as a floating security, did not unduly infringe on the parties’ freedom of contract, since their intention in formulating such a charge was in any event founded on the abovementioned erroneous belief.

The Spectrum Case

The Facts

In the autumn of 1997 Spectrum Plus Ltd (hereafter Spectrum) opened a current account with National Westminster Bank (hereafter the bank) on which it obtained an overdraft facility of £250,000. On the 30th of September 1997 Spectrum, in order to secure its indebtedness to the bank, executed a debenture which was expressed to grant a fixed charge over its present and future book debts. The debenture, which “was on all fours” with the debenture in *Siebe Gorman*, provided that:

[Spectrum] shall pay into [Spectrum’s] account with the bank all moneys which it may receive in respect of [book debts] and shall not without the prior consent in writing of the bank sell factor discount or otherwise charge or assign the same in favour of any other person or purport to do so and [Spectrum] shall if called upon to do so by the bank from time to time execute legal assignments of such book debts and other debts to the bank.

The debenture prevented Spectrum from disposing of or charging its uncollected book debts but left it free to deal with its debtors and to collect the debts from them. Although it obliged Spectrum to pay the debts, once collected, into its account with the bank, the debenture nevertheless left Spectrum free to draw on that account for its own business purposes provided that the overdraft limit of £250,000 was not exceeded, which in practice it was not.⁵⁹

The Decision

Following first instance⁶⁰ and Court of Appeal⁶¹ judgments, the House of Lords, comprising of seven judges⁶², was called on to decide whether such

⁵⁹ Indeed, as Lord Scott observes in *Spectrum*, at 85, there was no evidence in this case that any instructions regarding Spectrum’s drawings from the account or how the account could be used by Spectrum were ever given by the bank, or that the bank ever sought to exercise any control over the use made by Spectrum of its withdrawals from the account.

⁶⁰ [2004] 2 WLR 783.

⁶¹ [2004] Ch 337.

⁶² Lord Nicholls, Lord Steyn, Lord Hope, Lord Scott, Lord Walker, Lord Brown, Baroness Hale. The short judgments of Lord Steyn, Lord Brown and Baroness Hale will not be considered in

a charge over a company's present and future book debts was capable in law of being a fixed charge.

Lord Hope

Lord Hope believed that the following question was indeed crucial. Was the account into which the book debt proceeds were paid one which allowed the company to continue to use such proceeds as a source of its cash flow, or was it a blocked account which preserved the proceeds intact for the benefit of the bank's security?⁶³ His Lordship answered this question by re-evaluating Slade J's findings in *Siebe Gorman*, and by analysing the contractual relationship between the bank and the company. In *Siebe Gorman* Slade J. had concluded that the company was free to collect the proceeds, but it was not free to use them as it saw fit. His Lordship observed that Slade J. had reached this conclusion in two stages.⁶⁴ First, Slade J. held that the effect of the debenture was to prevent the company from doing anything with the proceeds once collected other than paying them into its account with the bank. Secondly, and perhaps most importantly, Slade J. held that, during the continuance of the security, the bank would have the right, *if it chose*⁶⁵, to assert its lien under the charge on the proceeds of the book debts.

Lord Hope was in full agreement with Slade J. as to the first point. However, with respect, his Lordship felt that the second point made by Slade J. overlooked what is the ordinary contractual relationship between a bank and its customer. This relationship does not permit the bank, *without notice*⁶⁶, to refuse to allow its customer to freely operate a current account while it is within the limits of any agreed overdraft. His Lordship argued that the debenture in *Siebe Gorman*, which provided for the payment of the proceeds into an account of this kind, must be viewed in the light of that relationship. After all, the debenture in *Siebe Gorman* lacked any provision which qualified that relationship.⁶⁷ His Lordship made it clear that an account from which the company is entitled to withdraw funds whenever it wishes within the limits of any agreed overdraft is not a blocked account. Therefore, Lord Hope concluded that because the company had a continuing contractual right to draw out sums equivalent to those paid in, this was "wholly destructive" of the argument that there was a fixed charge

this article.

⁶³ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 76-77, *per* Lord Hope.

⁶⁴ *Ibid.*, at 77.

⁶⁵ Emphasis added.

⁶⁶ Emphasis added.

⁶⁷ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 78, *per* Lord Hope.

over the book debt proceeds because the account into which they were paid was blocked.⁶⁸

Lord Scott

Lord Scott reviewed the body of case law from *Siebe Gorman* to *Spectrum*, all of which has been discussed earlier in this article. His Lordship also analysed the history of the floating charge and the emergence of the statute law that sought to curtail its effectiveness somewhat.⁶⁹ Lord Scott held that while a fixed charge over book debts is capable of being created, a charge that is expressed in a debenture to be a fixed charge, as in this case, but where the chargor is permitted to remove the charged assets from the chargee's security should, in principle, be categorised as a floating charge. The assets, he said, "would have the circulating, ambulatory character distinctive of a floating charge."⁷⁰

Lord Scott concluded that because *Spectrum* was free to draw on its account with the bank, this was inconsistent with the charge being labelled a fixed charge because the money paid in was not being appropriated to the repayment of the debt. Therefore the debenture, although purporting to grant a fixed charge, in law, granted only a floating charge over the book debts.⁷¹

A unanimous House of Lords held, albeit a little reluctantly because of its respect for his other judgments, that Slade J's decision in *Siebe Gorman*, where, as abovementioned, he found that an identical debenture created a fixed charge over the book debts, was wrong, and accordingly the 25 year old case was overruled with the usual retrospective effect.

The Result

In the light of this decision it would appear that, under English law, the key to realising a valid fixed charge over present and future book debts is control. In *Spectrum*, the House of Lords cited with approval the Irish Supreme Court's decision in *Re Keenan Bros. Ltd.*⁷² Although, perhaps somewhat unfortunately, no actual 'control test' was established, it is submitted that the tenor of their Lordships' judgments in *Spectrum* strongly approves of the 'blocked account' provided for in the *Re Keenan Bros. Ltd.* debenture, which will be discussed further below.

Lord Hope appears to "respectfully agree" that the *critical feature*⁷³ which led the Irish Supreme Court in *Re Keenan Bros. Ltd.* to characterise the charge on book debts in that case as a fixed charge was the 'blocked

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*, at 85-88, *per* Lord Scott.

⁷⁰ *Ibid.*, at 95, *per* Lord Scott.

⁷¹ *Ibid.*, at 98, *per* Lord Scott.

⁷² *Re Keenan Bros. Ltd.* [1985] IR 401. This decision was followed by Morritt J. in *William Gaskell Group Ltd. v. Highley and another Nos. 1,2,3* [1994] 1 BCLC 197.

⁷³ Emphasis added.

account' provided for in the debenture.⁷⁴ As Lord Walker observes, such an account allows "a charge on debts, described as a fixed or specific charge" to "take effect as such".⁷⁵ His Lordship points out that "in [the *Re Keenan Bros. Ltd.*] circumstances the chargee would be in control...and the trader would be unable to trade in the ordinary way without the chargee's positive concurrence."⁷⁶ This level of control, as Worthington points out, effectively ensures that a charge over book debts is fixed.⁷⁷ It prevents all dealings by the chargor-company with the book debts other than their collection, and it requires the collected proceeds to be paid into an account with the chargee-bank. This account is then blocked so that the chargor-company cannot use the proceeds as a source of its cash flow. Instead, the proceeds are preserved intact for the benefit of the chargee-bank's security. So long as the charge remains unredeemed, the proceeds can be released from the charge and made available to the chargor-company as a source of its cash flow only with the active concurrence of the chargee-bank.

This is the essential difference between a fixed charge and a floating charge. Whereas a fixed charge enables the chargee to effectively control the security for its own benefit, a floating charge, by contrast, enables the chargor, unless and until the chargee intervenes and causes the charge to crystallise, to decide how to run its own business.

The *Spectrum* case highlights that without any provision for the abovementioned special blocked account restrictions in the debenture contract, companies that pay book debt proceeds into their bank accounts can draw an equivalent amount out again (provided in the case of an overdrawn bank account, the borrowing company is within its agreed limit). This means that such companies can, in practice, use their book debt proceeds in the ordinary course of their business, making the charge over them floating, not fixed, under English law.

Substance over Form

Furthermore, the *Spectrum* case indicates that the debenture contract must not only contemplate a high degree of control by the bank over the proceeds, but such level of control must actually be exercised by the bank in the operation of the account, as this is imperative to the achievement of a valid fixed charge over the book debts. Lord Scott scrutinised the treatment of the account by the bank and found that it was in fact never treated as a blocked account.⁷⁸ His Lordship stated that the overdraft facility was there

⁷⁴ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 77, per Lord Hope. His Lordship was respectfully agreeing with Lord Millett in *Re Brumark* [2001] 2 AC 710, at 722.

⁷⁵ *Ibid.*, at 103, per Lord Walker.

⁷⁶ *Ibid.*

⁷⁷ Worthington, "An Unsatisfactory Area of the Law-Fixed and Floating Charges Yet Again" (2004) 1(4) *International Corporate Rescue*, 175, at 182.

⁷⁸ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 97, per Lord

to be drawn on by Spectrum at will. His Lordship, taking cognisance of the ordinary contractual relationship between the bank and Spectrum, stated that the bank could, by notice, have terminated the overdraft facility, and required an immediate repayment of the indebtedness and subsequently turned the account into a blocked account. It never did so in practice, and Spectrum was left free to draw on the account as it saw fit. Lord Scott concluded that, “[I]ts right to do so was inconsistent with the charge being a fixed charge....”⁷⁹

It is clear from the above that, in *Spectrum* Lord Scott not only implicitly approves of Lord Millett’s remark in *Re Brumark* that formal provisions for a blocked account are insufficient if the account is not operated as one in substance⁸⁰, but, by analysing the actual treatment of the account and holding such treatment relevant to the categorisation of the charge, his Lordship did in fact expand on such reasoning, although his precise legal basis for doing so is unclear.

It would appear that a three-tier approach to the construction/categorisation of charges, which clearly favours substance over form, has now developed under English law. The courts, in view of *Spectrum*, are likely to consider; the label attached to the charge in the debenture and the intention of the parties as expressed therein; the rights and obligations actually created/granted by the debenture; and the operation of the account in practice.

Practical Consequences

It is indisputable that the House of Lords’ decision in *Spectrum* is of significant legal and commercial importance. It not only brings a degree of certainty to this much debated area of the law, but it also allows the several hundred receiverships, administrations and liquidations that have long been held up pending the resolution of the fixed/floating issue to finally be closed. However, an unfortunate outcome of the *Spectrum* decision, for the banking sector at least, is that it has significantly weakened a banking practice relied upon by clearing banks in England, who have drafted their standard form debentures in reliance on the *Siebe Gorman* decision for over a quarter of a century. Such banks now have an inferior form of security than they supposed. On the other hand, it is arguable⁸¹ that this outcome could have been avoided if commercial lenders in England had listened to the alarm bells sounded well over a decade ago by the Irish Supreme Court’s decision in *Re Holidayair Ltd.*, which is discussed in detail below.

Scott.

⁷⁹ *Ibid.*

⁸⁰ *Agnew v. Commissioner of Inland Revenue; In Re Brumark Investments Ltd.* [2001] 2 AC 710, at 730, *per* Lord Millett.

⁸¹ *See* Breslin and Smith, *loc. cit.*, at 236.

Prospective Overruling

It is worth noting that, in the *Spectrum* case, the bank argued that if their Lordships decided that the *Siebe Gorman* decision was erroneous and thus sought to overrule it, they should do so *only with prospective effect*⁸² (only for the future). The bank's reason for so arguing is obvious. It wanted to protect lending institutions, like itself, who had drafted charges in reliance on the *Siebe Gorman* decision for many years. Such charges, which were considered to be fixed, would remain that way with a prospective overruling.

It is not proposed to consider in any great detail their Lordships' comments on the matter of prospective overruling here, but suffice it to say that, in the aftermath of much deliberation, they rejected the bank's argument and declined to overrule *Siebe Gorman* only with prospective effect. The House of Lords was of the opinion that a prospective overruling of the *Siebe Gorman* case could prejudice certain preferential creditors by denying them the priority to which they were entitled under English statute law.⁸³ However, the House of Lords considered that it could make a prospective over-ruling in future litigation, if the circumstances warranted, although, as Nolan points out, "there is very little indication [in *Spectrum*] of precisely when a ruling might be genuinely prospective only".⁸⁴

It has been observed that many receiverships, administrations and liquidations have long since been closed with the parties placing reliance on the *Siebe Gorman* decision, and therefore treating the charge over book debts as fixed.⁸⁵ This would have defeated the claims of the preferential creditors. Since it has now been established that *Siebe Gorman* was wrongly decided, and that case was overruled with the usual retrospective effect, many preferential creditors may take legal action to regularise their treatment under English law. However, it remains to be seen whether anyone will bring a case.⁸⁶

The Irish Position

The Irish approach to construing/categorising charges over book debts is somewhat stricter than the approach in England, discussed above. It is clear that "mere terminology" such as the attachment of the label "fixed" or "specific" to the charge in the debenture contract will not be determinative

⁸² Emphasis added.

⁸³ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 73, per Lord Nicholls.

⁸⁴ Nolan, "A Spectrum of Opinion" [2005] *Cambridge Law Journal* 554, at 558.

⁸⁵ Hanlon and Heywood, *loc. cit.*

⁸⁶ *Ibid.*

of the nature of the charge. As in England, the Irish approach is to look “not at the declared intention of the parties alone, but to the effect of the instruments whereby they purported to carry out that intention.”⁸⁷ The Irish approach, while substance over form, is not so to the same extent as in England because, as we shall see, the Irish courts, when determining the nature of the charge over book debts, refuse to look beyond the effect of the instruments in which the parties’ professed to carry out their intention to their subsequent conduct, *i.e.* their actual treatment of the account.

1. Re Keenan Bros. Ltd. – On Solid Ground

A “far stronger case” than *Siebe Gorman* is the Supreme Court’s influential judgment in *Re Keenan Bros. Ltd.*⁸⁸ The charge created by the debenture in this case was undoubtedly fixed. This is because there was no mere potential for the bank to intervene; the special account into which the proceeds were paid by the company was blocked.

The debenture was similar to that in *Siebe Gorman* as it required the company to pay the proceeds into a designated account with the bank. However, the debenture went further by stipulating that the company could not make any withdrawals from this account or direct any payment from it without the prior consent of the bank in writing. The requirement in the debenture that the proceeds be segregated in a special account where they would be rendered frozen and unusable without the bank’s consent meant that the charged assets were unavailable to the company as a source of its cash flow. The commercial effect of this stipulation was to ‘cut off’ the company from the charged assets from the moment they were placed in the designated account with the bank. Accordingly, the Supreme Court held that this arrangement was incompatible with the essence of a floating charge and that a fixed charge had been created by the terms of the debenture.⁸⁹ As Henchy J. opines:⁹⁰

It seems to me that such a degree of sequestration of the book debts when collected made [the proceeds] incapable of being used in the ordinary course of business...assets thus withdrawn from ordinary trade use, put in the keeping of the debenture holder, and...made undisposable save at the absolute discretion of the debenture holder, have the distinguishing feature of a fixed charge. The charge was not intended to float in the future on the book debts; it was affixed forthwith and without further ado to those debts as they were collected....

⁸⁷ *Re Keenan Bros. Ltd.* [1985] IR 401, at 421, *per* McCarthy J.

⁸⁸ *Re Brightlife Ltd.* [1987] Ch. 200, at 210, *per* Hoffmann J.

⁸⁹ *Re Keenan Bros. Ltd.* [1985] IR 401, at 419-420, *per* Henchy J.

⁹⁰ *Ibid.*

Thus, in *Re Keenan Bros. Ltd.* the terms of the debenture indubitably prevented the proceeds from freely mingling with the rest of the company's cash flow, whereas in *Siebe Gorman* the terms of the debenture allowed this channel to remain open unless and until such time as the bank chose to intervene and effectively 'close the sluice'.⁹¹

2. *Re Wogan's (Drogheda) Ltd. – Veering off Course*

In *Re Wogan's (Drogheda) Ltd.*⁹² a company purported to give a non-clearing bank a fixed charge over its present and future book debts. The debenture provided that the chargee-bank could designate a separate blocked bank account, identical to that in the earlier case of *Re Keenan Bros. Ltd.*, into which the proceeds would be paid by the chargor-company. Although no such account was ever designated, Finlay C.J. held that⁹³:

If a lender, having availed of a debenture in these terms, as a concession delays the designation of a bank account or suspends for some period the operation of direct control over the bank account into which the proceeds of book debts are paid, thus permitting the company issuing the debenture to carry on trading in a more normal fashion than strict compliance with the terms of a fixed charge would permit, there does not appear to be any principle of law or of justice which would deprive such a lender of the rights agreed by the debtor company of a fixed charge over the assets....

Thus, it would appear that in Ireland a chargee can have a fixed charge over book debts where the terms of the debenture place him in a position to bring about a state of affairs which will allow him to control the use of the proceeds, even though he is not presently exercising that control in reality because he has not yet designated a separate blocked bank account into which the charged assets will be deposited by the chargor.⁹⁴ A fixed charge has been created by the terms of the debenture but, as a concession, the chargee is permitting the chargor to deal with the charged assets for the time being as if they were the subject of a floating charge.⁹⁵ Thus, a fixed charge may be permitted to operate for an unspecified period of time as a floating charge and yet remain a fixed charge.⁹⁶

⁹¹ Smart, *loc. cit.*, at 333.

⁹² *Re Wogan's (Drogheda) Ltd.* [1993] 1 IR 157.

⁹³ *Ibid.*, at 170-171, *per* Finlay C.J. It is interesting to note that, in the High Court, Denham J. held that because the charger-company was, in practice, being permitted to use the book debt proceeds in the ordinary course of its business, pending the chargee-bank's designation of a special account, the charge was floating.

⁹⁴ Forde, *op.cit.*, at 616.

⁹⁵ *Ibid.*

⁹⁶ *Ibid.*

Finlay C.J. adopted the “strict contractual approach”⁹⁷ and held that the requirement in the debenture contract to have a separate blocked bank account was decisive in determining that it created a fixed charge over the book debts and the subsequent conduct of the parties was irrelevant in construing the terms of the debenture.⁹⁸ Breslin and Smith are right to point out that this reasoning makes “perfect sense” indeed, because it is well established that the contractual characteristics of a debenture contract cannot fluctuate depending on the subsequent conduct of the parties.⁹⁹ The strict contractual approach was explained by Lord Reid in *Whitworth Street Estates (Manchester) Ltd v. Miller*¹⁰⁰:

[I]t is not legitimate to use as an aid in the construction of the contract anything which the parties said or did after it was made. Otherwise one might have the result that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later.

Finlay C.J. felt that this was “a principle which, in my view, must be adhered to in our law and the mischief created by departing from it would...be considerable.”¹⁰¹ However, it is worth bearing in mind that the courts may depart from the “strict contractual approach” in a number of instances. First, where the apparent agreement between the parties is a ‘sham’; secondly, where the parties have subsequently varied the terms of their original agreement; and finally, where, as in this case, the facts clearly give rise to an estoppel.¹⁰² It is suggested that although the debenture in *Re Wogans (Drogheda) Ltd.* effectively provided for a fixed charge over the company’s book debts, the bank should nevertheless, by virtue of the doctrine of promissory estoppel, have been estopped from asserting that it had such a charge because its subsequent conduct was in fact entirely inconsistent with the existence of a fixed charge over book debts.

Indeed, the words of Lord Millett in *Re Brumark*¹⁰³, which were approved of in *Spectrum*¹⁰⁴, that “it is not enough to provide in the debenture that the account is a blocked account when it is not operated as one in fact”, seem particularly apt here. In *Re Wogans (Drogheda) Ltd.*, there was, in fact, over the course of a year, no actual operation of the

⁹⁷ Breslin and Smith, *loc. cit.*, at 230.

⁹⁸ Courtney, *op.cit.*, at 1179.

⁹⁹ Breslin and Smith, *loc. cit.*, at 230.

¹⁰⁰ *Whitworth Street Estates (Manchester) Ltd v. Miller* [1970] AC 583, at 603, *per* Lord Reid.

¹⁰¹ *Re Wogan’s (Drogheda) Ltd.* [1993] 1 IR 157, at 170, *per* Finlay C.J.

¹⁰² Smart, *loc. cit.*, at 335.

¹⁰³ *Agnew v. Commissioner of Inland Revenue; In Re Brumark Investments Ltd.* [2001] 2 AC 710, at 730, *per* Lord Millett.

¹⁰⁴ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 103, *per* Lord Walker.

blocked account provided for in the debenture. Instead, all of the proceeds were paid into the chargor-company's current account with its clearing bank, over which the non-clearing chargee-bank had no control other than via a general floating charge.¹⁰⁵

The chargor-company was free to draw on its current account while it was in credit or within the limits of any overdraft agreed with its clearing bank.¹⁰⁶ This is because, as we have seen, the relationship between a bank and a customer, in this case the clearing bank and the chargor-company, is founded in contract.¹⁰⁷ The chargor-company enjoyed a continuing contractual right to draw on its current account with its clearing bank, and it was therefore free to use the proceeds in the ordinary course of its business, a "freedom which is intrinsic to a floating charge, but anathema to a fixed charge."¹⁰⁸

Thus, the proceeds paid into this account were not, in practice, being appropriated to the repayment of the debt owing to the chargee-bank. Instead, the proceeds were being made available for drawings on the account by the chargor-company. It is arguable that the chargee-bank, by permitting the company to pay the proceeds into its normal bank current account alone, and by failing to even designate, let alone operate the separate blocked bank account provided for in the debenture contract over the course of a year, made by its conduct a clear and unambiguous representation to the chargor-company which could have led such company to believe that the bank would not enforce a particular clause in the contract between them, *i.e.* the blocked account clause. Therefore, it could be argued here that the bank should have been estopped from enforcing this clause against the company and taking a fixed charge over book debts.

Furthermore, it is apparent from the reasoning of Lord Millett in *Re Brumark* that if, as in this case, the charged assets are not under the chargee's control "so that it can prevent their dissipation without its consent" then the charge is incapable of being a fixed charge.¹⁰⁹ The charged assets in *Re Wogan's (Drogheda) Ltd.* were paid into the chargor-company's current account with its clearing bank, and not into the separate blocked bank account provided for in the debenture. As a result they were, in practice, not under the non-clearing chargee-bank's control.

Following *Spectrum*, a court in England may now take this post-contractual conduct into account and might characterise the charge as

¹⁰⁵ Forde, *op.cit.*, at 615.

¹⁰⁶ As Lord Hope points out in *Spectrum*, at 77, "[A]n account from which the customer is entitled to withdraw funds whenever it wishes within the agreed limits of any overdraft is not a blocked account."

¹⁰⁷ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 77, *per* Lord Hope.

¹⁰⁸ Courtney, *op.cit.*, at 1177.

¹⁰⁹ *Agnew v. Commissioner of Inland Revenue; In Re Brumark Investments Ltd.* [2001] 2 AC 710, at 723, *per* Lord Millett.

floating. However, in Ireland, the law remains the same; the characterisation of charges must be based on the debenture contract alone at the time it was created, subsequent behaviour is irrelevant. Thus, when construing/categorising charges over book debts, “Irish and English law part company.”¹¹⁰

3. *Re Holidair Ltd. – Coming Around Again*

A debenture “in the *Siebe Gorman* form” was considered by the Supreme Court in *Re Holidair Ltd.*¹¹¹, a case where Blayney J. reached a conclusion opposite to that of Slade J. The reasoning of Blayney J. in this case was recently described as “compelling”¹¹². Blayney J. held that, although the debenture provided that the chargee could designate a separate bank account into which the proceeds would be paid, it nevertheless created a floating charge over the chargor’s present and future book debts. This was because the terms of the debenture failed to prevent the chargor from drawing the proceeds out of the designated account and using them in the normal way for the purpose of carrying on its business. In short, the debenture did not provide for a ‘blocked account’. Blayney J.¹¹³ found that the charge created by the debenture contained the third characteristic of a floating charge, as described by Romer J. in *Re Yorkshire Woolcombers’ Association*¹¹⁴:

...if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets...

Breslin and Smith rightly argue that *Re Holidair Ltd.* “sterilised the *Siebe Gorman* precedent for the creation of a fixed charge in Ireland.”¹¹⁵ Some commentators¹¹⁶ believe that *Re Holidair Ltd.* is difficult to reconcile with *Re Wogan’s (Drogheda) Ltd.* It appears, to this author at least, that if one applies the abovementioned strict contractual approach, the cases can easily be reconciled. It is clear that in the former case the debenture contract, which was in the *Siebe Gorman* form, created a floating charge over the book debts because it enabled the chargor to withdraw the charged assets from the security without the chargee’s consent. However, in the latter case

¹¹⁰ Breslin and Smith, *loc. cit.*, at 235.

¹¹¹ *Re Holidair Ltd.* [1994] 1 ILRM 481.

¹¹² In *Spectrum* Lord Walker, at 106, so described the reasoning of Blayney J. in *Re Holidair Ltd.* Interestingly, *Siebe Gorman* was not cited in *Re Holidair Ltd.* and, as seen, Blayney J. reached the opposite conclusion when interpreting an identical debenture.

¹¹³ *Re Holidair Ltd.* [1994] 1 ILRM 481, at 493, per Blayney J.

¹¹⁴ *Re Yorkshire Woolcombers’ Association* [1903] 2 Ch 284, at 295, per Romer J.

¹¹⁵ Breslin and Smith, *loc. cit.*, at 230.

¹¹⁶ See further Courtney, *op. cit.*, at 1180. See also Ali, *loc. cit.*, at 48.

the debenture contract, which was in the *Re Keenan Bros. Ltd.* form, created a fixed charge over the book debts because it specifically prohibited the chargor from withdrawing the charged assets from the security without the chargee's prior consent in writing. Thus, in *Re Holidair Ltd.* Blayney J. was able to distinguish the earlier case of *Re Wogan's (Drogheda) Ltd.*, and, it is submitted, he was correct in doing so. This is because the debenture in that case, unlike that in the present case, specifically prohibited the chargor from withdrawing the money from the designated account without the prior consent of the chargee in writing. Therefore it created a fixed charge, not a floating charge, over the present and future book debts.¹¹⁷

Fixed Charges and Irish Statute Law

Whatever future impact the House of Lords' decision in *Spectrum* might have in this jurisdiction, it is submitted that it will, in any event, be far less significant than that in England. This is not simply because of the decision in *Re Holidair Ltd.*, or the Irish courts' reluctance to take the post-contractual conduct of the parties into account. It is due to the fact that, for quite some time now, there has been a variance between Irish and English law so far as fixed charges on book debts are concerned. In England, the proceeds of a fixed charge are paid to the fixed charge holder in priority to all other creditors, including preferential creditors. However in Ireland, the priority traditionally enjoyed by fixed charge holders was significantly undermined by section 115 of the Finance Act 1986 (as amended by section 174 of the Finance Act 1995). This legislation was introduced in response to the Supreme Court's decision in *Re Keenan Bros. Ltd.*, where the validity of fixed charges on book debts was upheld. That decision was "seen as a defeat by the Revenue Commissioners".¹¹⁸ As a result, the Revenue Commissioners were granted what is known as super-preferential status, which means that they now rank in priority to fixed charge holders. Indeed, section 1001 of the Taxes Consolidation Act 1997 enables the Revenue Commissioners to demand payment from the fixed charge holder of certain tax liabilities, i.e. PAYE and/or VAT owed by the chargor. This unilateral statutory indemnity,¹¹⁹ whereby a fixed charge holder is, quite frankly, forced to stand in the chargor's shoes, significantly diminishes the value of a fixed charge over a company's present and future book debts in

¹¹⁷ Forde, *op.cit.*,

Ireland, and makes such a charge “much less attractive as a security in the eyes of a lender.”¹²⁰

Conclusion

The fixed/floating issue has not been dealt with by the Irish Supreme Court in over a decade. While the case law, with its adherence to the strict contractual approach, does provide a sound legal basis for deciding the matter, “it remains to be seen whether the Irish courts will take into account post-contractual conduct of the parties, despite having ruled against it previously”.¹²¹ It is submitted that the courts should indeed be willing to invoke the established qualifications to the contractual principle if necessary to do justice. However, post-contractual conduct of the parties should not be considered lightly, as it was by Lord Scott¹²² in *Spectrum*. With respect, Lord Scott not only launches into a consideration of the treatment of the account by the contracting parties, but his Lordship allows such treatment to determine the nature of the charge, without a sound legal basis for so doing. First, the debenture in *Spectrum* was in the *Siebe Gorman* form, therefore it was unnecessary for his Lordship to look beyond its contractual makeup to decide that the charge was floating. Second, none of the established qualifications to the contractual principle were considered in *Spectrum*, so it was illogical, and indeed contrary to the principle, for Lord Scott to analyse any post-contractual treatment of the account, although, with respect, it is submitted that it was commonsensical.

It is the opinion of this author that Lord Millett’s comment in *Re Brumark*¹²³, regarding formal provision for *and*¹²⁴ actual operation of the account as relevant to the categorisation of a charge, although approved of by Lord Walker¹²⁵ and indeed built upon by Lord Scott¹²⁶, is unsound, not from a purely rational point of view, but from a strictly legal perspective. This remark of Lord Millett’s does, in the absence of conventional qualifications, conflict with the established principle that it is not legitimate to use as an aid, in the construction of a contract, anything which the parties said or did after it was made, and it is submitted that it is unlikely to hold any weight in an Irish court.

¹²⁰ Breslin and Smith, *loc. cit.*, at 229.

¹²¹ Ali, *loc. cit.*, at 49.

¹²² *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 97, per Lord Scott.

¹²³ *Agnew v. Commissioner of Inland Revenue; In Re Brumark Investments Ltd.* [2001] 2 AC 710, at 730, per Lord Millett.

¹²⁴ Emphasis added.

¹²⁵ *National Westminster Bank plc v. Spectrum Plus Limited* [2005] 3 WLR 58, at 103, per Lord Walker.

¹²⁶ *Ibid.*, at 97, per Lord Scott.

Although, as seen, the House of Lords' decision in *Spectrum* is of significant legal and commercial importance in England, it is likely to be of limited impact in Ireland. It could be of some persuasive value in future fixed/floating litigation because, in this author's opinion it adequately puts the fallacy of the 'hybrid charge' to bed by highlighting that the security rights over the book debts cannot be any greater than those over the proceeds. However, it is unlikely to affect the courts' observance of the strict contractual approach because it is unclear from the judgment of Lord Scott as to when exactly post-contractual conduct of the parties may be relevant to the categorisation of a charge over book debts. It is submitted that *Spectrum*, while no doubt a landmark case in England, does little more than fortify the existing body of case law in this jurisdiction. In conclusion, taken as a whole the Irish cases, and *Re Brumark* and *Spectrum*, hammer home the message that there is only one way to create a valid fixed charge over present and future book debts, provide in the debenture for the requisite level of control via a blocked account.

CREDIBILITY ASSESSMENTS AND VICTIMS OF FEMALE GENITAL MUTILATION: A RE-EVALUATION OF THE REFUGEE DETERMINATION PROCESS

AOIFE DRUDY*

Introduction

In the last decade there has been a greater focus on the influence of gender in refugee status determinations under Article 1 of the 1951 Convention,¹ and the significant problems women face in obtaining protection from a system originally designed to protect males fleeing from totalitarianism.² While gender-specific claims have been accepted as falling within the Convention grounds for persecution,³ women still face greater obstacles to the grant of refugee status than their male counterparts. In particular, women confront numerous hurdles in establishing their credibility in determination hearings. Refugee law has at its core the humanitarian belief that the international community must offer protection to victims of serious human rights violations, no matter what their nationality or gender.⁴ Viewed in this light, it is clear that credibility assessment must err on the side of protection, refrain from discrimination and maintain as a priority the well-being of the applicant. This essay seeks to examine the importance of

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¹ *Convention Relating to the Status of Refugees* 28 July 1951, 189 UNTS 150 and *Protocol Relating to the Status of Refugees* 4 October 1967, 606 UNTS 267. (Hereafter known as the Convention)

² ICCL Women's Committee, *Women and the Refugee Experience: Towards a Statement of Best Practice*, (in association with the National Consultative Committee on Racism and Interculturalism & The Irish Times) available at http://iccl.ie/DB_Data/publications/WomenandtheRefugeeExperience1.pdf (visited 7th August 2006), at 6 and 9. For literature on the topic of gender persecution and the refugee definition: Crawley *Refugees and Gender: Law and Process*, (Jordan, 2001); K Musalo and S Knight, *Steps Forward and Steps Back: Uneven Progress in the Law of Social Group and Gender-Based Claims in the United States* (2001) 13 Intl J Refugee L 51; Haines, *Gender-Related Persecution* in Feller, Türk and Nicholson eds., *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) at 319-350.

³ United Nations High Commissioner for Human Rights (hereafter UNHCR) *Guidelines on the Protection of Refugee Women* Geneva July 1991. (UNHCR Guidelines 1991)

⁴ UNHCR Guidelines 1991, para 1

credibility in asylum hearings⁵ and the problems associated with its evaluation. In particular, the position of women claiming on the grounds of female genital mutilation will be considered, as such women face specific difficulties that may have an adverse effect on their credibility. Finally, it is hoped to outline brief alternatives to the current method of credibility evaluation, which may be more suited to gender-specific claims and may therefore result in a more accurate determination process.

Definition Of Refugee

The international definition of a refugee is found in the 1951 Geneva Convention Relating to the Status of Refugees, as amended by its 1967 protocol.⁶ Article 1 of the Convention defines a refugee as any person who

... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷

There are a number of elements to this definition. First, the applicant must have a 'well-founded fear'. This comprises both a subjective and objective element, involving a consideration of the applicant's state of mind and a consideration of whether that state of mind is reasonable in all the circumstances.⁸ Second, that fear must be of persecution. Hathaway posits the test of persecution as 'a sustained and systematic violation of basic human rights demonstrative of a failure of State protection.'⁹ Third, the well-founded fear of persecution must relate to the applicant's race, religion, nationality, membership of a particular social group or political opinion. Fear of persecution on alternative grounds will not qualify the

⁵ The essay will not deal with the appeal/review process, as it varies greatly from country to country, although some appeal/review decisions will be referred to as examples.

⁶ The Convention *loc. cit.*

⁷ There are certain conditions in Article 1 that may disqualify a person from refugee status. However, they are not relevant to this article and will not be dealt with here.

⁸ UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* HCR/IP/4/Rev.1, 1979, at para 35-50. (UNHCR Handbook, 1979).

⁹ Hathaway, *The Law of Refugee Status* (Butterworths Toronto: 1991) at 101. There is no definition of persecution in the Convention. There is considerable literature on the matter, but an examination of such is beyond the scope of this article.

applicant for refugee status, but it may warrant other remedies.¹⁰ Fourth, the applicant must be outside the borders of his/her country of nationality. Fifth, the applicant must be unable to avail of state protection in his/her country of origin, or alternatively, unwilling to avail of such due to their fear of persecution. Refugee law is intended to meet the needs of only those who have no alternative to seeking international protection; as such, primary recourse should always be to one's own State.¹¹ Those who are recognised as coming within the 1951 Convention are entitled to the specific protections of the Convention and also to such additional protection as is available under the law of the country where their status is recognised.¹²

The 1951 Convention was ratified by Ireland in 1956 and the Protocol in 1968, although until recently there was no Irish legislation on the matter. The Refugee Act 1996¹³ incorporated elements of the Convention into Irish law, creating a statutory mechanism by which to examine the claims of asylum seekers.¹⁴ This has been amended by section 9 of the Immigration Act 1999, the Illegal Immigrants Trafficking Act 2000, the Immigration Act 2003 and the Immigration Act 2004.¹⁵ Section 2 of the 1996 Act follows the definition in Article 1 of the Convention almost word for word, although it goes somewhat further in its definition by providing that membership of a particular social group includes membership of a trade union and membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation.¹⁶ Accordingly, international materials based on the Convention are particularly helpful in interpreting the Irish law relating to the status of refugees.

¹⁰ For example, an applicant may be granted humanitarian leave to remain by the authorities of a State. Under Irish law, asylum seekers may apply to the Minister for Justice for leave to remain under section 9 of the Refugee Act, 1996. However, this is granted on an *ad hoc* basis and there are no formal guidelines laying down the circumstances in which leave to remain will be granted.

¹¹ Hathway, *op. cit.*, at 124.

¹² The Convention does not provide for any international tribunal to enforce compliance or to interpret its terms. As such, the Convention relies on States to implement it. However, the UNHCR, the body charged with overseeing the application of the Convention, works to promote refugee protection and provides a number of guidelines, recommendations and conclusions, which are accepted by most States as correct guidance. *See further*, Hathway, *The Rights of Refugees under International Law*, (Cambridge University Press, 2005), reviewed by Lynn, *Hathway and the Rights of Refugees under International Law*, 11(2) *Bar Review* 69.

¹³ Hereafter known as the 1996 Act. The 1996 Act did not become effective until 2000, with some provisions becoming effective in 2001.

¹⁴ *See further*, commentary on the 1996 Act: Byrne, *At the Cross-Roads: Refugee Protection in Ireland under the 1996 Refugee Act*, and Egan, *The Refugee Act 1996*, both in Driscoll ed. *Irish Human Rights Review 2000* (Round Hall Sweet & Maxwell 2000).

¹⁵ An unofficial but useful, consolidated version of the Act is available at <http://www.orac.ie/pages/CorpOff/publications.htm> (visited 7th August, 2006).

¹⁶ Section 1, Refugee Act 1996.

Under Irish law, an applicant may make an application for a declaration of refugee status on arrival at the frontier of the State, at a Garda station or at the Refugee Application Centre. The applicant must complete an asylum questionnaire and will be interviewed initially by an authorised officer or immigration officer. The independent Office of the Refugee Applications Commissioner (ORAC) is responsible for the investigation of asylum claims and makes recommendations at the first instance. If the application is refused, the applicant has a right of appeal to the Refugee Appeals Tribunal (RAT).¹⁷ If the application is refused by the RAT, there is no further right of appeal. However, the applicant may apply to the High Court for judicial review of the decision of the RAT.

Relevance Of Credibility

The UNHCR Handbook states that an assessment of credibility is indispensable where the case is not sufficiently clear from the facts on record,¹⁸ and in practice it has been found that credibility is a crucial element in the process of refugee status determination.

First, the assessment of well-founded fear may be based largely, or even primarily, on the applicant's own credible testimony, as it will often constitute the best evidence of risk.¹⁹ The definition of 'refugee' places a focus on the forward-looking fear of the person, involving the applicant's own assessment of his/her situation upon return.²⁰ In this context, an assessment of credibility is crucial to the evaluation of whether the applicant is really afraid (the subjective element) and whether the applicant's assessment of the situation in his/her country of origin is accurate (the objective element).²¹

Second, applicants can rarely corroborate their accounts with specific independent evidence, thus success in application will rest on being granted

¹⁷ According to the Refugee Act 1996 (as amended), section.16(3), the default appeal procedure is that of an oral hearing. However, if the case is one in which a finding was made pursuant to sections.13(5) or 13(8), the appeal will be determined without an oral hearing.

¹⁸ UNHCR Handbook, 1979, at para 41.

¹⁹ *The Michigan Guidelines on Well-Founded Fear: Third Colloquium on Challenges in International Refugee Law*, Convened by The Program in Refugee and Asylum Law, University of Michigan Law School, March 26-28, 2004, para 9. Accessible at <http://www.refugeecaselaw.org/fear.pdf> (last visited 7th August, 2006).

²⁰ Noll, *Evidentiary Assessment under the Refugee Convention: Risk, Pain and the Intersubjectivity of Fear*, in Noll ed., *Proof, Evidentiary Assessment and Credibility in Asylum Procedures* (Martinus Nijhoff Publishers, Leiden/Boston, 2005), at 143.

²¹ See the comments of Finlay Geoghegan J. in *N.K. (Kramarenko) v. Refugee Appeals Tribunal* [2004] 2 ILRM 550 (application for leave), that "credibility potentially comes into play in two aspects of the assessment of a claim. Firstly, in the assessment of the subjective element of the applicant's claim, that he/she has a fear of persecution for a Convention reason if returned to his/her own country and secondly, in assessing the objective facts relied upon by the applicant, to establish if the fear is well founded."

the benefit of the doubt. The UNHCR Handbook states that the applicant will be accorded the benefit of the doubt if ‘the account appears credible’²² or where the decision-maker is “satisfied as to the applicant’s general credibility”.²³ Although the latter statement relates primarily to the account given by the applicant, it may also allow for assessments of credibility outside the parameters of the basic account given, suggesting that non-verbal behaviour, delay in providing information and inconsistencies with independent information may be considered in an assessment of “general credibility”.²⁴

Third, and more generally, credibility will feed into the interpretation of all other elements in the refugee determination process, as a finding of lack of credibility may render other evidence provided by the applicant less reliable in the eyes of the decision-maker.²⁵

Kagan asserts that negative credibility assessments are a leading reason for rejections in most refugee status determination systems. For example, 77% of rejections reviewed from the UNHCR Regional Office in Cairo in Spring 2002 were attributed to applicants’ lack of credibility.²⁶ Similarly, it has been found that determination processes in the Netherlands²⁷, Canada²⁸, Australia²⁹, the United Kingdom³⁰ rely heavily on assessments of the credibility of applicants, and an examination of the Irish case-law relating to refugee applications suggests that it is similarly important in Ireland.³¹

²² UNHCR Handbook 1979, para 196.

²³ UNHCR Handbook 1979, para 204.

²⁴ This is borne out in the Irish context where decision makers are required to take into account the matters outlined in section 11B of the Immigration Act 2003 (amending the 1996 Act), which relate to matters peripheral to the applicant’s account of his/her persecution.

²⁵ Hathaway and Hicks, *Is There a Subjective Element in the Refugee Convention’s Requirement of “Well-Founded Fear”?* (2005) 26 *Michigan Journal of International Law* 505, at 531-532.

²⁶ Kagan, *Is Truth in the Eye of the Beholder? Objective Credibility Assessment in Refugee Status Determination* (2003) 17 *Geo. Immigr. L.J.* 367, at 368-369.

²⁷ Spijkerboer, *Stereotyping and Acceleration – Gender, Procedural Acceleration and Marginalised Judicial Review in the Dutch Asylum System*, in Noll ed., *op. cit.* Also TP Spijkerboer *Gender and Refugee Status* (Aldershot, Ashgate, 2000).

²⁸ Rousseau, Crepeau, Foxen and Houle, *The Compexity of Determining Refugeehood: A Multidisciplinary Analysis of the Decision-making Process Of the Canadian Immigration and Refugee Board* (2002) 15(1) *Journal of Refugee Studies* 43.

²⁹ Commonwealth of Australia: Senate and Constitutional References Committee *A Sanctuary Under Review: An Examination of Australia’s Refugee and Humanitarian Determination Processes* June 2000, 158. <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/refugees/report/contents.htm> (26 March 2006). The report acknowledges that credibility is an important factor in refugee determination and recommends that it continue to be so.

³⁰ Refugee Women’s Resource Project, *Asylum Aid Women asylum seekers in the UK: A Gender Perspective: Some Facts and Figures* February 2003, at 71. This study found that 54% of the refusals reviewed were based on findings of a lack of credibility relating to the facts of the case.

³¹ This issue is examined later in this article under ‘Credibility Determinations in Ireland’.

The evaluation of an applicant's credibility is indispensable in circumstances of a paucity of evidence. It follows that where there is independent evidence to support the applicant's claim, credibility should lose some of its sway. However, in some studies it was found that negative credibility determinations were the deciding factor in cases, despite the presence of documentary evidence to the contrary.³² It should be recalled that credibility is not an explicit part of the refugee definition. A person is a refugee if she has a well-founded fear of persecution on the basis of one of the five Convention grounds, and does not cease to be deserving of Convention protection because s/he has been less than completely honest.³³ Care must be taken, therefore, to ensure that credibility evaluation in refugee status determinations remains secondary to the refugee definition and remains consistent and forgiving in its application.³⁴

The Reliability Of Credibility Assessment

Assessments of credibility look for the personal and situational facts, from the point of view of the decision-maker, which may influence assumptions on the believability of an individual.³⁵ Although credibility is a crucial part of the asylum process, it has traditionally been subject to little research. However, recent studies have discovered a number of recurrent elements in the evaluation process and the problems associated with them in practice. Kagan identifies the positive and negative factors that are given probative weight in this assessment.³⁶ The positive criteria are detail and specificity, consistency, providing all the facts early and plausibility of the account. The negative criteria are vagueness, contradictions, delayed revelation of key facts and implausibility. In addition, corroborative evidence may have a positive bearing on credibility and the general demeanour of the applicant may have a significant impact on the evaluation as a whole.³⁷ It is proposed in this section to examine these factors in turn and to outline the particular difficulties they present for asylum applicants.

³² Rousseau *et al*, *loc. cit.* and Asylum Aid *Still No Reason At All: Home Office Decisions on Asylum Claims* (Asylum Aid, London, 1999), <http://www.asylumaid.org.uk/New%20RWRP/RWRP_RRP_Publicationslist.htm> (26 March 2006).

³³ *Re SA Refugee Appeal No. 1/92* (N.Z. Refugee Status Appeals Authority 1992), citing IRB, *Re Sittam Palam*, 13 Immigr. L. Rep. 2D 287 (1990), cited in Kagan, *loc. cit.*, at 370.

³⁴ Gorlick, *Common Burdens and Standards: Legal Elements in Assessing Claims to Refugee Status* (2003) 15 Intl J Refugee L 357, at 360.

³⁵ Zahle, *Competing Patterns for Evidentiary Assessments*, in Noll ed., *loc. cit.*, at 15.

³⁶ Kagan, *loc. Cit* at 384.; cited in Byrne, *Credibility in Changing Contexts: International Justice and International Protection*, in Noll ed., *op. cit.*

³⁷ The UNHCR Handbook 1979 acknowledges this fact at para. 202, and adds that, since the decision will affect human lives, the criteria must be applied in a spirit of justice and understanding and not influenced by the personal consideration that the applicant may be an "undeserving case".

Demeanour

Decisions as to credibility are often based on matters of impression, and an unfavourable view taken upon an otherwise minor issue may be decisive.

*- Gleeson C.J., High Court of Australia*³⁸

A decision-maker may form an impression of an applicant from their manner of responding to questions - verbal behaviour - or from their non-verbal behaviour. A positive impression may be established by a readiness to answer questions in a detailed manner, the display of appropriate emotions or making eye-contact. Alternatively, a negative impression may be established by inconsistent, vague or tentative answers, the display of too much or too little emotion, or disinterest and avoidance of eye contact.³⁹ Goodwin-Gill has remarked that decision-makers commonly rely on instinct and a feel for credibility to the detriment of other factors, such as identification of material facts, the weight of the evidence and the standard of proof.⁴⁰ It is submitted that this overall assessment of the credibility of an applicant is fundamentally defective as it disregards the extensive influence of cultural factors on perceptions of credible behaviour.

Numerous communication failures occur when people do not share the same cultural references, rules and codes.⁴¹ These notions of appropriate communication are seen as universal, and their cultural embeddedness is not always acknowledged.⁴² This can result in a number of errors, ranging from misinterpretations about minute non-verbal cues to different understandings as to the essential meaning of concepts. Misunderstanding is heightened by the linguistic barrier that often exists in the refugee context.⁴³ Even minor distortion of the applicant's statement by an interpreter may reflect negatively on his/her credibility. The resulting impression of the general demeanour of the applicant may then be

³⁸ *Re Refugee Review Tribunal, ex parte Aala* (2000) 176 ALR 219, at 221.

³⁹ Coffey, *The Credibility of Credibility Evidence at the Refugee Review Tribunal* (2003) 15 Intl J Refugee L 377, at 386-8.

⁴⁰ Goodwin-Gill *The Refugee in International Law* at 350 (Oxford: Oxford University Press, 2nd ed., 1996).

⁴¹ Rousseau *et al*, *loc. cit*, at 50.

⁴² Muller-Hoff, *Representations of Refugee Women – Legal Discourse in Europe* (2001) *Law, Social Justice & Global Development Journal*, 10, <<http://elj.warwick.ac.uk/global/issue/2001-1/mullerhoff1.html>> (26 March 2006).

⁴³ For example, an adverse finding on credibility was made because the applicant said at interview that he would meet a man *in* a Mosque, but later said at the appeal hearing that he met a man *outside* a Mosque. When asked to explain the inconsistency, the applicant replied that in the Nigerian language meeting a man in a Mosque and meeting him outside the Mosque mean the same thing. The Tribunal Member 'did not find this explanation to be credible', apparently without investigation of the colloquial use of language in the area. Reference 17: (Nigeria), Refugee Appeals Tribunal Published Decisions, Volume 1.

essentially indeterminate and misguided. Similarly, the cultural relativity of the concepts of 'lie' and 'truth' are often disregarded by decision-makers, who assess the truthfulness of a statement on the basis of their own political, cultural and moral discourse.⁴⁴

Even without such cultural barriers, there is little empirical evidence to show that assessors of any description are capable of reliably assessing the truthfulness of an individual's claims on the basis of demeanour and manner of presentation alone. Kapardis remarks that humans, including trained and experienced law-enforcement personnel, 'turn out to be as good as chance in detecting deception.'⁴⁵ Judgments based on demeanour, rather than articulated logic, are not susceptible to review, leaving the applicant with little recourse. Such unstructured and unreviewable credibility assessments lead to inconsistent decision-making and a great risk of mistaken refusal of persons in danger of serious human rights violations. To allow such a central part of refugee status determination as credibility assessment to be essentially subjective invokes serious doubts about the fairness and effectiveness of the refugee adjudication system.

Consistency, Plausibility and Attention to Detail:

An evaluation of the plausibility of an account involves a consideration of the internal consistency of the account, the reasonableness of the assertions made and their consonance with generally known facts.⁴⁶ Disbelief of evidence based on its intrinsic implausibility is a disbelief that the particular applicant would have followed a particular course of action or that a particular event would have transpired, a belief that will be subjective at best. Further, plausibility is decreased by internal inconsistency.

Minor inconsistencies or incorrect statements as to peripheral matters have often been decisive in rejecting an application.⁴⁷ Inconsistency may be an inconsistency of facts between two hearings or mutually inconsistent

⁴⁴ For example, Rousseau *et al.* point out that in many cultures, a strong identification with a collective identity, whether based on family, lineage, clan, language group or a broader sense of ethnicity, often blurs the boundaries between the individual and the community. Descriptions of traumatic events are then narrated in the context of one's broader community or ethnic loyalties. This blurring of I and We – absent in a Western western style of discourse which stresses the boundaries of individualism – reflects not only a cultural narrative style but also the manner in which many persecuted persons experience and interpret the violence against them: *loc. cit.*, at 63.

⁴⁵ Kapardis *Psychology and Law: A Critical Introduction* (Cambridge University Press, 2003), at 257.

⁴⁶ UNHCR *Note on Burden and Standard of Proof in Refugee Claims* 16 Dec 1998, para. 11 (UNCHR 1998); UNHCR Handbook 1979, para 204.

⁴⁷ Eg, in an Austrian case, the tribunal rejected the application for lack of credibility based on the incredibility of peripheral issues such as the route of travel and the unlikelihood that a Muslim man would give wine as a dowry gift. *Re Cameroonian Citizen*, Independent Federal Asylum Senate, Decision of 21 March 2002, <<http://www.refugeelawreader.org/index.d2?target=getpdf&id=1118>> (8 August 2006).

statements made within one hearing.⁴⁸ However, due to time lapse or the intensity of past events, an applicant may not be able to remember or recount accurately all factual details, and thus s/he may be vague or inaccurate in providing detailed facts.⁴⁹ Further, communication in asylum processes takes place within a strictly organised, often bureaucratic context. For the decision-makers this is familiar and easy to control, but for applicants it is a one-off experience for which they do not know the procedures.⁵⁰ The applicant may be ill-prepared for the procedure, intimidated by the unfamiliar surroundings or fearful of the outcome, resulting in confusion and disorientation.⁵¹

Evidence of dishonesty can irreparably damage the credibility of the account. Dishonesty is, however, often explicable in the context of refugees. Refugees may have received bad advice from traffickers, they may have a fear of being returned home or a misguided conviction that matters like the legitimacy of the travel route will bear heavily on the application.⁵² Hathaway and Hicks⁵³ go further to argue that lies or exaggeration may actually, paradoxically, be evidence of a genuine refugee. As the Australian Federal Court observed,

[G]enuine refugees are often at a dire disadvantage as to their capacity to bring their cases and are ... engaged in an often desperate battle for freedom, if not life itself. Exaggeration and lies are accordingly to be expected from some of them.⁵⁴

Out of desperation to avoid being returned to a situation of risk, even truly fearful applicants may lie and exaggerate in order to conform to the perception of the 'successful applicant'.

Delay

Delay in making the claim or in furnishing particular information relevant to a claim, can have a disastrous effect on the credibility of an applicant. Indeed, in many countries, delay in making a claim is explicitly stated in national regulations to be damaging to credibility and is cited as a reason

⁴⁸ Coffey, *loc. cit.*, at 388.

⁴⁹ UNHCR 1998, para. 9.

⁵⁰ Doornbos, *On Being Heard in Asylum Cases – Evidentiary Assessment through Asylum Interviews*, in Noll ed., *op. cit.*, at 108.

⁵¹ Pelosi *Intercultural Communication in the Refugee Determination Hearing* (1996, Montreal: School of Social Work, McGill University).

<<http://www.collectionscanada.ca/obj/s4/f2/dsk2/ftp01/MQ29855.pdf>> (26 March 2006).

⁵² Strictly, the legitimacy of the travel route should not have a bearing on the determination of refugee status, as the definition of refugee focuses on the fear of the applicant of returning home, rather than how they arrived away from home. However, dishonesty about the route of travel may have an effect on the applicant's credibility as it indicates a propensity to lie.

⁵³ Hathaway & Hicks, *loc. cit.*, at 533.

⁵⁴ *Kalala v. Minister for Immigration and Multicultural Affairs* [2001] F.C.A. 1594, at 3

for accelerated procedure or even refusal to hear the claim.⁵⁵ Yet there are a number of reasons why delay can occur in the context of refugees. Refugees, by definition, have a well-founded fear of persecution, persecution that has been condoned, if not sanctioned by the State in which they lived. It is entirely understandable that they may feel a degree of mistrust, or at least a marked ambivalence of feeling, vis-à-vis any authority. This may explain a delay in application or the provision of crucial information to the authorities.⁵⁶ Further, the interview may not be sufficiently long to gather all of the relevant information. While it is generally assumed that genuine refugees are able to present all relevant information at once, Crawley's study found that many refugees lack the knowledge about the relevance of details for the decision.⁵⁷

Corroboration

Consistency with independent evidence is an important positive criterion, as evidence which corroborates the account of the applicant bolsters the credibility of that account considerably.⁵⁸ The converse does not strictly apply, as recognition of refugee status is not dependent on the production of any particular formal evidence.⁵⁹ However, a lack of documentation to support the claim might have some bearing in circumstances where the decision-maker considers that such documentation might easily have been obtained by the applicant, or where there is a suspicion that such documentation may have been destroyed.

The Decision-maker

The UNHCR guidelines state:

Since the decision-maker's conclusion on the facts of the case and his personal impression of the applicant will lead to a decision that affects human lives, he must apply the criteria in a spirit of justice and understanding and his judgement should not, of course, be influenced by the personal

⁵⁵ *Reception Standards For Asylum Seekers In the European Union* UNHCR, Geneva, July 2000. The report states that Finland, Portugal, Spain and Sweden will view delay in making a claim as damaging an applicant's credibility unless the applicant can provide good reasons to the contrary. Portugal lists as valid reasons for delay illness, detention or incorrect information, but in practice only a strong case will be accepted after the given limitation (at 134 of the report).

⁵⁶ UNHCR Handbook 1979, para 198.

⁵⁷ Crawley *Breaking Down the Barriers, a Report on the Conduct of Asylum Interviews at Ports* (Immigration Law Practitioners' Association, London, 1999), at 59-82, available as a PDF from ILPA, email info@ilpa.org.uk; cited in Doornbos, *loc. cit.*

⁵⁸ UNHCR Note on Burden and Standard of Proof 1998, para. 11.

⁵⁹ Resolution for Minimum Guarantees for Asylum Procedures, adopted by the EU Council of Ministers, 1995. Council Resolution of 20 June 1995 on minimum guarantees for asylum procedures, T.12 Official Journal C274, 19/09/1996 at 0013-0017 (EUDOR) 396Y0919(05)

consideration that the applicant may be an “undeserving case”.⁶⁰

Despite this requirement, particular difficulties may arise relating to the decision-maker.⁶¹ First, the type of questions asked by a decision-maker may have an effect on the resulting coherence and detail of the account. Traumatic events may reduce a person’s capacity to independently recall peripheral detail.⁶² Open-ended and specific questioning can produce different levels of recall so both should be used. Without specific questioning peripheral details may be incapable of recall.

Secondly, the juxtaposition of the right to asylum with the growing fear of uncontrolled migration has often served to perpetuate popular and institutional negative characterisations of refugees as cheats, ‘spongers’ and economic migrants, fostering in decision-makers a pre-existing negative view of the credibility of applicants.⁶³

Thirdly, decision-makers may suffer from a phenomenon known as vicarious traumatising. The recounting of traumatic events can indirectly transmit trauma from the claimant to the decision-maker. The decision-maker may empathise with a victim, but s/he cannot use the usual defences of avoidance or denial to protect against the images associated with the story that has been told.⁶⁴ Vicarious traumatising can provoke the development of typical symptoms of post-traumatic stress disorder, but can also evoke voyeuristic and sadistic impulses in the listener.⁶⁵ Overexposure to traumatic accounts often triggers defensive reactions that lead to trivialisation of horror, cynicism and lack of empathy. Decision-makers studied by Rousseau *et al* displayed direct avoidance and denial, through refusal to hear the story, or a focus on peripheral events/neutral information while ignoring the traumatic event, followed by rejection of the applicant for lack of credibility. Similarly, trivialisation of traumatic events was observed, manifesting itself as cynicism. Decision-makers established a

⁶⁰ UNHCR Handbook 1979, para. 202.

⁶¹ For a stark critique of the practice of decision-makers, interpreters and decision-makers in the refugee determination process, see further, Asylum Aid, *loc. cit.*; Rousseau *et al*, *loc. cit.*

⁶² Christianson, Loftus, Hoffman & Loftus, *Eye fixations and memory for emotional events* (1991) 17 *Journal of Experimental Psychology, Learning, Memory and Cognition* 693.

⁶³ Silove, Steel, & Watters, *Policies of Deterrence and the Mental Health of Asylum Seekers*, (2000) 284 *Journal of the American Medical Association* 604. A classic example may be seen in the recent comments by Mr. Sean Aylward, Secretary General of the Department of Justice, during an appearance before the Public Accounts Committee that all asylum seekers are invariably prepared to “lie through their teeth”. These comments were subsequently disapproved of by the UN Assistant High Commissioner, Erica Feller: see “Politicians urged to mind language on asylum seekers” *Irish Times* 24th June, 2006.

⁶⁴ Mollica, *The Trauma Story: The Psychiatric Care of Refugee Survivors of Violence and Torture*, in Ochberg ed., *Post Traumatic Therapy and Victims of Violence* (Brunner/Mazel, New York, 1988)

⁶⁵ Cohen, *Questions of Credibility: Omissions, Discrepancies and Errors of Recall in the Testimony of Asylum Seekers* (2001) 13 *Intl J Refugee L* 293.

nexus between an everyday activity and the torture in order to render the torture innocuous.⁶⁶ The need for one to distance oneself as far as possible from 'evil' was manifested in confrontational and aggressive reactions to applicants, blame of applicants, sarcasm, scornful laughter and provocative questioning. This may indirectly damage the applicant's credibility, with the manifested effects of vicarious traumatising offending, upsetting and confusing the applicant, rendering them unable to provide a coherent account.

Trauma related difficulties

Most refugees are by definition likely to have had experiences that would be defined as traumatic. Refugees who have experienced traumatic events may suffer post-traumatic psychological reactions, which have a significant impact on their ability to accurately and consistently recall the traumatic events and their surrounding details. Herlihy⁶⁷ explains that, while normal memories can be recalled in chronological order, traumatic memories are held as fragments, usually sensory impressions, such as images, sensations, smells or emotional states. They do not seem to carry a time stamp and are not evoked at will, but provoked by triggers or reminders of the event. Thus, when a person who has suffered a traumatic experience is interviewed, they are unlikely to be able to produce a coherent verbal narrative, quite simply because no complete verbal narrative of their experience exists. S/he will only have fragments or impressions, which are likely, incidentally, to evoke the feelings that were felt at the time of the original experience, such as fear, distress, shame, humiliation, guilt or anger.

The most severe result of this psychological phenomenon is Post Traumatic Stress Disorder (PTSD). PTSD is an extreme result of the fragmentary way in which memories of traumatic events are processed. Symptoms include recurrent and intrusive recollections, avoidance of revisiting the event, difficulty sleeping and concentrating and augmented fearful reactions. The practical effects of PTSD in the refugee context can include avoidance: the focus of the applicant on issues other than the trauma or delay in making a claim; dissociation from the process of the hearing, giving the impression of disinterest or evasiveness; confusion and inconsistency in recounting peripheral details or the time frame of events; and fatigue-induced behaviour such as excessive emotion or despair.

⁶⁶ A good example given was that of an applicant whose body was covered in cigarette burns. The decision-maker disregarded the medical reports and made comments about how she herself was a smoker, implying that she did not give much weight to the cigarette burn marks. Such apparent cynicism was indicative of a traumatic situation being treated as normal: Rousseau *et al.*, *loc. cit.* at 55 and 59.

⁶⁷ Herlihy, *Evidentiary Assessment and Psychological Difficulties*, in Noll (ed), *op. cit.*, at 126

Where it goes unrecognised, these symptoms can have a seriously damaging effect on an applicant's credibility.⁶⁸

Refugees falling below the diagnostic criteria for PTSD may also bear psychological difficulties that impact negatively on their credibility, resulting in inconsistencies. Depression is relatively common in refugees, linked to post-migration factors such as isolation from friends and family

Credibility Determinations In Ireland

While there is a notable absence of statistics on the reasons for acceptance or refusal of an application for refugee status in Ireland, it is clear that credibility determinations play an important part in the process. In *Traore*⁷⁵, Finlay Geoghegan J. stated that “[t]he assessment of the credibility of an applicant and/or his/her story is often crucial to the determination of his or her entitlement to a Declaration of Refugee Status.” There are a significant number of judicial review cases dealing with negative credibility determinations by the RAT, and a number of the decisions recently published by the RAT place significant emphasis on the credibility of an applicant, whether positive or negative, in determining a claim.⁷⁶ Further, section 11B of the Immigration Act 2003 requires decision-makers to take a number of matters into account in determining the credibility of the applicant, placing further emphasis on this element of the assessment. It is proposed in this section to briefly examine Irish case-law⁷⁷ to determine whether the problems with the reliability of credibility assessment outlined above appear in the context of asylum application in Ireland.

The positive and negative factors identified by Kagan⁷⁸ as those which are given probative weight in credibility assessment are apparent in the Irish decision-making process. In the decisions recently published by the RAT, a positive conclusion on credibility was reached where the applicant was unhesitant in supplying information⁷⁹, gave a plausible, reasonable and consistent account⁸⁰, had an open demeanour and displayed appropriate emotion⁸¹. The RAT has reached a negative conclusion on credibility where the applicant was vague⁸², presented contradictions or

⁷⁵ *Traore v Refugee Appeals Tribunal*, Unreported, High Court, 14th May 2004, Finlay Geoghegan J at 8.

⁷⁶ For example, references 1, 3, 4, 5, 10, 13, 14, 17, 18, 19, 20, and 21 of the Published Decisions of the Refugee Appeals Tribunal, Volume 1, place significant emphasis on the credibility of the applicant, with credibility forming the material basis of the decision in a number of those cases.

⁷⁷ As many cases do not go beyond the granting of leave to apply, it is difficult to establish any concrete principles in Irish law. However, as many of the leave decisions have been quoted with some approval in substantive decisions, it is submitted that they form the strongest basis for ascertaining the principles that are applicable in Irish law. As such, this article will examine both leave decisions and substantive decisions.

⁷⁸ Kagan, *loc. cit* at 384.

⁷⁹ Reference 6 (Congo Brazzaville), Refugee Appeals Tribunal Published Decisions, Volume 1.

⁸⁰ Reference 6 (Congo Brazzaville), *ibid*.

⁸¹ Reference 20 (Sierra Leone), Refugee Appeals Tribunal Published Decisions, Volume 1: “The applicant presented as an honest person who was visibly upset when recounting events.”

⁸² Reference 4 (Angola), Refugee Appeals Tribunal Published Decisions, Volume 1: a young and illiterate applicant, who claimed to be a low-level member of a political organisation, was found to be incredible because he did not know of significant political developments within the party or some of the other factions of the party.

inconsistencies in his/her account⁸³, delayed in the revelation of key facts⁸⁴, provided an implausible account⁸⁵ and had a generally incredible demeanour⁸⁶. However, as outlined above, the application of these factors may be unreliable in the assessment of credibility.

Demeanour

The RAT may be criticised for basing credibility findings on an assessment of the demeanour of an applicant, a method which is unreliable at best. In *Olatunji*,⁸⁷ the rejection of the applicant's claim by the RAT was based in a material part of the general incredibility of the applicant.⁸⁸ Similarly, in *Kramarenko*⁸⁹, Finlay Geoghegan J found it was arguable that the RAT had failed to clearly determine the applicant's credibility in general or in relation to particular factual issues in circumstances where such determination was clearly necessary. The Irish courts have recognised the inherent unreliability of findings based on demeanour. In *Da Silveria*⁹⁰, Peart J. outlined the problem with assessment of demeanour as follows:

⁸³ *Ayoka v Refugee Appeals Tribunal*, Unreported, High Court, 29th July 2005, Gilligan J. (application for leave). The RAT Tribunal Member found that the contradictory evidence given by the applicant in relation to reporting the matter to the police, on one occasion she stated that she called them three times but they did not answer and subsequently stated that they refused to intervene, tended to undermine her credibility.

⁸⁴ *Bujari v Minister for Justice, Equality and Law Reform*, Unreported, High Court, 7th May 2003, Finlay Geoghegan J. (application for leave): The RAT found that the applicant was not credible because he failed to provide information material to his claim that his father was a Serb collaborator. The Tribunal Member did not consider the explanation offered by the applicant in his decision.

⁸⁵ *Deogratius Mbayo Sango v The Minister for Justice, Equality and Law Reform*, Unreported, High Court, 24th November 2005, Peart J. (application for leave). The RAT Tribunal Member found it implausible that a guard would place himself in danger to aid the applicant's escape, or that the applicant could have earned the money to fund his travel working in Zambia where the wages are low.

⁸⁶ *Zhuchkova v Minister for Justice and Refugee Appeals Tribunal*, Unreported, High Court, 26th November 2004, Clarke J. (application for leave): the RAT Tribunal Member rejected the evidence of the applicants as generally not credible, and on that basis concluded that their credibility had been undermined and he did not accept their evidence in relation to past persecution.

⁸⁷ *Olatunji v Refugee Appeals Tribunal & Anor*, Unreported, High Court, 7th April 2006, Finlay Geoghegan J.

⁸⁸ The Tribunal Member's assessment was "that the applicant has not discharged the necessary burden of proof and has not submitted a well founded fear of being persecuted of a credible calibre. ... As no credible evidence of persecution has been given the matter of internal relocation does not arise. ... Credibility was central to the decision reached." *Ibid*. The High Court criticised the RAT for taking matters into consideration in credibility assessment which were not put to the applicant during the hearing.

⁸⁹ *N.K. (Kramarenko) v. Refugee Appeals Tribunal* [2004] 2 ILRM 550, Finlay Geoghegan J. This was a leave decision and it was substantively overturned by Murphy J. *ex tempore*. However, the principle in the decision has been cited and approved in a number of other cases.

⁹⁰ *Da Silveiria v The Refugee Appeals Tribunal*, unreported, High Court, 9th July 2004, Peart J.

The assessment of credibility is one of the most difficult tasks facing the Commissioner and the Tribunal member. It is an unenviable task, and one that is fraught with possible danger. It is very easy, I suspect, to come to a conclusion in the light of the questionnaire answers and the interview and possibly the oral hearing on the appeal that the story as told is simply not believable. In every day life one is so used to simply having a feeling that all we are told is not exactly as someone would have us believe. One's experience of life hones the instincts and there comes a point where we can feel that the truth can, if it exists be smelt. But reliance on what one firmly believes is a correct instinct or gut feeling that the truth is not being told is an insufficient tool for use by an administrative body such as the Refugee Appeals Tribunal. Conclusions must be based on correct findings of fact. A factual error of sufficient importance will often have capacity to at least cast some doubt upon the integrity of the decision-making process...

Similarly, in *Zhuchova*⁹¹, Clarke J accepted this statement and held that it is at least arguable that a finding of lack of credibility must therefore be based on a rational analysis which explains why, in the view of the deciding-officer, the truth has not been told.⁹² Accordingly, it is recommended that decision-makers should not base their findings on assessments of the general credibility of an applicant without some outlined rational basis.

Inconsistencies

An applicant's credibility will often be undermined due to minor inconsistencies or incorrect statements as to peripheral matters.⁹³ However, as outlined above, there are significant difficulties with rejection on this basis. In *Nguedjo*⁹⁴, White J recognised that vague or inaccurate statements may be explicable on the basis of the tiredness, confusion and disorientation of the applicant, particularly in the context of unfamiliar and intimidating procedures.⁹⁵ Further, minor inconsistencies relating to

⁹¹ *Zhuchkova v Minister for Justice and Refugee Appeals Tribunal*, Unreported, High Court, 26th November 2004, Clarke J. (application for leave).

⁹² The RAT Tribunal Member was criticised by the High Court at the leave hearing for rejecting the applicants' explanation for delay in the provision of information as incredible, without providing an explanation of why this was so, suggesting that he relied solely on an assessment of the demeanour of the applicants.

⁹³ For example, in *Ayoka v Refugee Appeals Tribunal*, Unreported, High Court, 29th July 2005, Gilligan J. (application for leave), the Tribunal Member found the applicant to be incredible because she provided contradictory information in relation to reporting the matter to the police, saying once that she called three times but they did not answer, but saying on another occasion that they refused to intervene.

⁹⁴ *Nguedjo v. Refugee Appeals Tribunal*, Unreported, High Court, 23rd July 2003, White J.

⁹⁵ The applicant in this case was up at 5am in order to travel from Tramore to Dublin on public transport for the interview. White J accepted that he was tired, apprehensive and confused,

peripheral matters should not be determinative of a claim. Peart J outlined this matter clearly in *Memishi*⁹⁶, where he stated:

... a Tribunal is not entitled to make adverse credibility findings against an applicant without cogent reasons bearing a nexus to the decision, that the reasons for any such adverse finding on credibility must be substantial and not relating only to minor matters, that the fact that some important detail is not included in the application form completed by the applicant when he/she first arrives is not of itself sufficient to form the basis of an adverse credibility finding, and finally that the fact that the authority finds the applicant's story inherently implausible or unbelievable is not sufficient. Mere conjecture on the part of the authority is insufficient, and that corroboration is not essential to establish an applicant's credibility.⁹⁷

This was reiterated in *Sango*⁹⁸, where Peart J criticised the RAT for a finding of incredibility based on the plausibility of peripheral issues without sufficient examination of the core basis of the claim.⁹⁹ It is clear, therefore, that peripheral inconsistencies although they may have some bearing on the overall credibility of the applicant, should not form the material basis of a finding of incredibility.

In some cases, inconsistencies are not put to the applicant at the hearing, depriving the applicant of the opportunity to offer an explanation. In *Idiakheua*¹⁰⁰, the RAT was criticised for failure to put matters of concern and/or perceived discrepancy to an applicant and give them an opportunity of dealing with same. In *Olatunji*¹⁰¹, Finlay Geoghegan J. accepted that finding, quashing the decision of the RAT on the basis that the applicants

being interviewed in a strange country in a strange language, and that this may have affected the coherence of his account.

⁹⁶ *Memishi v. Refugee Appeals Tribunal and Ors.*, High Court, 25th June 2003, Peart J.

⁹⁷ These principles were outlined following an examination and approval of the US cases of *Diaz-Marroquin v. Immigration and Naturalization Service* (2001) U.S. App. Lexis 2352 and *Cordon-Garcia v. Immigration and Naturalization Service* 204 F.3d 985.

⁹⁸ *Deogratus Mbayo Sango v The Minister for Justice, Equality and Law Reform*, Unreported, High Court, 24th November 2005, Peart J. (application for leave). The applicant was found to be incredible based on his account of his escape from DR Congo, his account of his arrest in Zambia and his ability to fund his travel from Zambia to Ireland. At no point did the Tribunal Member impugn the core of the applicant's claim, that he was allegedly persecuted in DR Congo because he had the physical characteristics of a Tutsi.

⁹⁹ While such criticisms were outlined only at the leave stage of the application, such comments relied on the principles outlined in *Memishi* (above) and are therefore of some value.

¹⁰⁰ *Idiakheua v. Minister for Justice, Equality and Law Reform and R.A.T.*, Unreported, High Court, 10th May 2005, Clarke J. (application for leave).

¹⁰¹ *Olatunji v. Refugee Appeals Tribunal & Anor*, High Court, 7th April 2006, Finlay Geoghegan J. The Tribunal Member considered the applicant's claim that she was forced to leave her home to lack credibility, based on her subsequent failure to seek state protection. However, this matter was not put to the applicant.

were not given the opportunity to deal with the country of origin information which was deemed to be inconsistent with their account. In *Nguedjo*¹⁰², the decision of the Tribunal Member was quashed on the basis that an inconsistency that was crucial to the determination was not put to the applicant in the course of the hearing. In a recent application concerning a young Ghanaian girl, the RAT found that the applicant was incredible because, *inter alia*, she did not fit the profile of an accused witch, based on country of origin information stating that *most* accused witches are older women, often widows. It appears that the country of origin information was not put to the applicant for explanation.¹⁰³ It is submitted that this is a basic breach of fair procedures, but it appears to occur regularly in the refugee status determination process.

This problem may be further augmented by accelerated procedures whereby an oral hearing is not conducted by the RAT¹⁰⁴; in such cases, the applicant has no opportunity at all to offer an explanation to the RAT of inconsistencies which bear on a finding of incredibility. This problem was highlighted in *Ayoka*¹⁰⁵, where the RAT was criticised at the leave hearing¹⁰⁶ for failing to hold an oral hearing where a conflict of facts had a material effect on the assessment of credibility. Similarly, in *Moyosola*¹⁰⁷, it was held that where a finding is based in material part upon lack of credibility due to inconsistency with country of origin information, applicants must be given the opportunity to deal with that country of origin information.

Alternatively, where an explanation for inconsistencies is sought of the applicant, and provided accordingly, decision-makers may simply ignore the explanation. In *Bujari*¹⁰⁸, the RAT was criticised at the leave hearing for failing to consider and assess the explanation offered by the applicant for inconsistency of facts between his initial interview and his appeal hearing. Similarly, in *Traore*¹⁰⁹, the RAT was criticised for failure

¹⁰² *Nguedjo v. Refugee Appeals Tribunal*, High Court, 23rd July 2003, White J.

¹⁰³ Reference 10: (Ghana), Refugee Appeals Tribunal Published Decisions, Volume 1.

¹⁰⁴ Where a report of the RAC contains a finding in relation to one of the matters specified in s. 13(6), it is not necessary for the RAT to conduct an oral hearing.

¹⁰⁵ *Ayoka v Refugee Appeals Tribunal*, Unreported, High Court, 29th July 2005, Gilligan J. (application for leave).

¹⁰⁶ The hearing in which the applicant applies for leave to seek judicial review of the decision of the RAT. In such hearings the applicant need only show that there are substantial grounds for arguing that the decision of the RAT should be quashed, pending a full hearing.

¹⁰⁷ *Moyosola v The Refugee Applications Commissioner*, Unreported, High Court, 24th June 2005, Clarke J.

¹⁰⁸ *Bujari v Minister for Justice, Equality and Law Reform*, Unreported, High Court, 7th May 2003, Finlay Geoghegan J. (application for leave). The applicant failed to state in his initial interview that his parents were killed in Kosovo because his father was a Serb collaborator. He explained this consistency by reference to his initial shame of this fact and that he only revealed this fact to his legal advisors when he gained their trust.

¹⁰⁹ *Traore v Refugee Appeals Tribunal*, Unreported, High Court, 14th May 2004, Finlay Geoghegan J. The Tribunal Member considered it incredible that a Muslim man would be

consider evidence provided by the applicant explaining the perceived inconsistency with country of origin information.

It is clear, therefore, that there are considerable difficulties allied with assessment of credibility based on inconsistencies. It must be noted that in many cases inconsistencies or dishonesty may quite rightly form the basis of a finding of incredibility. In *Imafu*¹¹⁰, the High Court, while agreeing that there are difficulties with credibility determinations based on inconsistencies, observed that in some cases the inconsistencies will simply render the applicant unbelievable. As such, the primary obligation of the decision-maker will be to ensure fair procedures by conducting an oral hearing where credibility is in issue, putting inconsistencies or discrepancies to the applicant and seriously considering any explanation offered, and taking into account any factors such as confusion, disorientation, unfamiliarity or fear of authorities in assessing what bearing the inconsistencies will have on the claim.

Plausibility

The truthfulness of an applicant's claim will often be assessed based on the plausibility of the account provided. While this is often the only method available of assessing the claim, there are inherent difficulties associated with it. First, assessments of plausibility may be made without reference to country of origin information, resulting in a decision that is arguably based on mere conjecture. In *Traore*¹¹¹, the Tribunal Member considered it implausible that an illiterate man would be employed as a driver to a Secretary to top Government officials or given custody of important letters. This assessment was made without reference to the conditions in the claimant's country of origin, the Ivory Coast. This finding was found to be defective, as the Tribunal Member was obliged to assess the applicant's story in the context of what is known of the country of origin.¹¹² Similarly, in *Sango*¹¹³, the Tribunal Member was criticised at the leave hearing for

employed as a driver for a Secretary to top Government officials under a regime that discriminated against Muslims. However, she failed to consider evidence given by the applicant that he was employed by the previous regime, which did not discriminate against Muslims.

¹¹⁰ *Imafu v Minister for Justice, Equality and Law Reform and Refugee Appeals Tribunal*

Unreported, High Court, 9th December 2005, Peart J.

¹¹¹ *Traore v Refugee Appeals Tribunal*, Unreported, High Court, 14th May 2005, Finlay Geoghegan J.

¹¹² This reflects the principle outlined by Judge Pearl in *Horvath v. Secretary of State for the Home Department* [1999] INLR 7, that credibility findings can only really be made on the basis of a complete understanding of the entire picture. It is our view that one cannot assess a claim without placing that claim into the context of the background information of the country of origin information.

¹¹³ *Deogratus Mbayo Sango v The Minister for Justice, Equality and Law Reform*, Unreported, High Court, 24th November 2005, Peart J. (application for leave). The Tribunal Member found it implausible that a guard, who was a stranger, would expose himself to such danger such as allowing the applicant to flee. It was also found to be implausible that the applicant could raise \$1000 working in Zambia for one year considering the low wages there, despite evidence

engaging in personal conjecture in finding the applicants account of his escape from prison and his method of funding his travel to be implausible. In a recent decision involving a young Ghanaian girl¹¹⁴, it is submitted that the Tribunal Member engaged in excessive conjecture in relation to the plausibility of the applicant's account. It was considered incredible that a wealthy, respectable man would want to marry the applicant if she was considered a witch by the village, despite evidence given by the applicant that he did not have good intentions in proposing to marry her. Further, it was found incredible that the applicant's stepmother would pay for her education if she blamed the applicant for her father's death and considered her to be cursed, a conclusion which appears to be based on mere conjecture. Such flawed assessments should not form the basis of a finding of lack of credibility. Accordingly, any consideration of the plausibility of an applicant's account must not rely on mere conjecture and must be grounded in country of origin information. Further, it is submitted that any scepticism relating to the plausibility of an applicant's account should be put to the applicant during the oral hearing.

Delay

Delay in making a claim or in furnishing material information may have an adverse effect on the credibility of an applicant if s/he cannot provide a reasonable explanation for such delay. Indeed, it is one of the factors a decision-maker is obliged by statute to take into account when assessing credibility.¹¹⁵ As outlined above, there may be a number of reasons for delay in making a claim. However, in many cases, the reasons provided for delay have not been considered. In *Bujari*¹¹⁶, the applicant's delay in providing information material to his claim was a material factor in the tribunal-member's assessment of the applicant's credibility. The tribunal-member failed to consider the explanation offered by the applicant for such delay, namely that he felt a deep sense of shame as a Kosovan whose father was a Serb collaborator. In a decision concerning a young Ghanaian girl, the RAT considered the applicant's failure to mention that she was sexually assaulted by the police at interview to undermine her credibility, with no consideration of the fact that the applicant was a minor and no reference to the trauma and shame associated with sexual violence.¹¹⁷ It is submitted that any adverse findings based on delay must take into consideration the possible reasons for such delay, particularly in the case of a minor and in cases of torture or sexual violence.

provided by the applicant that he worked on the black market there.

¹¹⁴ Reference 10: (Ghana), Refugee Appeals Tribunal Published Decisions, Volume 1.

¹¹⁵ Delay in making a claim: s.11B(d); delay in furnishing information: s.11B(m), Refugee Act 1996, as amended by s.7, Immigration Act 2003.

¹¹⁶ *Bujari v Minister for Justice, Equality and Law Reform*, Unreported, High Court, 7th May 2005, Finlay Geoghegan J. (application for leave).

¹¹⁷ Reference 10 (Ghana), Refugee Appeals Tribunal, Published Decision, Volume 1.

Trauma

While there has been no research on the matter in Ireland, it is arguable that decision-makers in the RAT may suffer from vicarious traumatisation through transmission of trauma from the claimant to the tribunal-member. As outlined above, symptoms of vicarious traumatisation include trivialisation of horror, avoidance and denial, focus on peripheral issues, or the establishment of a nexus between everyday activity and torture in order to render the torture innocuous. It is arguable that the tribunal-member in a recent case before the RAT¹¹⁸ was suffering from some level of vicarious traumatisation. The applicant gave evidence that he suffered persecution by the police in Algeria on the basis of his sexual orientation and gave evidence of being raped by the guards, of being insulted as being a homosexual, of being advised to kill himself, of being tortured while under arrest for political activities and forced to sit on a wine bottle because of his homosexuality. The tribunal-member focused largely on the political activities of the applicant and focused only on peripheral issues when addressing his claim based on homosexuality. The ‘difficulties’ faced by the applicant were compared with those faced by homosexuals in Ireland, where the attitude is ‘stifling’, and there was little examination of the actual persecution of the applicant on the basis of his homosexuality, such as the rape and the wine bottle incident. This may be explained as trivialisation of horror and the establishment of a nexus between everyday activity in Ireland and the torture of the applicant. Similarly, in *Edionewe*¹¹⁹, the tribunal made only the briefest of references to the rape of the applicant and focused on peripheral details relating to her claim, rejecting her application on grounds of credibility, arguably a symptom of vicarious traumatisation in the form of avoidance of horror. It is difficult to establish without psychological research whether such difficulties are in fact experienced by tribunal-members, but it is submitted that counselling and psychological help should be made available to tribunal-members on a regular basis in order to prevent such symptoms occurring.

The attention given to post-traumatic psychological reactions experienced by refugees and asylum seekers can vary widely in the Irish context. In a recent case, the RAT recognised that traumatic difficulties may have a bearing on the applicant’s ability or willingness to provide information.¹²⁰ However, in other cases the RAT has failed to consider evidence of trauma when examining the credibility of the applicant. In *Edionewe*¹²¹, the decision of the RAT was quashed on the grounds that the

¹¹⁸ Reference 3 (Algeria), Refugee Appeals Tribunal, Published Decisions, Volume 1.

¹¹⁹ *Edionewe v Refugee Appeals Tribunal*, Unreported, High Court, 21st October 2004, Peart J, reported in (2005) 23 ILT 145.

¹²⁰ Reports of torture were taken into account in assessing an application by a man from Congo Brazzaville: Reference 6, Refugee Appeals Tribunal, Published Decisions, Volume 1.

¹²¹ *Edionewe v Refugee Appeals Tribunal*, Unreported, High Court, 21st October 2004, Peart J., reported in (2005) 23 ILT 145.

tribunal-member failed to attach any significance to the evidence of a social worker and a medical report outlining the trauma of the applicant following rape in relation to the ability of the applicant to properly recount her story. Similarly, in a recent decision, the RAT failed to examine the possible effects of trauma on a young applicant who was allegedly sexually assaulted in the delay in furnishing that information.¹²² Failure to consider the effects of trauma on an applicant can result in defective decisions and it is recommended that tribunal-members should always thoroughly consider the possibility.

Section 11B

By virtue of section 11B of the 1996 Act¹²³, decision-makers must take into account a number of factors in assessing the credibility of the applicant. These factors include delay in making a claim or furnishing information¹²⁴, whether an applicant possesses identity documents or has provided a reasonable explanation for the absence of such documents¹²⁵, whether the applicant has provided a reasonable explanation to substantiate the claim that Ireland is the first safe country s/he has reached¹²⁶, whether the applicant has provided a true explanation of how s/he travelled to and arrived in the State¹²⁷, whether the applicant has forged, destroyed or disposed of identity or other relevant documents or provided a reasonable explanation for doing so¹²⁸, and whether the applicant has adduced manifestly false evidence¹²⁹. A number of comments may be made in relation to this section.

First, it is unclear what weight the decision-maker is required to give to these factors in the assessment of credibility. While much may depend on the facts of the case and the judgment of the decision-maker, it may result in inconsistent decisions if decision-makers are unclear as to how important these factors should be when evaluating the evidence.

Second, it is suggested that such factors may be more appropriately outlined in a handbook of guidance for decision-makers rather than a statute. Considering the difficulties associated with assessment of credibility, decision-makers must retain discretion as to whether such issues are to be material in the final determination, and as guidance the criteria could be more helpfully fleshed out in a handbook rather than by statute.

¹²² Reference 10 (Ghana), Refugee Appeals Tribunal, Published Decisions, Volume 1.

¹²³ As amended by section 7, Immigration Act 2003.

¹²⁴ Delay in making a claim: s.11B(d); delay in furnishing information: s.11B(m).

¹²⁵ Section 11B(a)

¹²⁶ Section 11B(b)

¹²⁷ Section 11B(c)

¹²⁸ Section 11B(e)

¹²⁹ Section 11B(f)

Third, some of the criteria, such as that relating to documentation, travel and whether Ireland is the first safe country, are peripheral matters which do not relate directly to the core of the applicant's claim of persecution. With reference to the possession of documents, the UNHCR handbook states at paragraph 196 that "cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest necessities and very frequently even without personal documents." Indeed, at paragraphs 47-48, the Handbook issues a warning not to necessarily consider the possession of a passport as an indication of the absence of fear or evidence of the absence of state persecution. As such, the Handbook advises States that, although a genuine refugee may have documentation, s/he probably will not. The requirement in section 11B that the absence of documentation should have a bearing on the credibility of an applicant appears to be at odds with this advice. In addition, the requirement that the decision-maker consider whether the applicant has provided a true explanation of his/her method of travel appears to be at odds with the reality of the flight of refugees. Most refugees flee illegally with the aid of traffickers. They are likely to lie about their method of travel based on advice or threats from traffickers or based on a fear that they will be returned to their country or arrested because they travelled illegally. It must also be recalled that a refugee is a person who is *outside* their country of origin, regardless of how they arrived there. In addition, on the whole, the inclusion of such peripheral matters as these in s.11B gives an indication to the decision-maker that peripheral matters may be decisive in assessing the credibility of an applicant. This is clearly impermissible, as argued by Peart J in *Memishi and Sango*, outlined above. As such, it is submitted that s.11B may do more harm than good and should be reconsidered.

Reliability of Credibility Assessment in Ireland

Credibility is as important a factor in refugee status determinations in Ireland as it is internationally. At times such determinations are the only method available to a decision-maker in the absence of any other evidence. However, it is also clear that there are a number of difficulties with such credibility assessments. While there has been significant guidance provided by the High Court through judicial review, such guidance is not always followed by decision-makers. This situation must be resolved if the integrity of the system is to be maintained.

Credibility And Victims Of Female Genital Mutilation

It is clear from the above analysis that, in certain cases, credibility assessments based on demeanour, plausibility, consistency and prompt provision of information may be fundamentally unsound, and that psychological difficulties resulting from traumatic experiences may influence the ability of the applicant to give coherent testimony. These factors are heightened when it comes to evaluating the credibility of victims of gender-based violence, in particular, female genital mutilation.

What is Female Genital Mutilation?

Female genital mutilation¹³⁰ is the collective name given to traditional practices that involve partial or total removal of the female external genitalia and/or injury to the female genital organs for cultural or any other non-therapeutic reasons.¹³¹ Occurring predominantly in rural areas, it is mostly carried out in unsanitary conditions using unclean sharp instruments such as razor blades, scissors, kitchen knives and pieces of glass. Antiseptic techniques and anaesthesia are generally not used. The procedure is generally performed between the ages of 3 and 10 years, although it may be carried out during infancy, adolescence, on marriage or during first pregnancy.¹³² It is carried out by older members of the community, supported, condoned and assisted by families, entire communities and some States.¹³³ An estimated 135 million of the world's girls and women have undergone genital mutilation, and two million girls a year are at risk of mutilation - approximately 6,000 per day.¹³⁴ It is practised extensively in Africa and is common in some countries in the Middle East. It also occurs, mainly among immigrant communities, in parts of Asia and the Pacific, North and Latin America and Europe. Despite modernisation, public education and legal prohibition, FGM continues to be prevalent in many of these countries, and there is even some evidence that its incidence is

¹³⁰ For convenience, female genital mutilation will be hereafter known as 'FGM'.

¹³¹ Department of Women's Health, World Health Organisation

increasing rather than decreasing as a result of the process of modernisation.¹³⁵ The practice has been condemned by the international community as being a gross violation of the human rights of women and girls.¹³⁶ However, it was only recognised as a ground for refugee status under the Convention in 1994,¹³⁷ and sometimes goes unrecognised as a ground for refugee status, despite UNHCR documents and statements to the contrary.¹³⁸ However, Ireland has repeatedly recognised FGM as a ground for refugee status, at least in principle.¹³⁹

Problems of Credibility for FGM Victims

Refugees claiming on the basis of female genital mutilation face the same general problems in credibility assessments as other refugees, as outlined above. However, in many cases, their problems are augmented by a number of factors.

First, the imputations cast on credibility by delay in making a claim are particularly problematic for female applicants. The explanations accepted as reasonable for such delays often do not consider gender-specific problems like sexual violence. For example, omissions of events like sexual violence from the form for application are commonly considered evidence that it probably did not happen.¹⁴⁰ It is submitted that

¹³⁵ Mackie, *Ending Footbinding and Infibulation: A Convention Account* (1996) 61 *American Sociological Review* 999. This reality has also been recognised by the UNHCR *Guidelines on International Protection: Gender Related Persecution within the context of Article 1A2 of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* May 2002, para 11. (UNHCR Gender Guidelines 2002).

¹³⁶ Declaration on the Elimination of Violence against Women G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993), Article 2; UNHCR Gender Guidelines 2002, para. 9; *Study on Traditional Practices Affecting the Health of Women and Children*, Final Report by the Special Rapporteur, UN Doc. E/CN. 4/Sub. 2/1991/6.

¹³⁷ *Farah v. Canada (MEI)* 3 July 1994; *In re Kasinga* Int Dec 3278 (BIA 1996). Since then, it has received much recognition in UNHCR documents and Gender-Guidelines of states, as well as some caselaw. However, it still remains a lower priority as regards refugee status. See further, UNHCR Guidelines 2003, Chapter 8 at 111; Guidelines, Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender (May 26, 1996). For academic commentary: Kelley, *The Convention Refugee Definition and Gender-based Persecution: A Decade's Progress* (2002) 13 *Intl J Refugee L* 559.

¹³⁸ Eg, in the recent UK case of *Fornah v Secretary of State for the Home Department* [2005] 1 WLR 3773, the Court of Appeal did not accept that FGM could be a ground of persecution under the Convention, as the group did not exist independently of the persecution. This is contrary to the UNHCR material available and may be seen as a step back in terms of the protection of women.

¹³⁹ See *Moyosola v The Refugee Applications Commissioner*, Unreported, High Court, 23rd June 2005, Clarke J., where Clarke J noted that the RAC supported the contention that FGM could form the basis of a proper refugee claim.

¹⁴⁰ *Rousseau et al* at 57; *Jamil v. SSHD* (Unreported), 25 June 1996 (13588) IAT: the applicant's claim was undermined by a failure to mention sexual violence on arrival at Heathrow. See also the recent decision of the RAT relating to a young Ghanaian girl, where the tribunal-member considered the failure of the applicant to report a sexual assault by the police at interview to undermine her credibility: Reference 10: (Ghana), Refugee Appeals Tribunal,

this constitutes discrimination against victims of FGM in refugee status applications. Women and girls fleeing from FGM find themselves in an unfamiliar culture after rejection from their own community. They may feel anxious about what will happen to them or they may not know the correct procedure and feel that it is safer to enter as a visitor.¹⁴¹ Further, one interview may not be sufficient to obtain the information about sensitive sexual issues such as FGM; trust may need to be established before the claimant will reveal such information.¹⁴² Moreover, despite UNHCR guidelines,¹⁴³ women are still interviewed by male immigration officers, sometimes with the assistance of male interpreters.¹⁴⁴ Victims of sexual violence are particularly reluctant to disclose their experience in the presence of males, due to shame or fear that information will be passed on to her community, or to the fact that, in many cases, the torture and trauma of FGM has been perpetrated by or on behalf of men.¹⁴⁵ Combined with a fear and distrust of authorities, these circumstances are likely to seriously inhibit the capacity of an applicant to divulge details of her experiences to a male interviewer.¹⁴⁶ Further, a victim of FGM may be reluctant to disclose their experience in the presence of an interpreter from their locality or tribe, a particular difficulty considering that there may only be a small number of people who speak a particular tribal language. Accordingly, information disclosed at a later stage by the applicant should not be automatically disregarded or considered to reflect negatively on the credibility of the claimant.

Second, cultural differences may be a particularly compelling problem for victims of FGM. In order to be considered credible, an applicant must show appropriate emotions at the appropriate moments. A recent study by Spijkerboer demonstrated that female applicants are incredible if they display too much or too little emotion. In particular, he found that in the context of asylum applications women are normatively associated with emotion rather than rationality, which is a male trait. Further, applicants who show inappropriate behaviour towards their families, such as leaving their husbands behind, are considered

Published Decisions, Volume 1.

¹⁴¹ Crawley, *op. cit.*

¹⁴² UNHCR Guidelines 1991, para 72; UNHCR Gender Guidelines 2002, para. 36; UNHCR Guidelines 2003 at 29.

¹⁴³ UNHCR Gender Guidelines 2002, para 36; Executive Committee Conclusion No 64, *Refugee Women and International Protection*, 1990, (a)(iii); UNHCR Guidelines 2003, Chapter 8.

¹⁴⁴ Herlihy, *loc. cit.*, at 125. Note, however, that in Ireland female applicants are consistently interviewed by female interviewers, so this difficulty may not arise.

¹⁴⁵ The man may be a prospective husband, (like in *Kasinga*), a father, or a community leader.

¹⁴⁶ Australian Department of Immigration and Multicultural Affairs *Refugee and Humanitarian Visa Applications: Guidelines on Gender Issues for Decision Makers* 1996, para 3.13. This was also recognised in the US and Canadian guidelines.

incredible.¹⁴⁷ This gender-specific difficulty is compounded for victims of FGM, whose deeply rooted traditions are the subject of the claim rather than a sideline issue. A woman applying for asylum who has suffered because of the practice of genital mutilation is demonstrating her rejection of the social mores of her culture that may dishonour her family and hurt her chances for marriage.¹⁴⁸ The moral dilemma of divided loyalties between her own safety and the betrayal of her family and community can generate emotional difficulties for the applicant. The above problems may give rise to evasiveness, vagueness or inconsistency, culminating in a finding of lack of credibility.

Third, applicants claiming on the basis of FGM may face particular difficulties relating to the consistency of their account with country of origin information. The available information on a country may indicate that FGM is illegal and politically opposed in that country, but this does not necessarily mean that the laws are consistently enforced or that State protection is available.¹⁴⁹ However, decision-makers may make an adverse finding as to credibility based solely on such perceived inconsistencies. In *Imoh*¹⁵⁰ the RAT tribunal-member was criticised at the leave hearing for a finding of incredibility based on information on the prevalence of FGM and failure to seek police protection. While there was political opposition to FGM in Nigeria, it was still found to be carried out, and police protection would not have been available in Lagos, as the practice was not unlawful in that state. Similarly, in a recent decision by the RAT, a negative finding was reached on credibility based on the failure of the girl to make further efforts to seek State protection over and above her initial rejected attempt, despite country of origin information stating that protection was unavailable in rural areas.¹⁵¹ A young girl cannot be expected to realise that protection may be available elsewhere in the state when she has tried and

implausible considering her age¹⁵² or the level of state protection,¹⁵³ without sufficient consideration of the substantive practice of FGM or an examination of independent information about the country of origin. The inherent difficulty for an applicant of producing documentary evidence to support her claim may require the decision-maker to pro-actively seek independent information. Such activism can be laborious and time-consuming and decision-makers often do not engage in it, instead basing their decision on dubious assessments of plausibility of the account and general impression of the applicant's credibility.¹⁵⁴ Alternatively, the information provided on a country may not include information on the practice or prevalence of FGM, leading decision-makers to believe that there are no specific problems in the country, when in fact the problems may have escaped documentation. In some cases, where the country of origin information relating to FGM ostensibly contradicts the applicant's claim, such information may not be put to the applicant, depriving the applicant of the opportunity of providing more local and specific information.¹⁵⁵

An applicant on whom FGM has already been performed will have physical evidence on which to base her claim, but may have difficulty in showing that she is at risk of further persecution on return. It is commonly believed that once the procedure is carried out there ceases to be a credible fear of future persecution.¹⁵⁶ However, FGM has further implications than the initial procedure. With infibulation, cutting is necessary before first intercourse can take place. Some new wives are seriously damaged by unskilful cutting carried out by their husbands. The woman may be re-infibulated if her husband leaves for any period of time to secure her fidelity. During childbirth, existing scar tissue on excised women may tear. Infibulated women, whose genitals have been tightly closed, have to be cut to allow the baby to emerge. If no attendant is present to do this, perineal tears or obstructed labour can occur and the baby may be born dead. After birth, women are often re-infibulated. The constant cutting and re-stitching of a woman's genitals with each birth can result in tough scar tissue in the

¹⁵² In an Austrian case, it was found to be implausible that a 23 year old woman would be subjected to FGM and, considering much of the village knew she was not a virgin, the tribunal concluded that the main reason for FGM had ceased to exist. *Re Cameroonian Citizen*, Independent Federal Asylum Senate (Austria), Decision of 21 March 2002, <<http://www.refugeelawreader.org/index.d2?target=getpdf&id=118>> (8th August 2006).

¹⁵³ In a case of appeal to the Australian High Court it was found that, even where a state does not promote FGM, it may be unwilling in practice to protect against it. *A and Another v. MIEA and Another* [1997] 142 ALR.

¹⁵⁴ This was the main basis for the decision of the tribunal of first appeal in the Austrian case of *Re Cameroonian Citizen*, Independent Federal Asylum Senate (Austria), Decision of 21 March 2002, <<http://www.refugeelawreader.org/index.d2?target=getpdf&id=118>> 8th August 2006).

¹⁵⁵ *Moyosola v The Refugee Applications Commissioner*, Unreported, High Court, 23rd June 2005, Clarke J.

¹⁵⁶ *Crawley, op. cit.*, at 186.

genital area and serious pain and infection.¹⁵⁷ At the hearing, such applicant may be unable to communicate her story coherently due to psychological difficulties, which can have a negative effect on the assessment of credibility. A victim of sexual violence often desires to remain silent about her experience, owing in part to the wholly understandable concern about how she will be regarded and treated by others because of it.¹⁵⁸ She may continue to fear persons in authority, or she may fear rejection or reprisals from her family and community for disrespect of cultural norms.¹⁵⁹ The documented psychological effects of FGM include severe, recurrent anxiety, depression and a generalised phobic state.¹⁶⁰ Further, as a consequence of FGM many women are affected by chronic pain syndrome and mobility impairment.¹⁶¹ The chronic pain may be linked directly to the trauma of the procedure, or be a result of the complications that ensue, such as infection or menstrual difficulties. As with other causes of chronic pain there is an increased risk of depressed mood, with reduced social functioning, worthlessness, guilt, and even suicidal ideation.¹⁶² Victims of FGM may also develop PTSD.¹⁶³ PTSD is associated with flashbacks triggered by reminders of the traumatic event and may be accentuated by experiences such as sexual intercourse, gynaecological examination and childbirth in vulnerable persons.¹⁶⁴ As outlined above, PTSD can have a significant effect on the ability of the applicant to give a coherent account, thereby damaging her credibility if it is not recognised as such. This difficulty will be particularly apposite where the applicant fears a repeat of the procedure or where the applicant was herself a victim but now fears that her daughters will be subjected to the procedure.

Applicants claiming on the basis of FGM face considerable difficulties in proving their credibility. In order to avoid discriminating

¹⁵⁷ Amnesty International: <<http://www.amnesty.org/ailib/intcam/femgen/fgm1.htm#a3>> (8th August 2006).

¹⁵⁸ Van-Velsen, Gorst-Unsworth and Turner, *Survivors of Torture and Organised Violence: Demography and Diagnosis* (1996) 9 *Journal of Traumatic Stress* 181.

¹⁵⁹ Executive Committee of the High Commissioner's Programme, *Note on Certain Aspects of Sexual Violence Against Refugee Women*, 12 October 1993, A/AC.96/822, para 22.; UNHCR 2003 Guidelines, Chapter 8; Kelley, *loc. cit.*; O'Connor, *Refugee Law: Sexual Violence as "Persecution" within International Refugee Law—Part II* (2001) 19 *ILT* 101.

¹⁶⁰ Whitehorn, Ayonrinde & Maingay, *Female Genital Mutilation: Cultural and Psychological Implications* (2002) 17 *Sexual and Relationship Therapy* 161.

¹⁶¹ Lightfoot-Klein, *Disability in Female Immigrants with Ritually Inflicted Genital Mutilation* (1993) 14(3-4) *Women and Therapy* 187-194.

¹⁶² Lax, *Socially Sanctioned Violence against Women: Female Genital Mutilation is its most Brutal Form* (2000) 28 *Clinical Social Work Journal* 403-412.

¹⁶³ Jenkins, Langlais, Delis and Cohen, *Learning and memory in rape victims with post traumatic stress disorder* (1998) 155 *American Journal of Psychiatry* 278. This study found that victims of sexual violence commonly suffer from PTSD.

¹⁶⁴ Woolard & Edwards, *Female Circumcision: An Emerging Concern in College Healthcare*, (1997) 45(5) *Journal of American College Health* 230.

against such applicants there must be some viable alternative to the current approach to credibility evaluation in the refugee context.

A Viable Alternative?

A full examination of the measures necessary to remedy the significant obstacles facing victims of FGM in credibility assessments is beyond the scope of this essay. However, some basic recommendations may be made.

At the outset of the asylum procedure, a woman's application should be approached as being independent from her male associates and women should be advised in private of the possibility of seeking asylum in their own right and offered legal representation, as recommended by the ICCL.¹⁶⁵ Many women are reluctant to share their experience of persecution in the presence of male relatives or community members, or they may not realise the significance of their own experience as persecution.

Pre-Hearing

Where it appears to be possible that a woman may claim on the grounds of FGM, the following procedure should be followed in preparation for a hearing.

Medical and Psychological help should be provided to the applicant and a thorough evaluation of the applicant should be made. This will be crucial to the assessment in two senses: First, it will protect a victim of FGM from further suffering by providing necessary treatment. Second, it will provide interviewers with critical knowledge of possible cultural, psychological or medical difficulties that may have an effect on the interview, or, indeed, the lack of such difficulties, as the case may be.

An evaluation of all available information relative to the case should be made.¹⁶⁶ This will include an examination of the issue of FGM worldwide and information on the country of origin, such as an evaluation of the position of women, the legislation, the protection provided by authorities and its effectiveness, the level of access to organisations for women, and prevalence of tribal practices such as FGM.¹⁶⁷ This information may be found in state department materials, the reports of non-

¹⁶⁵ ICCL Women's Committee, *loc. cit.* at 19.

¹⁶⁶ UNHCR Gender Guidelines 2002; UNHCR Guidelines 2003, Chapter 8.

¹⁶⁷ In a recent Austrian case, the Independent Federal Asylum Senate condemned the appeals tribunal for a failure to do so, and for basing their decision largely on credibility without the benefit of such information. *Re Cameroonian Citizen*, Independent Federal Asylum Senate (Austria), Decision of 21 March 2002, <<http://www.refugeelawreader.org/index.d2?target=getpdf&id=118>> (26 March 2006).

governmental or international organisations¹⁶⁸ and other independent research or in the testimonies of other women similarly situated.¹⁶⁹

The Conduct of the Interview and Evaluation of Credibility:

The interview should be prepared so as to ensure trust, confidence and gender-sensitivity. There must be female interviewers and interpreters available and the interview room should be laid out in a non-adversarial informal manner.¹⁷⁰ The interview should not be conducted in the presence of members of the applicant's family, unless the applicant specifically requests this.¹⁷¹ The interviewers should be legally capable, with training in cultural sensitivity and gender-sensitivity, and a general knowledge of the difficulties faced by refugees.¹⁷² There should be psychological help available both for the applicant and the interviewers before and after the interview.¹⁷³

Interviews should be conducted in a professional and polite manner, without provocative questioning or inappropriate reactions such as sarcasm or cynicism.¹⁷⁴ Interviewers' body language should be open and unthreatening.¹⁷⁵ Absolute confidentiality must be maintained at all times, and female applicants should be specifically assured confidentiality. The method of questioning should follow carefully the guidelines set out in UNHCR¹⁷⁶ and national¹⁷⁷ gender guidelines. Questions should be short and simple, and it must be ensured that the applicant understands.¹⁷⁸ For victims of sexual harm, the type of questions asked must be specific. The applicant may not identify general questions about torture with the harm that she fears, such as FGM. Open, non-confrontational questions should be asked first, followed by more detailed questions relating to FGM.¹⁷⁹

The main principles of credibility assessment may be described as follows. First, refugee status determination begins with the presumption

¹⁶⁸ Eg, Country information is available from the UN website: <<http://www.unhcr.org/cgi-bin/texis/vtx/rsd>> and <<http://www.unhcr.org/cgi-bin/texis/vtx/research?id=3b850c744>> (26 March 2006).

¹⁶⁹ 2003 UNHCR guidelines.

¹⁷⁰ UNHCR Gender Guidelines 2002 para 36-37; See also, Executive Committee Conclusion No 64 *Refugee Women and International Protection* 1990, (a)(iii).

¹⁷¹ ICCL Women's Committee, *loc. cit.*, at 16.

¹⁷² ICCL Women's Committee, *ibid.*

¹⁷³ Rousseau *et al*, *loc. cit.*, at 67; UNHCR Guidelines 2003.

¹⁷⁴ ICCL Women's Committee, *loc. cit.*, at 16.

¹⁷⁵ ICCL Women's Committee, *ibid.*

¹⁷⁶ UNHCR Guidelines, 1991, 1995, and 2003; UNHCR Gender Guidelines 2002 at para 36.

¹⁷⁷ Eg, Canada: Immigration Refugee Board *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* 1994; U.S.: Immigration and Naturalization Service *Considerations for Asylum Officers Adjudicating Asylum Claims* 1995; Australia: Australian Department of Immigration and Multicultural Affairs *Guidelines on Gender Issues for Decision-makers* 1996.

¹⁷⁸ ICCL Women's Committee, *loc. cit.*, at 20.

¹⁷⁹ UNHCR Gender Guidelines 2002; UNHCR Guidelines 2003, Chapter 8.

that the applicant is telling the truth, which can be rebutted if there is *substantial* reason to reject credibility. Second, credibility assessment must consider positive credibility factors, not just look for flaws in an applicant's testimony. Third, applicants must have the chance to explain or rebut alleged flaws in their testimony, and negative credibility factors must be evaluated in light of any circumstances that may provide an innocent explanation for the imperfections. Fourth, adjudicators should consider whether parts of an applicant's testimony should be considered credible even if other parts are not.¹⁸⁰

Final assessment must take into account whether the flaws in an applicant's testimony, or the delay in providing information, are explicable on grounds such as trauma, fear of authority, lack of gender sensitivity, cultural or linguistic misunderstandings or normal memory failure. The psychological and medical reports will be of some help here. In final determination, the decision-maker should not decide whether s/he believes the account to be true, but rather if it is 'capable of being believed', *i.e.* whether there is any reasonable basis for believing the applicant. Credibility assessment in borderline cases should turn on a search for a reasonable basis to believe, not on finding a reasonable basis to reject testimony. If at the end of the assessment, no confident conclusion about credibility can be reached, the presumption that applicants will tell the truth should decide the case.

Conclusion

Credibility assessment is an unavoidable part of refugee status determination, as, due to the lack of documentary evidence, a great deal commonly rests on the statement of the applicant. Further, credibility assessment is necessary, as to allow a dishonest refugee to manipulate the system is to undermine the integrity of the Convention and reduce public confidence in its application. However, credibility assessments cannot be so stringent as to deny genuine refugees the protection to which they are legally entitled and that the State is internationally bound to provide. Refugee determination, if viewed appropriately as an international obligation to protect against serious human rights violations, must offer effective protection to persons who are the most vulnerable. Failure by a state to provide a thorough, fair and effective mechanism through which genuine refugees can present their claim is a legal injustice and a failure of the State and the international community to live up to their obligations under the UN Charter and international human rights treaties. It has been demonstrated that the current approach to credibility evaluation is unsatisfactory, as it creates a number of difficulties for genuine refugees

¹⁸⁰ Kagan, *loc. cit.*, at 399-401.

who are often disadvantaged by an unfamiliar and unforgiving system. Further, the failure of decision-makers to follow closely the gender guidelines provide by the UN and national bodies has resulted in an effective discrimination against victims of female genital mutilation seeking refugee status. With the developing recognition of the rights of women comes the international obligation to ensure the effective protection of female refugees fleeing from gender-based persecution, such as female genital mutilation. It is clear that a more pro-active and protective system must be developed and maintained if the Convention is to live up to its promise of the international and humanitarian protection of those persons who most urgently require it.

PROTECTING THE FUTURE OR COMPROMISING THE PRESENT?: SUSTAINABLE DEVELOPMENT AND THE LAW

JOHN DANAHER*

Sustainable development has emerged over the past two decades as the central precept of environmental law. It has been nearly universally adopted as an overarching policy goal. In an era of increasing concern over the impacts of mankind's activities on the natural world sustainable development is seen as the paradigm for enlightened and environmentally-conscious decision-making. At the domestic level it is now mentioned as a core aim in virtually every new policy and legislative initiative in the environmental arena. In spite of all this it remains unclear what sustainable development means or is supposed to mean. General definitions tend to be vague and protean. Given its increasing incorporation into legal devices important questions need to be asked concerning its role in environmental law and protection. This essay sets out to explore some of these questions. The purpose here is threefold: first, to examine the definitions offered so far of 'sustainable development'; secondly, to introduce some of the theoretical debates concerning its usefulness; and finally to address its justiciability.

1. What does it all mean?: Defining Sustainable Development

International Perspectives:

The genesis of sustainable development as a policy goal is rooted in the international sphere. Indeed in many respects sustainable development is, or at least was, at its core an international concern, arising from the so-called north-south divide, over the potential impact that developing countries could have on the environment. Developed nations of the world were anxious that, having regard to their own histories, the commensurate economic development of the third world could have catastrophic and irreversible consequences for the environment. At the same time developing nations did not want to have their right to economic development impeded. The notion of sustainable development essentially emerged as a compromise between the two positions.

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The first intimations of a movement towards a global concept of sustainable development came in the shape of the 1972 Stockholm Conference, which expressed that the need to protect and defend the environment for future generations was an imperative goal for mankind.¹ In 1982 similar soundings were made when the World Charter for Nature sought to address concerns for the resources of the world to "be managed [in order] to achieve and maintain optimum sustainable productivity".² However despite these initial rumblings, the major development in the area did not come until 1983 when the UN set up the Brundtland commission to evaluate and flesh out the factual and policy issues at the heart of sustainable development. Following several years of work by thousands of people and public hearings all around the globe the Brundtland commission issued its seminal report in 1987. It defined sustainable development as:

To meet the needs of the present without compromising the ability of future generations to meet their own needs.³

This definition has since served as the starting point for any discussion concerning sustainable development, but what does it mean? The Brundtland definition focuses on the combined issues of inter- and intra-generational equity. This is encapsulated in its reference to present needs and future needs. It has since emerged that such a definition, while commendable and readily agreed to, offers little in the way of clear policy guidelines. As Fry comments it is "impossible to get to grips with on an administrative basis"⁴ and so while it remains the core definition of sustainable development the more recent attempts to define it have added various subsidiary concepts and principles in order to give it more 'bite'.

The 1992 Rio Convention is perhaps that best example of this more detailed approach. With the adoption of Agenda 21 at that summit roughly ten principles were announced in connection with sustainable development. They included the following:⁵

- The right to development
- The integration of economic development and environmental protection
- Inter and intra- generational equity

¹ Stockholm Declaration of the United Nation's Conference on the Human Environment (1972) 11 ILM 1416.

² G.A. Res. 7, UN GAOR, 37th Sess., No. 51, at 239, UN Doc. A/RES/37/7 (1982), reprinted in 22 ILM 455 (1983) at 4.

³ World Commission on Environment and Development, *Our Common Future* (Oxford: OUP, 1987) at 43.

⁴ Fry 'Can EIA deliver Sustainable Development?' (1999) 6 *IPELJ* 17.

⁵ Burhenne-Guilmin, Hassan and Robinson eds., *Agenda 21 And The UNCED Proceedings* (Oxford University Press, 1992) at lxxxv.

- Reliance on the precautionary principle and the polluter pays principle
- Greater transparency, access to information and participation in procedures appertaining to the environment; for example the planning process.

The Johannesburg summit in 2002 reiterated the commitment to sustainable development and left these subsidiary principles essentially unchanged. However it did stress the importance of what may be termed the three-pillared approach to sustainable development.⁶ Essentially this view asserts that the role of sustainable development is to balance three competing and inter-related factors: environmental, economic and social. From an environmental perspective this approach has been criticised for its marginalisation of the environmental effects of a project (this issue will be addressed in more depth in section 2) but it is important to bear in mind that in a politically viable form sustainable development will be a compromise as opposed to an ideal.

Sustainable Development at the European Level

The EU has taken a similar line to that proposed at the Rio summit in relation to sustainable development. The principle has been enshrined as one of the core aims of the European Community in both Article 2 of the Treaty on European Union and in Article 2 of the EC Treaty. The latter seeks to promote the “harmonious, balanced and sustainable development of economic activities”. Also Article 6 of the EC treaty (the integration clause) provides that environmental protection must be integrated into the definition and implementation of Community policies and activities with a view to promoting sustainable development. Indeed the area of environmental policy integration has been earmarked as one of the key methods of attaining sustainable development as is indicated in the following extract from a report by the European Environment Agency:

Environmental Policy Integration (EPI) involves a continual process to ensure environmental issues are reflected in all policymaking... The product of EPI should be an overall improvement of policy and its implementation, in line with sustainable development needs.⁷

⁶ Osofsky “Defining Sustainable Development After Earth Summit 2002” (2003)

26 *Loy. L.A. Int'l & Comp. L. Rev.* 111 at 123.

⁷ European Environment Agency Technical Report No 2/2005 *Environmental Policy Integration in Europe: State of play and Evaluation Framework* (Luxembourg, Office for Official Publications of the European Communities, 2005) at 7. Report available at <http://reports.eea.europa.eu/technical_report_2005_2/en> (last visited 14th August 2006)

It is important to note that at no stage is the concept defined within the treaties. However, when one combines the commitment to the concept with the various environmental principles put forward in Article 174 of the treaty one can perhaps gain an improved understanding of what it may involve. Article 174 (2) lays down the following as being the key principles of EC environmental policy: the precautionary principle; the principle of prevention; the principle of rectification at source and the polluter pays principle. One can clearly note the correlation between these principles and those put forward in the Agenda 21 statement (although it is important to bear in mind that the majority of the EU principles were in existence prior to Agenda 21). These principles can be seen as complementing the goal of sustainable development as well as offering a means towards its attainment. The EU has also issued various policy documents and official statements, which offer further expansion and definition of the concept. One of the most important methods utilised by the community for expressing its environmental policy comes in the shape of the Environmental Action Programmes (EAPs), which date back to the 1970s.⁸ In the Fifth Action Programme⁹ dating from 1993, the Brundtland definition was adopted. It was also stated that sustainable development reflected a policy of “continued economic and social development without detriment to the environment”.¹⁰ More recently the sixth EAP¹¹ sought greater integration of environmental concerns into all areas of policy. There was also a greater emphasis placed on public-participation rights and rights of access to environmental information. This area of public-participation has increasingly been seen to be central to the concerns of sustainable development and may be viewed as relating to its ‘social’ pillar.¹² Other key areas of EC legislation have the concept at their core, in particular the Environmental Impact Assessment (EIA) directives¹³ and the Integrated Pollution Prevention and Control (IPPC) directive.¹⁴ While neither expressly mentions the term in their provisions it is mentioned in the

⁸ The first EAP was adopted by the Council of Ministers on November 22nd 1973.

⁹ *Towards Sustainability. A European Community programme of policy and action in relation to the environment and sustainable development* [1993] OJ C 138/1.

¹⁰ *Ibid* at 7.

¹¹ *Environment 2010: Our Future, Our Choice. 6th EU Environment Action Programme 2001-2010* [2002] OJ L 242/1 of 10 September, 2002.

¹² For an excellent account of the importance of public participation in the environmental context see Steele “Participation and Deliberation in Environmental Law: Exploring a problem-solving approach” (2001) 21 *Oxford Journal of Legal Studies* 415.

¹³ Council Directive 97/11/EC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ L 073/5 of 14 March 1997.

¹⁴ Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control OJ L 257/26, 10 October 1996, amended by Council Directive 2003/35/EC, OJ L 156/17, 25 June 2003, amended by Council Directive 2003/87/EC, OJ L 257/32, 25 October 2003, amended by Council Regulation (EC) No 1882/2003, OJ L 284/1, 31 October 2003.

recitals to both directives (the role of the EIA in achieving sustainable development will be discussed in greater detail in section 3)

Ireland's Search for a definition

The Irish government has also sought to clarify the meaning of sustainable development in various policy statements and has consistently expressed a commitment to the concept.¹⁵ It is once again the Brundtland definition which is relied upon as the starting point for the discussion; however Irish policy documents also seek to expand on this. The two major policy statements on the issue are *Sustainable Development: A Strategy for Ireland*¹⁶ and *Making Ireland's Development Sustainable*.¹⁷ Both documents endorsed the notion that sustainable development required the incorporation of environmental considerations into decision-making processes (as will be shown later, this is an example of the concept's procedural nature and indeed from a legal standpoint it may well be the case that the only method of recognising sustainable development is as a procedural requirement). The latter document expressed the view that sustainable development is concerned with 'breaking the link' between economic growth and environmental degradation.¹⁸ It is also clear that the three-pillared approach is central to the Irish view of sustainable development, for example the National Spatial Strategy (NSS) claimed that:

Sustainable Development is more than an environmental concept, although it includes that important element. It also requires a combination of a dynamic economy with social inclusion...the NSS through its focus on economic, social and environmental issues and on the inter-linkages between them, is a key policy instrument in the pursuit of Sustainable Development.¹⁹

Comhar, the National Sustainable Development Partnership, have also published a very comprehensive study of what they feel is involved in sustainable development.²⁰ They lay out a thematic framework from which a set of sustainable development principles are derived. Seen in this light the concept is no longer a principle in itself but rather an umbrella term for

¹⁵ See Ryall, "Sustainable Development In Ireland" (2005) 12 *IPELJ* 61.

¹⁶ (Dublin, Department of the Environment and Local Government, 1997).

¹⁷ (Dublin: Department of the Environment and Local Government, 2002).

¹⁸ *Ibid* at 2.

¹⁹ *National Spatial Strategy for Ireland 2002-2020: People, Places and Potential* (The Stationary Office, Dublin) at 13, para 1.3. Available at <<http://www.irishspatialstrategy.ie>> (visited 9 August 2006).

²⁰ See Comhar, The National Sustainable Development Partnership *Principles for Sustainable Development* (2002) at 6. Available at <<http://www.comhar-nsdp.ie/COMHARDocs/Sustain.pdf>> (visited 9 August, 2006).

a set of principles. The ‘themes’ put forward by Comhar include the notions of inter and intra-generational equity, biodiversity, good decision-making and satisfaction of needs; the ‘principles’ include encouraging renewable energy resources, promoting air quality, conserving habitats and promoting public participation. While this is certainly one of the most expansive ‘definitions’ offered to date its parallels with the European and International statements, such as Agenda 21, are clear. Finally it is worth considering Comhar’s mandate in relation to the definition of sustainable development. Comhar’s role is to promote sustainable development through dialogue, in this respect it seeks to involve all sectors of society in decision-making and in promoting sustainable development. This ‘participatory’ approach reinforces the social consequences of the concept.

It is also important at this stage to note the impact that sustainable development has had on law in this jurisdiction. Despite the problems with its definition it has gradually begun to enmesh itself into the Irish legislative landscape. The most obvious examples are the Planning and Development Act 2000 (Amendment act 2002) and the Environmental Protection Agency (EPA) Act 1992 (as amended by the Protection of the Environment Act 2003) but the incorporation of sustainable development into law does not end there. The following Acts also contain references to the principle: Sustainable Energy Act 2002, Local Government Act 2001, the Urban Renewal Act 1998, Fisheries (Amendment) Act 2003 and the Dublin Docklands Act 1997. It is imperative to point out that sustainable development has not been defined in these acts. In the Dáil debates concerning the Planning and Development Act, the then minister for the environment, Noel Dempsey, was questioned about such a definition but felt that the term was so “dynamic and all-embracing” that any legal definition would tend to “restrict and stifle it”.²¹ While this comment serves to highlight both the strengths and the weaknesses inherent in sustainable development, its end result (the present lack of a statutory definition) was probably well-advised for reasons which will become more apparent in our exploration of the theoretical and justiciable aspects of the concept. Finally it is worth noting that, although their recommendations were not acted upon, a majority of the Constitution Review Group were in favour of giving sustainable development some type of constitutional recognition.²²

As we can see from this brief examination the attempts to define sustainable development the precise meaning remains elusive. The initial Brundtland definition neatly encapsulates the two key temporal issues, namely the notions of responsibility to present and future generations (this temporal aspect of sustainable development is potentially circumspect, as will be demonstrated in the next section). Subsequent definitions have

²¹ 513 Dail Debates Col. 1006, Feb. 2, 2000.

²² *Report of the Constitution Review Group* (Dublin, Stationary Office, 1996) at 402.

sought to expand on the original through the addition of further principles such as the precautionary principle and rights of public-participation in decision-making. In this manner sustainable development has tended to lose any intrinsic meaning of its own and is instead beginning to be viewed as an umbrella term for other principles.²³ This has important consequences for the justiciability of the concept. We shall return to this issue in due course but for now let us turn our attention to the theoretical debates surrounding the nature of sustainable development.

2. Theoretical Problems with Sustainable Development

Environmental Economics

The previous section sought to present some of the definitions offered thus far for sustainable development without addressing the considerable debate which exists over the usefulness of the concept. This section will introduce some of these more fundamental concerns. While not all may have a direct relationship with the legal impact of sustainable development, they do highlight some of the problems that have been encountered in trying to work out just what exactly it might entail.

The first issue to be addressed when considering the potential shortcomings of sustainable development is its near-universal acceptance by governments around the world. While this should not normally be a problem it serves to highlight what many environmentalists see as the inherent weakness of the concept. It is so all-embracing and so dynamic that it has no real meaning at all or alternatively it certainly has no meaning from the perspective of environmental protection. Thus sustainable development, with its obvious economic overtones, serves as a mask for 'business as usual'. This sceptical view has been expressed, by Hodas, as follows:

[The] universal adoption of the language of sustainable development [was] simply a brilliant politically expedient compromise between the forces of economic growth and those of environmental protection. Environmentalists enthused over the word sustainability, while many business and government leaders praised development as the final word.²⁴

The question arises whether a term which commands such universal support can actually mean anything or is it merely, as mentioned above, an expedient compromise? This argument leads into the 'zero growth'

²³ Boyle and Firestone eds., *International Law and Sustainable Development. Past Achievements and Future Challenges* (Oxford: OUP, 1999) at 17-18.

²⁴ See Hodas, 'The Role of Law in Defining Sustainable Development: NEPA Reconsidered' (1998) 3 *Widener Law Symposium Journal* 1 (emphasis original).

argument discussed ahead but at this stage it is important to note that there is some merit to this view. Environmentalists are correct to point out that environmental protection and sustainability (if such a thing can be achieved) will entail constraints on at least some types of economic activity. There is a danger that the language of sustainable development may lead to a tendency to gloss over the genuine conflicts that do exist.

It has also been argued that the notion of sustainable development is an oxymoron; ‘development’, it is opined, can never be ‘sustained’. The most obvious expression of this school of thought comes from advocates of the ‘zero growth’ approach to environmental economics. Advocates of this approach would point to reports, such as the famous (or perhaps infamous) Club of Rome report entitled the ‘Limits to Growth’,²⁵ which indicate that if present rates of growth continue then we could exhaust our supply of natural assets. It would follow, if that were true, that no rate of growth could ever be sustained. The Limits to Growth report was challenged by many economists for failing to take account of ‘market feedback mechanisms’ (i.e. when resources become scarce we will switch to alternatives) and many of its findings in relation to resource depletion have since proven to be false. However it is worth noting that a UN report in March 2005 reached similar conclusions concerning the scale of environmental resource depletion.²⁶ The problem with sustainable development from the ‘zero growth’ perspective is that it presupposes the desirability of growth. This view, as Jacobs²⁷ points out, is flawed. First, if it refers to economic growth, it is mistaken. There is no necessary link between economic growth and environmental degradation or resource depletion. After all Gross National Product (the standard measure of economic growth), is concerned with monetary flows and in no way does it seek to measure the consumption of environmental assets or the harmful environmental impacts of our activities (of course many argue that economic calculations should take account of the rate of environmental resource depletion; this issue is given further consideration later). So while it may well be historically correct that economic growth has tended to have negative environmental impacts, it is nonetheless theoretically possible for us to ‘break the link’ between economic growth and environmental degradation. In fact some economic activities such as recycling or biodiversity farming actually have beneficial results for the environment.²⁸ Secondly ‘zero growth’ is a flawed argument because it implies that doing

²⁵ Meadows *The Limits to Growth. A Report for the Club of Rome’s Project on the Predicament of Mankind* (London: Pan, 1972).

²⁶ UN Millennium Ecosystems Assessment Report, March 2005; this report presented a sophisticated analysis of our reliance on ecosystem services.

²⁷ Jacobs *The Green Economy. The Environment, Sustainable Development and the Politics of the Future* (London: Pluto Press, 1991).

²⁸ *Ibid* at 54.

nothing is preferable to doing something; consequently not improving our energy efficiency or pollution control could be advocated for when this will actually have negative environmental impacts.²⁹ It is also important to note that ‘development’ does not necessarily equate with ‘growth’ anyway. Development may be a sufficiently all-embracing term that could take account of non-financial components of the environment. It follows that the ‘zero growth’ argument fails to show that sustainable development is an undesirable policy.

Environmental economists such as Pearce³⁰ have identified two schools of thought on what sustainability may entail from an economic perspective. These are the ‘weak’ and ‘strong’ sustainability arguments. Both approaches take onboard the Brundtland definition and interpret it in economic terms as meaning income per capita should not decline over time.³¹ In order to achieve this society must determine how best to use its total capital stock today and how much of it needs to be preserved for future generations. What differentiates the weak and strong sustainability schools of thought is their respective treatment of the relationship between human and physical capital, on the one hand, and natural capital on the other. It is widely accepted that modern forms of economic expansion are leading to the degradation of natural capital with corresponding increases in human and physical capital. The concern is that depletion of natural capital may be unsustainable. Weak sustainability sees no difference between the types of capital and thus advocates no real change in current economic policy (i.e. it seeks optimality of resource allocation). Strong sustainability on the other hand sees natural capital as being of far greater value and would advocate that the only sustainable approach is to maintain the stock of natural capital at constant levels.³²

The economist Wilfred Beckerman³³ has attacked both of these views. In his eyes weak sustainability is without merit as it adds nothing to the standard economist’s aims of optimality. Strong sustainability is, on the other hand, morally abhorrent, as it advocates no change at all. This would result in what he sees as an extreme type of conservationism.³⁴ He adopts the view that sustainable development actually runs counter to the aim of increased environmental protection. His view is based on the use of Environmental Kuznets Curves (EKC’s). While these may sound somewhat

²⁹ *Ibid* at 56.

³⁰ See Pearce et al *Blueprint for a Green Economy* (London: Earthscan, 1989) and Pearce, Markandya and Barbier, *Blueprint for a Sustainable Economy* (London: Earthscan, 2000).

³¹ See Pezzey *Economic Analysis of Sustainable Growth and Sustainable Development* (1989) Environment Department Working Paper, No. 15, World Bank Washington DC.

³² Pearce Markandya and Barbier *op. cit.*, at 24.

³³ See Beckerman *A Poverty of Reason: Sustainable Development* (The Independent Institute, 2003) and ‘Sustainable Development: Is it a Useful Concept?’ (1994) 3 *Environmental Values* 191.

³⁴ Beckerman (2003) *ibid*, Chapter 1 ‘What is Sustainable Development Supposed to Mean?’

daunting their underlying principle is relatively straightforward. EKC's tend to show that while economic development may lead to an increase in environmental degradation in the short-term, over time, and as society becomes wealthier, so does its ability to rectify environmental problems. Hence, in the long-term, society is better able to deal with environmental problems and the situation actually improves (consequently EKC's take the shape of an inverted-U). Taking this onboard Beckerman argues that, far from being the cause of environmental degradation, economic growth is in fact the solution to it.³⁵ As a result he sees sustainable development, with its potential to restrict economic growth, as exacerbating the environmental crisis. Before we get too carried away with a policy of unrestricted economic growth we should note that Beckerman's conclusion, as pointed out by Pearce, is premature. EKC's have only ever been shown to apply to certain short-term problems such as air pollution and do not hold true for long-term concerns such as carbon emissions and municipal solid waste.³⁶ One must also bear in mind that some types of environmental harm (e.g., biodiversity loss) are simply irreversible with the attendant result being that the downward half of the inverted-U of an EKC can never take place. In fact, even in situations in which EKC's do hold true it has been shown that economic growth on its own cannot correct negative environmental effects and more specific environmental policies, such as legislation on air pollution, are required.³⁷ This is because law has an important effect on internalising costs, which the marketplace, if left to its own devices, cannot do.³⁸ What has also emerged from the literature on EKC's is that the rule of law ideology and its associated system of rights and privileges is itself a necessary precondition for any meaningful sort of economic growth. Even Milton Friedman, the poster-boy of free market economics, acknowledged that his cries for former soviet bloc countries to 'Privatize, privatize, privatize' were proven redundant without a more fundamental revision of their legal systems.³⁹ Finally one should also be wary of the old maxim 'lies, damned lies and statistics.' For example some EKC's show that pollution per unit of output is decreasing over time but when coupled with

³⁵ See Beckerman 'Economic Growth and the Environment' (1992) 20 *World Development* 481

³⁶ See Pearce, Markandya and Barbier, *loc. cit.*, at 26-28 and also Kysar, D. 'Some Realism About Environmental Skepticism: The Implications of Bjorn Lomborg's The Skeptical Environmentalist for Environmental Law and Policy' (2003) 30 *Ecology Law Quarterly* 223 at 250.

³⁷ Kysar (2003) *Ibid.*

³⁸ Hodas, *loc. cit.*, at 6.

³⁹ See Anderson & Kosnik, 'Symposium on Bjorn Lomborg's The Skeptical Environmentalist: Sustainable Skepticism and Sustainable Development' (2002) 53 *Case Western Reserve Law Review* 439. At 440 the authors comment that the criticism often thrown at the World Bank and IMF reforms in countries such as Argentina, Brazil and South Africa is due to their failure to set up a proper legal system founded on the rule of law ideology prior to instituting their dramatic free-market policies.

a corresponding increase in output it is found that aggregate pollution is actually increasing.⁴⁰

If sustainable development is to be tackled from the perspective of economics then the environment must be usefully included in economic cost-benefit calculations. However, as Jacobs points out,⁴¹ this has not historically been the case. The reality is that most environmental commodities are available free of charge and thus their value goes unrecognised. Much of modern environmental economics is concerned with finding workable methods of valuing the environment.⁴² However we continue to have a distinct inability to put a value on certain aspects of the environment. For example how do we put a value on the aesthetic enjoyment of natural beauty? Or, to take a potential crisis we may face, how do we estimate the costs of the migration of people as a result of global warming? Such questions are central to any cogent analysis of sustainable development, which is after all at least in part concerned with environmental protection. While economists would no doubt insist that we *can* put values on such things any such valuation is likely to be arbitrary and imperfect. There is also, as Jacobs argues,⁴³ the question of who does the valuing? Given that several environmental problems will have their effects felt beyond the local arena, and indeed in the future, it is unlikely that we could ever get a representative sample of those affected.⁴⁴

Inter-generational Equity

As previously discussed the Brundtland definition contained two important temporal elements, namely the notions of intra-and inter-generational equity. There is little denying that concern for future and present generations is at the very heart of sustainable development. The notion of intra-generational equity is essentially concerned with the question of distribution of wealth (in the broadest sense of that term) amongst present generations. As pointed out at the start of this essay this concern with distribution has its origins in the international north-south divide. In international law this is given expression in the notion of “common but differentiated responsibilities”.⁴⁵ At a more local level a national governmental aim of ‘balanced regional development’ may be seen to

⁴⁰ Kysar *loc. cit.*, at 250.

⁴¹ Jacobs *op. cit.*, at xv.

⁴² Pearce Markandya and Barbier (2000), *loc. cit.*, Chapter 3 ‘Valuing the Environment’.

⁴³ Jacobs, *op. cit.*, at 67.

⁴⁴ This discussion has also ignored that there are serious inconsistencies present within any system of cost-benefit analysis. See for example Tomain ‘Junk Economics: Review of “Priceless: On Knowing the Price of Everything and the Value of Nothing” by Frank Ackerman & Lisa Heinzerling’ (2005) 93 *Georgetown Law Journal* 689; and also Sinden ‘Cass Sunstein’s Cost-Benefit Lite: Economics for Liberals’ (2004) 29 *Columbia Journal of Environmental Law* 191.

⁴⁵ This recognises the disparities between the resources available to different countries. Hence developed countries have greater responsibilities as regards the environment.

concern itself with intra-generational equity. Questions of redistribution of wealth within the state are relatively straightforward (albeit hotly contested) from a legal perspective. However the concept of inter-generational equity has specific problems from a legal and indeed ethical perspective.⁴⁶

Inter-generational equity is concerned with obligations or duties which we may owe to future generations. This is problematical in many respects, for example there is the impossibility of knowing to whom our obligations are owed and also the impossibility, as mentioned in the previous section, of knowing what future generations will value. As a result the principle offers little assistance to policy-makers as future generations will be unable to make their positions known. Is this a genuine problem? Some, such as Jacobs, feel that while it is true we will never know what people may value in the future, it is not unreasonable to speculate as to what they might *not* value.⁴⁷ While this common sense approach is welcome it may be better served through utilisation of the precautionary principle as discussed further on.

Also duties, by implication, create rights, but how can future generations, who are not yet alive, have rights? Rights supposedly inhere in people, if the people don't exist then surely there can be no rights?⁴⁸ For legal obligations to arise there must be some type of relationship between the parties to a dispute. Inter-generational equity is flawed in this respect as it creates a relationship between an existing group and one that may or may not come into existence. We should note that not all the members of future generations are inexistent, after all many children alive today are arguably members of future generations as well and it may be possible to represent their position. Indeed this has already taken place in the *Minors Oposa* case in the Philippines which concerned the future impact of deforestation. Inter-generational equity is enshrined in the Filipino Constitution and the parents were given a right to represent their children.⁴⁹ However that one example does not remove the problem, as 'future generations' will remain for the most part an indeterminate group. As Mayeda argues, from a legal perspective the notion of 'equity' is not simply an abstract concept but one that requires "consideration of the concrete particularity of each person's

⁴⁶ For an in-depth study of the incoherence of inter-generational equity see Mayeda 'Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law' (2004) 15 *Colorado Journal of International Environmental Law and Policy* 29.

⁴⁷ See Jacobs *op. cit.*, at 71-72.

⁴⁸ See Beckerman (2003) *loc. cit.*, Ch. 7 'The "Ethics" of Sustainable Development' at 65.

⁴⁹ See the *Minors Oposa v. Secretary of the Department of the Environment* (1994) 33 ILM 173.

situation”,⁵⁰ consequently inter-generational equity “cannot conceptualize the concrete nature of what is owed by whom and to whom.”⁵¹

Another problem which presents itself to us is that of cause and effect. This has important repercussions for ethics i.e., in addressing questions of the nature ‘what is the right thing to do?’ For the purposes of inter-generational equity some have argued that we should ensure that future generations are provided with the same ability to choose their own destiny as we have been provided with. However such a view could have absurd consequences. After all every action we undertake at present will affect who will come into existence in the future and so in order to not impact on future generations it would seem we are ethically obliged to take no action at all. However as Mayeda argues we can not simply do nothing as that too will have an effect.⁵² It would also be foolish to presume that our actions (and inactions) will not have lasting consequences as is illustrated by the following extract from Kramer:⁵³

The construction [in Italy] of the Via Appia some 2500 years ago has affected the siting of towns and villages; in the same way, any town siting or road construction today will affect future generations’ right to determine their own needs.⁵⁴

Finally there is also the potential that the scope of our obligations to future generations may be unlimited; if we constantly have to make sacrifices to future generations then every generation will be worse off than it could have been and no one generation will ever benefit.⁵⁵ The result is that inter-generational equity is in direct conflict with intra-generational equity and thus the competing interests of present and future generations must be weighed up in any dispute. This will again raise the question of who can represent the interests of future generations.⁵⁶

Despite this we cannot ignore the fact that concern for the future is essential to our understanding of sustainable development and our responsibility to the environment. In its common sense meaning sustainability has very strong temporal connotations. It refers to the continuation of something over time. However Mayeda argues that the best method of recognising that sense of responsibility to the future is via the precautionary principle, as it allows us to respect our uncertainty as to the

⁵⁰ Mayeda, *loc. cit.*, at 42.

⁵¹ *Ibid* at 43.

⁵² Mayeda *loc. cit.*, at 43-44.

⁵³ Krämer, L. *EC Environmental Law 5th Edition* (London: Sweet and Maxwell, 2003).

⁵⁴ *Ibid* at 10.

⁵⁵ Mayeda *loc. cit.*, at 47.

⁵⁶ See the *Minors Oposa Case* (1994) 33 ILM 173.

future and the values of future generations.⁵⁷ There is cogency to his argument; it is precisely because we do not know what future generations will value that we should be careful about our present actions. Nevertheless the precautionary principle is itself disputable. The principle would hold that environmental policies must seek to anticipate, prevent and attack the causes of environmental degradation. The result being that even in circumstances where there is a lack of scientific knowledge and uncertainty about the outcome of events, this must not stop the implementation of policies to prevent potential degradation. As has already been alluded to this is one of the core environmental principles of the EU. The problem with the principle, as pointed out by Beckerman,⁵⁸ is that there is never full scientific certainty about environmental effects, even concerning the use of technologies often thought to be beneficial to the environment such as hydropower or windpower. Also the policy may be harmful as it would place restrictions on scientific discovery. Beckerman shows how the use of the principle in relation to GM crops and biotechnology is slowing progress on what could be beneficial to mankind; for example in the development of drought resistant crops.⁵⁹ While there is some merit to his claims on the whole they suffer from a type of hyperbole. To paraphrase Bertrand Russell: while nothing may be certain, there are degrees of uncertainty and one must be very careful to emphasise that fact. The precautionary principle may be harmful if carried to an extreme but it could surely be hoped that a common sense approach, recognising the relative degrees of uncertainty, could be utilised in its application.

All of the above arguments have concerned the more technical and economic concerns over sustainable development i.e. what exactly is 'sustainable' in the developmental context? However, as will be my contention in this next section, much of this is irrelevant from a legal perspective. Given the debate that rages over sustainable development and its precise meaning it is highly unlikely that any 'right' to 'sustainable' development exists or that a development could be challenged for its unsustainability. It is far more likely that, if it is justiciable, it will be as a type of procedural requirement or safeguard. It is instructive to look at the views of Jacobs in this regard. Jacobs, while acknowledging the shortcomings and criticisms of sustainable development, feels that it does perform the function required of it: namely it focuses attention on the issue of environmental protection in decision-making and combines it with some measure of concern for the impacts of our decisions on future generations. He also refuses to adopt an extreme view of 'environmental protection' as requiring the maintenance of the environment exactly as it is now. Instead he sees it as an effort to make informed choices about the type of

⁵⁷ Mayeda, *loc. cit.*, at 50.

⁵⁸ See Beckerman (2003) *loc. cit.*, Ch. 5 'The Precautionary Principle' at 44.

⁵⁹ *Ibid* at 45-47.

environment we want to live in.⁶⁰ I would suggest this to be the better view of what is required by sustainable development; it requires us to constantly give attention to the environmental impacts of what we do whether they be good or bad and to subsequently act in a way that respects both the environment itself and our intended relationship to it.

3. The Justiciability of Sustainable Development

In this section I will address the question of whether or not sustainable development can be a legally enforceable principle or whether it remains, at best, a vague policy goal. The view that has attained the greatest level of acceptance, and the one to which I subscribe in this section, is that it can, after a fashion, be legally enforceable. The key lies in considering the subsidiary sustainable principles as opposed to the substantive notion of sustainability. In this sense sustainable development will be seen as a type of procedural requirement in decision-making and also as a mechanism for reappraising our relationship to the natural world. However reaching such a conclusion will not necessarily serve to endorse the concept.

As has previously been highlighted sustainable development has been incorporated into several pieces of domestic legislation. It is also an underlying goal of the European Union's environmental policy. Thus it exists in law, albeit in what is as of yet an underdeveloped state. In order to examine its potential legal function we will focus on the role that it has to play in the area of planning and development law. In Ireland, Section 10(2)(d) of the 2000 Planning and Development Act (as amended) provides that a development plan must concern itself with the "sustainable development of the area". Also section 34(2)(a) provides that decisions taken on planning permission must be restricted to "considering the proper planning and sustainable development of the area". It is thus clear that, in making decisions concerning development, the relevant authorities are statutorily obliged to at least consider the issue of sustainable development. Similar provisions exist within English legislation and before moving on to consider what I feel to be the justiciable aspects of sustainable development we should pause momentarily to reflect upon the fate of the concept to date in both the English and Irish courts.

The reality is that it has received little in the way of sophisticated legal consideration in either jurisdiction. In Ireland the principle has been mentioned in the context of judicial review of planning decisions by the local authorities. It has arisen in cases where individuals have appealed decisions on planning permission which had been refused on the grounds that they were contrary to the 'proper planning and sustainable development' of the area in question. In most of these decisions it is

⁶⁰ Jacobs, *op. cit.*, at 62-63.

unclear whether the emphasis is placed on proper planning or on sustainable development or whether the two are conflated in some sense. However with regard to the appeals to the courts it is clear that judges favour passing over any serious contemplation of either principle, probably due to a fear that this would be to encroach upon the decision-making powers of expert bodies. After all the traditional view, given clearest expression in the case of *O'Keefe v. An Bord Pleanala*,⁶¹ is that judicial review is an appeal not on merits but on legality. I will discuss the issue of judicial review and its relationship to sustainable development in greater detail later. The case law demonstrates that Irish courts have not, to date, attempted to consider any definition of the concept nor have they attempted to question the findings of the local authorities on what might constitute a 'sustainable' development.⁶²

It has suffered a similar fate in England and Wales. In the main it is passed over as a concern for the local authorities in their decision-making.⁶³ That said there are a couple of decisions which attempted a more 'engaged' consideration of the topic. In the interests of brevity I will limit myself to discussion of just one of these as similar conclusions have been reached in most instances. In the case of *Fairlie*⁶⁴ a decision of the Secretary of State for Environment to refuse planning permission to a group of subsistence farmers who wished to erect tented accommodation on their land (which was held under trust) was appealed on several grounds. One of the grounds stated was that the secretary of state had, in refusing to grant permission, misunderstood what was meant by sustainable development. The applicants felt that their development was sustainable in that it would not impact on the ability of future generations to meet their needs. However the Secretary of State's opinion was that the development would not help to secure higher living standards for present or future generations. In the case several definitions of sustainable development were proffered, mainly coming from governmental policy statements which employed variations of the Brundtland definition. It seems that the government had placed a greater emphasis on the economic aspects of sustainable development as opposed to the environmental aspects. However the court was reluctant to question the Secretary of State's findings on the grounds that it was 'his' concept

⁶¹ *O'Keefe v. An Bord Pleanala* [1993] 1 IR 139.

⁶² For examples of this type of judicial treatment see *PM Cantwell v. McCarthy*, Unreported, High Court, 1st November 2005, Murphy J.; *Mulholland & anor v. An Bord Pleanala* 3 IR [2005] 1; *Talbot & anor v. An Bord Pleanala*, Unreported, High Court, 21st June 2005, Peart J.

⁶³ As an example see *Dartmoor National Park Authority v Secretary of State for Transport, Local Government and the Regions* [2003] EWHC 236 (Admin), 28th of January 2003; or *Barratt Homes Limited v Secretary of State for the Department of Transport, Local Government and the Regions* [2002] EWHC Admin 1109, 14 May 2002.

⁶⁴ *Fairlie v The Secretary of State for the Environment and another*, Unreported, Court Of Appeal (Civil Division) 12th May 1997.

and ‘so it is somewhat unlikely that he misunderstood it.’⁶⁵ What we see here is an unwillingness to engage in a merits-based review of the decision similar to the unwillingness which is present in this jurisdiction.⁶⁶ However this unwillingness is probably well founded. The patent uncertainty and self-contradiction that is present in a strict literary-type definition of sustainable development (such as the Brundtland definition) or even in a technical economic definition (weak sustainability vs. strong sustainability) makes the term far from amenable to curial interpretation and pronouncement. In my view the appeals of the individuals in the *Fairlie* case were, if they wished to obtain a legal review of the decision, focused on the wrong area sustainable development. Their concern was with the substantive notion of what would make a development ‘sustainable’ in the sense explored in section 2 of this essay. If the issue is to be considered in a

world and are often earmarked as the primary method for achieving sustainable development.⁶⁸ As Hodas puts it:

At its core, the EIS process requires that each government decision-maker incorporate environmental concerns into the decision-making process at each stage of evaluation so that the final outcome will reflect an integration of all inputs: economic, environmental, political, and social. In theory, EIS laws that are now ubiquitous in national and international legal systems, will, by the gradual, but insistent, accretion of project decisions, inevitably advance the world along the road to sustainable development.⁶⁹

While the EIA directive only deals with certain projects,⁷⁰ the provisions under the planning and development act seem to indicate that sustainable development must be taken into account in virtually all development decisions. It is also important to note the impact of the Strategic Environmental Assessment Directive⁷¹ in this area; it will require a similar process to the EIA to be undertaken with regard to the preparation, by the relevant authorities, of the development plan. This is consistent with the notion of environmental policy integration which was mentioned earlier.

The notion of sustainable development as a procedural requirement is something which has been backed up in what is to date the major international judicial pronouncement on the concept. In the *Case Concerning the Gabčíkovo-Nagymaros Dam*⁷² the International Court of Justice (ICJ) invoked the concept of sustainable development in relation to a project to construct a dam between Hungary and Slovakia. The decision commented on the role that sustainable development had to play in reconciling the need for environmental protection with the need for economic growth. However in the eyes of the court this did not equate with any right to 'sustainable' development, after all we have seen how elusive the notion of sustainability can be, but rather it simply required the decision to go ahead with the dam to be reinvestigated and re-evaluated. In the words of the court this was expressed as follows:

'This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development. For the purposes of the present case, this means that

⁶⁸ See Hodas *loc. cit.*, at 7.

⁶⁹ *Ibid* at 7

⁷⁰ Those likely to have significant effects on the environment. See EIA directive, *loc.cit.*, Art 1(1) and 2(1). See also Annex I and Annex II to the directive for the types of project envisaged.

⁷¹ Directive 2001/42/EEC OJ L197 of 21 July 2001, at 30.

⁷² ICJ Reports 1997 at 7

the parties should look afresh at the effects on the environment of the operation.⁷³

In reaching this conclusion, the ICJ has recommended a process that would essentially equate to the EIA process. This view of sustainable development is also backed up by commentators such as Birnie and Boyle who argue that despite the inability to arrive at a useful definition, “clearly a policy of economic growth which disregards environmental considerations, or vice versa, will not meet the criterion of sustainable development.”⁷⁴

To continue this line of argument, planning decisions in this jurisdiction (and indeed other developmental decisions such as those taken by the EPA through granting waste licences and IPPC licences) should be legally challengeable for failing to live up to the ideals of sustainable decision-making. Mindful of the risks of becoming submerged in the considerable debate that exists over judicial review, I will first attempt to briefly contextualise the nature of judicial review.

Judicial review is the procedure by which the High Court can

To be reviewably irrational it is not sufficient that a decision maker goes wrong or even hopelessly and fundamentally wrong: he must have gone completely and inexplicably mad; taken leave of his senses and come to an absurd conclusion.⁷⁹

To put this in a more readily understandable form we may say that a decision is irrational when the decision-maker had no facts before him/her that could support their conclusion. Clearly this is a considerable hurdle to overcome but it would seem that if one wanted to review a decision of what was 'sustainable' in a particular context it could only be done through a merits-based review.

However if we avoid the substantive notion of 'sustainability' and focus instead on 'sustainable development' as an umbrella term for subsidiary sustainable principles to be used in decision-making then it should be entirely possible to obtain judicial review. As Simons argues⁸⁰ the weak form of judicial review mandated by the *O'Keefe* decision should apply purely to planning matters (questions of fact) whereas questions of law should be subject to full review. In his opinion a failure to allow for such an appeal would actually serve to undermine the rule of law.⁸¹ It seems clear to this author that at least some of the subsidiary principles, such as public participation and environmental impact assessment, could be reviewed purely as questions of law (e.g. a failure to undertake an environmental impact assessment or a failure to consult with the public could result in a decision of the planning authority being quashed). This is what is in mind when I refer to a type of sustainable decision-making. The other subsidiary principles will of course be relevant such as those endorsed at the European level (i.e., the precautionary principle, the polluter pays principle etc.). Indeed some of these principles, in particular the polluter pays principle, would be capable of more direct enforcement in their own right. However we must be quick to acknowledge that the dividing line between questions of fact and questions of law will not always be readily apparent. Indeed in the area of EIA (which as previously discussed can be seen as one of the primary vehicles for achieving sustainable development) the decisions of the planning authorities may often involve complex and mixed questions of law and fact. Nevertheless what is now needed is a greater willingness to engage with the concept of sustainable decision-making at a judicial level. If this is done it will lead to a greater level of certainty over what is involved in such decision-making; it will ensure that environmental issues are integrated into the decision-making process; and that adequate public consultation and input in the

⁷⁹ *Ibid.*

⁸⁰ Simons, 'The Unreasonable Planning Authority: A Review of the Application of *O'Keefe v. An Bord Pleanála* (Part I)' (2000) 7(4) *IPELJ* 164. Part II of the article is at (2001) 5 *IPELJ* 26.

⁸¹ Simons (2000) *ibid* at 165.

process of decision-making are provided for. In essence while the court will not in itself be engaging with the topic of sustainability, it will be providing an important safeguard in ensuring that the issue is given consideration at another level. This would have an important role to play in fostering a culture of 'sustainable' thinking.

While it is my opinion that, at present, the only realistic effect of sustainable development will be as a procedural requirement, and that the notion of EIA combined with public participation and consultation best encapsulates how this would work, it would be wrong to presume that the process is the most effective means of protecting the environment. Indeed it is likely that, on a practical level, it is a highly ineffective means of securing greater environmental protection. The system outlined above only requires that we direct our mind towards the environmental impacts of a project, that we involve the public in the process and help to direct our attention towards consideration of our intended relationship to our environment. It does not, in its present form, oblige a particular course of action; it is purely a procedure that must be gone through and nothing else.⁸² We must ask what would be the value of such a process? What would it end up achieving? Discussing the results of EIS-type legislation in the US under the National Environmental Policy Act (NEPA), Hodas has the following to say:

The widespread existence of NEPA-like laws has created a false sense of environmental security. Instead of advancing sustainability, EIS laws allow a project's unsustainability to be masked by a process that purports to promote sustainability. In the United States, NEPA not only fails to promote sustainable development, it allows decision-makers to dress up unsustainable proposals with a veneer of sustainability.⁸³

These are strong words indeed and serve as a stark warning to the potential impotence of EIS-laws and sustainable development. There is no doubt that the present systems of EIS are in need of considerable amendment in respect of the actual terms of their process and the issues they consider. As Fry comments the EIA-directive is purely project-based and since projects only have a finite lifespan they are by definition unsustainable.⁸⁴ Hodas himself feels that NEPA is a "sheep's clothing for economically predatory wolves"⁸⁵ and that in order to achieve sustainability EIS-type laws should

⁸² Article 8 of the EIA directive merely requires that the results of the EIA be given due consideration in reaching a decision and does not oblige the most environmentally favourable decision.

⁸³ Hodas *loc. cit.*, at 7.

⁸⁴ Fry *loc. cit.*

⁸⁵ Hodas *loc. cit.*, at 27.

create a structure whereby the adverse environmental effects can be internalised into every economic development decision (in this sense he wants what we previously discussed: a useful way of including the environment in cost-benefit calculations).⁸⁶ While there is no doubt merit to these views and the calls for reform therein, there is something worrying about this whole approach to environmental issues more generally be it through EIS-type laws or sustainable development. It remains purely aspirational; we hope that directing our attention towards the environmental impacts of our decisions and involving the public more generally in our decision-making processes will result in a more enlightened and concerned approach to our environment and even that it will result in a greater level of environmental protection but we can never be certain of such an eventuality. Given the urgency that faces us in relation to several environmental problems more substantive laws will continue to be required.

Conclusion

This article has sought to review and assess some of the debates surrounding the definitional, theoretical and justiciable aspects of ‘sustainable development’. So what conclusions, if any, can be reached? In our exposition of the potential definitions for the concept we have seen that despite numerous attempts precise meanings have proved elusive. In its simplest sense it is a temporal construct that seeks to combine a sense of concern for future generations with concern for present generations but this is seen as insufficient from a policy perspective. Hence from its core it has begun to grow tentacles and it could also be seen as an umbrella term for various other ‘sustainability principles’.

In analysing the theoretical debates surrounding the concept we saw that several of its most intrinsic aspects, such as inter-generational equity, are potentially conflicting, incoherent and ill advised. It seems that the considerable ink that has been spilt in attempting to define sustainable developments leaves us with a hopelessly self-contradictory policy. However we also observed that while it may be imprecise and even contradictory from a technical and economic perspective it may fulfill the role required of it, as it focuses our attention on environmental protection and the future impacts of our present actions. We also noted that environmental protection is not a static concept concerned with conserving things the way they are now but is rather a dynamic concept concerned with redefining and reconsidering our relationship with the natural world.

⁸⁶ *Ibid* at 19.

Finally, in addressing its potential impact in the legal sphere, we bore witness to the role it can play in reappraising decision-making. While it may well be that sustainable development, with its focus on public participation and access to information, will usher in a new and enlightened era in participatory politics and environmental consciousness it is also likely that it is an ineffective practical means of securing greater environmental protection. Given that it is now nearly twenty years since the Brundtland Commission issued its report it is timely to reflect on the merits of sustainable development. Has the time come, given the continuing uncertainty over the concept, to abandon it altogether? Do alternative and more definite concepts exist? Or does sustainable development, for all its failings, remain our only hope for reconciling economic growth with environmental protection?

REVIEWING THE RIOTS: ANALYSING THE ROLE OF PARAMILITARY POLICING IN THE POLICE RIOTS OF 1980'S BRITAIN

CIAN C. MURPHY*

Introduction

The riots in Dublin on Saturday 25th February, 2006 brought home to the south of Ireland something that the North and Britain already knew: when different cultures clash on the streets, the job of the police can be a difficult, if not impossible one.¹ This paper seeks to examine the history of the 1980's riots in Britain, and how they were policed, in an attempt to explain what causes protest to boil over into civil unrest. Its focus is on riots in marginalised communities in Britain. Bowling and Phillips say that paramilitary policing is “part of a vicious circle that contributes to the criminalisation of marginalised communities and undermines not only the ‘confidence and trust’ in the police but also the legitimacy of the state itself.”² This paper will present a critical analysis of the idea of a ‘vicious circle’, and the role which paramilitary policing has to play in it. First, an explanation will be sought for the criminalisation of marginalised communities. Secondly, the police response and the resulting ‘spiral of deterioration’ will be examined. Lea and Young describe this phenomenon as “a vicious circle in which moves in the direction of military policing undermine whatever elements of consensus policing may remain, and lay the conditions for further moves in the direction of military policing”.³ Often, the eventual result of this cycle is the eruption of large-scale public disorder. Therefore the third stage of the analysis will examine disorder, its policing, and consequential questions for the legitimacy of the state. In concluding, the relevance of this analysis to policing today, in Britain and Ireland, will be highlighted. However, it is neither the purpose of this paper to provide a detailed account of the February riots, nor to assess them in terms of cause and effect, but merely to highlight the errors of the past in

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¹ “Under siege from madmen” *The Sunday Times*, 26 February 2006.

² Bowling and Phillips, “Policing Ethnic Minority Communities” in Newburn, ed., *Handbook of Policing*. (William Publishing, 2003) at 549.

³ Lea and Young, *What's To Be Done About Law and Order?* (Penguin, 1984) at 175.

the hope of avoiding their repetition in the future. At the outset, it is useful to address a number of definitional issues.

Paramilitary Policing

The two leading commentators on paramilitary policing are Tony Jefferson and P.A.J. 'Tank' Waddington. Jefferson's definition of paramilitary policing is "the application of (quasi-)military training, equipment, philosophy and organization to questions of policing".⁴ This definition views paramilitarism in the police as a complete doctrine, from Commissioner to combat gear. For Waddington, the key to 'paramilitary' policing is in organisation: "co-ordination through superior command and control".⁵ His focus is on the control of police officers through a rigid military command structure. Both commentators appear to conjure their definition for a purpose: either to include or exclude certain features of policing as part of paramilitary policing. Alice Hills' definition is the most exclusionary one: forces "whose training, organisation, equipment and control suggest they may be usable in support or in lieu of regular military forces".⁶ While perhaps semantically most correct, it defines out of existence a phenomenon that she herself accepts exists.⁷ This paper will examine questions of definition as they arise, but does not seek to resolve that debate.

Marginalised Communities

Though paramilitary style policing has been deployed against many marginalised sectors of society, this essay will focus on those communities where membership of the marginalised strata is permanent, rather than temporary. In effect, this means communities defined by race, ethnicity, or religion. Other strata – the young, the unemployed - lack "a clear identity and consciousness of being discriminated".⁸ The limitation is useful as the communities are clearly defined and literature is abundant.

The heart of this paper will be an analysis of policing in black communities in Britain in the late 1970's and early 1980's. Throughout the early 1980's, outbreaks of rioting and general public disorder were widespread in Britain. Riots predominantly took place in marginalised communities. The most infamous of these was the 'Brixton Disorders' of 1981, prompting an inquiry by Lord Scarman.⁹ In addition to events in

⁴ Jefferson, "Pondering Paramilitarism: A Question of Standpoints?" (1993) 33 *Brit. J. Criminol.* 374.

⁵ Waddington, "The Case against Paramilitary Policing Considered" (1993) 33 *Brit. J. Criminol.* 353.

⁶ Hills, "Militant Tendencies: 'Paramilitarism' in the British Police" (1995) 35 *Brit. J. Criminol.* 450, at 452.

⁷ *Ibid.*, at 451.

⁸ Reiner, *The Politics of the Police* (Oxford University Press, 2003) at 78.

⁹ Scarman, *The Brixton Disorders April 10 – 12* (Her Majesty's Stationary Office, 1981).

Brixton, there were also inquiries into riots in Moss Side,¹⁰ and Birmingham (Silverman, 1985).¹¹ Even in ‘post-Lawrence’ Britain¹², there is much contemporary relevance.

Criminalising Communities

Lea and Young, in their analysis of policing in the early 1980’s, claim three key factors lead to the deterioration of police-community relations in marginalised communities, and the perception that such communities were hotbeds of crime. Those were a rise in petty crime due to social deprivation, racism in the police, and the increased use of technology by the police.¹³

Socio-Economic Factors

The rate of unemployment in Britain doubled between 1979 and 1981 and welfare provisions were cut back to counter a perceived ‘dependency culture’. The Government of the day refused to acknowledge the link between unemployed, deprived citizens and an increase in petty crime, something since referred to as the “failure of Conservative criminology”.¹⁴

Given socio-economic factors exist in all communities the question arises as to why it is specifically in the black community that the ‘spiral of deterioration’ exists.¹⁵ Each of the three reports cited highlighted unemployment and social deprivation as the backdrop to the riots, though none held socio-economic factors as the primary cause. Scraton points out that impoverished members of society have rarely displayed little more than a ‘grudging acceptance’ of the police.¹⁶ This may perhaps be explained by the image of the police as representing a state in which the community has little or no stake.

Police Racism

Much ink has been spilled in analysing police culture and its inherent racism. That which Lord Scarman believed to be the flaws of a few

¹⁰ Hytner, *Report of the Moss Side Enquiry Panel to the Leader of the Greater Manchester Council* (Moss Side Enquiry Panel, 1981).

¹¹ Silverman, *The Handsworth, Lozell Riots 9, 10, 11 September 1985: Report of an Inquiry by Mr. Julius Silverman* (Birmingham City Council, 1985). Further rioting took place in Toxteth (1981), Tottenham (1985), and again in Brixton (1985).

¹² Stephen Lawrence, an 18 year old black man, was the victim of a fatal and racist attack on April 22 1993. The Macpherson Inquiry into his murder labelled the London police force “institutionally racist”.

¹³ Lea and Young, *op. cit.*, at 179-181.

¹⁴ Brake and Hale, *Public Order and Private Lives: The Politics of Law and Order* (Routledge Press, 1992) at 115.

¹⁵ Scraton, *The State of the Police*. (Pluto, 1985) at 98.

¹⁶ *Ibid*, at 99.

individuals, Lord McPherson held to be ‘institutionalised’.¹⁷ While views differ on the causes and effects of racism in the police, its existence as part of police culture is generally agreed.¹⁸

‘Institutional racism’ is perhaps best defined by the Home Secretary’s comments on the Lawrence Inquiry as “procedures, practices and a culture that tend to exclude or to disadvantage non-white people”.¹⁹ It is a particularly abusive manifestation of what Kleinig calls the ‘Us-Them’ divide: the police, the ‘good guys’ are ‘Us’, and criminals are ‘Them’.²⁰ Police racism tends to view all non-white people as ‘Them’.

The Home Secretary’s formulation is useful because it recognises the role that culture plays in an institution such as the police. In a recent ‘appreciation’ of police culture, Waddington claims that police stereotyping and prejudice may be explained as a means of neutralising moral dilemmas. He claims there is a disjunction between police culture and police action.²¹ Her Majesty’s Inspectorate of Constabulary, not always the most vociferous critic of the police, rejects this, and finds a clear link between culture and action.²² Nevertheless, that police in Moss Side marched through the streets chanting “nigger, nigger, nigger, oi, oi, oi” is hardly indicative of multicultural tolerance.²³ Furthermore, the absence of racial diversity in the police itself has long been a cause for concern.²⁴

Finally, culture is not monolithic, and there are differences between ‘street culture’ and ‘management culture’.²⁵ Despite this, racial prejudice has been found at the uppermost echelons of police hierarchy,²⁶ most vividly demonstrated by the remarks of Sir Kenneth Newman that “Jamaicans... are constitutionally disposed to be anti-authority”.²⁷

¹⁷ Scarman, *op. cit.*, at 64; cf Macpherson, *The Stephen Lawrence Inquiry: Report of an Inquiry by Sir William Macpherson of Cluny* (Home Office, 1999) at 29.

¹⁸ Reiner, *op. cit.*, at 98.

¹⁹ Quoted in Bowling and Phillips *Racism, Crime and Justice* (Pearson Education Limited, 2002) at 160.

²⁰ Kleinig, *The Ethics of Policing* (Cambridge University Press, 1996) at 24.

²¹ Waddington, “Police (Canteen) Sub-Culture: An Appreciation” (1999) 39 *Brit. J. Criminol.* 287.

²² HM Inspectorate of Constabulary, *Winning the Race: Policing Plural Communities, HMIC Thematic Inspection Report on Police Community and Race Relations 1996/97* (Home Office, 1997) at 18.

²³ Nally, “Eyewitness in Moss Side” in Benyon, ed., *Scarman and After* (Pergamon, 1984) at 60.

²⁴ Scarman, *op. cit.*, at 128.

²⁵ Kleinig, *op. cit.*, at 68.

²⁶ Reiner, *Chief Constables: Bobbies, Bosses or Bureaucrats* (Oxford University Press, 1992) at 204.

²⁷ Clare, “Eyewitness in Brixton” in Benyon, ed., *Scarman and After* (Pergamon, 1984), Newman is a former Commissioner of the Metropolitan Police. Though the Commissioner later denied the remarks, the journalist was quite emphatic that he had correctly quoted the Commissioner. *Daily Mirror*, 30 June 1982.

Whether or not a disjunction exists between culture and the causes of police action, there is ample evidence that police officers of all ranks are prejudiced, both in their private conversations and public actions.

Increased Use of Technology

The third part of Lea and Young's breakdown is the increasing use of technology by society.²⁸ Citing John Alderson,²⁹ former police chief of Devon and Cornwall Constabulary, they describe police radios, patrol cars, and computer systems as being part of 'military policing'. Twenty years later, this argument appears rather jaded. It would be unrealistic to expect the 'bobby on the beat' in 2006 to be equipped as he was in 1976: with truncheon and notebook. Policing should enjoy technological advances just as all other occupations do (not least criminals!).

Despite this caveat, it is foolish to ignore the effect that technological advances have on a relationship: in this case the police-community one. Increased reliance on technology has lessened dependence on information harvested from a willing public.³⁰ Furthermore, the opportunity to obtain that information was diminished by what Alderson describes as 'reactive' policing, made possible by police vehicles. By staying inside patrol cars, attending to the public only in response to an incident, police became estranged from their communities, and lost the contact that provided important information.³¹

Criminalisation Explained

The process of criminalisation is easier to explain in hindsight. The period in question was the height of Britain's love affair with Thatcherism, and her obsession with the individualism. Those who suffered from the system were marginalised and defined out of citizenship. Marginalised social strata were not new to the 1970's. There have always been those left for the police to deal with, be they Peel's 'criminals classes',³² or Reiner's 'police property' and 'rubbish'.³³ Furthermore, the police have always used stereotypes; racism is an abusive incarnation of that inherent tendency. Technological advances made it possible to rely on stereotypes, which affect statistics, which in turn influence further prejudicial action.

This gave rise to a perception that public safety was at risk. McLaughlin cites the 1970's as the time when society began to perceive young black men as a serious problem. Sensationalist media coverage

²⁸ Lea and Young, *op. cit.*, at 181.

²⁹ Alderson, *Policing Freedom: A Commentary on the Dilemmas of Policing in Western Democracies* (MacDonald and Evans, 1979) at 41.

³⁰ Fielding, *The Police and Social Conflict: Rhetoric and Reality* (Athlone Press, 1991) at 143

³¹ Alderson, *op. cit.*, at 42.

³² *Ibid.*, at 38.

³³ Reiner, *The Politics of the Police, op. cit.*, 93.

fuelled irrational public fear of crime.³⁴ As Lea and Young demonstrate, the chattering classes had little to fear from the ‘muggers’ they despised. This did not prevent them from pressuring the police to ‘do something’ about the problem.³⁵

Paramilitarism and Disaffection

Having labelled marginalised communities as crime-ridden, police were under strong pressure to deal with the problem. During the course of Swamp ’81³⁶, 943 people were stopped and 118 arrested. Special Patrol Groups were deployed, and ‘sus laws’³⁷ were widely used. This was, in former Chief Constable Kenneth Oxford’s words, ‘hard policing’.³⁸ Before considering how these actions affected police-community relations, it is necessary to examine if they were truly paramilitary in nature.

Community policing, the oft cited the utopian model, is something of an ethereal concept which can mean many things to many people. The traditional British philosophy is of a small force working with public support – ‘consensual policing’.³⁹ The purpose of such a police force is not to impose law and order on the public, but to foster self-policing by the public. ‘Community’ and ‘paramilitary’ models, while being difficult to define, are also ideal-type models.⁴⁰ As Waddington points out, what is occurring in Britain is a ‘drift towards paramilitary policing’, and so any particular aspect of policing may be examined to see where it lies between these two extremes.

Saturation operations attempt to deter crime by increasing the statistical likelihood that an offender will be caught. Strength in numbers is a military tactic; one that Waddington claims is often required to maintain public order.⁴¹ In Bowling and Foster’s typology, a ‘show of force’ is an aspect of the military model of policing.⁴² Therefore, Swamp ’81 and similar operations are examples of the use of paramilitary tactics.

Special Patrol Groups⁴³ (SPGs) are the most obviously paramilitary aspect of British policing. SPGs form the focus of Jefferson’s seminal

³⁴ McLaughlin, “The Crisis of the Social and the Political Materialization of Community Safety” in Hughes, McLaughlin, and Muncie, eds., *Crime Prevention and Community Safety: New Directions* (Sage Publications, 2002) at 82.

³⁵ Lea and Young, *op. cit.*

³⁶ Swamp ’81 was an intensive police campaign targeting robbers and burglars.

³⁷ This is an informal name for stop-and-search laws.

³⁸ Oxford, “Policing by Consent” in Benyon, *op.cit.* at 116.

³⁹ Alderson, *op. cit.*, at 11.

⁴⁰ Bowling and Phillips, *Racism, Crime and Justice.*, *op.cit.*, at 984.

⁴¹ Waddington, “The Case against Paramilitary Policing Considered” *loc. cit.*, at 362.

⁴² Bowling and Phillips, *Racism, Crime and Justice.*, *op.cit.*, at 984.

⁴³ Now known as Police Support Units (PSU).

critique of paramilitary policing,⁴⁴ and were deployed in Brixton several times in the late 1970's. The Special Patrol Group, of twenty-two policemen in total, is deployed as a squad under superior command. International commentators classify them as paramilitary units without hesitation.⁴⁵

The effect of a squad system and quasi-military activity on police culture cannot be ignored. Police culture already suffers from machismo.⁴⁶ Specialist paramilitary police sub-culture exacerbates this.⁴⁷ Kraska and Cubellis note that the military model fosters the 'we-them' attitude, acts as a barrier to community relations, and promotes a warlike attitude.⁴⁸ The effect is that these groups, generally deployed in hostile situations, view themselves as imposing peace, rather than fostering it. As one Brixtonian noted: "there's a lot of boys, all psyched up...they want action".⁴⁹

Waddington argues that paramilitary structures reduce police discretion, by deploying a tightly knit unit, rather than individual officers.⁵⁰ This is contestable. To begin, the decision to deploy is an exercise of

police attempted to get to grips with what they saw as rampant drug culture.⁵⁵

It is clear that in each instance the police moved away from the model of consensual policing, towards the ‘hard’ paramilitary ideal. While some may not agree that the policing was paramilitary in nature, police actions certainly tended towards that model. Whether it was in the culture and operational tactics of the SPGs or in the aggression of other officers, police were there to ‘impose’ the law. The discretion granted by the ‘sus laws’ – the Vagrancy Act 1864 - provided ample scope for *legal*, abusive action. Those abuses are well documented, and lie at the heart of public dissatisfaction.⁵⁶

The Community’s Response

It is worth recalling that in marginalised areas, police always enjoy far less support than in more affluent neighbourhoods.⁵⁷ Lea and Young’s case is blind to the lack of police legitimacy before the shift toward paramilitarism.⁵⁸ Despite this, an argument can be made that such a shift worsens police-community relations, and the change from acceptance, however grudging, to opposition is an important one.

There is no shortage of evidence of dissatisfaction with the police amongst young black people. Scarman found this to be the primary cause of the Brixton riots.⁵⁹ Silverman could not recall one member of that demographic who did not mention police abuse.⁶⁰ Hytner described the beliefs of police prejudice as ‘deep rooted’ in the minds of Moss Side youths.⁶¹ This cannot merely be dismissed as youth rebellion against authority, as it was more pronounced in black youths than in youths generally, and focussed specifically on the police. The effect of alienation is most noteworthy in Handsworth, where in the space of four years, the police went from integrated members of the community to hate figures.⁶²

That this alienation was a new development is clear when one considers the attitudes of older members of the community. Scarman and Silverman both found evidence of police operations damaging their relationship with community leaders.⁶³ The Special Patrol Groups in Brixton were particularly culpable. Because of this, youth opposition to

⁵⁵ *Ibid.*, at 49.

⁵⁶ Hytner, *op. cit.*, at 25; cf Scarman (1981), *op. cit.*, at 45.

⁵⁷ Scraton, *op. cit.*, at 99.

⁵⁸ Gilroy, “The Myth of Black Criminality” in Scraton, ed., *Law, Order and the Authoritarian State* (Open University Press, 1987) 113.

⁵⁹ Scarman, *op. cit.*, at 45.

⁶⁰ Silverman, *op. cit.*, at 82.

⁶¹ Hytner, *op. cit.*, at 25.

⁶² Silverman, *op. cit.*, at 47.

⁶³ Scarman, *op. cit.*, at 52; cf Silverman, *op. cit.*, at 82.

police excesses was bolstered by the community's shared experience of racial discrimination in wider life.⁶⁴

Furthermore, the 'citizen in uniform' image is undermined by 'tooling up' – the most obvious manifestation of paramilitary policing. The vans used by Special Patrol Groups "created an air of menace and symbolised an abrasive policing style that was spoken of in terms of fear".⁶⁵ On the other hand, plainclothes officers (used in Swamp '81) break Peel's promise of visible police officers, and represent an 'espionage' model of policing. Both tactics further undermine trust in the police.

To return to the 'Us-Them' divide, just as the police begun to view the policed as an 'enemy', the public also saw police as working *against* rather than *with* them. Thus, the idea of the police reinforcing social controls evaporates, and is replaced with one of the police imposing a particular control. The language of the U.S. National Commission reporting on the 1967 riots in that country echoes well here: "police have come to symbolise white power, white racism, and white repression".⁶⁶ The perception of the police imposing a particular order, rather than maintaining public order, is damaging to their impartiality.

The result of diminished trust was a drying up of information flowing from the public, disenfranchisement from the establishment that imposed the order, and collective resistance to the exercise of police power. When information ceased to flow to the police from the public, officers' actions were even more ill informed. It is at this point that the cycle referred to by Bowling and Phillips,⁶⁷ as envisaged by Lea and Young, begins to reinforce itself.⁶⁸

One must consider whether the cycle is inevitable in any event – that marginalised communities will oppose police presence no matter how benign. Evidence would suggest that is not the case. Despite the unrepresentative nature of the force, policing in Handsworth 'worked' under Superintendent Burton and his predecessor, David Webb.⁶⁹ Specific police decisions damaged police-community relations: the deployment of SPGs in Brixton; the conduct of aggressive drugs raids in Birmingham and widespread 'hard policing' in all three locales. These actions subscribe to paramilitary ethos, and all contributed to the subsequent disorders.

Furthermore, such actions cannot be justified as a 'necessary evil'. Contrary to intentions, saturation police operations, and the employment of paramilitary police units, displaces rather than reduces crime.⁷⁰ Operational failure only matches public anxiety with police frustration and heightens

⁶⁴ Reiner, *op. cit.*, at 79.

⁶⁵ McConville and Shepard, *op. cit.*, at 40.

⁶⁶ Northam, *Shooting in the Dark: Riot Police in Britain* (Faber, 1988) at 27.

⁶⁷ Bowling and Phillips, "Policing Ethnic Minority Communities", *loc. cit.*, at 549.

⁶⁸ Lea and Young, *op. cit.*, at 183.

⁶⁹ Silverman, *op. cit.*, at 47.

⁷⁰ Scarman, *op. cit.*, at 51.

tension in the community. As the situation deteriorates, tension reaches fever pitch, and the wheels must eventually come off. When it did in the 1980's, it was in the form of widespread public disorder.

Public Disorder and State Legitimacy

The riots in Brixton, Moss Side and Birmingham were each the subject of much debate and political discussion. Arguments about their causes were hampered by the Prime Minister's view that explanation amounted to excuse.⁷¹ It is clear from the above analysis that the rioting was the result of the eventual eruption of high tension between the police and the communities they policed. This section seeks to explain how that tension boiled over and rioting broke out.

The Causes of Riot

It is difficult to ascertain why a group of otherwise orderly citizens will perpetrate an act of violent public disorder. Little evidence exists to provide a window into the thought processes of the crowd at the time of rioting. Furthermore, a crowd may contain rioters with multiple motivations, not all of them shared with other rioters. Finally, rioters are often slow in coming forward to explain their actions – due either to shame or a fear of prosecution. Nevertheless, commentators have posited several theories to predict when a crowd will riot, and when it will not.

Le Bon's theory of rioting, as developed by twentieth century psychologists, is that of 'frustration-aggression'. It claims that a crowd, once frustrated enough, will eventually erupt into random acts of aggression.⁷² Though seemingly sensible, this theory fails to distinguish why some events become disorderly, and others do not.

The 'riff-raff' theory – that disorder is the result of criminal classes causing trouble – seems rooted in the same prejudiced logic that views certain communities as inherently criminal. While demonstrations and disorder may attract some unsavoury characters, there is little evidence that any of those cited were instigated by outsiders.⁷³ The 'ballot-box' view on the other hand, which says that aggrieved persons riot to remedy injustices, may impute too much common purpose in a disparate collection of human minds.⁷⁴ As Silverman notes, if this was the cause of the riots, the message delivered may not have been the one intended.⁷⁵ The difficulty with each of

⁷¹ Kettle and Hodges, *Uprising! The Police, the People and the Riots in Britain's Cities*, (Pan Books, 1982) at 182.

⁷² Waddington, "Policing public order and political contention" in Newburn, ed., *Handbook of Policing* (Willan Publishing, 2003) at 398.

⁷³ Kettle and Hodges, *op. cit.*, at 186.

⁷⁴ Waddington, *Contemporary Issues in Public Disorder*, (Routledge, 1992) at 400.

⁷⁵ Silverman, *op. cit.*, at 71.

these theories is that of over-simplification: viewing a large group of aggrieved people as having a singular consciousness.

David Waddington offers the flashpoint model to explain outbreaks of disorder.⁷⁶ His theory is based on a multi-level analysis of public disorder by which a context is created for high tension between a particular alienated group on the one hand, and the police on the other. The final stage is the ‘interactional level’, where the flashpoint – a particularly aggressive encounter – occurs. If the flashpoint is seen as symbolic of a shared grievance, disorder breaks out.

This model can be applied to the 1980’s disorders. In Brixton in 1981, the ‘flashpoint’ was the overzealous search and arrest of a taxi driver.⁷⁷ In Birmingham, it was an ill-handled traffic incident.⁷⁸ The Moss Side riots tell a slightly different tale. Hytner concluded that the carnival turned disorderly due to a common belief that “trouble was inevitable” (Providing some evidence for Le Bon’s theory).⁷⁹ However, the outbreak of police-community violence occurred after a police line broke and a number of officers attacked the crowd.⁸⁰ Riot, it would seem, is prompted time and time again by police action.⁸¹

Policing the Disorders

Policing protest is a dangerous business, both for the individual officers, and – as we shall see – for the state they represent. Mass protest plays an important part in democracy, deriving from the rights to free expression and assembly. In the case of the disorders in Brixton, the usual difficulty of police impartiality was exacerbated as the police themselves were the subject of the protest.

A stand-off of sorts took place in Moss Side. Hytner reports that police made little or no attempt to disperse the crowd, and attempts by third parties to do so were not aided by senior officers. Eventually police charged the crowd and used vans driving at high speed to attack protestors. Somewhat unsatisfactorily, the Hytner Report does not assess operational efficacy, as the Committee believed themselves ill equipped to do so.⁸² They did find sufficient evidence to suggest that police over-reacted to the situation.

Perhaps the most damning case was that of the Birmingham riots. Occurring four years after the Scarman Report, one might have expected the Lord’s word, much lauded as it was, to have been implemented. Northam notes that police chiefs quoted section 5, paragraph 72

⁷⁶ Waddington, *Contemporary Issues in Public Disorder*, *op.cit.*

⁷⁷ *Ibid.*, at 89.

⁷⁸ Silverman, *op. cit.*, at 53.

⁷⁹ Hytner, *op. cit.*, at 52.

⁸⁰ *Ibid.*, at 48.

⁸¹ Northam, *op. cit.*, at 62.

⁸² Hytner, *op. cit.*, at 54.

evangelically.⁸³ This was the section recommending police preparations for public disorder. However, when the time came to police the growing unrest in Birmingham, the police were found to have poor training, ill-fitting equipment, and disastrous intelligence.⁸⁴

Jefferson and Waddington have traded many verbal blows over the efficacy of paramilitary policing of public order. Unfortunately, that debate has been hampered by the desire of both commentators to interpret facts in a manner that aids their argument. The flaws of the scholarship aside, the three disorders under scrutiny do not easily fit into the parameters of that debate. Police were not refereeing conflict; they were participating in it. Nevertheless, the policing of the Handsworth/Lozells riots highlights the danger of attempting to implement paramilitary policing in a liberal democratic state: doing it badly.

The success of paramilitary policing, in Waddington's eyes, lies in the superior training of the officers, their deployment as a unit, and their superior command and control.⁸⁵ In reality, this may never be the case. Struggles between Chief Constables and police authorities may prevent the acquisition of equipment, or the provision of training.⁸⁶ Where the Home Office overrules local authority, questions of democratic accountability come to the fore.⁸⁷

Even if it were possible to militarise the police, it would be operationally undesirable. Police are ill equipped to act like soldiers: they do not have the luxury of seeing rioters as enemies; their role is to diffuse violence situations, not to engage in them. Waddington recognises that no plan survives contact with the enemy,⁸⁸ but fails to realise that police cannot call in artillery support if the battle goes awry. 'Tooling-up' dehumanises the police, making it easier for protestors to reconcile themselves with acting violently towards officers of the law. Jefferson's central criticism, that paramilitary policing tends to amplify disorder, is borne out in the instant cases.⁸⁹

Police and State Legitimacy

As Rousseau, Locke, and countless others have intoned, the legitimacy of the state derives from the social contract; the principle of government by consent.⁹⁰ The state possesses a monopoly on the use of coercive force within particular territorial boundaries and that force is

⁸³ Northam, *op. cit.*, at 50.

⁸⁴ Silverman, *op. cit.*, at 78.

⁸⁵ Waddington, *op. cit.*, at 353.

⁸⁶ Northam, *op. cit.*, at 62.

⁸⁷ *Ibid.* at 63.

⁸⁸ Waddington, "Policing Public Order and Public Contention", *loc. cit.*, at 394.

⁸⁹ Jefferson, *The Case Against Paramilitary Policing*, *op. cit.*, at 82.

⁹⁰ Kleinig, *op. cit.*, at 14.

largely the preserve of the police. It may be described as the core of the police function.⁹¹

Public protest itself, and even public disorder, does not necessarily pose problems to state legitimacy, it is one of the mechanisms by which consent or dissatisfaction may be expressed.⁹² However, as it usually signals that the state is failing some of its citizens in some way, the policing of mass protest is a delicate operation if state legitimacy is to be maintained.⁹³

Jefferson, in discussing the Peterloo protest of 1822, claims that the involvement of the military in internal civil strife is itself indicative of failed democracy.⁹⁴ It may be imputed then that the ‘drift towards paramilitarism’ in a civilian police force represents a similar failure. Further analysis demonstrates the full extent of the failure.

In policing protest, the police must be careful not to deny the public their right to express themselves. However, this is problematic when the protest is violent. If the protest amounts to rebellion, then public consent to be policed is withdrawn. The police role becomes that of protecting the security of the state, and so they lose their impartiality and legitimacy as servants of the law.

Despite Lord Scarman’s fears, the police in Brixton were *not* the thin blue line between state and anarchy,⁹⁵ and a march on Westminster was unlikely.⁹⁶ The difficulty in terms of legitimacy was that the public sought the withdrawal of police from the Brixton area.⁹⁷ Refusal by the police to withdraw amounted to the imposition of force without consent, and so police presence was morally illegitimate. On the other hand, had the police withdrawn, the state’s control over that area of the metropolis would evaporate, making it a ‘no-go’ area – a ‘failed local state’. This quandary is made even more impossible in Birmingham, where police were criticised for at first adopting a ‘no-profile’, rather than ‘low-profile’ in the area in the hours leading up to the riot.⁹⁸ The public wanted a police force, but not an oppressive one.

Paramilitary policing is particularly damaging in this regard, as it increases the likelihood that the public will reject the police presence. The evidence for this may be found throughout the accounts of the disorders. Paramilitary structures are top-down and anti-democratic. ‘Command and

⁹¹ Bittner, *The Functions of the Police In Modern Society* (National Institute of Mental Health, 1970).

⁹² Kleinig, *op. cit.*, at 16.

⁹³ Waddington, “Policing Public Order and Public Contention”, *op. cit.*, at 412.

⁹⁴ Jefferson, “The Racism of Criminalisation: Policing and the Reproduction of the Criminal Other”, *loc. cit.*, at 395.

⁹⁵ Scarman, *op. cit.*, at 97.

⁹⁶ Clare, *loc. cit.*, at 51.

⁹⁷ Scarman, *op. cit.*, at 26.

⁹⁸ Hytner, *op. cit.*, at 46.

control' may be a euphemism for authoritarian. The sub-culture Jefferson observed in Special Patrol Groups was not unlike that of a military platoon patrolling a colony.⁹⁹ The deployment of such forces in times when democracy has already been undermined is haunted with the dangerous symbolism of totalitarianism: rows and rows of military-style police, seeking to suppress the community and impose order.

What Kind of Police Force for Britain...

In the twenty-twenty vision of hindsight, the commentaries that immediately followed the 1980's urban riots appear flawed. Both academics on the 'Left', and Britain's ethnic minorities themselves were divided as to their causes. Lea and Young's contribution suffered from historic myopia, failing to appreciate the permanence of a 'criminal Other' in capitalist societies. Scraton's critique of their work seems indicative of Liberals' struggle to cope with the ideological domination of Thatcherism.

The interdependence of the Scarman, Hytner and Silverman Reports is worth noting. They represent the 'official take' on the riots. While the Scarman Report was universally heralded as a doctrinal document, even the Lord's oeuvre had its shortcomings. It failed to truly understand the nature of police racism, a failing perpetuated by the establishment until the Macpherson Report in 1999. Furthermore, it provided the ACPO with the basis to roll out their Public Order Manual – a document drawn up and implemented without the slightest parliamentary oversight.¹⁰⁰

Despite the limitations of the early literature, it is clear that Bowling and Phillips' 'vicious circle' is all too real. The role of paramilitary policing in it is less clear. At no point did policing in the cases cited meet the standards set by Waddington to be classified as purely paramilitary. Nevertheless, it seems that the paramilitary tendency that was evident in the early 1980's played a crucial role in precipitating the riotous events that followed. Hard policing – through the role of the SPG, for example – was part of mix of factors that led to the riots and a specific police intervention was the trigger to the disorders. Though the riots may not have been policed in a purely paramilitary fashion, they did prompt further calls for militarisation of public order policing.

In the time that has elapsed since those volatile years, the march towards a 'law and order' society¹⁰¹ has continued apace. Blairism, it seems, has picked up where Thatcherism left off. Many of the problems that afflicted policing in 1981 still exist today. Under-representation of ethnic minorities in the police force is as real today as it was when Lord

⁹⁹ Jefferson, *The Case Against Paramilitary Policing*, *op. cit.*

¹⁰⁰ Northam, *op. cit.*, at 50.

¹⁰¹ Hall, *Drifting into a Law and Order Society* (Cobden Trust, 1980).

Scarman made his plea. Despite a 50% increase in ethnic minority staff since 1999, the force is still largely unrepresentative of the public it serves.¹⁰²

DeMichele and Kraska argue that paramilitary and community models are being fused in a synergetic fashion.¹⁰³ Their theory, if equally accurate in Britain, presents a frightening scenario of repressive policing. It requires police to do exactly that which one officer present at the Broadwater Farm riot found impossible: “we can’t pat kids on the head one day and then shoot with plastic bullets the next”.¹⁰⁴

That most-discussed police power, the stop and search, is once more at the forefront of public debate. Stop and searches of Asian persons increased twelve fold after the July 7th terrorism attacks.¹⁰⁵ Even prior to that atrocity, black and Asian persons were more likely to be stopped under terrorism legislation than their white counterparts.¹⁰⁶ Policing in 2006 operates within the context of a “war on terrorism”. It seeks once more a scapegoat, an ‘Other’ upon whom blame can be loaded. What was once the role of the criminal classes, the Irish, and then black communities,¹⁰⁷ now appears to be falling to Britain’s Asian and Middle Eastern communities.

The words of one Metropolitan Police Authority member are all too familiar: “random stops deter no one and alienate ... large numbers of people”.¹⁰⁸ In his recent Dimpleby Lecture¹⁰⁹, Sir Ian Blair, Commissioner of the Metropolitan Police described policing as too important to leave to police chiefs alone. He has called for public debate on British policing. That debate we should be mindful of the errors of the past, least it pave the way for the riots of the future.

...and what kind of force for Ireland?

Travelling back across the Irish Sea, one can only hope that the lessons being slowly learned in Britain are assimilated more quickly here. Dublin 2006 is of different lineage to Brixton 1981 or Birmingham 1985; we

¹⁰² Home Office Website: < <http://www.homeoffice.gov.uk/police/about/race-relations/>> Last accessed 3rd February 2006.

¹⁰³ DeMichele, and Kraska, “Community Policing in Battle Garb: A Paradox or Coherent Strategy?” in Kraska, ed., *Militarizing the American Criminal Justice System: The Changing Roles of the Armed Forces & the Police* (Northeastern University Press, 2001).

¹⁰⁴ Quoted in Northam, *op. cit.*, at 64.

¹⁰⁵ *The Guardian*, 24 December 2004. While there were also increases in the numbers of white and black persons stopped, they were not as large.

¹⁰⁶ Hearndon and Hough, *Race and the Criminal Justice System: An Overview to the Complete Statistics 2002-2003* (Home Office, 2004) at 14.

¹⁰⁷ Jefferson, “The Racism of Criminalization: Policing and the Reproduction of the Criminal Other” in Gelsthorpe, ed., *Minority Ethnic Groups in the Criminal Justice System* (Institute of Criminology, 1993) at 29.

¹⁰⁸ *The Guardian*, 24th December 2005.

¹⁰⁹ Transcript available at <<http://news.bbc.co.uk/1/hi/uk/4443386.stm>> Last accessed 3rd February 2006.

should be naturally hesitant in transferring truths from one socio-legal context to another. However, the Dublin 2006 riot should serve as a warning for all those interested in preserving peaceful protest as a tool of Irish democracy. In recent years, the Patten Report into policing north of the border has revolutionised the Police Service of Northern Ireland.¹¹⁰ In the south, Conway notes that the Garda Síochána Act 2005 was described by the Minister for Justice as

[T]he first major revision of the operation of the Garda Síochána since the foundation of the State and will support the efficient and effective operation and administration of the Garda Síochána in the twenty first century.¹¹¹

If that prophesy is to be fulfilled, the Gardaí, and all of Irish society, should be cognisant of the mistakes made elsewhere. As Ireland develops in the twenty first century, the tensions between the two traditions on the isle, and the ever-more cosmopolitan face of our country will present fresh challenges to the ‘guardians of the peace’.

¹¹⁰ See generally, Mulcahy, *Policing Northern Ireland: Conflict, Legitimacy and Reform* (Willan Publishing, 2006).

¹¹¹ Department of Justice press release, July 12 2005. Conway’s article is a useful critique of the Act. See: Conway, “An Garda Síochána Act 2005 – Breaking Down the Thick Blue Wall?” (2005) 23 *ILT* 297.

CIVIL SUBSONIC JET AEROPLANE NOISE: ITS IMPACT, REGULATION AND REMEDIES

ZELDINE NIAMH O'BRIEN *

Introduction

Noise is one of the great banes of technological advance. Aircraft noise is a prime example of this, only emerging in the last century as a major contributor to ambient noise pollution levels.¹ Excessive noise can have profound negative effects on humans, physical, psychological and social. Balanced against these costs are the benefits of the aeroplane as a form of transport, which has helped to open up many global and socio-cultural frontiers, along with the revenue the air transport industry brings into the economy. The subject of aircraft noise is particularly relevant at this time as Dublin Airport is set to construct a new parallel runway², which will increase the amount of air traffic in the area by over 100,000 movements by 2020. This article focuses on aircraft noise pollution and examines the impact of such pollution. The effects of noise on health, land values, social capital, education and communications are considered. The article examines the roles of the International Civil Aviation Organization (ICAO), the European Union, national law and national aviation authorities in the legal regulation of aircraft noise pollution. Finally, it assesses the constitutional and human rights basis for any legal challenge to excessive aircraft noise.

What is Noise?

Noise is any unwanted sound and thus contains a subjective element.³ The EC defined noise as “a number of tonal components disagreeable to man and intolerable to him because of discomfort, fatigue, agitation and, in some cases, pain it causes”.⁴ Sound is the auditory sensation caused by the

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¹ See Jensen, “Community Noise” in Lipscomb ed., *Noise and Audiology* (University Park Press, 1978) at 245 and Milne, *Noise Pollution* (David and Charles, 1975) chapter 1.

² As planned in the County Development Plan of 1972.

³ See McEldowney and McEldowney, *Environment and the Law* (Longman, 1996), chapter 13, Bates, Births and Pugh, *Liability for Environmental Harm* (Lexis Nexis, 2004) chapter 13.

⁴ EC, *Second Environmental Action Programme 1977-1981*.

perception of waves of fluctuating pressure disturbances which propagate from a solid vibrating in air⁵. Human response to sound varies with its intensity, frequency and duration. Sound intensity is measured as a logarithmic ratio⁶ in decibels⁷ (dB), while frequency is measured in hertz (Hz). Low frequencies will produce little response even at moderately high decibels. The range of human hearing varies with age. Children and young adults are able to hear between 16-20,000 Hz,⁸ with the greatest sensitivity occurring at 4 kHz⁹ (though the ear is highly responsive to frequencies between 1-5 kHz)¹⁰ The range of audible sound pressure is 0-140 dB. On this scale, an increase of 10 dB is perceived as a doubling of the loudness of the sound. A soft whisper at five feet from the source is 30 dB and a jet at take-off at 200 feet is 125 dB¹¹.

Various rating scales have been derived.¹² The noise rating scheme adopted for the grant of noise certificates under the Chicago Convention and in Irish law is the effective perceived noise level (expressed in units of EPNdB). This is an average of noise levels at certain points, but it takes into account hearing irritation and the tonal content of the noise. Two of the most frequently used aircraft noise rating scales are LAmax and LAeq(T).

LAmax measures the maximum A-weighted sound-pressure level (i.e. the loudest noise occurring within a given timeframe) and is used to measure the maximum sound pressure of an aircraft noise event. This can be very appropriate in assessing the possibility of disturbance to sleep due to impulsive or repeated instances of noise.

Alternatively, LAeq(T) (where T=Time) may be used. This provides the average of aircraft noise events during a period of time, rather than simply a figure for a single noise event. As observed by O'Kelly, it "offers the advantage that it incorporates both amplitude and time."¹³ A 16-hour LAeq index is now favoured by most states in Europe, although it may generate a low value where only a few aircraft noise events have occurred. Both the LAeq(T) and the LAmax are recommended by the World Health Organization (WHO) to calculate aircraft noise. Other rating scales include Lden (day-evening-night level), which is prescribed by Directive 2002/49.¹⁴

⁵ Goldstein, "Fundamental Concepts in Sound Measurement" in Lipscomb ed., *Noise and Audiology*, (University Park Press, 1978), at 4. See also Adams and McManus, *Noise and Noise Law: A Practical Approach* (Wiley Chancery Law, 1994) at 5.

⁶ Level (in dB) = $10 \log (P^2 / P_0^2) = 20 \log (P / P_0)$

⁷ Adams and McManus, *op. cit.*, at 12.

⁸ Goldstein, *loc. cit.*, at 6-7.

⁹ Adams and McManus, *op. cit.*, at 25.

¹⁰ Adams and McManus, *op. cit.*, at 25.

¹¹ Goldstein, *loc. cit.*, at 17. See also McEldowney and McEldowney, *op. cit.*, Table 13.1. See *Dunton v. Dover District Council* [1977] QB 87 per Griffiths J.

¹² See O'Kelly, "Assessment of Environmental Noise" (1994) 1 (3) *Irish Planning and Environmental Law Journal* 99.

¹³ See O'Kelly, *loc. cit.*

¹⁴ Article 5.

Aircraft Noise¹⁵

There are two sources of aeroplane noise – the engines and the aircraft frame¹⁶. There are two main types of engine, jet and piston engines. Propeller-driven aircraft are much quieter than jet aircraft but the tonal sounds generated can be more annoying. The noise from older jet aircraft is caused by the violent reaction of the exhaust gases as they mix with the surrounding air.

Modern aircraft use turbofans that surround the exhaust. They reduce the velocity of the airflow by allowing some of the air to bypass the engine's combustion chamber. The fan itself causes much noise, especially during take-off and landing. The bigger the fan, the more the noise of the reaction is reduced, but the greater the noise of the fan. Therefore, a high bypass ratio turbofan engine may still be as noisy as aircraft with smaller turbofans around their exhausts. While jet engines also produce other forms of ultrasonic noise, these forms are not audible, although they can have a number of non-auditory effects such as vibrating hairs in the air or nasal cavity¹⁷.

Noise and flight track monitoring has been introduced at Dublin Airport in order to facilitate the full environmental impact assessment of noise in the area. Such procedures have been recommended by the WHO and are required by the Environmental Noise Regulations 2006¹⁸, which bring Directive 2002/49 into Irish law. The conclusion in the Environmental Impact Statement, submitted as part of the planning application for the new runway, was that the "impact on human health of the changes will be minimal" owing to the low population and the lack of vulnerable populations in the area¹⁹.

¹⁵ See Kratovil, "The Airport Noise and Capacity Act of 1990: Superfluous Hurdle for Airport Proprietors who have assured Federal Grants" (2004) 12 *Penn St. Environmental Law Review* 499, Burns, *Noise and Man*, (2nd ed., John Murray, 1973) chapter 13, Powers, "Aircraft Noise Generation and Control: Noise Around Airports in Sáenz and Stephens eds., *Noise Pollution: Effects and Control* (John Wiley & Sons, 1986) at 343, Bronzaft, Ahern, McGinn, O'Connor and Savino, "Aircraft Noise: A Potential Health Hazard" (1998) 30 *Environment and Behaviour* 101 and Anthrop, *Noise Pollution* (Lexington Books, 1973) chapter 6 and 83.

¹⁶ See Abeyratne, "Aircraft Engine Emissions and Noise" (1994) 24 *Environmental Policy & Law* 238 at 241.

¹⁷ Burns, *op. cit.*, at 344.

¹⁸ SI 140 of 2006.

¹⁹ Parkman, "Dublin Airport Environmental Impact Statement: Northern Parallel Runway" December 2004, Part 1 Non-Technical Summary, at 5.

The Impact of Excessive Noise

(a) Health²⁰

According to the Fifth Environmental Action Programme of the EU: “No person should be exposed to noise levels which endanger health and quality of life.” The European Court of Human Rights has accepted that excessive noise exposure may give rise to an action under article 8 of the Convention, observing:

Article 8 protects the individual’s right to respect for his or her private and family life, home and correspondence. There is no explicit right in the Convention to a clean and quiet environment, but where an individual is directly and seriously affected by noise or other pollution, an issue may arise under Article 8.²¹

(i) Physical Effects

*Hearing Loss and Damage to Ears*²²

Threshold shift occurs when the ear requires more sound pressure than normal for a particular frequency to produce audibility. It can be either temporary threshold shift (TTS) or permanent threshold shift (PTS)²³. TTS of 10 dB at 4 kHz can occur after only five minutes of exposure to noise at 1.2-2.4 Hz with a pressure level of 105 dB.²⁴ A TTS of 30 dB results in a noticeable social handicap²⁵. Noise-induced PTS will occur where there is exposure to high levels of noise for long periods²⁶. Noise in excess of 130 dB SPL for short periods will affect the structure of the inner ear²⁷. The effect of noise can be more severe on the young and the old²⁸. It is unlikely that aircraft noise in those in residential areas within a 69 dB contour would sustain any hearing loss from the increased aircraft noise levels resulting from the use of the new runway.

²⁰ See generally, London Health Commission, *Noise and Health: Making the Link* (LHC, 2003).

²¹ *Hatton and Others v United Kingdom* [2003] ECHR 338; (2003) 37 EHRR 28, para.96. See also *Powell and Rayner v. the United Kingdom* (judgment of 21 February 1990, Series A no. 172, § 40).

²² See Loeb, *Noise and Human Efficiency* New York (Wiley, 1986), chapter 5, Ward, “Auditory After-Effects of Noise” in Sáenz and Stephens, *op. cit.*, at 201 and Milne, *Noise Pollution – Impact and Countermeasures* (David and Charles, 1979) .68-81.

²³ See Melnick, “Temporary and Permanent Threshold Shift” in Lipscomb, *op. cit.*, at 83 and Adams and McManus, *op. cit.*, chapter 3.

²⁴ Adams and McManus, *op. cit.*, at 40-41.

²⁵ WHO, *Noise Guidelines*, available at <http://www.who.int/docstore/peh/noise/Comnoise3.htm> (visited on 19 August 2006)

²⁶ Adams and McManus, *op. cit.*, 42-44.

²⁷ See Durrant, “Anatomic and Physiologic Correlates of the Effects of Noise on Hearing” in Lipscomb, *op. cit.*, at 109.

²⁸ See Mills, “Effects of Noise on Young and Old People” in Lipscomb, *op. cit.*, at 229.

*Disruption and Interference with Sleep Patterns*²⁹

Noise negatively impacts on sleep, with night flights causing both sleep deprivation and sleep disturbance. It can cause sleep stage changes³⁰ by reducing the amount of REM (rapid-eye-movement) sleep a person receives.³¹ It can increase sleep latency periods (the length of the interval between being fully awake and falling asleep)³² although it has not been shown conclusively that aircraft noise increases sleep onset latency (the length of the interval between 'lights out' and falling asleep).³³ The secondary effects include reduced perceived sleep quality, increased fatigue, depressed mood or well-being and decreased performance³⁴. While physiological habituation³⁵ is a relevant factor, no such habituation occurs for internal noise levels at 60 dB(A) and higher³⁶. In addition, while habituation may affect awakenings, it does not alter the effects of noise on the heart rate nor the after-effects, e.g. perceived sleep quality, mood and performance³⁷.

The Fifth EC Environmental Action Programme requires noise levels of 65 db+ outdoors at night to be phased out and no increase in noise levels between 55-65 dB³⁸. The American Academy of Pediatrics (AAP) suggests that <35 dB(A) is required for newborns to sleep³⁹. According to the WHO, noise levels should not exceed 30 dB(A) for continuous noise and 45

²⁹ See Griefahn, "Noise Pollution During the Night – A Possible Risk Factor for Health" in Sáenz and Stephens, *op. cit.*, at 265 and Loeb, *op. cit.*, at 154-160; See also Porter, Kershaw and Ollerhead, *Adverse Effects of Night-time Aircraft Noise*, R&D Report 9964, March 2000, available at <http://www.caa.co.uk/docs/33/ERCD9964.PDF> (visited on 19 August 2006)

³⁰ Berglund and Lindvall, *Community Noise*, Document Prepared for the WHO, (1995) 2(1) *Archives of the Centre for Sensory Research, Stockholm University and Karolinska Institute*

³¹ Carter, "Transportation Noise, Sleep and After-Effects," (1996) 22(1) *Environmental International* 105.

³² WHO, *Guidelines for Community Noise* (WHO, Geneva, 1999).

³³ Hume, Van and Watson, *Effects of Aircraft Noise on Sleep: EEG-Based Measurements* (Department of Biological Sciences, Manchester Metropolitan University, June 2003) available at <http://www.cate.mmu.ac.uk/documents/Publications/CAAreport0603.pdf> (visited on 19 August 2006)

³⁴ *Guidelines for Community Noise*, 1999, citing *inter alia*, Öhrström, "Research on Noise and Sleep since 1988: Present State" in Vallet ed., *Noise as a Public Health Problem* (INRETS, 1993) vol.3 331. See also Bonnet, "Sleep Deprivation" in Kryger, Roth, Dement eds., *Principles and Practice of Sleep Medicine*, (2nd ed., WB Saunders Co., 1994) at 50-67.

³⁵ See Griefahn, "Long Term Exposure to Noise: Aspects of Adaption, Habituation and Compensation" (1977) 1 *Waking Sleeping* 383.

³⁶ Adams and Mc Manus, *op. cit.*, at 99.

³⁷ Öhrström and Björkman, "Effects of Noise Disturbed Sleep – A Laboratory Study on Habituation and Subjective Noise Sensitivity" (1988) 122 *Journal of Sound and Vibration* 277.

³⁸ See Kiss and Shelton, *Manual of European Environmental Law* (2nd ed., Cambridge University Press, 1997) at 466-467.

³⁹ American Academy of Pediatrics, "Noise: A Hazard to Fetus and Newborns" (1997) 100(4) *Pediatrics* 724, available at <http://aaolicy.aapublications.org/cgi/reprint/pediatrics;100/4/724.pdf> (visited on 19 August 2006).

dB(A) for intermittent noise⁴⁰ indoors at night-time. From the Parkman analysis of the predicted noise contour levels at Dublin Airport, taking into account the reduction in noise from the external walls of the house with closed windows, it is clear that some residential areas (inc. Fosterstown South, Barberstown and Kingstown) will be subject to indoor night-time noises above this level. While sleeping with all the windows shut may reduce the impact of external noise by 15dB(A), the WHO has observed that individuals should be able to sleep with the window slightly opened. Thus the reduction from closed windows is not a definitive factor.

Contradictory studies exist regarding the impact of aircraft noise on sleep. So while a 1994 study suggests that there is no clear connection between aircraft noise and sleep disturbance⁴¹, other studies have found a link but no major disturbance⁴², although a more recent study suggests that community exposure to aircraft noise and the health indicators of poor general health status (use of sleep medication, and use of medication for cardiovascular diseases) are linked⁴³. Curfews on night-time flights have in some measure assisted with this problem and the WHO has recommended that night-time movements be discouraged where they negatively impact on residential areas.

*Cardiovascular and Other Physiological Effects*⁴⁴

Noise can increase “heart rate, peripheral vascular resistance, cause changes in blood pressure, blood viscosity and blood lipids and shifts in electrolyte balance (Mg/Ca) and hormonal levels (epinephrine, norepinephrine, cortisol)”⁴⁵. Noise levels exceeding 65-70 dB for LAeq

⁴⁰ WHO, *Guidelines for Community Noise*, 1999. According to Vallet and Vernet, intermittent noise levels should not be in excess of 45 dB L_Amax more than 10-15 times per night, in “Night Aircraft Noise Index and Sleep Research Results” in Laurence ed., *The Cost of Noise* (Noise Control Foundation, Poughkeepsie, 1991) Volume 1, at 207-210.

⁴¹ Horne, “A Field Study of Sleep Disturbance: Effects of Aircraft Noise and Other Factors on 5,742 Nights of Actimetrically Monitored Sleep in a Large Subject Sample” (1994) 17 *Sleep* 146-159.

⁴² Flindell, Bullmore, Robertson, Wright, Turner, Birch, Jiggins, Berry, Davison and Dix, *Aircraft Noise and Sleep – 1999 UK Trial Methodology Study*, (Institute of Sound and Vibration Research Consultancy, 27th November 2000) at 33; DOT, *Report of a Field Study of Aircraft Noise and Sleep Disturbance: A Study Commissioned by the Department of Transport, from the Department of Safety, Environment and Engineering* (Civil Aviation Authority, December 1992); Hume, Van and Watson, *Supra*; Porter and Rhodes, *Aircraft Noise in London: Past, Present and Future* (Environmental Research Consultancy Department, May 2001) available at http://www.caa.co.uk/docs/68/Noise_London.pdf (visited 19 August 2006).

⁴³ Franssen, Van Wiechen, Nagelkerke and Leuret, “Aircraft Noise Around a Large International Airport and its Impact on General Health and Medication Use” (2004) 61 *Occupational and Environmental Medicine* 405. See also Muzet and Erhart, “Habituation of Heart-Rate and Finger Pulse Responses to Noise in Sleep” in Tobias *et al* ed.), *Noise as a Public Health Problem* (Rockville, Maryland, ASHA Report No.10, 1980).

⁴⁴ Babisch, “Epidemiological Studies of the Cardiovascular Effects of Occupational Noise – A Critical Aroach” (1998) 1 *Noise & Health* 24.

⁴⁵ WHO, *Guidelines for Community Noise*, 1999.

(06–22) can increase ischaemic heart disease, though other factors must be taken into account, such as the length of exposure and window-opening habits⁴⁶. Gastrointestinal motility may also be elevated. Noise can increase fatigue, which has a negative impact on productivity, absenteeism and accidents in the workplace⁴⁷. The AAP has concluded that exposure to excessive noise during pregnancy can result in the loss of high-frequency hearing in newborn infants and “may be associated with prematurity and intrauterine growth retardation”.⁴⁸ A study by Ando found that increased rates of birth weights of <3kilogrammes occurred where mothers were exposed to increasing levels of noise from jet aircraft.⁴⁹

(ii) *Psychological Effects*⁵⁰

*Mental Health*⁵¹

While there is no evidence to suggest that noise can directly cause mental illness, it can exacerbate a latent mental-health problem. The WHO has listed the symptoms of noise-induced mental states, including “anxiety; emotional stress; nervous complaints; nausea; headaches; instability; argumentativeness; sexual impotency; changes in mood; increase in social conflicts”⁵². While an early study showed a link between aircraft noise and mental-hospital admissions⁵³, methodological flaws in it mar its reliability⁵⁴. A later study seemingly confirming the original findings was made⁵⁵ but the results could not be duplicated⁵⁶. There is a great deal of academic debate in the area but there is nothing to confirm conclusively such a link.⁵⁷

⁴⁶ WHO, *Guidelines for Community Noise*, 1999.

⁴⁷ Kjellberg, Muhr and Sköldström, “Fatigue After Work in Noise” (1998) 1 *Noise and Health* 47-55.

⁴⁸ American Academy of Pediatrics, “Noise: A Hazard to the Fetus and Newborn” (1997) 100(4) *Committee on Environmental Health Pediatrics* 724, available at <http://aaolicy.aapublications.org/cgi/reprint/pediatrics;100/4/724.pdf> (visited 19 August 2006).

⁴⁹ Ando, “Effects of Daily Noise on Fetuses and Cerebral Hemisphere Specialization in Children” (1988) 127 *Journal of Sound and Vibration* 411.

⁵⁰ See Jansen and Gres, “Non Auditory Effects of Noise: Physiological and Psychological Effects” in Sáenz and Stephens, *op. cit.*, at .285.

⁵¹ See Stansfield, *Noise, Noise Sensitivity and Psychiatric Disorder: Epidemiological and Psychophysiological Studies* Psychological Medicine. Monograph Su. (CCUP, 1992).

⁵² WHO, *Guidelines for Community Noise*, 1999.

⁵³ Abey-Wickrama, A’Brook, Gattoni and Herridge, “Mental Hospital Admissions and Aircraft Noise” (1969) 633 *Lancet* 1275-1277.

⁵⁴ Chowns, “Mental Hospital Admissions and Aircraft Noise”, (1970) *Lancet* 1467.

⁵⁵ Jenkins, Tarnopolsky, Hand and Barker, “Comparison of Three Studies of Aircraft Noise and Psychiatric Hospital Admissions Conducted in the same Area” (1979) 9 *Psychological Medicine* 681.

⁵⁶ Jenkins, Tarnopolsky and Hand, “Psychiatric Admissions and Aircraft Noise from London Airport” (1981) 11 *Psychological Medicine* 765.

⁵⁷ Kryter, “Aircraft Noise and Social Factors in Psychiatric Hospital Admission Rates: a re-examination of some data” (1990) 20 *Psychological Medicine* 395-411.

*Stress and Annoyance*⁵⁸

The WHO defines annoyance as “a feeling of displeasure evoked by noise”. Notwithstanding the difficulty in assessing annoyance, outdoor noise levels rising above *L*Aeq 65 dB(A) cause considerable annoyance⁵⁹. Research has shown that aircraft noise is more annoying than road-traffic noise even where the *L*dn dB(A) (day-night equivalent noise level) was less than that of road traffic⁶⁰. The Parkman analysis of 2004 asserts that those living between 63 dB(A) and 57dB(A) are aware but not significantly annoyed by aircraft noise⁶¹. The Committee on the Problem of Noise in 1963 found that at noise levels of 57 dB(A) (35NNI), 35% of people were annoyed due to the interference with other sounds, 25% were kept from sleeping and 46% were woken up by noise at that level⁶². The EIS on the Northern Parallel Runway assessed annoyance at three levels: low annoyance (57 dB), moderate annoyance (63 dB) and high annoyance at (69 dB).⁶³ The German Federal Environmental Agency (FEA) concluded that aircraft noise levels of 55 dB(A) during the day and 45 dB(A) at night reach the limits of ‘considerable annoyance’⁶⁴. In its report, the FEA found that 35% of people were “significantly annoyed” by aircraft noise over 60 dB (*Leq*). This rose to 85% of people surveyed at 65 dB (*Leq*), with over 30% “unbearably annoyed”⁶⁵. Annoyance levels are increased where the noise interferes with communication or television⁶⁶. There is an argument that this is because of the sensitivity of individuals tested and not because of the level of exposure. However, research conducted by Van Kamp *et al* on the subject comes to a different conclusion:

⁵⁸ See Bjorkman, Ahrlin and Rylander, “Aircraft Noise Annoyance and Average vs Maximum Noise Levels” (1992) 47(5) *Archives of Environmental Health* 326 and Bronzaft, Ahern, McGinn, O’Connor and Savino, “Aircraft Noise: A Potential Health Hazard” (1998) 30 *Environment and Behaviour* 101.

⁵⁹ Nelson ed., “Summary Effects of Noise on Man” in *Transportation Noise Reference Book* (Butterworths, 1987).

⁶⁰ *Report of the Noise Review Working Party* (DOE, HMSO, London, 1990) and Hall, Birnie, Taylor and Palmer, “Direct Comparison of Community Reaction to Road Traffic Noise and to Aircraft Noise” (1981) 70 *Journal of the Acoustical Society of America* 1690.

⁶¹ See the Fingal County Council, *South Fingal Planning Study, Final Report* (Sept. 2004), para. 8.1.4.

⁶² Findings cited by Burns, *op. cit.*, at 314.

⁶³ See the Draft Dublin Airport Masterplan: Strategic Environmental Assessment, Figure 6.6 at 55 for the 2003 Parkman noise annoyance contour map.

⁶⁴ Federal Environmental Agency, *Fluglärmwirkungen* (Effects of Aircraft Noise), (FEA, 2001) available for download at <http://www.umweltbundesamt.de/uba-info-daten/daten/fluglaerm.htm> (visited on 19 August 2006).

⁶⁵ *Ibid.*

⁶⁶ Gunn, Shigehisa and Shepherd “Annoyance responses to Spectrally Modified Recorded Aircraft Noise during Television Viewing” (1977) 17 *Journal of Auditory Research* 241-249.

The results of analysis support the hypothesis that noise sensitivity increases annoyance independently from, and above, level of noise exposure, after adjustment for relevant confounders. It can be concluded that noise and sensitivity are important and independent predictors of annoyance in all three studies across a range of cultures and climates...These findings were consistent across three studies, broadly suggesting that neither the cultural differences nor the different measures involved in these studies influenced the observed role of sensitivity.⁶⁷

Annoyance can also be caused in outdoor recreational areas from aircraft noise⁶⁸ though a number of variables must be taken into account in assessing the impact, such as strength and duration of exposure. This will be of particular significance to users of golf courses, playgrounds and parks in the area surrounding Dublin Airport. Forest Little golf course, for instance, will lie within the 69 dB contour and is situated just north of the proposed runway.

(b) Economic Costs

There are two primary economic costs to aircraft noise: the diminution in land values surrounding airports as a consequence of the additional noise pollution and the cost to the national health system of those suffering from chronic aircraft noise exposure. In the US, an estimated 600,000 homes are affected severely by aircraft noise⁶⁹. In Greensboro, for example, the average tax reduction in the tax value of homes in multiple flight paths compared to those in single flight paths is \$2,140.53 per house.⁷⁰ Balanced against these are the economic returns from a high level of air transport

economy⁷³. However, Lief submits that this cost-benefit analysis is misplaced where Lockean rights theory is concerned⁷⁴.

(c) *Social Capital*⁷⁵

Social capital can be eroded where people are compelled to relocate owing to aircraft noise, such as the applicants in the *Hatton v. UK* case, and the development and growth of social capital in the areas worst affected by aircraft noise can be impeded. As Lief observes:

[W]hen residential noise causes people to move, it can create a transient atmosphere that decreases the value of an entire neighbourhood.⁷⁶

On the other hand, anecdotal evidence exists of residents in America choosing to remain in areas of high aircraft noise where high social capital does exist.⁷⁷ So while aircraft noise may reduce social capital, areas with high levels of social capital may be able to encourage people to remain notwithstanding the noise.

(d) *Education and Communications*

Noise interferes with the effectiveness and intelligibility of speech.⁷⁸ This can in itself lead to a number of stress reactions.⁷⁹ It can be particularly detrimental to children.⁸⁰ Wachs, Uzgiris and Hunt's 1971 study of 102 infants from 7-22 months found that noise levels impacted negatively on the development of speech and language.⁸¹ Exposure to traffic noise negatively affected speech discrimination and reading skills of children.⁸² Such results have been confirmed in relation to aircraft noise by a more

⁷³ Air Transport Association, "Annual Revenue and Earnings" available at <http://www.airlines.org/econ/d.aspx?nid=1034> (visited 19 August 2006).

⁷⁴ Lief, "Insuring Domestic Tranquility with through Quieter Products: A Proposed Product Nuisance Tort" (1994-1995) 16 *Cardozo Law Review* 595 at 604.

⁷⁵ See Wall, "Social Capital: To What Extent Can it be a Means to Achieve Sustainable Development in Planning and Development?" [2004] 7 *Trinity College Law Review* 80.

⁷⁶ Note: See Lief, *loc. cit.*, at 603.

⁷⁷ Campbell, "Airport Noise: Aggravation and Acclimation" (1975) *Psychology Today* 118.

⁷⁸ See Webster, "Speech Interference Aspects of Noise" in Lipscomb ed., *op. cit.*, at 193 and Tarnóczy, "Noise Interference with Oral Communication" in Sáenz and Stephens eds., *op. cit.*, at 249.

⁷⁹ Lazarus, "Noise and Communication: The Present State" in Carter and Job (eds.), *Noise as a Public Health Problem*, (Noise Effects 1998, PTY Ltd., Sydney, 1998) volume 1 at 157-162.

⁸⁰ Mills, *loc. cit.*, at 233.

⁸¹ "Cognitive Development in Infants of Differential Age Levels and from Different Backgrounds" (1971) 17 *Merrill-Palmer Quarterly of Behaviour and Development* 288, findings cited by Mills, *loc. cit.*, at 234.

⁸² Cohen, Glass and Singer, "Apartment Noise, Auditory Discrimination and Reading Ability in Children" (1973) 9 *Journal of Experimental and Social Psychology* at 407, findings cited by Mills, *loc. cit.*, at 234. See also Green, Pastenak and Shore, "Effects of Aircraft Noise on the Reading Ability of School-Age Children (1982) 1 *Archives of Environmental Health* 24.

recent study on children aged between 8 and 11 living around London (Heathrow) Airport subject to aircraft-noise exposure at levels of either (16:00 outdoor) $Leq > 66$ dB(A) or (16:00 outdoor) $Leq > 57$ dB(A). This study links chronic aircraft noise exposure to impaired reading comprehension, which “could not be accounted for by the mediating role of annoyance, confounding by social class, deprivation, main language or acute noise exposure”.⁸³ Noise impacts negatively on concentration, memory retention and problem solving skills. In Cohen’s study in 1988, schoolchildren exposed to aircraft noise in Los Angeles had difficulty in proofreading and engaging in puzzles.⁸⁴ House façades with closed windows reduce external noise by approximately 15 dB, so the ambient external sound level should be no greater than 55-60 dB(A).

Regulation of Aircraft Noise

*(a) The Role of the International Civil Aviation Authority*⁸⁵

This was established under the Convention for International Civil Aviation 1944 (the Chicago Convention) in 1947.⁸⁶ ICAO has issued a number of resolutions governing the international regulation of permissible aircraft noise levels. At the 33rd ICAO assembly, Resolution A33/7 was adopted, introducing the concept of a “balanced approach” to aircraft-noise management. The permissible levels of aeroplane noise are in Annex 16 of the Chicago Convention. Annex 16 originally set out three groups of aircraft – in chapters 1, 2 and 3⁸⁷. In June 2001, ICAO established more stringent standards for modern aeroplanes in Chapter 4 of the annex. Chapter 1 aircraft, such as the B 707 and DC-8, are the noisiest; they have been banned. Chapter 2 aircraft (e.g. Boeing 727, 737 and 747; DC-9 and DC-10) have been phased out in the EU and Canada and from 1st April, 2002 no longer operate at Community airports. All modern aircraft must meet Chapter 4 requirements. Chapter 3 aircraft are to be phased out over the next ten years. Annex 16⁸⁸ is brought into effect in the Irish Aviation Authority (Noise Certification and Limitation) Orders 1984 to 1999.⁸⁹

⁸³ Haines, Stansfield, Berglund, Job and Head, “Chronic Aircraft Noise Exposure, Stress Responses, Mental Health and Cognitive Performance in School Children” (2001) 31 *Psychological Medicine* 265.

⁸⁴ Cohen, Evans, Krantz and Stokols, “Psychological, Motivational, and Cognitive Effects of Aircraft Noise on Children” (1980) 35 *American Psychologist* 231

⁸⁵ See ICAO Secretariat, “Aircraft Noise: ICAO’s Existing Policies” (Proceedings of the Colloquium on Environmental Aspects of Aviation, Montreal 9-11 April 2001).

⁸⁶ See De Murias, *The Economic Regulation of International Air Transport*, (McFarland and Co. Inc., 1989) 44 -51.

⁸⁷ The Federal Aviation Regulations (FAR) of the US use the term ‘stage’ in place of ‘chapter’.

⁸⁸ ICAO Volume 1, third edition, 1993.

⁸⁹ The Air Navigation (Noise Certification and Limitation) Order 1984 (SI No.13 of 1984) as amended by Irish Aviation Authority (Noise Certification and Limitation) (Amendment) Order

(b) *The Role of the EU*⁹⁰

The EU has a number of directives governing the noise levels of subsonic jet aircraft. These adopt the standards set down by ICAO and apply them internally, as in Council Directive 92/14/EEC⁹¹. The most recent measure, Directive 2002/30/EC, aims “to lay down rules for the community to facilitate the introduction of operating restrictions to limit or reduce the number of people significantly affected by the harmful effects of noise”. It incorporates the ‘balanced approach’ to noise management within Community law⁹².

This is defined in Article 2(g) as “an approach under which Member States shall consider the available measures to address the noise problem at an airport in their territory, namely the foreseeable effect of a reduction of aircraft noise at source, land-use planning and management, noise abatement operational procedures and operating restrictions”.

Directive 2002/30 has been implemented in Ireland.⁹³ It defines marginally compliant aircraft (MCA) as those which meet the standards of chapter 3. Under article 6, rules are set down aimed at the withdrawal of MCA where the assessment of all available measures so require. Operators may then be required to reduce the movements of MCA at an annual rate of not more than 20% of the initial total of movements. Noise-sensitive city airports⁹⁴ are free to impose stricter noise standards than are prescribed by the directive⁹⁵, though the aircraft of developing nations can be exempt for up to ten years⁹⁶. The directive introduces the American problem into EU airspace, whereby individual noise-sensitive airports can impose separate regulations, increasing the difficulties of airline operators. Krämer suggests that such airports are unlikely to introduce such regulations if the operators threaten to give their custom to another airport⁹⁷.

Another directive of interest in this area is Directive 2002/49 EC of June 25, 2002⁹⁸ as brought into law in the Environmental Noise

1999 (SI No.421 of 1999)

⁹⁰ See Davies and Goh, “EC Law on Aircraft Noise: Recent Developments” [1993] 2 *European Environmental Law Review* 229; Goh, “Problems of Transnational Regulation: A Case Study of Aircraft Noise Regulation in the European Community” (1995) 23 *Transportation Law Journal* 277; Scannell, *Environmental and Land Use Law* (Thomson Round Hall, 2005) at 895 and Ercmann, “Pollution Control in the European Community”, (Kluwer Law International, 1996).

⁹¹ As amended. Brought into effect in Ireland in the European Communities (Restrictions of Civil Subsonic Jet Aeroplane Operations) Regulations 2003

⁹² See article 4.

⁹³ SI No. 645 of 2003.

⁹⁴ Berlin-Tempelhof, Stockholm Bromma, London City and Belfast City airports.

⁹⁵ See article 6(2).

⁹⁶ Article 8.

⁹⁷ *Ibid.*

⁹⁸ OJ L 189, 18/07/2002 P 0012-0026.

Regulations 2006.⁹⁹ This requires Member States to conduct strategic noise mapping¹⁰⁰ showing, *inter alia*, major airports, which can enable a global assessment of noise exposure. This mapping must be reviewed and revised, if necessary, every five years and must comply with the requirements set down in annex VI of the directive. These procedures are voluntary in the US.¹⁰¹ Action plans must also be drawn up for major airports and both this and the noise maps are to be forwarded to the Commission. Proposals have also been made for a new directive to establish a framework for noise classification of civil subsonic aircraft in order to calculate noise charges.¹⁰²

(c) The Role of National Law

Irish national law has incorporated Annex 16 and most of the relevant EU directives. However, environmental and planning areas of law also have an impact on airports. Appropriate zoning and application of the Planning and Development Act 2000 (PDA 2000) can reduce the number of houses subject to high levels of aircraft-noise exposure. So, for instance, under the Development Plan 2005-2011, the FCC's objectives for Dublin Airport include the promotion of appropriate land-use patterns in the vicinity of the flight paths serving the airport, but at the same time to realise the optimal use of lands around the airport. Possible land uses around airports include uses as warehouses and as cemeteries. The latter has been done at Dardistown, on the old airport road, where Veronica Guerin was buried. The low-lying nature of installations on the land does not pose a risk to approaching aircraft, and there are no complaints about the noise. The Council plans to create a designated airport area and to zone lands in that area for uses integral and ancillary to the airport as such. One of the objectives of the plan is "to restrict residential development in areas likely to be affected by levels of aircraft noise inappropriate to residential use".¹⁰³

Under s34(2)(a)(i) of the PDA 2000, the planning authority must have regard to the provisions of the Development Plan and the emission of any noise and vibration from any site comprised in the proposed development which might give reasonable cause for annoyance either to persons in any premises in the neighbourhood or any persons lawfully using a public place in the neighbourhood¹⁰⁴ in considering the grant of planning permission. "To have regard to" means that the planning authority and An Bord

⁹⁹ SI 140 of 2006.

¹⁰⁰ This is "the presentation of data on an existing or predicted noise situation in terms of a noise indicator, indicating breaches of any relevant limit value in force, the number of people affected in a certain area, or the number of dwellings exposed to certain values of a noise indicator in a certain area". (Art. 3(1) Environmental Noise Regulations 2006 S.I. 140 of 2006).

¹⁰¹ Part 150 Federal Aviation Regulations.

¹⁰² COM (2001) 74 OJ C103 E of 30.04.2002. See also the European Commission, *Green Paper on Future Noise Policy* (COM 96 540).

¹⁰³ Objective TO 20, p.106.

¹⁰⁴ Section 34(2)(a)(v) and 34(4)(c)(i) of the PDA 2000.

Pleanála on appeal are obliged to inform themselves fully of and give reasonable consideration to the issues above.¹⁰⁵

Conditions can be attached to the grant of planning permission to reduce or prevent the emission of noise and vibration under s. 34(4(i)). Under section 9, schedule 4 of the Act, no compensation is payable where the planning authority/An Bord Pleanála gives as a reason for the refusal of planning permission that the proposed development would cause serious noise pollution or vibration, that the proposed development is in an area where it is necessary to limit the risk of there being any serious danger to human health in the environment, or that the proposed development would materially contravene an objective of the Development Plan.

While the EPA has jurisdiction under the Environmental Protection Acts 1992-2003 to consider the impact of noise in an area, aircraft noise is specifically excluded under the noise nuisance provisions in section 108 of the 1992 Act.¹⁰⁶ Aircraft noise is also specifically exempted under the EPA (Noise) Regulations 1994.¹⁰⁷ However, this is not the case in Norway, where aircraft noise is not explicitly excluded from the operation of s.2 of the Neighbour Act 1961/Naboloven 1961.¹⁰⁸ Thus, it may give rise to compensation where it is ‘unreasonable or unnecessary’, and awards of compensation have been made in relation to noise created by the operation of military aircraft.¹⁰⁹ In Ireland, complaints regarding noise should be made directly to the Irish Aviation Authority. In 2004, two aircraft noise complaints were received by the FCC from the Balbriggan Swords Area, the same as 2003, a reduction from three in 2002.¹¹⁰

(d) *The Role of National Aviation Authorities*

In Ireland, the Irish Civil Aviation Authority, as established under the Irish Aviation Authority Act 1993¹¹¹, is responsible for testing and issuing aircraft-worthiness¹¹² and air-operator certificates.¹¹³ One of the objects of the IAA is “to undertake research and development respecting the

¹⁰⁵ *McEvoy v. Meath County Council* [2003] 1 ILRM 431; *Griffin v. Galway City and County Manager*, Unreported, High Court, 31 October 1990, Blayney J. See Simons, *Planning and Development Law* (Thomson Round Hall, 2003) at 8.

¹⁰⁶ See Scannell, *op. cit.*, at 884 -5.

¹⁰⁷ Environmental Protection Agency Act 1992 (Noise) Regulations 1994 (SI 179 of 1994).

¹⁰⁸ LOV 1961-06-16 nr 15: Lov om rettshøve mellom grannar (grannelova). My thanks to Ms. Asbjørg Selvli for her assistance in researching Norwegian law.

¹⁰⁹ See the *Bardufoss Case* (1965) 3 *Arkiv for Luftrett* No.1. But see also the *Rygge Cases* (based on the 1887 Neighbour Act) where the aircraft noise was found to be within toleration: (1960) *Norsk Retstidende* 62 and (1961) 1 *Arkiv for Luftrett* 343. See Lødrup, P., “Decisions on National Laws: Aircraft Noise” in [1965] *Yearbook of Air and Space Law* 325.

¹¹⁰ Fingal County Council, Minutes for 14th April 2004, Balbriggan Swords Area, “Noise Complaints Received in 2002/2003/2004 and 2005”, BSA/131/05, <http://www.fingalcoco.ie/minutes/2005/BSA/0414/BSA20050131.htm> (visited 19 August 2006)

¹¹¹ No.29 of 1993, as amended.

¹¹² Irish Aviation Authority (Airworthiness of Aircraft) Orders 1997 to 2003.

¹¹³ Irish Aviation Authority (Air Operator Certificates) Order 1999 (SI no. 420 of 1999)

environment”.¹¹⁴ It has the power to order that any of the provisions of the Annex 16 to the Chicago Convention, whether or not those provisions are limited to aircraft of any special description or engaged in any special kind of navigation, apply to any aircraft in or over the State. The IAA is a competent authority to enforce the balanced approach.

Resolving the Problem of Aircraft Noise¹¹⁵

Proactive

(a) Improved Technology and Design

As technology advances and aeroplane design improves, the noise levels of such crafts are significantly reduced. Improved fan design and jet nozzles, increased nacelle lining, modifications to the trailing flap outboard edge, alterations to the landing gears, scooped inlets and winglets (which reduce noise by 0.5-0.7 EPNdB at cutback) have contributed to a reduction of engine noise.¹¹⁶ However, Adams and McManus suggest that “a stage is being reached where the scope for further noise reduction, by improved engine design, is decreasing”¹¹⁷. At present, older craft just meet the noise threshold requirements set down by ICAO in Chapter 3, and only after the engines have been refitted with hush kits¹¹⁸. It is because such craft still meet ICAO guidelines that led to the hush kits dispute between the EU and the US (examined below), which is illustrative of the difficulties attendant with the legal regulation of different generation planes. Flight operations can also reduce noise at airports, such as use of thrust cutback on take-off, two-segment approaches to landing and noise preferential routes¹¹⁹ (environmental noise corridors)¹²⁰. Curfews or other restrictions on night-time movements limit the impact on the sleep patterns of those living near

¹¹⁴ PII, section 14, Irish Aviation Act 1993.

¹¹⁵ Harper, “Regulation of Aircraft Noise at Major Airports: Past, Present and Future (1988) 17 *Transportation Law Journal* 117.

¹¹⁶ See Porter and Rhodes, *Aircraft Noise in London: Past, Present and Future*, Environmental Research Consultancy Department, May 2001 available at http://www.caa.co.uk/docs/68/Noise_London.pdf (visited 19 August 2006).

¹¹⁷ *Ibid.*

¹¹⁸ These are devices that are fitted into jet engines that reduce the noise level.

¹¹⁹ See Powers, *loc. cit.*, at 353-355 and Adams and McManus, *op. cit.*, at 120-121.

¹²⁰ These corridors “define the airspace in the runway approaches or departure where most aircraft are required to operate... and extend in a straight line from the end of each runway out to distances ranging from five or six nautical miles depending on the runway”. See “Aircraft Disturbance Complaints Procedure” in (2006) 2 *Your Airport* 4 http://www.dublinairport.com/images/your_airport_issue2a.pdf (visited 22 August 2006). However not all aircraft are required to fly within the corridor.

airports.¹²¹ The construction of parallel runways, rather than perpendicular or cross-secting runways can also reduce the size of the affected area.

*The Hush-Kits Saga*¹²²

On the 29th April 2001, the Council of Ministers passed the controversial 'Hushkits Regulation' that set out higher and stricter standards for aeroplanes that were modified to comply with Chapter 3 standards.¹²³ Such craft were effectively to be denied access to European airspace owing to their noise levels. The higher standards were prescribed solely by reference to the bypass ratios¹²⁴ of the planes and made no reference to airframe-noise levels. The regulation was a response to the failure to reach agreement within ICAO at that time on the updating of the standards in Annex 16, due in part to the resistance by the US. It would have a profound effect on US carriers, with many Chapter 3 aircraft, e.g. the B747, operating on transatlantic routes.

The US alleged that it would cost some \$2.3billion to comply with the measure. It would also impact negatively on less developed countries still using Chapter 3 aeroplanes. The US filed a complaint with ICAO under article 84 of the Chicago Convention 1944. The regulation was also directly challenged by Irish company Omega Air and the Irish Aviation Authority before the Courts of the EC¹²⁵. Shortly after the court of first instance agreed to send forward the challenge on two out of the five grounds of challenge, the regulation was repealed by Directive 2002/30 in the wake of US pressure following the attacks on the World Trade Center¹²⁶. The new directive still lowers the noise thresholds for Chapter 3 aeroplanes but it will take up to ten years to operate to some aircraft, by which time most of the existing Chapter 3 aeroplanes will have exhausted their 25-year lifespan or will be close to doing so.

¹²¹ Some of the quota systems adopted by relevant State authorities to this end have in themselves been challenged. In, for example, *R. v. Secretary of State for Transport Ex p. Richmond upon Thames LBC (No.2)* [1994] 1 WLR 74; [1995] Env. L. R. 390, a challenge to an altered schedule increasing new night-time noise restrictions by the local borough council was successful on the basis that the consultation exercise had been misleading.

¹²² See Claes, "Aircraft Noise Regulation in the European Union: The Hushkit Problem" (2000) 65 *J. Air Law and Com.* 329 and Brown, Comment: "The ICAO is the Aropriate Jurisdiction to Settle Hushkit Dispute Between the United States and the European Union (2002) 20(2) *Penn State International Law Review* 465.

¹²³ Regulation 925/1999 on the registration and operation within the Community of certain types of civil subsonic jet aircraft which have been modified and recertified as meeting the standards of volume 1, part II, chapter 3 of Annex 16 (the Hushkits Regulation)

¹²⁴ The ratio of the volume of air entering the jet engine that bypasses the combustion chamber to the volume that goes through it.

¹²⁵ *The Queen v. Secretary of State for the Environment, ex parte: Omega Air Ltd and Omega Air Ltd., Aero Engines Ireland Ltd., Omega Aviation Services Ltd. v. Irish Aviation Authority* Joined Cases C-27/100 and C-122/100, Judgment of the Court 12 March 2002.

¹²⁶ Directive 2002/30/EC of 26 March 2002 [OJ L 85 of 28.03.2002].

The new directive has been criticised for failing to ensure harmonious regulation at all airports in the Union¹²⁷

As far back as 1978, it was envisaged that proper planning would reduce the impact of air-traffic noise at future airports¹³³. Both zoning and noise-abatement procedures are required as part of “the balanced approach”. Under s. 14 of the Air Navigation and Transport Act 1950, the Minister for Transport can restrict the use of land in the vicinity of an aerodrome to prevent interference with aircraft navigation by declaring a particular area to be a protected area. Persons with interest in land who are subsequently denied a permit to build or granted a permit subject to onerous conditions can seek compensation¹³⁴. Such protected areas exist around the vicinity of Dublin Airport¹³⁵, Shannon Airport¹³⁶ and Connaught Regional Aerodrome¹³⁷.

It is unlikely that s.14 would be found unconstitutional. In *Liddy v. The Minister for Public Enterprise*¹³⁸, Finnegan P held that the objective of limiting development for the safety of aircraft or their safe or sufficient navigation was based on the common good and was an appropriate matter to be balanced against constitutional property rights. There was no infringement there where a developer had been refused planning permission for land zoned residential because it fell within a red zone, within which residential development is prohibited. While the objective behind these provisions is clearly not to protect the hearing of the land user, the limitation on land use can operate to restrict the aircraft-noise exposure of people within the protected area.

It is also unlikely that s.14 is contrary to Art.6 of the ECHR. In *Matos e Silva, Ltd. and Others v. Portugal*,¹³⁹ the Court accepted the legitimacy of measures pursued through town and country planning for a public purpose (in this case, to protect the environment) as justifying restrictions on property rights. Nor is it likely that it is contrary to Art1 of the first protocol given the provision for compensation.

In Denmark, the Danish Environmental Protection Agency establishes zones according to noise levels with 55 dB(A) (DENL) being the maximum for residential areas¹⁴⁰. In France, similar zoning restrictions apply, limiting residential development according to four different noise bands, measured by the *indice psophique* (IP)¹⁴¹. Residential development in areas where aircraft noise levels exceed 75 dB(A) is not permitted in

¹³³ Jensen, *Supra*, p.246.

¹³⁴ But not if denied planning permission by a planning authority or An Bord Pleanála: section 10(e) schedule 4 of the Planning and Development Act 2000, no compensation is payable.

¹³⁵ Air Navigation (Protection Area) Order 1988.

¹³⁶ Air Navigation (Protected Area) Order 1993.

¹³⁷ Air Navigation (Protection Area) Order 1989.

¹³⁸ [2003] ITLR 10.3.2003. See Menzies, “Major Accident Hazards and Land-Use Planning” (2003) 10(4) *IPELJ* 128, available at <http://www.arup.ie/publications/IPELJArticle.pdf> at .11-12 (visited 19 August 2006).

¹³⁹ 1996-IV ECHR, Judgment of 16 September 1996; (1997) 24 EHRR 573.

¹⁴⁰ See Law No. 388 of 6th June 1991. Copenhagen International Airport exceeds these limits.

¹⁴¹ Noise Abatement Law of 31 December 1992.

Germany, though it is permissible at 67 dB(A) where adequate measures are taken for the provision of soundproofing. Housing around airports in the Netherlands is permitted in areas not exceeding 45 Kosten Units (Ke). In the US, land zoning and land banking¹⁴² are also used to restrict residential development on land and exposure to aircraft noise¹⁴³. Noise zones have also been established by Fingal County Council around Dublin Airport. In Ireland, the Parkman analysis¹⁴⁴ recommended that no new residential development be permitted within the 63 dB(A) contour. Under FCC's Development Plan 2005-2011, an outer zone (restricted development permitted) and inner noise zone (resisting new residential development)¹⁴⁵ are established. These zones will be subject to ongoing review in light of EU Directive 2002/49 on environmental-noise assessment and management¹⁴⁶.

Retroactive

(a) Constitutional Rights

(i) The Right to Property¹⁴⁷

The original common law position with regard to the ownership of airspace over land was summed up by the maxim *cujus est solum, ejus est usque ad coelum*, 'whosoever has the soil, also owns to the heavens above and to the centre beneath',¹⁴⁸ a position shared by the Roman law concept of vertical property.¹⁴⁹ As observed by Seare *et al.*:

The principle derived undoubtedly from a circumstance, or, rather from the absence of a circumstance, the possibility of the utilisation of space.¹⁵⁰

¹⁴² In *Griggs v. Allegheny County* 369 US 84, 82 S Ct 531.

¹⁴³ Creswell, "Airport Policy in the United States: The Need for Accountability, Planning and Leadership" (1990) 19 *Transp. L.J.* 1.

¹⁴⁴ Parkman Consultants, Study of Dublin Airport Noise Contours, Aer Rianta, Dublin, 2004.

¹⁴⁵ DAP11, Development Plan, p45.

¹⁴⁶ Development Plan 2005-2011, DAO8, p.45.

¹⁴⁷ See *Central Dublin Development Association v. AG* (1975) 109 ILTR 69 and Hogan and Whyte, *J.M. Kelly: The Irish Constitution* (4th ed., Butterworths, 2003) at 1969-2028; Forde, *Constitutional Law*, (2nd ed., First Law, 2004) at 727-764 and Casey, *Constitutional Law in Ireland*, (3rd ed., Round Hall Sweet and Maxwell, 2000) at 662-684.

¹⁴⁸ As first alied in *Bury v Pope* Cro. Eliz 118, 78 Eng Rep. 375 (Ex. 1587). See Blackstone's *Commentaries on the Laws of England*, Chapter 2 and 19; Cahoon, "Low Altitude Airspace: A Property Rights No-Man's Land" (1990) *Journal of Air Law & Commerce* 157 at 161. *But see People of Colorado v Emmert* 597 P.2d 1025 (1979).

¹⁴⁹ On the origin of the maxim, see Klein, "Cujus Est Ejus Est... Quousque Tandem?" (1959) 26 *Journal of Air Law & Commerce* 237 and Wright, *The Law of Airspace*, (Bobbs-Merill Co. Inc., 1968), chapter 2, and 11-30.

¹⁵⁰ Seara Vásquez, Modesto (Translated by Malley, Elaine), *Cosmic International Law*, (Wayne State University Press, 1965) at 28.

With the emergence of the aviation industry, the principle was rightly rejected as having ‘no place in the modern world’¹⁵¹. However, this does not mean that a landowner is devoid of any interest in the superadjacent airspace above his or her land. In *United States v Causby*,¹⁵² the US Supreme Court assessed the balance to be struck between the government’s interest in the free use of airspace and the landowner’s interest in the use and enjoyment of his or her property and in doing so concluded that a landowner has a reasonable, although not absolute, interest in his/her superadjacent airspace.

[The] use of land presupposes the use of some of the airspace above it otherwise no home could be built, no tree planted, no fence constructed, no chimney erected...¹⁵³

In that case, the noise of heavy bombers and small fighter planes from a nearby military airbase overflying the plaintiff’s property caused the plaintiff’s chickens to panic and fly into the wall of their coups. At the time of the action, the plaintiff had lost approximately 150 chickens and the land could no longer be used for chicken farming. The Court also found that the owner’s rest at night had been disturbed. The plaintiff claimed that the overflights amounted to the taking of an easement under the Fifth Amendment. The Court rejected outright the application of the *usque ad coelum* rule as it held that navigable airspace had been placed in the public domain by Congress. Private claims to airspace would seriously interfere with control and development of air routes. The guide, for determining where the limit of that public domain lay, was the minimum altitude for safe flight, which then stood at 500 feet¹⁵⁴. However, the Government conceded that where overflights rendered property uninhabitable, a taking would have occurred. In any case, the overflights in the case had been below 500 feet. The Court held:

¹⁵¹ *US v Causby* 328 US 256 (1946) at 260.

¹⁵² (1946) 328 US 256. *See also Griggs v. Allegheny County* 369 US 84 (1962); *Matson v. US* 171 F. Su 283 (Ct Cl 1959); *Aaron v. US* 311 F. 2d 798 (Ct Cl 1963); *A.J. Hodges Indus. Inc. v. US* 355 F.2d 592 (Ct Cl 1966); *Lacey v. US* 595 F 2d 614 (Ct Cl 1979) and Falzone, *Supra*, p.778.

¹⁵³ *Ibid* at 264.

¹⁵⁴ *See* Rule 3 Irish Aviation Authority (Rules of the Air) Order 2004 (SI 72 of 2004), which provides that aircraft are not to be flown at altitudes of less than 450m/1,500feet above ground or water and not less than 300m/1,000feet above the highest obstacle within a 600m radius of the aircraft over congested areas, towns or cities and also Art. 37., Operators of commercial transport aircraft must comply with the applicable joint aviation requirements in respect of minimum flight altitude for any flight: Art.24 Irish Aviation Authority (Operations) Order 2006, SI 61 of 2006.

Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference¹⁵⁵ with the enjoyment and use of the land.¹⁵⁶

It accepted that low overflights amounting to continuous invasions of the superadjacent airspace could affect the use of the surface. The character of this invasion and not the amount of the resulting damage, providing the damage was substantial, was the definitive factor in determining whether a taking had occurred. Here, the plaintiff had shown a diminution in the value of his property caused by the overflights. This constituted a servitude that amounted to the taking of an easement. The comment of the Court above and its subsequent comments in *Griggs v Allegheny County*¹⁵⁷ have been interpreted as setting out the four requirements to determine whether an overflight taking has occurred, viz:

1. a flight directly over the claimant's land;
2. flights which were low and frequent;
3. the flights directly and immediately interfered with the claimant's use and enjoyment of land and
4. the interference with the use and enjoyment of land was substantial¹⁵⁸

Thus two overflights a day will not be sufficient¹⁵⁹. The test is applied in the second stage of a takings claim. That is, in determining whether the government's action constitutes a taking, the claimant must still show a compensable property right under the Fifth Amendment.¹⁶⁰ The Federal Aviation Act 1958 expanded the limits of navigable airspace to flights below the 500-foot level where necessary for take-off and landing, and this was subsequently examined in *Griggs* where the Court held that the path of the glide or flight for landing or taking off was not the downward reach of the 'navigable airspace'. The limit remained the minimum altitude of safe flight as had been included in Congress's definition of airspace. The 500-foot limit was originally construed as a bright-line rule, with the Court in *Aaron*¹⁶¹ stating that claims for Fifth Amendment takings by federal

¹⁵⁵ See *Speir v. US* 485 F 2d 643 (1973) and *Adaman Mutual Water Co. et al v. United States* (1958) (US Ct Claims; 143 Ct Cl 921, 181 F Su 658).

¹⁵⁶ *United States v. Causby* (1946) 328 US 256, p.264.

¹⁵⁷ 369 US 84 (1962).

¹⁵⁸ See King, "The Fifth Amendment Takings Implications of Air Force Aircraft Overflights and the Air Installation Compatible Use Programme" (1997) 43 *Air Force Law Rev* 197, at 206. See *Brown v. US* 73 F 3d 1100 (Fed Cir, 1996); *Alevizos v. Metropolitan Airports Commission* [Alevizos I], Minn. 1974 298 Minn. 471, 216 NW 2d 651 and *Jensen v. US* 305 F 2d 444 (Ct Cl 1962) (700 flights per day was sufficient)

¹⁵⁹ *Aaron v. US* 311 F 2d 798 (Ct Cl 3).

¹⁶⁰ *M&J Coal Co. v United States* 30 Fed Cl 360 (1994).

¹⁶¹ *Aaron v. US* 311 F 2d 798 (Ct Cl 3) at p.801.

government arising from aeroplane flights at 501 feet would be struck out¹⁶². But in *Branning v. US*¹⁶³ the Court held that a flight over 500 feet (independent of landing or taking off) could constitute a taking where it was “peculiarly burdensome”¹⁶⁴. Nonetheless, *Branning* did not reject *Aaron* outright and the opinion in the former carefully circumscribed it to its specific facts.

The US approach provides guidance in determining how Irish constitutional law could approach a property owner’s challenge to excessive aircraft noise where grounded in article 43.1.1°. Given the nature of the Irish incarnation of the right to property as a natural right, ‘antecedent to all positive law’, permitting the claims that meet the four requirements above would be preferable than an absolute exclusion of any such action in the name of the common good. However, no such case has yet been made and it remains to be seen if *Causby* will be followed. The acceptance of the minimum altitude of safe flight as the basic linear determinant for demonstrating an invasion is admittedly only one method of delineating the public domain of navigable airspace from private airspace, but a spatialist approach would be preferable in providing certainty in the application of the law. In addition, the *Branning* exception provides the courts with a degree of flexibility. But this approach is not without its flaws. Using property rights to eliminate noise nuisance from planes under the *Causby* approach is limited by the need for overflight. The violation of the right arises from the character of the invasion. Thus, noise and vibration from planes resulting in material damage where the noise source is adjacent to a plaintiff’s property will not ground a *Causby* action¹⁶⁵. Furthermore, in order to gain compensation, the plaintiff must show a compensable property right. The *Causby* approach is not adequate to deal fully with aircraft-noise nuisance.

(ii) *The Right to Peaceable Enjoyment of Property*

It is arguable that a case could be made that excess noise constitutes a violation of the right to the peaceable enjoyment of property¹⁶⁶. Such an approach overcomes some of the initial difficulties of the *Causby* approach. Compensation for infringement of this right does not require overflights. Noise may be adjacent, and the plaintiff need not be in a red zone. An exception to the *Causby* 500-foot rule was carved on this basis in *Thornburg v. Port of Portland*¹⁶⁷ and *Martin v. Port of Seattle*¹⁶⁸, where the

¹⁶² See King, *loc. cit.*, at 201-204.

¹⁶³ 654 F 2d 88 (Ct Cl 1981).

¹⁶⁴ See also *Argent v. US* 124 F 3d 1277 (Fed Cir 1997).

¹⁶⁵ *Batten v. US* 306 F 2d 580 (10th Cir, 1962); *Freeman v. US* 167 F Su 541 (WD Okla 1958); *Pope v. US* 173 F Su 36 (ND Tex 1959).

¹⁶⁶ For example: *Hero Lands Company v. United States* (1983) (US Ct Claims 554 F Su 1262). See also *Powell and Raynor v United Kingdom* (1990) 12 EHRR 345.

¹⁶⁷ 233 Or 178, 376 P.2d 100, 106 (Or. 1962)

Supreme Courts of Oregon and Washington respectively found that where the flights interfered with the practical enjoyment of land and where there is a diminution of the property value, an action by a property owner for compensation against the government entity responsible could succeed, even where the flight took place over 500 feet¹⁶⁹. This reasoning was justified by reference to *Causby* as the Courts found that altitude was only one method of determining the minimum level of safe flight. Given the impact of noise levels and the risks it posed for the safety of those on the ground, altitude alone could not govern the level of safe flight. This approach also recommends itself to Irish constitutional-law property rights.

(iii) *The Right to Bodily Integrity*¹⁷⁰

It is arguable that a case could be made where injury had resulted from aircraft noise and vibration, and causation could be shown, that the State or airport operator had violated the applicant's right to bodily integrity. In *Ryan v AG*¹⁷¹, O'Dalaigh C.J.:

The State has the duty of protecting the citizens from dangers to health in a manner not incompatible or inconsistent with the rights of those citizens as human persons.

The right has been "broadened... into a more general right not to have one's health endangered by the actions of the State."¹⁷² It has been ranked as second in priority to the right to life.¹⁷³ In accordance with the definition of health as provided by the WHO, it is clear that mental health is within the scope of the article. This appears supported by the case law dealing the treatment of prisoners. It has horizontal effect, opening up the possibility of individuals taking actions against non-State entities responsible for aircraft noise. The particular benefit of relying on such a right is that a plaintiff would not need to have and demonstrate the existence of any constitutionally cognisable property right in order to bring an action. But as the Court observed in *The State (C.) v Frawley*¹⁷⁴:

I see no reason why the principle [of bodily integrity] should not also operate to prevent an act or omission of the Executive which, *without justification*, would expose the health of the person to risk or danger.

¹⁶⁸ 64 Wash. 2d 309 (S Ct WA, 1964). See also *Jackson v. Metropolitan Knoxville Airport Authority*, Tenn., 1996 922 S W 2d 860.

¹⁶⁹ See Soenksen, *Supra*, at p.335.

¹⁷⁰ *Ryan v. AG* [1965] IR 294, *McGee v. Attorney General* [1973] IESC 2; [1974] IR 284.

¹⁷¹ [1965] IR 294.

¹⁷² Hogan and Whyte, *op. cit.*, at 1420, para.7.3.72.

¹⁷³ *Heaney v Dublin Corporation* SC, 17 August 1998 *per* O'Flaherty J.

¹⁷⁴ [1976] IR 365 at 372, emphasis added.

In the case of exposure to aircraft noise within tolerable limits, it is clear that the State does operate with justification, or at the very least, with good excuse.

(iv) Countervailing Considerations: The Common Good and Security of the State

No personal right is unlimited. Article 40.3.1° itself requires the State to defend and vindicate the personal rights of the citizen ‘as far as practicable’. Article 43.2.21° permits the State to “delimit by law the exercise of [property rights] with a view to reconciling their exercise with the exigencies of the common good”¹⁷⁵. The courts are disposed to give the Executive a wide margin in matters involving security and defence. It is likely that a case against excessive aircraft noise could succeed on peaceful enjoyment of property and on property rights in general. This is also the case for an action taken on the grounds of the right to the protection of one’s health. While the free navigation of the air is a valid public interest, meriting preservation, it does not justify imposing the financial cost of such preservation, in the diminution of property values due to excessive noise, consistently on landowners.

The aim behind a circumscription of rights may be justifiable but their absolute denial in the field of aeroplane noise does not appear to be proportionate to the aim. Some measure of compensation should be allowed to landowners where there is a diminution in land value owing to aircraft noise, where the practical enjoyment of land is interfered with unreasonably or where the *Causby* grounds are met. The creation of a statutory noise-insulation scheme, as exists in England, France and Denmark, for those most affected would appear to be a necessary counterbalancing measure. But it is highly unlikely that an injunction would be granted as the balance on convenience *prima facie* lies with the State in allowing the free navigation of its air space. Even in the US, where constitutional challenges do succeed injunctions are rare¹⁷⁶. However, compensation for a taking may be made.

(b) Tort Law: Nuisance¹⁷⁷ and Trespass

Section 55 of the Air Transport and Navigation Act 1936¹⁷⁸ provides that no actions can lie in respect of trespass or in respect of nuisance, by reason

¹⁷⁵ See also *Buckley v AG* [1950] IR 67; *Murray v. Ireland* [1991] ILRM 465.

¹⁷⁶ *Brooks v. Patterson* 159 Fla 263 (1947); *Loma Portal Civic Club v. American Airlines Inc.* 61 Cal. 2d 582; 394 P. 2d 548 (1964) and *Virginians for Dulles v. Volpe* 344 F Su 573 (ED Va 1972). But see the exception in *Anderson v. Souza* (1952) 38 Cal 2d 825, 243 P 2d 497.

¹⁷⁷ See *Hanrahan v. Merck Sharp and Dohme (Ireland) Ltd.* [1988] ILRM 629 and *Molumby v. Kearns* [1999] IEHC 86, *Baxter v. Harland and Wolff PLC* [1990] IRLR 516, McMahon and Binchy, *The Law of Torts*, (3rd ed., Butterworths, 2000) and Turner and Morrow, *Northern Ireland Environmental Law* (Gill and Macmillan, 1997) chapter 9.

only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather and all the circumstances of the case is reasonable, or the ordinary incidents of the flight, so long as the provisions of part II of the Act and any order or regulations made are duly complied with¹⁷⁹. Though liability can lie for material damage or loss caused to any persons or property on land or water by any person in or any article or person falling from an aircraft while in flight, taking off or landing.¹⁸⁰ Section 56 creates the offence of dangerous flying where an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property on land or water. It is unlikely that the potential and gradual loss of hearing would constitute an unnecessary danger, though the application of noise can constitute an assault under section 2 of the Non-Fatal Offences of the Person Act 1997. The Air Navigation and Transport Act 1988 provides that aircraft operators will have liability for loss or damage caused to any person or property on or over land or water in the State caused or occasioned or contributed to by the aircraft in flight, taking off or landing¹⁸¹. An almost identical provision to section 55 exists in the UK: s.76 of the Civil Aviation Act 1982. That section provides that no actions for nuisance or trespass caused by aircraft shall lie. This exclusion was challenged before the domestic courts under the Human Rights Act (UK) 1998 and before the European Court of Human Rights for interfering with the applicant's right of access to the courts. The claim did not succeed.¹⁸² Whether s.55 would be considered to violate the Constitution, the European Convention on Human Rights and the first protocol/the Human Rights Act 2003 is considered below.

Is Section 55 of the Air Transport and Navigation Act 1936 Constitutional?

No case has been taken challenging the constitutionality of section 55. The denial of any claim to be made in nuisance or in tort by statute could be unconstitutional for violating the right of access to the courts and property rights and for amounting to a failure by the State to vindicate the rights of its citizens under article 40 or contrary to Art.6 of the ECHR. The right to property is set down in articles 40.3 and 43. However, this must be read with article 43.2, which provides:

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

¹⁷⁸ As amended by s.47 of the Air Navigation and Transport Act 1988. See Forde, *Supra*, p.757.

¹⁷⁹ See Article 1 Rome Convention 1952 on the Damage Caused by Foreign Aircraft to Third parties on the Surface (UNTS 1958, vol. 310 no. 4493, p.182)

¹⁸⁰ Section 21 Air Navigation and Transport Act 1936.

¹⁸¹ Section 17 (b) (ii).

¹⁸² *Baggs v. The UK*. (1985) 44 DR 13.

This article would *prima facie* justify the exemption from liability in section 55, notwithstanding the strong position of property rights under 43.1.1°. Under article 40.3.2°, the State has a duty by its laws to protect as best it may from unjust attack and, in the case of injustice done, vindicate the property rights of every citizen. This law may be viewed as a breach of this duty by failing to protect the rights set out above. However, this provision must also be harmoniously interpreted with article 43.2.2°. It could also be viewed as a violation of the right of access to the courts and to litigate claims¹⁸³. The citizen is indirectly denied the freedom of having the issue determined by a competent tribunal, though similar challenges to restrictions placed by the Statute of Limitations 1957 have met with mixed reactions¹⁸⁴. The Courts will balance the rights issues with the common good and the security of the state. Here, the importance of the common good, in this case the importance of free navigation in State airspace, combined with the need for its free use by the Air Force for the security and defence of the State, may be sufficient to overcome the challenge. Furthermore, section 55 does not absolutely limit any particular right. It is internally limited to where there is compliance with the Act itself and any regulations or orders made under it. Actions for overflights will still lie where the overflight is unreasonable in all the circumstances, where the overflight is combined with some other factor such as material damage from an object falling from the plane or where the plane is not engaged in flight (e.g. engine testing). The case will then turn on the Courts' interpretation of what is factually unreasonable in any given case. As such, the limitation on the right of access is itself limited and subject to a reasonableness requirement. Section 55 does not limit constitutional actions nor actions taken under the Human Rights Act 2003. Section 55 has a legitimate aim and would appear to be proportionate to that aim.

(b) Human Rights Law

Unlike the Protocol of San Salvador to the American Convention¹⁸⁵, there is no right to a healthy environment guaranteed in the European Convention on Human Rights or its protocols. However, as noted above, excessive noise may give rise to an action under article 8.¹⁸⁶ Other articles of relevance are article 6.1 (civil right determination), article 13 (the right to an effective domestic remedy) and article 1 of the first protocol (the right to the peaceable enjoyment of possessions).

¹⁸³ Recognised in *Macauley v. Minister for Posts and Telegraphs* [1966] IR 345 and *Tuohy v. Courtney* [1994] 3 IR 1. See *Casey op. cit.*, at 413-420.

¹⁸⁴ *Tuohy v. Courtney* [1994] 3 IR 1; *O'Brien v. Keogh* [1972] IR 144; *Ó Domhnaill v. Merrick* [1984] IR 151.

¹⁸⁵ Article 11.

¹⁸⁶ See Shelton, "Human Rights, Health and Environment: A Background Paper for the World Health Organization" Health and Human Rights Working Paper Series No.1, 2002, available at http://www.who.int/hhr/information/en/Series_1%20%20Human_Rights_Health_Environmenta%20Protection_Shelton.pdf (visited on 19 August 2006).

*Article 8*¹⁸⁷

In *Powell and Rayner v. UK*¹⁸⁸, the applicants claimed that the noise caused by aircraft movement at Heathrow airport violated their rights under article 8 of the Convention by interfering with their quality of life and their enjoyment of the amenities of their homes. The Court found that it had no jurisdiction to rule on article 8, independent of article 13. This contradicted the dicta of the Commission in *S v. France*¹⁸⁹, where it accepted that noise could affect well-being and prevent enjoyment of amenities. Article 8 was found applicable in both *Arrondelle v. the UK*¹⁹⁰ and *Baggs v. the UK*¹⁹¹. In both of these aircraft-noise cases, the applicants' arguments on article 8 were found admissible but friendly settlements were reached before the matter was tried. In *Vearncombe, Herbst, Clemens and Speil Lager v. the United Kingdom and Germany*¹⁹², the Commission noted that individuals that were or expect to be exposed to "an intolerable and exceptional noise nuisance of such a level and frequency could amount to an interference with the right to protection of private life or peaceful enjoyment of possessions". In the recent case of *Moreno Gómez v. Spain*¹⁹³, complaints relating to noise (from a nightclub granted a licence in an area of noise sensitivity) based on article 8 were upheld as a violation of the state's positive duties.

The applicants in *Hatton v. the UK*¹⁹⁴ claimed the respondent had violated their article-8 and article-13 rights. They challenged a new schedule based on a quota system for night flights at Heathrow under which noisier aircraft were given a higher quota count than quieter craft. Both the Chamber and the Grand Chamber found the complaints admissible. The Chamber did find a violation of article 8 by a 5:2 majority, but the applicants were unsuccessful on article 8 before the Grand Chamber (12:5)¹⁹⁵. The Chamber had found that the government had failed in its positive duty under article 8 by neglecting to conduct independent research on the impact of night flights on the sleep patterns of residents¹⁹⁶. But the Grand Chamber had found that the domestic irregularity that was a feature

¹⁸⁷ See Ovey and White eds., *Jacobs and White: The European Convention on Human Rights*, (3rd ed., Oxford University Press, 2002) 251-251; Harris, O'Boyle, and Warbrick, *Law of the European Convention on Human Rights*, (Butterworths, London, 1995) 302-355.

¹⁸⁸ (1990) 12 EHRR 345. See Sunkin, Ong and Wight, *Sourcebook on Environmental Law*, (2nd ed., Cavendish Publishing, 2002) 866-869.

¹⁸⁹ (1990), 65 DR 250.

¹⁹⁰ (1980), 55 DR 19 p.186; (1982) 26 DR 5.

¹⁹¹ (1985) 44 DR 13; (1987) 52 DR 29.

¹⁹² A. No. 12816/87, 59 Eur Comm'n HR DR 186 (1989) p.196.

¹⁹³ [2004] ECHR 633.

¹⁹⁴ [2003] ECHR 338; (2003) 37 EHRR 28. See Hobe, Stephan and Giesecke, Christian, „Zur Vereinbarkeit von nächtlichem Fluglärm mit Artikel 8 EMRK,“ (2003) LII(4) ZLW 501.

¹⁹⁵ (2002) 34 EHRR 1.

¹⁹⁶ See Smith, "Hatton v. the UK" (2002) *AJIL* 697 on the Chamber decision.

of both *Lopez Ostra*¹⁹⁷ and *Guerra*¹⁹⁸ was absent here¹⁹⁹. It was legitimate for the respondent to take into account economic interests in the shaping of policy. While the Grand Chamber accepted that the State had failed to strike a fair balance between the interests of the applicants and those of the community, it rejected the applicants' argument that sleep disturbance was such an aspect of private life as required an especially narrow margin of appreciation, as was applicable in the case of sexual orientation²⁰⁰. The night-flight schedule did not overstep the discretion allowed to states in failing to strike a fair balance.²⁰¹

There is the authority of *Dennis v. Ministry of Defence*²⁰², where the plaintiffs relied on, *inter alia*, article 8, that was brought in response to the noise from Harrier Jets at RAF Wittering, which succeeded before the English High Court. While the Court accepted that the base was important for the defence of the realm and this was in the public interest in that case, it held that the individual should not have to carry the burden of the public interest. Buckley J. in this instance found that a nuisance existed but, as the public interest demanded the training of pilots, a declaration requiring the MOD to halt their activities would not be made. The extent of the interference and the significant reduction in property values justified a finding of violation of article 8 and article 1. However, this case must be put in context as a case from noise arising from a single national military airbase using particularly noisy craft that were flown low over the properties in question at full throttle. Complaints had been made against the base for some time but no affirmative measures were taken to address the noise nuisance. Buckley J. admitted that the facts of the case were extreme.

This contrasts with the situation of aeroplane noise arising from commercial international airports with strong economic reasons for their existence and a plethora of measures to limit noise nuisance for the aircraft. It is submitted that there are sufficient grounds for distinguishing between *Dennis* and the precedents of the ECHR. It is unlikely that a case against Ireland challenging aircraft noise would succeed on article 8, unless there was some proven domestic irregularity.

Article 6.1²⁰³

¹⁹⁷ *Lopez Ostra v. Spain* (1994) 20 EHRR 277.

¹⁹⁸ *Guerra v. Italy* [1998] ECHR 7; 26 EHRR 357.

¹⁹⁹ Para. 120 *Hatton v. The United Kingdom*, [2003] ECHR 338; (2003) 37 EHRR 28.

²⁰⁰ See *Dudgeon v. the United Kingdom* (1981) 4 EHRR 149, series A no. 45 at p.21.

²⁰¹ The dissenting opinion of Costa, Reiss Tümer, Zupančič and Steiner is informative and highlights some of the difficulties with the reasoning of the majority.

²⁰² [2003] EWHC 793 (QB); [2003] EWHC 793; [2003] Env LR 34; [2003] EHLR 17; [2003] 2 EGLR 121; [2006] RVR 45; [2003] JPL 1577; [2003] 19 EGCS 118; (2003) 153 NLJ 634; [2003] NPC 55.

²⁰³ See Ovey and White, *op. cit.*, 139-170 and Janis, Kay and Bradley, *European Human Rights Law: Text and Materials*, (2nd ed, OUP, 2000) 406-466.

Under this article, an applicant is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law in the determination of his or her civil rights and obligations. The applicant must show that the procedure was decisive in the determination of the right²⁰⁴ and that the right in question is recognised by domestic law.²⁰⁵ In *Zander v Sweden*,²⁰⁶ the Commission found that, as the right related to the environmental conditions of tu8(t)-77pl8.3(ndicanvi)-8.2(ronme'8.2(tipto)-8

Convention rights²¹². Article 13 was raised with article 8 and 6.1 in *Powell and Rayner*, discussed above. The Court noted the importance of striking a fair balance between the interests of the applicant and those of the community. The operation of an international airport was accepted by the applicants and the Court as a legitimate aim and it found that the State had not gone beyond the scope of the margin of appreciation given the existence of policies and regulatory measures to deal with noise nuisance in the area. The Court found that it was neither for it nor for the Commission to substitute another assessment of policy for that chosen by the government in relation to the operation of night flights. It unanimously held that there was no violation of article 13.

Article 13 was again raised in *Hatton*, where the UK was found in violation. The Court held that the availability of judicial review, as limited by English public-law concepts of unlawfulness and unreasonableness, did not allow for consideration of whether the schedule in question represented a limitation on article 8 rights guaranteed under the Human Rights Act 1998. The availability of judicial review of the decision²¹³ by a planning authority to allow a new runway will be relevant in deciding the impact of article 13. However, where the domestic courts define policy so broadly that it is not possible to make Convention points, it may fail to meet the requirements of article 13.

This means that the application of the *O’Keeffe*²¹⁴ test of unreasonableness in Irish judicial review may lead to the conclusion that although review is available, it is not an effective remedy. It is also possible that even if a successful challenge was taken based on the Human Rights Act 2003, the section 5 declaration of incompatibility as provided for in the Act would not be viewed as an effective remedy either.

*Article 1 of the First Protocol*²¹⁵

This provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions.... The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it seems

²¹² *Klass v. FRG* (1979) 2 EHRR 214; *Soering v. UK* 11 EHRR 439 (para.120); *Vilvarajah and Others v. the United Kingdom*, [1991] ECHR 47; [1991] IHRL 49 .38-40; (1991) 14 EHRR 248.

²¹³ See also *AGOSI v. UK* (1987) 9 EHRR 1 and *Denev v. Sweden* (1989) 59 DR 127.

²¹⁴ *O’Keeffe v An Bord Pleanála* [1993] 1 IR 39; [1992] IRLM 237.

²¹⁵ See Harris, O’Boyle and Warbrick, *op. cit.*, 300-319; Ovey and White, *op. cit.*, 139-170; Kenna, “Property, Housing and Environment” in Kilkely ed., *The European Convention on Human Rights and Irish Law*, (Jordans, 2004) chapter 10.

necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

The term ‘possessions’ (*biens* in the French text) has an autonomous meaning independent of national law²¹⁶ and it has been given a broad definition²¹⁷. It includes property rights²¹⁸. States have been accorded a wide margin of appreciation on account of the extensive limitation in the second sentence²¹⁹. The availability of a better means of achieving the state’s goal does not mean that the chosen measure *per se* infringes proportionality²²⁰. The Commission in its opinion in *Powell* observed that art.1 is “mainly concerned with the arbitrary confiscation of property and does not in principle guarantee a right to the peaceful enjoyment of possessions in a pleasant environment.” However, it went on to note that:

Noise nuisance which is particularly severe in both intensity and frequency may seriously affect the value of real property or even render it unsaleable or unusable and thus amount to a partial expropriation.

However, the Court held that it would only find a breach of this article in exceptional circumstances. This view was supported in *S. v. France*²²¹, which suggests that where the property of the applicant declines in value as a result of noise nuisance, such an exceptional circumstance could arise. The Commission in that case also observed:

Where an authority carries on an undertaking in the interest of the community as a whole it may have to pay compensation to individuals whose rights are infringed by that undertaking in order to achieve a fair balance between the interests of the individual and the community.²²²

²¹⁶ *Beyeler v. Italy* [2000] ECHR 1, (2001) 33 EHRR 52 at paras 98 and 100; [2002] ECHR 466 (Grand Chamber).

²¹⁷ *See Pine Valley Developments v. Ireland* [1991] 14 EHRR 319; [1991] ECHR 55; [1993] ECHR 2.

²¹⁸ *Gasus Dosier und Fördertechnik GmbH v. Netherlands*, [1995] ECHR 7; (1995) 20 EHRR 403, para.53.

²¹⁹ *Fredin v Sweden (No.1)* [1991] ECHR 2; [1991] 13 EHRR 784; *Fisher and Anor v. English Nature* [2001] EWHC 1599; [2004] 1 WLR 503 (appeal denied [2004] EWCA Civ 663).

²²⁰ *James v The UK* [1986] ECHR 2; [1986] 8 EHRR 123; *Tre Traktor Aktiebolag v Sweden* [1989] ECHR 15; [1991] 13 EHRR 309.

²²¹ (1990) 65 DR 250

²²² *Id.* at para. 117

This position is supported by the Court, albeit not in an aircraft-noise context, in *Spörrong and Lönroth v. Sweden*²²³, where it held that “an individual and excessive burden which could have been rendered legitimate only if they had the possibility of ... claiming compensation”. This suggests that the limitation on land use provided for in section 14 of the Air Navigation and Transport Act 1950 is not in breach of article 1. This ground was not raised in *Hatton*. The applicants in *Dennis* successfully raised this ground, as Buckley J. found that a fair balance had not been struck between the rights of the applicants and the interests of the State in the absence of compensation. It was not proportionate to pursue or give effect to the public interest without such compensation.²²⁴ Any taking that amounts to a violation of national law will also amount to a breach of article 1²²⁵, so where the superior courts find a violation of constitutional property rights, a violation of article 1 would follow. States are entitled to control land use but a balancing test is used to see if the limitation is permissible²²⁶. The limitation must be a measure in the character of law, in the general interest and be deemed necessary by the state²²⁷. The restriction made must be proportionate to the aim to be achieved. The aim must be legitimate and in the public interest.²²⁸ Section 14 of the 1950 Act would meet this test. Where compensation is available under domestic law, a fair balance may be found to have been struck²²⁹.

Conclusion

It is clear that there is a significant link between the effects of noise and human health. While more research in the field is needed, especially with regard to the direct impact of aircraft noise on mental health, the existing research suggests that the hazards of aircraft noise should not be discounted lightly. The problems of aircraft noise have not gone unrecognised, and regulation at international, Community and national levels already exists. The introduction of the balanced approach is a welcome addition to Community law but it is submitted that Irish and Community law be updated to reflect the new standards set down in chapter 4 of ICAO Annex 16. In addition, while planning law and noise-abatement procedures have in some measure limited the impact of aircraft noise, other proactive solutions should be adopted. To this end, the Building Regulations 1997 should be

²²³ [1982] ECHR 5; 5 EHRR 35, para 29-30.

²²⁴ See [2003] Env L R 34, para.63.

²²⁵ *Iatridis v. Greece* [1999] ECHR 14; [2000] ECHR 502; (2000) 30 EHRR 1997.

²²⁶ *Pine Valley Developments v. Ireland* (1992) 14 EHRR 319.

²²⁷ *Spadea & Scalabrino v. Italy* [1995] ECHR 35; (1996) 21 EHRR 481.

²²⁸ *Lindsay v. CCE* [2002] 1 WLR 1766; *R. (POW Trust & Anor.) v. Chief Executive and Registrar of Companies* [2002] EWHC 2783.

²²⁹ *Holy Monasteries v. Greece*, (1995) 20 EHRR 1.

amended, and standards should be established to provide for acoustic insulation from external sound. As to the retroactive solutions, it is arguable that a constitutional case could be made out for compensation for a taking of an air easement and for the interference with the peaceful enjoyment of possessions on the basis of US authorities. It remains to be seen if those authorities will be followed by the Courts here should such a case arise. Though tort and nuisance actions are limited by s.55 of the Air Transport and Navigation Act 1950, it is submitted that this would be found constitutional. As to claims to be made under the ECHR, it is unlikely that a case for excessive aircraft noise under article 8 against Ireland would succeed due to the measures that have been taken by the State. The authority of *Hatton* suggests that s.55 combined with the limited nature of judicial review may result in a successful challenge under the ECHR for a violation of article 13, though the cases before the Court on the subject, including *Hatton*, are fact-specific. It is unlikely that s.55 would be found to violate article 6 given the existing case law, though it may be a possibility in the future were the Court to revise its interpretation of “civil rights”. Where property is found to have diminished in value due to aircraft noise, there is also an arguable case for a breach of article 1 of the First Protocol. Any case made under the Convention will have to meet the balancing test.

PRE-EMPTIVE COSTS ORDERS: EVOLUTION AND POTENTIAL IN IRISH LAW

JAMES MULCAHY

There is little point in opening the doors to courts if litigants cannot afford to come in. The general rule in litigation that ‘costs follow the event’ is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality...), with devastating consequences to the individual or... group bringing the action, must inhibit the taking of a case to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.¹

Introduction

The above words of Justice Toohey, formerly of the High Court of Australia, are no less relevant in the Irish context than the Australian. Public interest law and litigation are underdeveloped in this jurisdiction due to a number of barriers. Our civil law system has its roots in the conventional “bilateral private dispute model”² of litigation, and the procedural law has been shaped to a large extent by this model. The old assumptions regarding economic incentives to litigate do not apply,³ therefore the procedures are not suited to public interest litigation.⁴ The rules governing the vital issue of costs must be examined and, for the purposes of this discussion, reform of the rules relating to pre-emptive costs orders is urged.

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¹ Toohey, “Environmental Law – Its Place in the System” in Proceedings of the 1st National Environmental Law Association/LawAsia Conference on Environmental Law (14-18 June 1989, Sydney).

² Chakrabarti, Stephens and Gallagher, “Whose Cost the Public Interest” (2003) *Public Law* 697.

³ Friedlander, “Costs and Public Interest Litigation” (1995) 40 *McGill Law Journal* 56, at 103.

⁴ For a detailed discussion on the differences between conventional litigation and public interest litigation, see Whyte, *Social Inclusion and the Legal System - Public Interest Law in Ireland* (IPA, 2002), at 58.

Public Interest Litigation / Judicial Review

Any person seeking to promote litigation taken to vindicate the public interest will necessarily have to address questions about the scope of public interest law – what is the public interest it seeks to vindicate? The term ‘public interest law’ originally related to attempts to use the law on behalf of disadvantaged and marginalised groups,⁵ and this remit is discernible in recent Irish literature.⁶ A judicial review of a decision may also be in the public interest where governmental accountability is a driving motive behind the review, and this understanding of public interest litigation is visible in recent English cases.⁷

It may also refer to cases taken by, for example, environmental groups, and it is in this area that some reform of the costs rules has taken place in Ireland⁸ and other common law jurisdictions. Much development in public interest judicial review has taken place in the context of environmental and planning law, and there are several reasons for this. First, environmental and planning decisions generally affect large numbers of individuals or groups.⁹ Second, the environmental field is one in which the public is often faced with the consequences of maladministration or unlawful actions of public authorities.¹⁰ Third, as McIntyre points out, Irish planning and environmental law relies heavily on judicial review procedures for facilitating challenges to regulatory decisions. As a result, it is perhaps not surprising that many of the cases regarding costs and the public interest involve this area of law.¹¹ Finally, the importance of public interest litigation in the environmental/planning sphere is reflected in the rules of standing. The Irish judiciary have tended to treat judicial review of environmental and planning issues in a special way. In *Lancefort v. An Bord Pleanála*,¹² Denham J. provided an insight into the judiciary's attitude¹³ when she stated:

⁵ *Ibid.*, at 1.

⁶ Litigation on behalf of the disadvantaged is the subject of Whyte, *Ibid.*; Cousins, “Public Interest Law and Litigation in Ireland” presented to the Free Legal Advice Centres Conference “Public Interest Law in Ireland - the Reality and the Potential” (6 October 2005, Dublin).

⁷ See, *R v. The Prime Minister ex parte CND* [2002] EWHC 2712 (Admin); *R (Corner House Research) v. The Secretary of State for Trade and Industry* [2005] 1 WLR 2600.

⁸ Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (1995) ALRC 75.

⁹ Stein and Beagent, “Case Law Analysis: *R (Corner House Research) v. Secretary of State for Trade and Industry*” (2005) *Journal of Environmental Law* 413 at 436.

¹⁰ *Ibid.*

¹¹ McIntyre, “The Role of Pre-emptive/Protective Costs Orders in Environmental Judicial Review”: address to the 4th Annual Conference for Environmental Professionals, University College Cork, 27 April 2006; available at <http://www.ucc.ie/en/lawsite/eventsandnews/previousevents/environapr2006/DocumentFile,16192,en.doc> (visited 11 August 2006).

¹² [1997] 2 ILRM 508.

¹³ McIntyre, *loc.cit.*, at 3.

[T]he public interest element must carry some weight in considering the circumstances of environmental law cases and the *locus standi* of its parties.

Denham J. also remarked that the sufficient interest required by the Rules of the Superior Court and the planning legislation should be interpreted in light of the unique position of and problems presented by litigation on the environment in that “often the issues affect a whole community as a community rather than an individual *per se*.” Regard for the public interest element is discernible in the later case of *Murphy v. Wicklow County Council*,¹⁴ in which an applicant, who had no interest in the matter aside from a concern for the impact of the decision on the environment and the related interest of the public, was declared to have *locus standi*. Outside of the environmental sphere, the Irish courts have been reluctant to grant *locus standi* to non-governmental organisations, but in the recent judgment of Gilligan J. in the High Court,¹⁵ the Irish Penal Reform Trust was held to have *locus standi* to represent mentally ill prisoners in legal proceedings against the State.

Pre-Emptive / Protective Costs Orders

Introduction

While the relaxation of the standing rules may provide some encouragement to the public interest litigant, the remaining issue of costs continues to exclude many from the judicial review mechanism. The cost of taking a legal action was cited as the primary and most significant barrier to public interest litigation in a recent report on public interest law in Ireland.¹⁶ This barrier is multi-faceted, but primarily consists of the inability to pay lawyers' fees and also the fear that one may have to pay the costs of the other side if unsuccessful. Ireland follows the ‘English rule’¹⁷ or the ‘costs follow the event’ rule of cost allocation which requires the losing party to pay the costs of both sides. The prohibitive or chilling effect of costs on litigation is a problem that has been increasingly recognised over the past two decades.

¹⁴ Unreported, High Court, 19 March 1999, O’Sullivan J.

¹⁵ *The Irish Times*, 3 September 2005.

¹⁶ Cousins, *loc. cit.*, at 21.

¹⁷ The ‘English rule’ differs from the ‘American rule’ insofar as the latter requires each party to pay their own costs regardless of the outcome of the case. For more on the historical development of the American rule, see McDermott and Rothschild, “The Private Attorney General Rule and Public Interest Litigation in California” [1978] 66 *California Law Review* 138.

The sentiments of Justice Toohey mentioned at the outset have been echoed by many judges and commentators. In *R (Corner House Research) v Secretary of State for Trade and Industry*,¹⁸ Phillips L.J. of the Court of Appeal refers to:

[A] growing feeling in some quarters, both in [England] and in other common law countries abroad which have adopted the 'costs follow the event' regime, that access to justice is sometimes unjustly impeded if there is a slavish adherence to the normal private law costs regime.¹⁹

Indeed, the prohibitive nature of costs may help explain the extremely small number of public interest cases brought before the Irish courts. In 2003 and 2004, 3.5% of all cases brought in the High and Supreme Courts were public interest cases.²⁰

It is important at this juncture to set out the rules that govern the making of costs orders in Ireland. The Irish courts have a general discretion in costs matters, granted to them by order 99, rule 1(1) of the Rules of the Superior Courts, 1986. The general rule stated in subsections (3) and (4) of Rule 1 is that unless otherwise ordered, costs follow the event. Rule 5 provides that costs may be dealt with at any stage of the proceedings and an order for the payment of costs may require that costs be paid notwithstanding that the proceedings may not have concluded. The Irish judiciary, like their English counterparts, have held that jurisdiction exists for the making of pre-emptive costs orders (PCOs). This jurisdiction arises from the general discretion exercised by judges in costs matters, and a decision on costs made prior to the trial of the substantive issues is a permissible exception to the general rule that costs follow the event. As is readily appreciable, a PCO may prove to be a highly effective response to the prohibitive effects of the English rule. A discussion on the development of the PCO in Ireland will be preceded by a discussion on the English law in this area.

England and Wales

The courts in England and Wales have, over the past five decades, increasingly expanded the importance of judicial review proceedings in regulating the relationship between the citizen and the state.²¹ According to McIntyre, the origins of PCOs in England and Wales can be traced back to

¹⁸ [2005] 1 WLR 2600.

¹⁹ *Ibid.*, at 2613.

²⁰ Cousins, *loc.cit.*, at 43. The definition used in the Cousins report, which relates solely to the interests of vulnerable and disadvantaged groups, is narrower than the definition used in this discussion. However, as the report notes, a slightly broader definition would not significantly increase this level.

²¹ Stein and Beagent, *loc.cit.*, at 435.

the progressively more liberal approach taken by the courts to the rules on standing in judicial review proceedings. This approach has, as Stein and Beagent note, led to the development of the role of the Administrative Court²² as a “forum in which members of the public can challenge the actions of public authorities in the wider public interest.”²³

The House of Lords decision of *IRC v. National Federation of Self-Employed and Small Businesses Ltd*²⁴ liberalised the rules of standing in England, and the modern approach to *locus standi* was justified by Diplock LJ in the following terms:

It would ... be a grave lacuna in our system of public law if a pressure group ... or even a public-spirited taxpayer ... were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.²⁵

In the landmark case of *R v. Lord Chancellor, ex parte Child Poverty Action Group*,²⁶ the Court of Appeal held that the jurisdiction make PCOs existed,²⁷ but an order was not granted to the applicants. Child Poverty Action Group (CPAG), a non-governmental organisation, sought to judicially review the manner in which the Lord Chancellor exercised his power regarding legal the extension of legal aid to cover cases before social security tribunals and commissioners. Dyson J. heard its application for a PCO, along with a similar application by Amnesty International with respect to a different matter. The Court held that this discretion can only be exercised in the most exceptional cases and established the criteria that must be satisfied before an order would be granted:

- (i) the court must be satisfied that the issues raised are truly ones of general public interest;

²² The Administrative Court's jurisdiction is varied, consisting of the administrative law jurisdiction of England and Wales as well as a supervisory jurisdiction over inferior courts and tribunals. See <http://www.hmcourts-service.gov.uk/cms/admin.htm> (visited 11 August 2006).

²³ Stein and Beagent, *loc.cit.*, at 435.

²⁴ [1982] AC 617.

²⁵ *Ibid.*, at 644.

²⁶ [1999] 1 WLR 347.

²⁷ The jurisdiction is based on the Supreme Court Act 1981, section 51, which provides at subsection (1): “Subject to the provisions of this and other Act and to the rules of court, the costs of and incidental to all proceedings ... shall be in the discretion of the court, and the court shall have full power to determine by whom and to what extent the costs should be paid.” Dyson J., in *Child Poverty Action Group*, noted that the House of Lords had previously confirmed the very wide remit of this discretion in *Aiden Shipping Co. Ltd. v. Interbulk Ltd.* [1986] AC 965.

- (ii) the court must be satisfied, following short argument, that it has sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make an order;
- (iii) the court must have regard to the financial resources of the applicant and respondent, and the amount of costs likely to be in issue; and
- (iv) the court will be more likely to make an order where the respondent clearly has a superior capacity to bear the costs of the proceedings than the applicant, and where it is satisfied that, unless the order is made, the applicant will probably discontinue the proceedings, and will be acting reasonably in doing so.²⁸

Dyson J. doubted whether the CPAG satisfied the first two criteria above, and also held that Amnesty International could not meet any of the criteria. The above criteria regarding the grant of a PCO in a public interest challenge should be read in light of Dyson J.'s explanation of what constitutes a public interest challenge. It is worth reproducing his explanation in full:

The essential characteristics of a public law challenge are that it raises public law issues that are of general importance, where the applicant has no private interest in the outcome of the case. It is obvious that many, indeed most, judicial review challenges do not fall into the category of public interest challenges so defined. This is because, even if they do raise issues of general importance, they are cases in which the applicant is seeking to protect some private interest of his or her own.²⁹

This explanation may be seen as a preliminary criterion which must be satisfied before satisfaction of the four criteria will be considered. This is not explicitly stated in the case, but is implied, as a PCO will only be granted where the application relates to a public law challenge. This prohibition on private interests will be discussed in greater detail below.

The rules set out by Dyson J. in *CPAG* were subsequently applied in *R v. Hammersmith and Fulham LBC, ex parte CPRE*³⁰ and *R v. Prime Minister, ex parte Campaign for Nuclear Disarmament*.³¹ The applicants in the latter case were the first to receive a PCO, the terms of which limited

²⁸ The *CPAG* criteria as set out in *Corner House Research* [2005] 1 WLR 2600, at 2617-8.

²⁹ [1999] 1 WLR 347, at 353.

³⁰ CAT, 26 October 1999, (CO/4050/99).

³¹ [2002] EWHC Admin 2712.

their liability to costs to £25,000. The first full PCO was granted in *R (Refugee Legal Centre) v. Home Secretary*,³² a case in which the applicant was eventually successful. The Court of Appeal in the later case of *Corner House Research* commented upon the important public purpose behind the *Refugee Legal Centre*. In *Corner House Research*,³³ the applicant, an NGO which campaigns against corruption in international trade, sought to judicially review a decision of the Department of Trade and Industry not to consult the applicant in advance of amendments made to anti-bribery and corruption procedures. It applied for a PCO as it had been established that it would not be in a position to proceed without one. The High Court applied the rules of Dyson J. and refused to make the order, but the Court of Appeal overturned this decision and, in doing so, altered the CPAG criteria so as to make the PCO regime less cumbersome and more accessible. The first ‘guiding principle’ in *Corner House Research* lowers the merits threshold from the court being required to have “sufficient appreciation of the merits of the claim” to the court having to satisfy itself that the applicant has “real prospect of success” or a “properly arguable” case.³⁴ The Court stated that the higher threshold established by Dyson J. contributed substantially to the cumbersome nature in which the PCO regime had operated. It has been said³⁵ that *Corner House Research* introduced the requirement that an applicant must not have a private interest in the litigation. However, this is not strictly accurate because Dyson J.’s conception of a public interest challenge stated that a litigant should have no private interest in the matter. The *Corner House Research* principles also state that the issues in the case must be “of general public importance”³⁶ but that the public interest must “require that those issues ... be resolved.”³⁷ Stein and Beagent note that this latter requirement may be analogous to the costs benefit test in public funding.³⁸

The subsequent case of *Goodson v. HM Coroner of Bedfordshire and Luton*³⁹ elaborated upon certain aspects of the *Corner House Research* case, in particular the prohibition on private interests. In *Goodson*, counsel for the applicants argued that it is not necessary that the applicant should have no private interest of any kind in the outcome of the proceedings before a PCO can be justified and that it is sufficient that the public interest in having the issue decided transcends or wholly outweighs the interest of the particular litigant. The Court, in response, held that:

³² [2004] EWCA Civ 1296.

³³ [2005] 1 WLR 2600.

³⁴ *Ibid.*, at 2625.

³⁵ Stein and Beagent, *loc.cit.*, at 437; McIntyre, *loc.cit.*, at 10

³⁶ [2005] 1 WLR 2600.

³⁷ *Ibid.*

³⁸ Stein and Beagent, *loc.cit.*, at 438.

³⁹ [2005] EWCA Civ 1172.

[T]he requirement that the applicant must have no private interest in the outcome of the case is expressed in unqualified terms, although the court could easily have formulated this part of the guidelines in more qualified terms corresponding to [the applicant's] submission if it had thought it appropriate to do so.

To support this position, the Court referred to the exceptional nature with which Dyson J. in *CPAG* held that the PCO regime should operate. It is clear that this view on private interests will limit substantially the ability of an applicant to obtain a PCO. The reasoning in this case will be discussed below. First, it is necessary to introduce the position of PCOs in Irish law.

Ireland

The judiciary affirmed their jurisdiction to make “pre-emptive costs orders” (PCOs) in the High Court decision of *Village Residents v. An Bord Pleanala*⁴⁰ and held that such orders should only be granted in exceptional circumstances. Laffoy J. laid down the criteria for obtaining a PCO and relied heavily on those enunciated by Dyson J. in the *CPAG* judgment. In *Village Residents* the applicant sought, *inter alia*, a pre-emptive costs order. This order was not granted because the challenge was not a “public law challenge in the sense that that concept was explained by Dyson J. [in *CPAG*]⁴¹” as the members of the company bringing the challenge were held to have a private interest in the outcome of the application. Unfortunately, the Court did not explain what is meant by a private interest. In addition, Laffoy J. said that as she did not have a sufficient appreciation of the merits of the application, she could not conclude that it would be in the public interest to make a PCO. This is in accordance with the *CPAG* criterion that the Court must be satisfied that it has sufficient appreciation of the merits of the claim that it can be concluded that it is in the public interest to make an order. McIntyre⁴² believes that Laffoy J. may have taken a more flexible approach to PCOs than Dyson J. as she expressly anticipates that “it maybe that in a particular type of case other factors may come into play,”⁴³ *e.g.* policy considerations reflected in environmental or heritage protection legislation. Laffoy J. preferred not to make “any generalisation as to the circumstances in which it would be appropriate to make a pre-emptive costs order”⁴⁴ as a multiplicity of factors that might arise in any given case.

The position in Ireland is considerably less clear than in England regarding PCOs as there have been no relevant judgments post-*Village*

⁴⁰ [2000] 4 IR 321.

⁴¹ *Ibid.*, at 330, *per* Laffoy J.

⁴² McIntyre, *loc.cit.*, at 16.

⁴³ [2000] 4 IR 321, at 330.

⁴⁴ *Ibid.*

Residents. However some guidance may be extrapolated from decisions handed down by the courts subsequently. These cases relate to applications for favourable costs orders by public interest litigants after the trial of the substantive issues. In particular, these cases may provide an insight into the judiciary's understanding of a public interest challenge and the effect of a privately held interest of a litigant on the application. In *McEvoy v Meath County Council*,⁴⁵ following the hearing of submissions on the question of costs, Quirke J. in the High Court ordered the respondents to pay 50% of the applicant's costs of the proceedings and the full costs of the daily transcript. The applicants sought a declaration that the respondent in making and adopting the development plan for County Meath failed to have due regard to the "strategic planning guidelines for the greater Dublin area." Although they were unsuccessful, a favourable costs order was granted to them because the applicants "acted solely by the way of furtherance of a valid public interest in the environment and in particular in

to make PCOs very difficult to obtain. These barriers are disproportionate and conceptually unsound, as will be demonstrated below. They also perpetuate the exclusivity with which the judicial review mechanisms operate. While it may be argued that the courts are an inappropriate forum in which to challenge legislation or policies of the executive, Ireland has a rigorous judicial review regime and it would seem unjust to exclude individuals or groups from its operation on economic grounds. The separation of powers inherent in our constitutional order necessarily mandates a system of checks and balances between the organs of State⁴⁸ and judicial review is the exercise of, *inter alia*, control by the courts over public power.⁴⁹ The contention that use of the courts to vindicate the public interest is illegitimate is an extension of the argument that judicial review, generally, is anti-democratic. This argument is, however, based upon the misconception that crude majoritarianism and democracy are synonymous. In a liberal democracy such as Ireland's, the will of the majority, represented in the legislature and the executive, is subject to the rule of law and moderated by a constitution which emphasises the protection of the rights and freedoms of individuals and minorities. Thus, recourse to the courts for review of legislation, policies and practices is valid and does not constitute a usurpation of the democratic process.⁵⁰

The prohibitive effect of the current regime may lead to a situation in which there is an “under-supply of precedents.”⁵¹ McIntyre believes that reform of the costs rules may encourage the “emergence of clear precedent to inform the application of complex areas of the law ... [and] ... render the application of the law more predictable, thereby encouraging parties to settle disputes and reducing non-compliance.”⁵²

In addition, on the point of access to justice, it may be argued that a restrictive approach to PCOs may run contrary to the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (‘Aarhus Convention’).⁵³ Article 9 of the convention, to which Ireland is a signatory but has not yet ratified, contains the provisions regarding access to justice in environmental matters

⁴⁸ Cousins, *loc.cit.*, at 9.

⁴⁹ See De Blacam, *Judicial Review* (Butterworths, 2001), Chapter 1.

⁵⁰ A detailed discussion on the legitimacy of judicial review is outside the scope of this article. See Tremblay, “General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law” [2003] 23 *Oxford Journal of Legal Studies* 525; Monahan, “Judicial Review and Democracy: A Theory of Judicial Review” (1987) 21 *University of British Columbia Law Review* 87; Ely, *Democracy & Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).

⁵¹ Office of Regulation Review (Australia), *The use of cost litigation rules to improve the efficiency of the legal system*: submission to the Australian Law Reform Commission review of the litigation cost rules (March 1995), at 8.

⁵² McIntyre, *loc.cit.*, at 4.

⁵³ (1999) 38 ILM 517 (Aarhus, 25 June 1998).

and requires signatories to ensure access to justice for the public and establish procedures which shall:

provide adequate and effective remedies ... and be fair, equitable, timely and not prohibitively expensive.

In addition, signatory states must “consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.” In England, the Court of Appeal in *R (Burkett) v. LB Hammersmith & Fulham*⁵⁴ specifically recognised the problem of access to justice for sections of the wider public and Brooke L.J. noted the concern of many respondents to a survey, carried out as part of a study on environmental justice, that the costs regime in place in England precluded compliance with the Aarhus Convention. Stein and Beagent conclude that it was in recognition of this and other factors that the Court of Appeal in *Corner House Research* proceeded to reform the PCO regime.

One may wonder whether the Irish courts will be similarly influenced by the provisions regarding access to justice contained in article 9. As mentioned above, Ireland is a signatory but has not ratified the convention, so it is not part of Irish law. The European Union has been a party to the convention since May 2005 and has enacted two directives which deal with public access to environmental information (2003/4/EC)⁵⁵ and public participation in certain environmental decision-making procedures (2003/35/EC).⁵⁶ According to the Department for Environment and Local Government, “[r]atification of the Convention will take place after these Directives have been transposed into Irish Law.”⁵⁷

The Prohibition on Private Interests

The prohibition on private interests is a wholly disproportionate response to the threat of a “litigation explosion.”⁵⁸ While *Village Residents* did accept that the litigation need not involve issues as grandiose as a “heritage protection issue or an environmental issue”⁵⁹ to be worthy of protection, the Court did hold that its jurisdiction would only be exercised in favour of litigants acting in a “selfless, disinterested spirit.”⁶⁰ This prohibition

⁵⁴ [2004] EWCA Civ 1342.

⁵⁵ Implementation into the national law of member states was required by 14 February 2005.

⁵⁶ Implementation into the national law of member states was required by 25 February 2005.

⁵⁷ “List of questions submitted by members of the Public for Europe Day and corresponding answers from Departments/Organisations” (10 May 2006), at 27, available at http://www.oireachtas.ie/documents/committees29thdail/europeanaffairsreports/Europe_day.doc (visited 2 August 2006).

⁵⁸ Friedlander, *loc.cit.*, at 92.

⁵⁹ Costello, “Costs Principles and Environmental Judicial Review” (2000) 35 *Irish Jurist* 121, at 135.

⁶⁰ *Ibid.*

supposes that the public interest character is wholly tarnished by the presence of a private interest on the part of the applicant. The problem with this approach is that it buys into the false dichotomy which accepts that public and private interests operate distinctly and to the exclusion of the other.⁶¹ This is tantamount to saying that the presence of a private or personal interest is necessarily improper, and the exercise by the courts of its jurisdiction to grant PCOs will only be possible when some “altruistic stranger”⁶² decides to bring a case. Chakrabarti *et al.* suggest this prohibition is “nonsensical” and “deeply flawed” and call for its abandonment.⁶³

There is a considerable lack of clarity in the present arrangement. Does a company incorporated to initiate litigation on behalf of some cause necessarily have a private interest in the litigation and must, therefore, be refused an order? Stein and Beagent commented post-*Corner House Research* but pre-*Goodson* that the private interest prohibition was intended:

to emphasise that claimants with a *primarily* personal or financial interest in bringing a claim should not be able to shield themselves behind the public interest when this had not been at least part of the motive for bringing the claim.⁶⁴

This interpretation of the law appears premature in light of the *Goodson* decision, in which the English Court of Appeal held that the private interests prohibition operates strictly and that any private interest in the litigation will prevent an applicant from obtaining a PCO. The *Goodson* case also has the effect of restricting PCOs to NGOs and public interest groups rather than individuals.⁶⁵ It is hoped that the Irish courts will not follow the decision of *Goodson* in relation to its strict interpretation of “private interests”, in particular its restriction of PCOs to interest/pressure groups. McIntyre warns that such a restriction further concentrates the ability to initiate judicial review proceedings in the hands of a few interest groups⁶⁶ and Stein and Beagent express concern that such interest groups, in the environmental field, may not have the capacity to take the number of environmental challenges warranted at a particular time.⁶⁷

The approach of the Irish courts regarding the private interests prohibition is, as the law stands now, more liberal than the approach of the English Court of Appeal in *Goodson*. In Ireland, individuals have been

⁶¹ Thomas, “Costs in Public Interest Cases” (2001) October *Legal Action* 21.

⁶² Chakrabarti, Stephens and Gallagher, *loc.cit.*, at 712.

⁶³ *Ibid.*

⁶⁴ Stein and Beagent, *loc.cit.*, at 439.

⁶⁵ McIntyre, *loc.cit.*, at 10-11.

⁶⁶ *Ibid.*, at 11.

⁶⁷ Stein & Beagent, *loc.cit.*, at 439.

deemed not to have a private interest in recent environmental judicial review cases, *e.g.* *McEvoy* and *Dunne*. Despite this, the private interest prohibition is flawed and places too great an emphasis on the motives of the applicant and not enough on the actual subject matter of the application. Whyte notes that in Ireland, pre-emptive costs orders will “probably be restricted to *Crotty*-type litigants raising issues that effect all citizens equally.”⁶⁸

The Merits Threshold

In *Village Residents*, Laffoy J. held that she could not grant a PCO to the applicants because, *inter alia*, she did not have a sufficient appreciation of the merits of the case. This argument, which the author refers to as the ‘prematurity argument’, is more difficult to refute as one can appreciate the difficulty a judge may have in determining whether litigation is actually in the public interest before the trial. This is a result of the alleged inability of judges in cases to separate the assessment of the public interest status of a case from the determination of the merits of the challenge, and this has been described as the most unfortunate aspect of the *CPAG* decision⁶⁹. The merits of bringing a claim can be assessed at the interlocutory stage and the courts regularly make the distinction in relation to interlocutory injunctions. To grant an interlocutory injunction, the courts do not have to satisfy themselves that the claimant has a *prima facie* case or is likely to succeed at a full trial of the action.⁷⁰ The court must only be satisfied that the plaintiff’s case is not frivolous or vexatious and that there is a serious question to be tried. It may be contended that the nature of an interlocutory injunction is distinct from that of a PCO because the latter involves a judgment that carries financial implications for the other side. The judicial hesitation regarding PCOs is to a large degree related to the fear that such an order may be revealed to have been inappropriate in light of the facts of the case. According to Costello, “only in exceptional cases will the courts be able to make the decision the legal issue is one of such importance that no order in costs would be made against the applicant.”⁷¹ However, interlocutory injunctions can carry financial implications for the other side, for example, where the enjoined party must cease trading until the

⁶⁸ Whyte, *op.cit.*, at 92. The term “*Crotty*-type litigants” relates to the case of *Crotty v. An Taoiseach* [1987] ILRM 400, which involved a challenge to the constitutionality of the European Communities (Amendment) Act 1986 on the grounds that this Act sought to incorporate the amendments to the original treaties contained in Title II of the Single European Act.

⁶⁹ Chakrabarti, Stephens and Gallagher, *loc.cit.*, at 704.

⁷⁰ The “*prima facie*” standard was rejected by the House of Lords in *American Cyanamid Co. v. Ethicon Ltd.* [1975] AC 396 and by the Irish Supreme Court in *Campus Oil v. Minister for Industry and Commerce* [1983] IR 88. See Delany, *Equity and the Law of Trusts in Ireland* (3rd Edition, Round Hall, 2003), Chapter 13.

⁷¹ Costello, *loc.cit.*, at 136.

conclusion of the trial. Furthermore, the courts, through the employment of the *Mareva* injunction,⁷² have been willing to freeze the assets of a defendant in order to prevent them from dissipating or removing assets prior to trial. The standard of proof required for a *Mareva* injunction is the same as that for an interlocutory injunction, i.e. a substantial question to be tried, rather than the requirement to show a *prima facie* case.⁷³ Add to this the fact that *Mareva* injunctions are generally granted *ex parte*, and one begins to realise that the judiciary can and do differentiate between the merits of bringing a case and the actual merits of that case.

In England, the Court of Appeal in *Corner House Research* removed Dyson J.'s requirement that the court should have "sufficient appreciation of the merits of the claim that it can be concluded that that it is in the public interest to make the order." The Court believed that this requirement substantially contributed to the cumbersome nature with which the CPAG regime has operated:

It commonly happens when a court has to take an important decision at an early stage of proceedings that it must do no more than conclude that the applicant's case has a real (as opposed to a fanciful) prospect of success, or that its case is "properly arguable". To place the threshold any higher is to invite heavy and time-consuming ancillary litigation of the type that disfigured the conduct of civil litigation 25 years ago.⁷⁴

The lowering of the threshold in *Corner House Research* is to be welcomed, and it is hoped that the Irish courts will follow their English counterparts' lead.

Reform and Other Jurisdictions

Suggested Reforms throughout the Common Law World

Reform regarding costs orders and the public interest has been discussed or has taken place across the common law world. The Irish Law Reform Commission dealt briefly with the issue of pre-emptive costs orders⁷⁵ and recommended that the courts continue to exercise their jurisdiction to make them only in exceptional circumstances. The Commission's cautiousness mirrors that of certain commentators.⁷⁶ However, it recommends that courts

⁷² Taking its name from *Mareva Campania Naveria v. International Bulkcarriers* [1975] 2 Lloyd's Rep 509.

⁷³ *Countyglen v. Carway* [1995] 1 IR 481; *O'Mahony v. Horgan* [1995] 2 IR 411.

⁷⁴ [2005] 1 WLR 2600, at 2625.

⁷⁵ Law Reform Commission, *Report on Judicial Review Procedure*, (LRC71-2004), at 64.

⁷⁶ Costello, *loc.cit.*, at 136.

should, in certain circumstances, “indicate at an initial stage of proceedings the likely outcome in relation to costs while not committing itself absolutely on the issue.”⁷⁷ Costello says of this approach:

while the applicant will have a legitimate expectation which, although reversible, must be afforded sufficient weight when the court exercises its ultimate costs jurisdiction.⁷⁸

This approach is desirable in circumstances where the determination of the public interest status of a challenge can only be made in light of some evidence to be presented in the trial. However, in most cases, the public interest status of a challenge will be obvious.

The Australian Law Reform Commission has been more progressive in relation to costs orders and has proposed the introduction of Public Interest Costs Orders, which could be granted by any court or tribunal provided it is satisfied that:

- (i) the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant sector of the community;
- (ii) the proceedings will affect the development of the law generally and may reduce the need for further litigation;
- (iii) the proceedings otherwise have the character of public interest or test case proceedings;
- (iv) A court or tribunal may make a public interest costs order *notwithstanding that one or more of the parties to the proceedings has a personal interest in the matter.*⁷⁹

The appeal of such orders is that they can be awarded pre-emptively and do not prevent relief where a litigant has a private interest. The commission also recognised the potential benefit of indicative costs orders where the court could not determine the status of a challenge at the interlocutory stage.⁸⁰ The recommendations of the Australian Law Reform Commission have not yet been implemented. The Australian judiciary have been reluctant to liberalise the rule regarding the availability of PCOs despite the decision in *Oshlack v. Richmond River Council*,⁸¹ which had been characterised by commentators as authority for allowing the court to advert to a concept of public interest litigation in making a determination as to

⁷⁷ Law Reform Commission, *loc.cit.*, at 67.

⁷⁸ Costello, *loc.cit.*, at 136.

⁷⁹ Australian Law Reform Commission, *loc.cit.*, at Chapter 13. Emphasis added.

⁸⁰ *Ibid.*, at para 2.34.

⁸¹ [1998] HCA 11, HC (Aus).

costs. Kirby J, in the High Court of Australia, rejected the Council's contention that the floodgates would be opened if litigants could bring cases without a costs penalty where such litigation proved unsuccessful. He agreed with the trial judge, Stein J., who believed that experience showed that what could reasonably be expected was "little more than a modest flow barely wetting the wellies."⁸² While the *Oshlack* principles were intended to enjoy a broad application, subsequent decisions have rejected the public interest litigation consideration.⁸³

In South Africa, the basic principles of costs allocation are similar to Ireland; however, the exceptions to the general rule that costs follow the event are quite different. The courts in numerous cases have not awarded costs against an unsuccessful litigant who raises questions of constitutional law in cases against the state. To do otherwise would have a "chilling effect"⁸⁴ on other potential litigants. In the case of *Die Oranje Vrystaat vir Staatsondersteinde Skole v. Premier van die Provinsie Vrystaat*,⁸⁵ the court employed a two-part test: first, whether the complaint was frivolous or vexatious; and second, whether the applicants had any improper motives in bringing the proceedings. The definition of "frivolous and vexatious" is narrowly interpreted which has resulted in no costs orders being made against unsuccessful applicants even when they were unlikely to succeed.⁸⁶ Despite this, the courts have warned against the bringing of spurious challenges. Whether the litigant has a private/personal interest is not an issue. Chakrabarti *et al.* have praised the South African model; however, they do recognise a problem relating to the difficulty of making a distinction between a spurious challenge and a "worthy failed human rights" argument after the trial.⁸⁷ They suggest that this determination should be made at the permission stage and pre-emptive costs orders would provide an opportunity to make the distinction.⁸⁸ Clearly, if certainty of risk is to be promoted in order to prevent a "chilling effect", the litigant should be aware of the status of his case before the trial.

A thoughtful and detailed law reform proposal has been presented by Chakrabarti *et al.*, who submit that the granting of PCOs should be governed by a two-fold test, with the two requirements being cumulative: "(i) is this a public interest case⁸⁹ ... and (ii) does the defendant's superiority

⁸² (1994) 82 LGERA 236 at 245.

⁸³ See Edwards, "Costs and Public Interest Litigation after *Oshlack v Richmond River Council*" [1999] *Sydney Law Review* 27.

⁸⁴ *Motsepe v. CIR*, CCT 35/96, Constitutional Court (1997), at 30.

⁸⁵ (1998) 3 SA 692.

⁸⁶ Chakrabarti, Stephens and Gallagher, *loc.cit.*, at 709.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ A dual working definition of a public interest case is used, each being sufficient independently: "(a) it involves a real (as opposed to manufactured or academic) human rights complaint; (b) it involves a real (as opposed to manufactured or academic) challenge to legislation, policy or practice of wide or potentially wide application or consequence, or

in terms of its financial capacity to bear the costs of the litigation create an inequality of arms?" This approach not only avoids the private interest prohibition and the pre-maturity argument, but also focuses on the nature of the case taken rather the characteristics of the litigant. This is the appropriate level at which to screen cases, and the above proposal ensures that marginal or frivolous challenges will not receive an order.

Potential Framework

The above discussion demonstrates that there are numerous ways of reforming the current law on costs and public interest litigation and judicial review. It should be noted that law reform regarding costs and public interest litigation is not solely the concern of the judiciary. The civil legal aid system in Ireland⁹⁰ should be expanded to cover cases taken in the public interest as has been done in the United Kingdom.⁹¹

The courts, when exercising their discretion, should continue to follow the general rule that costs follow the event. They should depart from this general rule when the case is taken in the public interest, i.e. where it involves a genuine challenge to legislation, policy or practice of a public authority which is of wide or potentially wide application or consequence. This definition necessarily excludes redundant and frivolous challenges. While a favourable costs order to an unsuccessful public interest litigant granted after the trial is welcomed, pre-emptive costs orders are more effective in enabling public interest litigation. The presence of a private/personal interest should not impact upon the public interest character of a challenge. When making a pre-emptive costs order, the courts should not have regard to the substantive merits of the claim or whether the litigant is likely to succeed. They should base their decision on the merits of bringing the claim, *i.e.* whether there is an arguable case. Where the determination of the status of a challenge is dependent upon some evidence to be produced at trial, the court should indicate that a favourable costs order will be granted to the litigant, unless the evidence does not confirm its public interest status. The failure of a litigant to receive a PCO should not prejudice their application for a favourable costs order after the trial. The granting of pre-emptive costs orders should be contingent on the ability of the defendant to pay the costs bill and the courts should have regard to the effect the payment of costs would have on the plaintiff if unsuccessful.

exciting wide controversy.”

⁹⁰ See generally on the problems with the civil legal aid scheme, Free Legal Advice Centres, *Access to Justice: A Right or a Privilege?* (Dublin, 2005).

⁹¹ See Smith, “The UK experience of test cases and the Human Rights Act 1998”, a speech given at “Public Interest Law in Ireland” Conference; Dublin, 6 October 2005; available at <http://www.flac.ie> (last visited 11 August, 2006).

Conclusion

The purpose of judicial review is, according to Monahan, “to ensure that the political process is open to those of all viewpoints on something approaching an equal basis.”⁹² We have, through our Constitution and the adoption of a liberal democratic form of government, entrusted the courts with the authority to adjudicate the legality and propriety of legislation of parliament and the actions of bodies exercising public power. It would therefore appear that the prohibitive effect of costs on judicial review should be taken very seriously, especially where a challenge relates to some issue of public interest or of consequence to the public or group in society. It is therefore of the utmost importance that the potential of pre-emptive costs orders be realised.

⁹² Monahan, “Judicial Review and Democracy: A Theory of Judicial Review” (1987) 21 *University of British Columbia Law Review*, at p.89.

LESSONS ON LESSER EVILS: ISRAEL AND THE PROHIBITION AGAINST TORTURE

THERESE LYNE *

Introduction

I challenge you – answer. Imagine that you are creating a fabric of human destiny with the object of making men happy in the end, giving them peace and rest at last, but that it was essential and inevitable to torture to death, only one tiny creature – that little child beating its breast with its fist, for instance – and to found that edifice on its unavenged tears, would you consent to be the architect on those conditions? Tell me and tell the truth.¹

Following the tragic events of September 11th and the resulting ‘War on Terror’ the question of the legitimacy of torture has been raised repeatedly in both scholarly writings and the popular press. These considerations tend to focus on two interrelated issues: the factual question of whether torture is currently being used as a counter-terrorism strategy by the United States government and its allies and the theoretical question of whether torture represents a justifiable policy in certain situations.² Since the publication of the Abu Ghraib photographs and the leaked US legal memos the debate on whether the US has used torture has abated to a certain extent.³ These

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¹ Dostoevski, *The Brothers Karamazov* quoted in Dorfman, “The Tyranny of Torture; Is Torture Inevitable in our Century and Beyond?”, Levinson, ed., *Torture A Collection*, (Oxford University Press 2004) at 15.

² For more on this point see generally Rothenberg, “What we have seen has been terrible: Public Presentational Torture and the Communicative Logic of State Terror”, (2003) 67 *Albany Law Review* at 465.

³ On 26th December 2002 the Washington Post published an article detailing how captured al-Qaeda operatives and Taliban commanders held at US occupied Bagram airbase in Afghanistan were subjected to physical and psychological “Stress and Duress” techniques including being held blindfolded, hooded, bound in awkward painful positions and deprived of sleep for prolonged periods. In the aftermath of that article, numerous photographs were discovered which depicted in graphic detail the abuse suffered by detainees in the War on Terror at the hands of certain members of the US military. Following the publication of these photographs, legal correspondence between the White House, the US Department of Justice and the US Attorney General’s office were leaked to the press expressing opinions on the types of ‘pressure’ which could be applied to detainees which clearly contradicted generally accepted principles of US and international law prohibiting torture and ill treatment. A collection of these

photographs and memos constituted irrefutable evidence that the US had violated the international prohibition of torture by using torture-like techniques on detainees during the War on Terror. Hence, the current debate is primarily focused on whether the US was justified in using such techniques and, if so, whether the absolute prohibition against torture is now an outdated ideal which cannot be strictly adhered to.

This article seeks to address the question of whether torture can ever be legally permitted for the extraction of information. Many Human Rights are subject to limitation or exception. International instruments frequently contain provisions stating that the exercise and enjoyment of the rights and freedoms otherwise protected by the instrument can be limited or restricted by States on specific grounds.⁴ Generally, these grounds relate to times of external aggression or internal political difficulties. Despite this, the international community has recognised that even in times of emergency there is a need for non-derogation from certain rights particularly the right to be free from torture.⁵ Therefore the prohibition against torture is an absolute prohibition and there can be never be a legal justification for its violation.⁶ While there is no question that torture is morally reprehensible I would contend that from a legal perspective we can no longer ignore the fact that torture is currently being used as a counter terrorist strategy and has been so used over the last twenty years. If the law is maintained in its current form and the practice of torture continues around the world without reproach, the prohibition will eventually lose all legitimacy and become obsolete. Under these circumstances I would respectfully contend that the introduction of a post facto necessity defence which will only be available when strict conditions are met represents the ‘lesser of two evils’.

The debate on the introduction of an exception to the absolute nature of the prohibition of torture tends to reveal a marked division between those who accept Human Rights standards as universally binding and those with less sacrosanct vision of international law. Arguments for the possible use of torture highlight the differences between what Daniel Rothenberg

memos and opinions has since been published under the title Greenberg and Dratel, eds., *The Torture Papers: The Road to Abu Ghraib*, (Cambridge University Press 2005).

⁴ For example Article 15 ECHR states: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

⁵ For more on this see generally Boulesbaa, “The Nature of the Obligations incurred by States under Article 2 of the UN Convention Against Torture”, (1990) 12 (1) *Human Rights Quarterly* at 53.

⁶ Article 2(2) United Nations Convention Against Torture (hereafter UNCAT) states: “No exceptional circumstance whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.” Article 2(3) states: “An order from a superior officer or a public authority may not be invoked as a justification for torture.”

calls Human Rights formalists and advocates of *realpolitik*. Human Rights formalists understand the array of legal obligations associated with Conventions and other sources of international law as genuine demands – to be understood as binding and to be followed as rules that define acceptable behaviour on the part of States. This is particularly true for obligations on torture. Advocates of *realpolitik* express a different vision of international legal obligations, understanding these commitments as idealistic general principles that need not be followed when they run counter to the needs of a State or obscure the complexity of actual political conditions. From this perspective, the Universalist claim of the Human Rights system can be understood as either lofty ideals of moral value or empty promises of limited significance, particularly in light of pressing concerns such as national security.⁷

This article will look briefly at the historical background of the practice of torture, its legal prohibition and absolute nature. It will consider the definition of torture under the United Nations Convention Against Torture discussing which elements of this definition appear throughout international and domestic law and can be regarded as the essential ingredients of an act of torture. This will make it possible to demonstrate that the current interrogation practices of the US in its “War on Terror” and the interrogation techniques utilised for decades by the Israeli General Security Service⁸ contain those ingredients, violate international law and hence undermine the absolute nature of the prohibition of torture.

The article will then focus on the various attempts made by the US authorities since 2001 to circumvent the absolute nature of the prohibition of torture by re-interpreting international law to defend its conduct in Afghanistan and Iraq. In relation to Israel I discuss the approach which Israel has taken to the use of force by its security services specifically in the context of the Landau Rules and the 1999 decision of the Israeli Supreme Court in *Public Committee Against Torture*.⁹ I consider how the situation in Israel has influenced the current debate on torture and whether the Israeli necessity defence presents a viable solution to recent proposals that torture be used as a legitimate anti-terrorist interrogation technique.

Finally I will consider whether a State investigator can ever be relieved of criminal responsibility if he inflicts torture on another human being in order to obtain vital information regarding an imminent terrorist attack. This imminent terrorist attack is often referred to as the ‘ticking bomb’ paradigm. In its starkest form the ‘ticking bomb scenario’ is when a bomb has been set to explode in a metropolitan area that will kill thousands of people should it go off. A detained person is known to have information

⁷ Rothenberg *loc. cit.* at 465.

⁸ Hereafter referred to as the GSS.

⁹ HC 5100/94 *Public Committee against Torture in Israel v. The State of Israel* 53(4) PD 817, 38 ILM 1471.

on where the bomb is and how to defuse it. In order for the interrogator to get the information he requires to save the innocent, torturing the terrorist is heralded as the lesser of two evils.¹⁰ I look at the torture warrant proposal put forward by Professor Alan Dershowitz and explain why I disagree with advance approval of torture through the use of warrants.¹¹ I also examine the possibility of using a necessity defence, loosely based on Oren Gross' model for official disobedience, to excuse acts of torture where the case meets very strict criteria.¹²

Background Information

Torture is as old as human history itself; it is a scandalous heritage handed down to modern civilisation from prehistoric times of savage ignorance. Throughout the ages it has been used as a tool in the discovery of truth, as a process of moral and spiritual cleansing and as a legally sanctioned punishment. For half a millennium the law courts of Europe tortured suspected persons to obtain evidence. They acted openly and according to law. Investigation under torture was a routine part of criminal procedure in late medieval and early modern times. The jurists and judges who elaborated and administered this system were aware of the dangers of coerced evidence and accordingly they developed safeguards designed to render tortured confessions reliable. Across the centuries it became clear that the safeguards were far from safe. In the end, it was conceded that the long experiment with torture was a failure, and across the eighteenth century the use of torture was banned from European legal systems.

Legal Prohibition

The real death knell came for legally sanctioned torture in the wake of World War Two. Thousands of people, both civilian and military had endured horrendous torture at the hands of the Third Reich. In 1948, the General Assembly of the UN took the first steps to ensuring that such atrocities would never happen again. They inserted a prohibition against torture into the landmark Universal Declaration of Human Rights¹³, which

¹⁰ It was Jeremy Bentham who first put forward the ticking bomb scenario. Two Bentham scholars, W.L. Twining and P.E. Twining have argued that torture is impermissible even when restricted to a limited situation. They argue that there should be a distinction between justifying an isolated act of torture in an extreme emergency (like the ticking bomb scenario) and justifying the institutionalisation of torture as a regular practice (even in limited circumstances) because no government in the world can be trusted not to abuse this power. For more on this point see generally Silker, "Terrorists, Interrogation and Torture: Where do we draw the line?", [2004] 31 *Journal of Legislation* at 191.

¹¹ For more on this point see generally Dershowitz, "Tortured Reasoning", Levinson, ed., *op. cit.*, at 258 and Dershowitz, *Why Terrorism Works: Undertaking the Threat, Responding to the Challenge*, Yale University Press 2002 at 138.

¹² For more on this point see Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience", (2004) 88 *Minnesota Law Review* at 1481.

¹³ Hereafter referred to as the UDHR.

is now regarded as the foundational document of international Human Rights discourse and practice. Article 5 states: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.¹⁴ This ban on torture was subsequently incorporated in Article 7 International Covenant on Civil and Political Rights.¹⁵ In 1984 the UN displayed its commitment to the prohibition of torture by enacting the Convention against Torture or other Cruel, Inhuman and Degrading Treatment or Punishment. Under Article 4 UNCAT every State Party is obliged to ensure that all acts of torture are criminal offences under domestic legislation. State parties are also obliged to prosecute anyone who commits torture or extradite them for prosecution if they are unwilling to do so themselves.¹⁶ The UNCAT has been ratified by over 134 nations¹⁷ and serves to unify international understanding of the crime, institutionalise global condemnation and encourage the punishment of perpetrators.¹⁸

However, the prohibition of torture did not take on universal standing until it was accepted as a peremptory norm of customary international law.¹⁹ As a peremptory norm of *jus cogens* the prohibition of torture supersedes all other treaties and customary laws except laws that are also *jus cogens*.

¹⁴ Article 5 UDHR.

¹⁵ Hereafter referred to as the ICCPR.

¹⁶ Article 5 UNCAT.

¹⁷ Rosenberg, *loc. cit.* at 465.

¹⁸ These include Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, hereafter referred to as the ECHR. This article prohibits torture, . Article 5 of The African [Banjul] Charter on Human and People’s Rights 1981 and Article 5 of The American Convention on Human Rights 1969 all prohibit torture. The prohibition on Torture is also fundamental to humanitarian law, also known as the Laws of War. These laws govern the conduct of parties during armed conflict. Under international humanitarian law there is a duty to protect the life, health and safety of civilians and other non-combatants including soldiers who are captured or who have laid down their arms. Torture or inhuman treatment of Prisoners of War or protected persons are grave breaches of the Geneva Conventions and are considered war crimes. War crimes create an obligation on any State to prosecute the alleged perpetrators or turn them over to another State for prosecution. This obligation applies regardless of the nationality of the perpetrator, the nationality of the victim or the place where the act of torture or inhuman treatment was committed. Even persons who are not entitled to the protection of the 1949 Geneva Conventions, such as some detainees from third world countries, are protected by the “fundamental guarantees” of Article 75 of Protocol 1 of 1977 of the Geneva Conventions. The US has long considered Article 75 to be a part of customary international law as it prohibits murder, torture of all kinds whether physical or mental, corporal punishment and “outrages upon personal dignity, in particular humiliating and degrading treatment and any form of indecent assault.”

¹⁹ While in existence in customary international law before 1998, the case of *International Criminal Tribunal for the Former Yugoslavia Prosecutor v Furundzija* IT-95-17/I-T (December 10th 1999) clearly marked the prohibition of torture as a *jus cogens* norm of customary international law. The Trial Chamber characterised the prohibition of torture as a peremptory norm of international law, which is owed toward all nations as an *erga omnes* obligation. The International Criminal Tribunal for the Former Yugoslavia is hereinafter referred to as the ICTY.

Giving the prohibition such status has had effects at both inter-state and individual levels. At the inter-state level, it serves to internationally delegitimise any legislative, administrative or judicial act authorising torture. At an individual level it would seem that one of the consequences of the *jus cogens* character of the prohibition is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture who are present in a territory under its jurisdiction.²⁰ Hence “the torturer has become – like the pirate and slave trader before him – *hostis humani generis*, an enemy of all mankind.”²¹

Post 9/11 treatment of the absolute prohibition of torture

“There was a before - 9/11 and an after –9/11.
After 9/11 the gloves came off.”²²

The terrible events of September 11th 2001 highlighted the dangers of terrorism with painful clarity. They sparked a declaration of war on terrorists and the conditions that allow them to flourish. Though the fight against terrorism is not new, it has turned into a proactive international effort without precedent. However, despite the noble goal behind these international efforts, the War on Terror has not been conducted in a noble manner.²³

²⁰ De Wet, “The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law” (2004) *European Journal of International Law* at 97.

²¹ As stated in *Filartiga v. Pena-Irala* US Court of Appeals, Second Circuit, 1980.630.F.2d 876, where the US Court ruled in favour of a victims’ claim against his torturer, for more on this point see generally Rothenberg, *loc. cit.* This view of the torturer was restated by Circuit Court Judge Irving R Faufman sitting in a US Court of Appeals: “Among the rights universally proclaimed by all nations is the right to be free of physical torture and that for the purposes of civil liability the torturer has become the enemy of all mankind” as quoted in David Hope, “Torture” (2004) *International and Comparative Law Quarterly* 53.4 at 807.

²² Cofer Black, Former Director of the C.I.A.’s counter terrorist unit, in testimony to Congress quoted in “C.I.A. policy to evade International Law”, www.hrw.org, last accessed 02/03/2005.

²³ Because of the murderous machinations of al-Qaeda styled terrorism the US government has crafted a variety of robust anti-terrorism responses designed to disrupt the terrorist network and prevent future terrorist attacks from occurring. These measures include passage of the US Patriot Act; creation of the cabinet level post of Secretary of Homeland Security and the Department of Homeland Security; and the establishment of the United States Northern Command in Colorado. The US has also engaged in more controversial actions, such as the use of pre-emptive military force against rogue states and the indefinite detention of suspected illegal alien terrorists and enemy combatants. It is also alleged that they have use torture and CID treatment on detainees to procure information about possible future terrorist attacks, all the time claiming that their actions have not infringed international law - For more on this point see generally Addicott, “Into the Star Chamber: Does the United States engage in the use of Torture or other Similar Illegal Practices in the War on Terror?” (2003/2004) 92 *Kentucky Law Journal* at 849. There are also allegations that the US has returned suspected terrorists to countries where they are at risk of torture in breach of Article 3 UNCAT. Furthermore, in a proposal that will further undermine the absolute nature of the prohibition of torture the 9/11

Post 9/11 the US has repeatedly undermined the absolute nature of the prohibition against torture re-interpreting international law to accommodate its practices in both Afghanistan and Iraq,

Reports of Torture in the War on Terror

The 1999 Initial Report of the United States to the UN Committee Against Torture stated that:

[T]he use of torture is categorically denounced as a matter of policy and as a tool of state authority.... No official of the government, federal, state or local, civilian or military, is authorised to commit or to instruct anyone else to commit torture. Nor may any official condone or tolerate it in any form.... Every act of torture within the meaning of the Convention Against Torture is illegal under existing federal and state law and any individual who commits such an act is subject to penal sanctions as specified in criminal statutes.”²⁴

It is hard to believe that just three years after this declaration was made by the US denouncing the use of torture, a story would be published in the Washington Post which alleged that the US themselves had used torture in the War on Terror. On the 26th of December 2002 the Washington Post published an article detailing how captured al-Qaeda operatives and Taliban commanders held at the US occupied Bagram airbase in Afghanistan were subjected to physical and psychological “Stress and Duress” techniques including being held blindfolded, hooded, bound in awkward painful positions and deprived of sleep for prolonged periods.²⁵ While supporters of the Bush administration dismissed these allegations as unfounded and wholly untrue, the veracity of the Washington Post’s article could not be denied once the Abu Ghraib photographs were discovered. The now notorious photographs depict cruel and depraved scenes from within one of many US military locations. The pictures provide a vivid account of how detainees were physically and psychologically abused, sexually humiliated and degraded at the hands of the US military.

In a February 2004 report, the International Committee of the Red Cross found that “methods of physical and psychological coercion were

Recommendations Implementation Act 2004 would make it official US policy to send or return individuals to countries where they would be of grave risk of torture. The provision would violate US law and policy and is completely inconsistent with decades of efforts by Republicans and Democrats alike to make America a world leader in the fight against torture and for Human Rights.

²⁴ 1999 Initial Report of the United States to the UN Committee Against Torture.

²⁵ One unnamed US official quoted in the Washington Post stated: “If you don’t violate someone’s human rights some of the time, you probably aren’t doing your job” - “Legal Prohibition Against Torture”, June 1st 2004, www.hrw.org, last accessed 02/03/2005.

being used by the military intelligence in a systematic way to gain confessions and to extract information.”²⁶

The methods cited include: detainees being forced to remain for prolonged periods in painful stress positions, detainees being attached repeatedly over several days, for several hours each time to the bars of cell doors naked or in positions causing physical pain, as well as sleep, food and water deprivation. As set out above, such techniques, especially when used in combination, constitute torture. The classified investigative military report of Major General Antonio Taguba confirmed these findings.²⁷ Taguba reported that “numerous incidents of sadistic, blatant and wanton criminal abuses were inflicted on several detainees. This systematic and illegal abuse was intentionally perpetrated....”²⁸

Despite evidence to the contrary, since the publication of the Abu Ghraib photographs the US government has repeatedly sought to portray the abuse in that facility as an isolated incident – the work of a few “bad apples” acting without orders. On May 4th 2004, the US Secretary of Defence Donald H. Rumsfeld in a formulation that would be used over and over again by US officials, described the abuses at Abu Ghraib as “an exceptional isolated” case. In a nationally televised address on May 24th 2004 President George W. Bush spoke of “disgraceful conduct by a few

²⁶ “Iraq: Applying Counter-Terrorism Tactics during a Military Occupation”, www.hrw.org, last accessed 02/03/2005.

²⁷ The Taguba Report March 2004 reproduced in full in Greenberg and Dratel, Eds “The Torture Papers; The Road to Abu Ghraib”, (Cambridge University Press 2005) at 405. This report was compiled when on January 19th 2004, Lieutenant General Ricardo S Sanchez, Commander, Combined Joint Task Force (CJTF-7) requested that the Commander, US Central Command, appoint an investigating officer in the grade of Major General (MG) or above to investigate the conduct of operations within the 800th Military Police (MP) Brigade.

²⁸ *Ibid.*, He went on to state that:

Several US Army soldiers have committed egregious acts and grave breaches of international law at Abu Ghraib/BCCF and Camp Bucca, Iraq. Furthermore, key senior leaders in both the 800th MP Brigade and the 205th MI Brigade failed to comply with established regulations, policies and command directives in preventing detainee abuse at Abu Ghraib (BCCF) and at Camp Bucca during the period August 2003 to February 2004.

This abuse occurred in violation of both American domestic law and international law. Automatically the US is bound by customary international law whereby torture is prohibited as a peremptory norm of *jus cogens*. However, the US is also bound by the UNCAT which it ratified in 1990 and transposed into domestic law via the Torture Convention Implementation Act which attempts to bring the US Criminal Code into Conformity with the Convention Directives. Simultaneously, Section 2340A of US Federal Law makes it a federal offence for an American national to commit or attempt to commit torture outside the US. Added to this is the US Army’s Field Manual 34-52 which echoes international proscriptions categorically providing that the “use of force, mental torture, threats, insults, or exposure to unpleasant or inhumane treatment of any kind is prohibited by law and is neither authorised or condoned by the US government.” - Quoted in Robert K. Goldman, “Trivialising Torture: The Office of Legal Counsel’s 2002 Opinion Letter and International Law Against Torture”, (2004) 12 *Human Rights Brief* at 1.

American troops who dishonoured our country and disregarded our values.”²⁹

Given the fervour with which the Bush Administration publicly denounced the abuses at Abu Ghraib, many people still believed that what had occurred in Iraq had been an isolated incident, never endorsed by the US government and certainly never to be repeated. But over the weeks that followed a rich source of leaked legal memos and opinions³⁰ clarified official US policy on the issue of torture and clearly demonstrated that what had occurred at Abu Ghraib had not only been allowed to occur by the US military but had actually been approved by the US government.³¹

The US have attacked the prohibition of torture on three fronts. They have argued that the majority of detainees captured during the War on Terror are not entitled to the protection of international law when subject to interrogation. Secondly, they contend that even if certain detainees are protected by international law the coercive interrogation practices used by the US do not come within the ambit of the US definition of torture and are therefore not prohibited. Thirdly, the US asserts that even if their techniques amount to cruel, inhuman or degrading treatment or punishment³² the international prohibition on CID treatment does not apply to non-nationals detained by the US abroad.

Since the War on Terror began, the US has detained hundreds of individuals that can be grouped into one of four categories:

1. Those suspected of having links to al-Qaeda and other terror movements;
2. Those designated as enemy combatants;
3. Those detained as Prisoners of War in the Iraq military campaign and
4. Those who have been apprehended since the close of major combat operations in Iraq and designated as “security detainees”.

When the US Secretary of Defence Donald Rumsfeld labelled certain detainees as “enemy combatants” they were automatically denied the status of Prisoners of War³³ under international humanitarian law.³⁴ According to

²⁹ Quotes taken from the Introduction to Human Rights Watch Publications on Torture www.hrw.org last accessed 02/03/2005.

³⁰ These memos are reproduced in full in Greenberg and Dratel, Eds *op. cit.*

³¹ For more on this point see generally Sands, *Lawless World: America and the Making and Breaking of Global Rules from FDR's Atlantic Charter to George W. Bush's Illegal War*, (Penguin Group USA 2005)

³² Hereinafter referred to as CID treatment.

³³ Hereinafter referred to as POWs.

³⁴ The third Geneva Convention concerns Prisoners of War while the fourth Geneva Convention safeguards “protected persons” - detained civilians. Common Article 3 to the Geneva Conventions bans “violence of life and person, in particular murder of all kinds, mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment”. The use of force to obtain information is specifically prohibited in

Article 4A of the third Geneva Convention POW status is conferred on individuals who are “members of the armed forces of a party to the conflict” as well as “members of other militias and members of other volunteer corps, including those organised resistance movements belonging to a Party”,³⁵ provided such groups fulfil four specific conditions. These conditions include:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognisable at a distance;
- (c) That of carrying arms openly and
- (d) That of conducting their operations in accordance with the laws and customs of war.³⁶

All of the combatants captured during the Afghan conflict have been denied POW status by the US. Before the current Karzai government was put in place in Afghanistan, the US was engaged in an international armed conflict with Afghanistan, which was governed by the Taliban.³⁷ However, the Taliban militia, who were acting on behalf of the established government were found by Judge Ellis in *United States v Lindh*³⁸ not to qualify for lawful combatant status. After the establishment of the Karzai government the conflict in Afghanistan became an internal one with the US present in Afghanistan with the consent of the Karzai government to assist in maintaining order. The third Geneva Convention on POW status only applies in situations of international armed conflict and therefore ceased to apply once the Afghan conflict became an internal one.³⁹ In relation to al-Qaeda operatives, the US has declared that they are not recognised members of an armed force meeting the four criteria set out above and

Article 31 of the fourth Geneva Convention: “No physical or moral coercion shall be exercised against protected persons in particular to obtain information from them or from third parties.” Article 99 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War prohibits torture and ill treatment of Prisoners of War.

³⁵ Article 4A of the third Geneva Convention.

³⁶ Geneva Convention Relative to the Treatment of Prisoners of War, August 12th 1949, 6 UST. 3316, 75 U.N.T.S. 135 Article 4A. <http://www.unhchr.ch/html/menu3/b/91.htm> – generally referred to as the third Geneva Convention.

³⁷ The US did not officially recognise the Taliban government.

³⁸ *United States v. Lindh* 212 F. Supp. 2d. 541. The Taliban fighters were held not to qualify as POWs because they did not wear distinctive military insignia i.e. uniforms, which would make them distinguishable from the civilian population at a distance. The Bush Administration took this argument further stating that the Taliban had forfeited any claim to POW status because they had “adopted and provided support to the unlawful terrorist objectives of al-Qaeda.” – For more on this point see Addicott, *loc. cit.*, at 849.

³⁹ For more on this point see generally The Committee on International Human Rights and the Committee on Military Affairs and Justice, “Human Rights Standards Applicable to the United States Interrogation of Detainees” (2004) *The Record of the Association of the Bar of the City of New York* at 183.

hence do not qualify as POWs.⁴⁰ All detainees captured during the Iraqi conflict have been accorded POW status.

I would respectfully contend that restricting the categories of detainee that come within the definition of a POW was an covert attempt by the US to undermine international law and avoid the limits which the absolute prohibition of torture places on interrogation practices. All detainees held in an international armed conflict, even if they do not qualify for POW status, benefit from the protection of Common Article 3 which protects them from “humiliating and degrading treatment” and “mutilation and cruel treatment and torture”,⁴¹ but only POWs can rely on Article 17. Article 17 of the third Geneva Convention provides that Prisoners of War are only required to give their surname, first name and rank, date of birth, and army, regimental, personal or serial number or equivalent information. Article 17 goes on to provide that “no physical or mental torture, nor any other form of coercion, may be inflicted on Prisoners of War to secure from them information of any kind whatever. Prisoners of War who refuse to answer may not be threatened, insulted or exposed to any unpleasant or disadvantageous treatment of any kind.”⁴² By labelling detainees as “enemy combatants” they do not benefit from Article 17 protection meaning they can be questioned on issues beyond those detailed above so long as they are not subjected to torture. However, what the US regards as torture is in reality quite different to the internationally accepted definition of torture.

The Definition of Torture

*Almost all official interrogation is coercive, yet not all coercive interrogation would be called ‘torture’ by any competent user of the English language, so that what is involved in using the word is picking out the point along a continuum at which the observer’s queasiness turns to revulsion.*⁴³

The correct definition of torture has always been the subject of considerable debate. There are a substantial number of varying definitions within international law and, at domestic level what amounts to torture inevitably reflects the values and experiences of that particular culture. Furthermore, in the wake of almost universal prohibition of abusive interrogation practices, interrogators have developed sophisticated psychologically oriented interrogation techniques designed to convince suspects it is in their best interests to make truthful statements to

⁴⁰For more on this point see Addicott, *loc. cit.*

⁴¹The third Geneva Convention Article 3(1).

⁴²The third Geneva Convention Article 17.

⁴³Quote taken from Posner, “Torture, Terrorism and Interrogation” in Levinson, Ed. *Torture A Collection*, (Oxford University Press 2004) at 291.

interrogators.⁴⁴ With the development of these techniques and the failure of international instruments to reach a concord on the definition of torture it has become increasingly difficult to determine what amounts to torture, what constitutes legitimate interrogation or what will be classified as ill treatment which does not reach the threshold of torture. Certain countries the United States have taken advantage of this deficiency in international law and used what Oren Gross calls “definitional wizardry” to classify their interrogation techniques as less than torture and therefore not prohibited by international law.⁴⁵

Everyone knows, in general terms at least, what the word torture means. The first international instrument to provide a legal definition of torture was the UN Declaration on the Protection of all Persons from being Subject to Torture and other Cruel, Inhuman and Degrading Treatment or Punishment 1974. Under this early definition, torture constituted an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment.⁴⁶

This definition has since evolved so that varied definitions are now found in both regional and international instruments.⁴⁷ However, there is a tendency to regard the definition of torture contained in the UNCAT as reflecting a consensus “representative of customary international law”.⁴⁸ Article 1(1) of the UNCAT states that:

⁴⁴ See generally Parry and White, “Interrogating Suspected Terrorists: Should Torture be an Option?” (2002) 63 *University of Pittsburgh Law Review* at 743.

⁴⁵ Gross, “The Prohibition on Torture and the Limits of the Law”, in Levinson Ed. *op. cit.*, at 232.

⁴⁶ According to Hope, *op. cit.*

⁴⁷ The American Convention on Human Rights Article 1 defines torture as any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation as a means of intimidation, as personal punishment, as a preventative measure, as a penalty or for any other purpose. Torture under this Convention also includes the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture does not include physical or mental pain solely as the consequence of lawful measures. In categorising torture as a Crime Against Humanity the Statute of the International Criminal Court (hereinafter the ICC) defines torture as “the intentional infliction of severe pain or suffering whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions.” Article 3 ECHR declares that “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.” While the ECHR does not in itself contain a definition of torture, the European Court of Human Rights provided one in *The Greek Case* Report of 5th November 1969 (1969) 12 Yearbook 186-510. The Court held that “the word ‘torture’ is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment.”

⁴⁸ Quoted in Vander Vyver, “Torture as a Crime under International Law” (2003) 67 *Albany Law Review* at 427.

Torture means any act by which severe pain or suffering, whether physical or mental,⁴⁹ is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.⁵⁰

According to the International Criminal Tribunal for the Former Yugoslavia in *Furundzija*,⁵¹ the definition contained in Art 1(1) UNCAT has acquired customary status.

Accepting that the UNCAT definition is the most widely agreed upon definition of torture in international law, it is possible to extract the essential ingredients of torture from the wording of Article 1. I would respectfully submit that this definition contains three essential components: the relative intensity of the pain inflicted, the purpose for which it was inflicted and the status of the perpetrator.

If these three elements are present in a crime then it amounts to torture. If one or more of these elements are missing, the crime in question will constitute something less than torture. Such a crime is generally known as cruel, inhuman or degrading treatment or punishment.⁵² The UNCAT does not define CID treatment, but the United Nation's Code of Conduct for Law Enforcement Officials says that the phrase "should be interpreted so as to extend the widest possible protection against abuses whether

⁴⁹ The reference to mental torture makes it clear that it is as much torture to inflict severe mental distress on the victim by psychological means as it is to subject him to physical violence.

⁵⁰ Hence despite the fact that in Iran Article 119 of the Law of Hodoud and Qesas prescribes stoning to death as the penalty for adultery, it is not prohibited by the UNCAT as in Iran it is a lawful sanction and the UNCAT must take account of issues of cultural relativism. For more on this point see generally Vander Vyver, *loc. cit.*

⁵¹ International Criminal Tribunal for the Former Yugoslavia *Prosecutor v. Furundzija* IT -95-17/I-T (December 10th 1999).

⁵² Hereinafter referred to as CID. For the purposes of this article CID treatment is an umbrella heading for a three tiered hierarchy of objectionable treatment where degrading treatment or punishment generally encompasses treatment or punishment that humiliates or demeans a person in a way that shows a lack of respect for his or her dignity and personhood. It is also characterised by the feelings it arouses in the victim. The difference in defining treatment as inhuman rather than degrading or as torture could be said to derive primarily from the intensity of the suffering experienced by the individual. For more on this point see generally Ni Aolain, "The European Convention on Human Rights and Its Prohibition on Torture", in Levinson, Ed. *op.cit.*, at 213.

physical or mental.”⁵³ While it may appear that distinguishing between torture and CID treatment is straightforward, it has proved a much greater challenge, a challenge evident in the case law of the European Court of Human Rights.⁵⁴

In *Republic of Ireland v United Kingdom*,⁵⁵ the Court had to consider whether five interrogation techniques⁵⁶ used on IRA suspects by the British Security Forces in Northern Ireland constituted torture or CID treatment. The Court, rather to the surprise of many, concluded that the techniques in question did not amount to torture, though they did constitute CID treatment. The case has become the *locus classicus* in defining the terms used in Article 3 ECHR⁵⁷ and in distinguishing between torture and CID treatment in general. While the majority limited the finding to CID treatment, several judges in the minority concluded that the five techniques amounted to torture. The formal language of the decision suggests that it was the degree of suffering experienced by the detainees, in terms of its cruelty and intensity, that constituted the basis for the Court’s finding of the lesser violation. In other words, the first essential ingredient of the definition of torture as set out above – the relative intensity of the pain suffered by the victim(s) – did not meet the threshold of torture.⁵⁸

The distinction between torture and CID treatment is of paramount importance in the current debate re-evaluating the absolute nature of the prohibition on torture. Under the UNCAT, while States are under an obligation to prevent acts amounting to CID treatment, certain provisions of the UNCAT can only apply where the acts in question are categorised as torture. The obligations not to return a person to a country where they

⁵³ Quoted in Parry, “Escalation and Necessity; Defining Torture at Home and Abroad”, in Levinson, Ed. *Op.cit.*, at 147.

⁵⁴ Despite the ratification and operationalisation of the UNCAT the European Convention system continues to play a leading role in defining the legal terms of the international debate on standards prohibiting and defining acts of torture. The case law of the European Court is particularly helpful given that The Human Rights Committee, the European Committee for the Prevention of Torture and the Inter-American Commission have generally avoided distinguishing torture from CID treatment. See generally Rehman, *International Human Rights Law; A Practical Approach*, (Pearson Education Limited 2003) at 413.

⁵⁵ *Republic of Ireland v. United Kingdom* Judgment of the 18th January 1978, Series A, No. 25; (1979-1980) 2 EHRR 25.

⁵⁶ *Ibid.*, The five techniques consisted of being forced to stand for long periods in a stress position against a wall, being kept hooded, being subjected to continuous noise, deprivation of sleep and deprivation of food and drink. These techniques had been found to constitute torture when the Republic of Ireland case was before the European Commission.

⁵⁷ Article 3 ECHR states: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

⁵⁸ However it must be borne in mind that in the last 25 years since the Republic of Ireland case the European Court’s standards have shifted. The case must also be read in the context of its time as a highly sensitive political case – a leading Western democracy being accused of systematic torture, in the context of a fraught internal conflict in Northern Ireland to which the British government had committed its military forces. In such a context, the decision needs to be read as much in terms of its political weight as the practices being examined.

would be at risk of torture,⁵⁹ to criminalise all acts of torture,⁶⁰ to establish jurisdiction over the offences of torture,⁶¹ to take into custody alleged torturers,⁶² to extradite or try alleged offenders⁶³ and to provide remedies to torture victims,⁶⁴ are all limited to torture and do not apply where the practice in question is mere CID treatment. Moreover, Article 2(2) UNCAT which defines the prohibition as absolute in nature only applies to torture.⁶⁵ Article 16 UNCAT⁶⁶ which applies to CID treatment does not state that the prohibition of CID treatment is absolute. Therefore, an “exceptional circumstances” justification could be available if a State Party can prove that their interrogation techniques amounted to CID treatment, which did not meet the threshold of torture.

The US Definition of Torture

In a memo of August 1st 2002⁶⁷ Jay Bybee, an assistant Attorney General, dispensed with the established definition of torture contained in Article 1 UNCAT⁶⁸ and concluded that torture covers only the most extreme acts and is limited to severe pain which is difficult for the victim to endure. He writes that where the pain is physical, it must be of an intensity akin to that

⁵⁹ Article 3 UNCAT.

⁶⁰ Article 4 UNCAT.

⁶¹ Article 5 UNCAT.

⁶² Article 6 UNCAT.

⁶³ Article 7 UNCAT.

⁶⁴ Article 14 UNCAT.

⁶⁵ Article 2(2) UNCAT states:

No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture:

⁶⁶ Article 16(1) UNCAT states:

Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in Article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity....

⁶⁷ Newsweek reported that the August 1st 2002 memo was prompted by CIA questions about what to do with those captives alleged to be top ranking al-Qaeda terrorists such as as-Shaykh al-Libi and Abu Zubaydah. *See Sands, op. cit.*

⁶⁸ The US has accepted the binding value of Article 1 UNCAT to the extent that it is interpreted consistently with US law, which under 18 USC Section 2340 requires a “specific intent” to inflict severe physical or mental pain. Specific intent implies that one may be accused of torture only if his specific intent was to cause pain or suffering. If the defendant acted knowing that severe pain or suffering was reasonably likely to result from his actions but no more, he would have acted only with general intent. In the context of the Abu Ghraib scandal General Taguba found that the “systematic and illegal abuse was intentionally perpetrated....” Greenberg and Dratel Eds., *Op. Cit.* Hence, this indicates that the specific intent element of the US definition of torture was present and hence the abuses which took place in Afghanistan and Iraq not only qualify as torture within the meaning of the UNCAT but also within the more restricted definition in US domestic law. *See generally* Cassese, “Are International Human Rights Treaties and Customary Rules on Torture Binding upon US Troops in Iraq?” (2004) *Journal of International Criminal Justice* 2.3 at 872.

which accompanies serious physical injury such as death or organ failure.⁶⁹ The memo went on to list 7 practices that the US Courts consider torture including:

1. Burning, especially burning with cigarettes;
2. Severe beatings using instruments such as iron barks, truncheons and clubs;
3. Threats of imminent death, such as mock executions;
4. Threats of removing extremities;
5. Electric shocks to genitalia or threats to do so;
6. Rape or sexual assault and
7. Forcing a prisoner to watch the torture of another person.

The memo advised that “interrogation techniques would have to be similar to these in their extreme nature and in the type of harm caused to violate the law” which would infer that anything less than these forms of abuse was acceptable.⁷⁰

When the US ratified the UNCAT, it entered a reservation as to the meaning of mental torture, whereby it would be defined in accordance with US domestic law 18 USC. Section 2340. This statute defines “severe mental pain or suffering” as the prolonged mental harm caused by or resulting from:

1. The intentional infliction or threatened infliction of severe physical pain or suffering;
2. The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
3. The threat of imminent death; or
4. The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind-altering substances or other procedures calculated to disrupt profoundly the senses or the personality.⁷¹

Therefore the US definition of mental torture was established as narrower than that under international law even before the War on Terror began. The August 2002 memo, however, attempted to restrict the scope of the words “mental torture” even further. The memo opined that what constitutes mental torture must cause long-term mental harm resulting in “suffering not just at the moment of infliction but it also requires lasting psychological

⁶⁹ To read this memo see Greenberg and Dratel, Eds *op. cit.* at p.172.

⁷⁰ *Ibid.*, at 193.

⁷¹ *Ibid.*, at 177.

harm such as seen in mental disorders like post traumatic stress disorder.”⁷² Therefore mental torture was restricted to clinically diagnosed mental conditions with psychological effects lasting a significant duration i.e. months or years.

From these memos it is clear that the US government was attempting to ensure that should the interrogation methods used by the US military during the War on Terror ever be called into question, plausible legal arguments were available to contend that the conduct concerned did not meet the threshold of torture either physically or psychologically.

A number of consequences attach to a finding of torture.⁷³ First, US military officials would be open to prosecution in other States if their actions came within the definition of torture as torture is a crime subject to universal jurisdiction.⁷⁴ Secondly, the UNCAT bars torture absolutely. Article 2(2) of the UNCAT states that:

No exceptional circumstances, whatsoever, whether a state of war or threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.⁷⁵

According to the restricted definition of torture adopted by the US what occurred in Abu Ghraib and other US facilities during the War on Terror would amount at most to CID treatment. As stated above, States that ratify the UNCAT, like the US, must only “undertake to prevent”⁷⁶ CID treatment but the “no exceptional circumstances” provision does not apply.⁷⁷ Finally, Article 16 UNCAT governs the law on CID treatment. It does not require the exclusion of statements obtained from ill treatment as evidence at a criminal trial.⁷⁸ Hence, evidence procured by coercive practices which do not meet the threshold of torture under the US restrictive definition of torture will be admissible in the criminal prosecution of the victim or other suspected terrorists.

It is interesting to note that after the US had manipulated international law to exclude their coercive interrogation practices from the

⁷² *Ibid.*

⁷³ A number of Articles of the UNCAT only apply when torture takes place. The three consequences of a finding of torture described here are just a limited selection.

⁷⁴ When a crime like torture is subject to universal jurisdiction it means that the State involved in under a duty to try the alleged torturer or extradite him/her to a country that will try them. The rationale behind rendering certain crimes subject to universal jurisdiction is that there is a common interest in all States prosecuting such crimes.

⁷⁵ Article 2(2) UNCAT.

⁷⁶ Article 16(1) UNCAT.

⁷⁷ This distinction was noted by the Committee on International Human Rights *loc.cit.*, at 240.

⁷⁸ Article 15 UNCAT provides:

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made.

ambit of the definition of torture, they put forward the argument that these techniques did not even meet the threshold of CID treatment. When the US Senate gave its advice and consent to ratification of the UNCAT in 1994 it included a reservation under which the US defined the prohibited “cruel inhuman or degrading treatment or punishment” to mean ill treatment prohibited by the Fifth, Eighth and Fourteenth Amendments to the US Constitution. The US reservation was intended to clarify the kinds of conduct that would be prohibited. Yet White House Counsel and Attorney General nominee Alberto Gonzales has contended that these reservations limit the geographic reach of the treaty. He asserts because the Constitution does not apply to non-US citizens outside the US, neither does the Convention’s prohibition of ill treatment. This interpretation would mean the US officials interrogating and detaining non-US citizens abroad would be free to engage in cruel and inhuman treatment short of torture without violating the Convention.⁷⁹

I would respectfully submit that throughout the War on Terror the US has significantly undermined the absolute nature of the prohibition on torture. They ensured that many coercive interrogation practices would not reach the level of seriousness required to amount to torture i.e. loss of a limb, organ failure or death. They then tried to restrict the prohibition of CID treatment to US domestic territory and US citizens. In relation to excluding detainees from POW status, the US essentially reinterpreted the Geneva Conventions to suit the Administration’s purposes. I would respectfully contend that when the US began the current War on Terror they ought to have been reminded that “victory alone is not the singular goal. How one achieves victory is also important.”⁸⁰ The effect of the actions of the US has been to gravely undermine the prohibition of torture and to raise serious questions about the continued existence of the prohibition in its absolute form. However, these attempts to circumvent the prohibition are not novel. While the tragic events of September 11th have inflamed the debate on the absolute nature of the prohibition of torture, it was perhaps the actions of Israel that first ignited the debate twenty years ago. I would respectfully submit that Israel’s experience in dealing with the question of state-sponsored torture is instructive; their legal system has to create a framework that will recognise claims to basic Human Rights while also giving due regard to the needs of the government in its effort to foil terrorists who have established as their goal Israel’s annihilation.⁸¹

⁷⁹ For more on this point see Human Rights Watch’s Paper “US: Justifying Abuse of Detainees”, New York Conference January 25th 2005, www.hrw.org last accessed 02/03/2005.

⁸⁰ Bethke Elshain, “Reflection on the Problem of Dirty Hands” in Levinson Ed. *Op.cit.*, at 80.

⁸¹ See generally Parry and White, *loc.cit.*, at 743.

Lessons in Lesser Evils: Israel and the Prohibition against Torture

Since its birth, the State of Israel has been the target of significant threats to its existence, which have been manifested in a number of ways. The citizens of Israel have had to live for many years with the reality of suicide terrorism, where bombers blow themselves up in city centres, with an intensity and frequency unprecedented elsewhere around the world. Up until the late 1980's the official position of the government of Israel was its GSS interrogators did not use torture or CID treatment during terrorist interrogations.⁸² Despite this assertion, rumour abounded about the "coercive" methods of Israel's GSS. In order to investigate these claims and their veracity, a commission, chaired by Moshe Landau,⁸³ was set up in 1987 to examine the interrogation techniques of the GSS.⁸⁴ In November 1987 the Landau Commission issued its report, recognising the terrorist threat to the nation and the attendant necessity for the GSS to engage in what it termed euphemistically as "a moderate measure of physical pressure" during interrogation of suspected terrorists. In a separate secret part of the Report, the Landau Commission set out limits to the types of physical pressure that the GSS might employ. In the publicly released section of the Report, the Commission advised that GSS agents should combine "non-violent psychological pressure of a vigorous and extensive interrogation ...with...a moderate amount of physical pressure."⁸⁵

The Commission concluded that Israel's codified version of the necessity defence authorises in advance the use of moderate physical pressure on suspects allegedly involved in security offences, so long as the interrogator reasonably believes that the use of force is necessary to get information that would prevent the greater evil of the loss of innocent lives.⁸⁶ In addition, there was no need to require imminence for the defence to apply; necessity could be used to authorise torture where the suspected attack was not to occur for days, weeks or even months.⁸⁷

There are a number of issues arising from the adoption of these so-called Landau Rules. Firstly, the Commission in describing the actions of the GSS never used the word "torture". I would contend that in reality the techniques approved by the Commission did amount to torture or at the very least to CID treatment, given the fact that in subsequent years comparable techniques have been singled out by the UN Committee on

⁸² The General Security Service (GSS) are also known as the Shin Bet. The GSS is responsible for safeguarding the security of the State of Israel. For more on this point *see generally* Addicott, *loc. cit.*, at 849.

⁸³ Former President of the Supreme Court of Israel.

⁸⁴ The Commission was appointed by the government under the Commission of Inquiry Statute 1968.

⁸⁵ For more on this point *see generally* Addicott, *loc. cit.*

⁸⁶ Report of the Commission of Inquiry Regarding the Interrogation Practices of the GSS with Respect to the Hostile Terrorist Activities headed by Justice (ret.) M. Landau 1987.

⁸⁷ According to Silker, *loc. cit.*, at 191.

Torture and the Special Rapporteur on Torture as acts that come within the definition of torture under international law.⁸⁸ Hence, the Commission, by omitting the word “torture” from its report was attempting to manipulate the definition of torture under international law to accommodate the interrogation techniques of the GSS. This manipulation of language to avoid the prohibition against torture is directly comparable to the “definitional wizardry” utilised by the US in the War on Terror. By redefining the physical pressure applied by the GSS to suspects subject to interrogation as something less than “torture”, I would contend that the Israelis were not only avoiding their obligations under international law to refrain from using torture but were undermining the prohibition in its absolute form; Israel ratified the UNCAT in 1991 yet had in operation, with few successful challenges by other States party to the UNCAT or the Committee Against Torture,⁸⁹ an interrogation system which clearly utilised techniques amounting at the very least to CID treatment and more probably to torture.

Secondly, the use of the necessity defence to justify “coercive” interrogation practices was an attempt to introduce an exception to the absolute prohibition against torture. As stated above, many rights recognised by international Human Rights treaties are subject to limitation or restriction on specific grounds. Despite this, the international community has recognised that regardless of circumstance certain rights are so fundamental to the preservation of civilised society and basic standards of human decency that they can never be subject to exception. These rights include the right to be free from slavery, the right to freedom of thought, conscience and religion and more particularly the right to be free from torture. By using “necessity” as a defence to the practice of torture the Israeli’s were ignoring the absolute nature of the ban on torture and, interestingly, while in most jurisdictions necessity would be a defence after the fact - in other words once someone has been criminally indicted - in Israel necessity was used to authorise the use of torture in advance.⁹⁰ This

⁸⁸ These Rules condoned in advance allowing suspects and prisoners to be shackled, deprived of sleep and food, shaken violently and kept for prolonged periods in isolation. In its Concluding Observations Concerning the Republic of Korea (1996) UN DOC. No A/52/44 at paragraph 56 the UN Committee concluded that in severe cases sleep deprivation amounts to torture. In its concluding observations concerning New Zealand (1998) UN DOC. No A/53/44 at paragraph 175 the UN Committee found that depriving someone of food and/or water amounts to CID treatment under the UNCAT. In its Concluding Observations concerning Israel (1997) UN DOC. No A/52/44 at paragraph 257 the UN Committee found that violent shaking amounts to torture under the UNCAT. In relation to shackling the UN Committee found in its Concluding Observations concerning Israel (1997) UN DOC. No A/52/44 at paragraph 257 that being restrained in very painful positions amounts to torture. In the context of being held in isolation the UN Special Rapporteur on Torture has held that total isolation and sensory deprivation constitutes torture. For more on this point *see generally* Addicott, *loc. cit.*

⁸⁹ Monitoring Body for the UNCAT.

⁹⁰ *See generally* Silker, *loc. cit.*

meant that necessity could be pled in every case of moderate physical pressure and Israeli Courts were extremely reluctant to question whether the interrogator was actually justified in using the techniques in question. Also, in waiving the need for immediacy from the necessity defence, the Landau Commission ignored the unique nature of the defence as an emergency measure aimed at preventing concrete and actual damage.⁹¹

The Commission's report established the bureaucratic framework for the practice of torture in Israel, which was to exist for over a decade. These practices continued despite Israel's ratification in 1991 of the UNCAT as the Israelis maintained that these techniques did not amount to torture within the definition contained in the UNCAT.⁹²

In 1997 the Committee Against Torture declared that the methods approved by the Landau Commission did breach Article 16 and Article 1 of the UNCAT.⁹³ They declared that this conclusion was especially true where such methods of interrogation are used in combination, which appeared at the time to be the standard case. The Committee recognised that Israel had to strike a balance between security and human rights but that they were failing to do so:

The Committee acknowledges the terrible dilemma that Israel confronts in dealing with terrorist threats to its security, but as a state party to the Convention Israel is precluded from raising before this committee exceptional circumstances as justification for prohibited acts.⁹⁴

Yuval Ginbar, a spokesman for Israel's leading Human Rights group B'Tselem, stated that all the Landau Commission did was confirm that "torture is routine, it is used against at least 800 Palestinians every year and worse it is legitimised and legalised by the government, by the parliament and by the courts."⁹⁵

*The Public Committee Decision*⁹⁶

The Landau Rules remained in force for 12 years and were not subject to substantial challenge until 1996 when the Israeli Supreme Court⁹⁷ revoked

⁹¹ According to Gur-Arye, "Can the War Against Terror justify the use of Force in Interrogations? Reflections in Light of the Israeli Experience", in Levinson, Ed. *Op. Cit.*, at 185.

⁹² Concluding Observations of the Committee Against Torture: Israel, 09/05/1997 A/52/44 paragraphs 253-260, Office of the High Commissioner for Human Rights 1997.

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ "Israel Defends Interrogation Methods", Friday May 15th 1998 www.bbc.co.uk last accessed 01/06/2005.

⁹⁶ HC 5100/94 *Public Committee Against Torture in Israel v. The State of Israel* 53(4) PD 817, 38 ILM 1471.

⁹⁷ In these cases the Israeli Supreme Court assumed the form of the High Court of Justice. The High Court of Justice reviews the activities of public authorities, including the security forces,

an order preventing the use of force in a particular interrogation when the GSS claimed that it was interrogating the suspect to obtain information that could prevent future terrorist attacks.⁹⁸ The suspect's attorney said that "the court's decision reflected its usual practice of granting injunctions only when the State made no objections and allowing the use of physical pressure when the State sought it."⁹⁹ This decision led to a UN investigation of the use of force in Israeli interrogations and in 1999 an unprecedented investigation into the detention of Palestinian prisoners.

This investigation gave rise to the case of *Public Committee Against Torture v The State of Israel*.¹⁰⁰ The question before the Court in this case was whether it was possible to infer the authority in advance, to establish permanent directives setting out the physical interrogation means that may be used under conditions of "necessity". The forms of physical interrogation involved included repeated and forceful shaking, sleep deprivation and being kept in positions of extreme discomfort for prolonged periods.¹⁰¹ According to the defendants the use of such techniques was subject to internal regulation which required obtaining permission from various ranks in the GSS hierarchy depending on the technique sought to be used, the status of the suspect and the information thought to be in his possession.¹⁰² The arguments in favour of these techniques presented to the Landau Commission were also brought before the Supreme Court – primarily that given the ticking time bomb threat from Palestinian rebels and suicide bombers the GSS was authorised in advance to use such interrogation methods as were necessary including physical and psychological pressure. According to Gidan Ezra, the Head of the GSS, Israel's security services "are fighting terror which doesn't care about

to ensure that they are in line with the law. This judicial review is exercised as the first instance Court. This means that the High Court of Justice is the first Court to address the case and is not a Court of Appeal. It is also the last instance. There is no appeal on its rulings since it is the Supreme Court, the highest in the land.

⁹⁸ According to Silker, *loc. cit.*

⁹⁹ Quoted in Silker, *loc. cit.*

¹⁰⁰ 53(4) PD 817, 38 ILM 1471

¹⁰¹ One of these positions was the "shabach" position whereby a suspect is interrogated with his hands tied behind his back. He is seated on a small low chair whose seat is tilted forward. One hand is tied behind the suspect and placed inside the gap between the chair's seat and back support. The suspect's second hand is tied behind the chair against the back support. A sack that falls down to his shoulders covers the suspect's head and loud music is played in the room. It should be noted that the judgment did not directly address the question of whether the interrogation methods were reasonable or not. Instead, the Court examined whether the GSS was authorised to use these methods. The Court did so in light of the fundamental legal principle of administrative legality, according to which the activities of an administrative authority must be authorised by statute or by virtue of statute. The Court did not find such authorisation.

¹⁰² However, the GSS did not always adhere to these regulations and there is evidence that the GSS tortured as many as 85% of detained Palestinians. Between 1987 and 1994, between sixteen and twenty-five Palestinians died during or shortly after interrogation. See Silker, *loc.cit.*

children, women or old people, we have to defend people". Ezra contends that in order to successfully defend the people the GSS must be allowed to use moderate physical pressure.¹⁰³

The applicants in the case contended that the physical means employed by GSS investigators not only infringed upon the human dignity of the suspect undergoing interrogation, but in fact constituted criminal offences in violation of international law prohibiting torture. They also alleged that the use of these interrogation methods violated Israel's Basic Law: Human Dignity and Liberty.¹⁰⁴ By sharp contrast, the State of Israel argued that the methods utilised by the GSS did not violate international law, could not qualify as torture or CID treatment and did not cause pain and suffering to the person being interrogated. The State went on to argue that these interrogation methods were also valid under domestic law as a result of the defence of necessity.

The Supreme Court held that any form of interrogation must be measured against a strong presumption of individual liberty and dignity. Chief Justice Barak held that an interrogation by its very nature places a suspect in a difficult position. The "criminal's interrogation is not a negotiation process between two open and honest merchants, conducting their affairs in mutual trust."¹⁰⁵ An interrogation is a "competition of minds" in which the investigator attempts to penetrate the suspects mind and elicit the information that the investigator seeks to obtain. Quite accurately it was noted that "any interrogation, be it the fairest and most reasonable of all, inevitably places the suspect in embarrassing situations, burdens him, penetrates the deepest crevices of his soul, while creating serious emotional pressure."¹⁰⁶

Based on this reasoning, the majority¹⁰⁷ of the Court held that a reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment and free of any degrading conduct whatsoever. Unfortunately the Court failed to classify these interrogation methods as torture or even CID treatment. Further, while it acknowledged that under various international law treaties, to which Israel is a signatory, "a reasonable investigation is one free of torture", it failed to address whether the interrogation methods under scrutiny in that case violated those treaties. Instead, the court concluded that the methods utilised by the GSS were

¹⁰³ "Israeli Court to Rule on Torture Law," Wednesday May 20th 1998 www.bbc.co.uk last accessed 01/06/2005.

¹⁰⁴ According to www.knesset.gov.il, the Israeli legislature's website, the purpose of the Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.

¹⁰⁵ CR.A 216/74 *Cohen v. The State of Israel* at 352.

¹⁰⁶ Kedmi, On "Evidence" (1991) quoted in *Public Committee Against Torture in Israel v. The State of Israel* 53(4) PD 817, 38 I.L.M 1471.

¹⁰⁷ In his minority opinion, Justice Y Kedmi agreed with the judgment but determined that its implementation should be postponed in order to allow the security services to prepare.

degrading, infringed upon an individual's human dignity and were not inherent in an interrogation and could therefore not be subject to prior authorisation under Israeli domestic law.¹⁰⁸

For many this decision represented a positive step towards reinforcing the absolute nature of the prohibition on torture which the Landau Commission had severely undermined 22 years earlier. Veteran Israeli human rights lawyer Leah Tsemel stated:

It took 30 years of human rights abuse to get to this. It will stop torture and make Israel abide by international law.¹⁰⁹

I disagree with this view of the Supreme Court's judgment. While the Court appeared to outlaw certain interrogation techniques, it never stated that these practices were absolutely prohibited but in fact sought to create an exception to the absolute prohibition on torture under international law. In rendering its decision the Court cited Israeli penal law regarding necessity¹¹⁰ – engaging in illegal conduct in order to promote a greater good – and recognised that “in the appropriate circumstances, GSS investigators may avail themselves of the ‘necessity defence’ if criminally indicted.”¹¹¹

Mirroring the Landau Rules, the Court went on to hold that “the ‘necessity defence’ can arise in instances of ‘ticking bombs’, and that the phrase ‘immediate need’ in the statute¹¹² refers to the imminent nature of

¹⁰⁸ For more on this point *see generally* Hope, “Torture” (2004) *International and Comparative Law Quarterly* 53.4 at 807.

¹⁰⁹ “Israeli Torture Methods Illegal” Monday September 6th 1999 www.bbc.co.uk last accessed 01/06/2005.

¹¹⁰ Section 34(1) of the Israeli Penal Law Statute provides:

A person will not bear criminal liability for committing any act immediately necessary for the purpose of saving the life, liberty, body or property, of either himself or his fellow person, from substantial danger of serious harm, in response to particular circumstances during a specific time, and absent alternative means for avoiding the harm.

The defence of necessity is essentially a “state of nature” plea. If one finds oneself in an impossible position requiring one to choose between violating the law and preventing a greater harm, such as the taking of innocent life – and one has no time to seek recourse from the proper authorities – society authorises one to act as if there were no law. In other words, since society has broken its part of the social contract with you, namely to protect you, it follows that you are not obligated to keep your part of the social contract, namely to obey the law. Thus it has been said, “necessity knows no law.” – For more on this point *see generally* Dershowitz *loc. cit.*, at 260.

¹¹¹ Chief Justice Barak in *Public Committee Against Torture in Israel v. The State of Israel* at paragraph 35. Given that the Israeli Court left open the possibility of the necessity defence it is interesting to note that in the late 1980s Dershowitz proposed the idea of torture warrants in the Hebrew University in Israel. The Israeli government and judiciary rejected his proposal. The response, especially of Israeli judges, was horror at the prospect that they – the robed embodiment of the rule of law – might have to dirty their hands by approving so barbaric a practice in advance and in specific cases – For more on this point *see* Dershowitz, *loc. cit.*

¹¹² Referring to Section 34(1) of the Israeli Penal Law – Quoted in Dershowitz, *ibid.*

the act rather than that of the danger. Hence, the imminence criterion is satisfied even if the bomb is set to explode in a few days, or even a few weeks, provided the danger is certain to materialise and there is no alternative means of preventing it.”

The Court did reject the use of necessity as an *ex ante* justification for torture, holding that the nature of the defence was inconsistent with that approach. It was a defence dealing with a person’s reaction to a given set of facts, not the source of general administrative power.¹¹³ Therefore, while the Court rejected the Landau Commission’s formulation of the necessity defence, it introduced its own exception to the absolute nature of the prohibition of torture – a *post facto* necessity defence available to a State investigator accused of torture. While this was still illegal given the absolute nature of the prohibition, it was, for many, an acceptable compromise to the prohibition in order to deal with the ticking bomb threat. However, in practice, since 1999, this *post facto* defence has been transformed into an *ex ante* justification for torture. The Israeli Courts have chosen not to prosecute interrogators accused of torture once they claim that exigent circumstances existed and that they are intending to plead necessity. According to Human Rights Watch, as of January 2004, some 5,900 Palestinians were still being held on security-related grounds.¹¹⁴ Reports of ill treatment were widespread including kicking, beating, squalid conditions and deprivation of food and drink. Israeli Human Rights organisations documented cases of torture with some 631 persons being held on the basis of secret evidence as administrative detainees without effective judicial review.¹¹⁵ Hence, while the Supreme Court decision on its face reinforces the prohibition of torture, in practice, it subtly undermines it. A *post facto* necessity defence is a good idea in theory provided you can ensure criminal prosecution of the suspected torturer in every case. It should not be available to prevent prosecution from the beginning.

Twenty years ago the State of Israel lay the foundations for the current debate surrounding the use of torture in America’s War on Terror. The international community left Israeli security practices unchecked for far too long with the Landau Rules operating for 12 years in clear breach of international law. While the Supreme Court decision was welcome as a public declaration that GSS interrogation techniques were illegal, it left the door ajar for the GSS to continue to torture Palestinians with the security of knowing that, should the State ever attempt to prosecute them, they would

¹¹³ The UN Committee Against Torture 2001 welcomed the judgment and change in policy but insisted that no defence should be allowed to justify torture.

¹¹⁴ Despite this it did appear for a short time that the Public Committee decision had had an impact on GSS interrogation practices. Following the judgment, the Knesset, otherwise known as the Israeli legislature, enacted the General Security Services Law 2002, which regulated the operations of this security agency for the first time. For more on this point see Allain Ed. *Unlocking the Middle East; the writings of Richard Falk* (Olive Branch Press 2003).

¹¹⁵ “Israel/Occupied Territories” January 2004 www.hrw.org last accessed 01/06/2005.

have a practically unbeatable defence in the form of necessity. In Israel the exceptional defence of necessity has quickly become the norm – every suspect is a ticking time bomb threat, every prisoner has information that could save lives, every Palestinian can be tortured so as to protect the State from an ever-present and frequently imagined terrorist threat.

Cicero once said: “*inter arma silent leges*”,¹¹⁶ which means in battle laws are silent. It appears that in the so-called battle between Israel and Palestinian rebels, international laws prohibiting torture to which Israel is a party have been irreparably silenced and irreparably damaged. Given Israel’s high level of dependence on US foreign aid – especially considering the high cost associated with subsidising Israeli settlements in the Gaza Strip and West Bank – the question must be asked as to why the US government failed to challenge the silencing of such well established international laws.¹¹⁷ I would respectfully submit that their failure to criticise Israeli treatment of Palestinians has ensured that they will be not been seen as hypocrites in relation to the interrogation methods employed by US security personal.

In the *Public Committee* decision Chief Justice Barak stated that “at times the price of truth is so high that a democratic society is not prepared to pay.”¹¹⁸ In this current War on Terror it seems that no price is too high for revenge and retribution post September 11th. On that day the world changed, as did the status of the prohibition of torture. Israel was alone for many years in its open use of “coercive” interrogation techniques and had been heavily criticised for it; now their techniques are being lauded by the world’s last remaining super power. Therefore, not only has Israel’s policy on torture undermined the absolute nature of the prohibition, but it has also encouraged other countries to circumvent international laws on torture slowly leading to the erosion of the prohibition of torture in its absolute form.

Solutions - Where do we go from here?

In the aftermath of September 11th 2001, many academic commentators made proposals as to how the US and the world in general should deal with the al-Qaeda terrorist threat. It is Harvard Law School Professor Alan Dershowitz’s torture warrant proposal that has attracted the most attention.¹¹⁹ Dershowitz’s argument proceeds in 3 steps. First, he believes

¹¹⁶ Cicero *Pro Milano* Chapter 11, quoted in *Chambers Dictionary of Quotations* (Chambers Harrap, Edinburgh 2005) at 218.

¹¹⁷ See generally Allain, *op. cit.*

¹¹⁸ 53(4) PD 817, 38 I.L.M 1471.

¹¹⁹ While the torture warrant proposal has only attracted attention since the War on Terror, Dershowitz actually made this proposal back in the 1980s – see above and generally. Dershowitz *loc. cit.*, in Levinson Ed. at 258. It is also interesting to note that there once existed

that the record shows that “torture sometimes does work and can sometimes prevent major disasters”¹²⁰ that can be averted in no other fashion. Second, in light of this, he believes that public opinion would condemn a refusal to use torture to prevent terrorist attacks and that US officials would in fact engage in torture in certain situations. From these premises Professor Dershowitz concludes that:

[T]he real issue, therefore, is not whether some torture would or would not be used in the ticking bomb case – it would. The question is whether it would be done openly, pursuant to a previously established legal procedure, or whether it would be done secretly, in violation of existing law.¹²¹

As between the two options, he maintains that the use of open and established procedures is likely to result in less torture. He contends that a judge would not issue a torture warrant unless fully convinced that it is the most appropriate cause of action and the only real choice left under the circumstances. Dershowitz promotes the fact that a torture warrant would leave an official record; both judges and executive officials would be held accountable should they allow torture to occur when it was not necessary.¹²² He goes on to argue that this warrant requirement would also serve to protect the rights of the suspect:

He would be granted immunity, told that he was now compelled to testify, threatened with imprisonment if he refused to do so and given the option of providing the requested information.¹²³

If the suspect refused to provide the information after being immunised, he would then be threatened with torture. Dershowitz argues that the suspect might be more willing to provide the information if he knows that the use of torture has been authorised by law.¹²⁴

Dershowitz is not in favour of torture *per se*. Rather, he regards himself as a realist. He believes that one way or another torture is going to be used and he would rather that it be subject to official authorisation and accountability. He contends that:

a *bona fide* torture warrant system specifically used by the English Privy Council from about 1540 to 1640. For more on this point see Hope *loc. cit.*, at 807.

¹²⁰ Dershowitz, *Why Terrorism Works: Understanding the Threat, Responding to the Challenge*, (Yale University Press 2002) at 138.

¹²¹ Quote taken from Dershowitz, *op. cit.* at 151.

¹²² For more on this point see generally Kreimer, “Too close to the Rack and Screw: Constitutional Constraints on Torture in the War on Terror” (2003) 6 *University of Pennsylvania Journal of Constitutional Law* at 278.

¹²³ Quote taken from Silker *loc. cit.*, at 191.

¹²⁴ For more on this point see Silker, *ibid.*

[I]f we ever confronted an actual case of imminent mass terrorism that could be prevented by the infliction of torture, we would use torture (even lethal torture) and the public would favour its use.... It is not so much about the substantive issue of torture as it is about accountability, visibility and candour in a democracy that is confronting a choice of evils.¹²⁵

Leaving aside the legal minefield of trying to put torture on the statute books¹²⁶ I would contend that there are a number of other persuasive reasons why Dershowitz's torture warrant proposal should not be adopted. First, the torture warrant system legitimises the use of torture and I would contend that legitimisation of torture runs the risk of normalising its use. Dershowitz himself acknowledges this flaw in his proposal stating that "the major downside of any warrant procedure would be its legitimisation of a horrible practice."¹²⁷

Once torture becomes a legitimate option it is open to abuse. Dershowitz contends that torture would only be used in the most exigent circumstances – that of the ticking bomb terrorist – yet what qualifies as exigent is open to debate. I would respectfully submit that the system established under the Foreign Intelligence Surveillance Act 1978¹²⁸ is directly comparable to Dershowitz's torture warrant proposal. FISA was created by the US government as a corollary to the public legal system in order to discreetly process search warrants against suspected terrorists and spies. As initially enacted, FISA allowed specially designated judges to

¹²⁵ Quote taken from Dershowitz, *loc. cit.*, at 266.

¹²⁶ In order to put torture warrants on the US statute books, the legislature would have to circumvent the 4th, 5th, 8th and 14th Amendments to the US Constitution as well as the UNCAT. The Fourth Amendment guarantees the right to be free of unreasonable search or seizure, which encompasses the right not to be abused by the police. The Fifth Amendment guarantees the right against self-incrimination, which encompasses the right to remain silent during interrogations. The Fifth and Fourteenth Amendments guarantee due process ensuring fundamental fairness in the criminal justice system. The Eighth Amendment guarantees the right to be free of cruel or unusual punishment. Dershowitz begins by taking the position that as long as the information obtained, by using torture authorised by a torture warrant, is not used in a criminal prosecution, the protections of the US Constitution's Fifth Amendment's prohibition on compelled self incrimination are not transgressed. Further, he argues, in addressing the constraints on deployment of force in pursuit of prevention – as opposed to retribution – the Eighth Amendment's constraints on cruel and unusual punishment are inapplicable. The only relevant constitutional limitations, in Dershowitz's view, are the unreasonable searches and seizures and the general commands of the due process clause. As the relevant Fourth Amendment norm is one of reasonableness the same principles that allow the involuntary insertion of a needle to obtain blood alcohol tests in order to prosecute drunk drivers, would approve the insertion of a needle bearing "truth serums" to prevent terrorism. This would allow proportionately more serious breaches of public order, culminating in torture where absolutely essential to preserve life. For more on this point see Kreimer *loc.cit.*, at 278.

¹²⁷ Dershowitz, *loc. cit.*, at 271.

¹²⁸ Hereinafter referred to as FISA.

authorise surveillance to acquire foreign intelligence information under certain circumstances, in a Court known as the Foreign Intelligence Surveillance Committee.¹²⁹ Unfortunately the FISC model¹³⁰ has proved an embodiment of the critics' worst fears with the annual reports to Congress for the calendar year 2002 showing that 1,226 of 1,228 applications for search warrants had been approved by FISC.¹³¹ The remaining two were approved by the supplementary appeals council to the FISC, the FISCR.¹³² It is obvious that a system that always approves torture warrant applications would bluntly defeat the purpose of the system particularly as Dershowitz was trying to reduce the occurrence of torture by bringing it above board. I would respectfully contend that if the US were to create a torture warrant Court such a Court has the potential to become a rubber stamping mechanism, as has occurred with the FISC.

The second problem with Dershowitz's proposal is the fact that it is unlikely to achieve the visibility and accountability it was designed for. Taking the FISA model once more as an example, the records and files of cases involving FISC search warrants are sealed and may only be revealed to an extremely limited degree. Dershowitz contends that torture warrants would only be used in the most extreme of circumstances, which would imply that they would be reserved for cases of national security. The practical reality is that issues of national security will always involve *ex parte in camera* proceedings and the sealing of all associated documents thereby placing the "official" use of torture completely off the radar screen. Hence, such a warrant procedure would in fact defeat the goals of transparency and accountability and the whole premise behind Dershowitz's proposal may be called into question.

I would respectfully submit that the third flaw in Dershowitz's argument is the impracticality of the warrant system. In the ticking bomb situation, every minute counts. I would contend if such a situation arose today, there would be no time for law enforcement officials to present evidence to a judge in order to obtain a warrant. Under the current legal system operating in the US law enforcement officials are entitled to carry out warrantless searches of property where it is impractical to take the time to obtain a warrant from a judge having regard to the serious circumstances

¹²⁹ Hereinafter referred to as FISC. The seven-judge Court set up under the FISA was expanded to 11 judges under the 2001 USA Patriot Act. The model is adaptable to the torture warrant proposal, insofar as an 11 judge panel might be effective at quickly expediting decisions on torture warrants and making tough decisions regarding ticking bomb terrorists.

¹³⁰ As amended by the USA Patriot Act 2001 and other legislation.

¹³¹ According to Scarry the FISC has declined only one requested warrant in 25 years and the estimated number of warrant requests is 25,000. See Scarry, "Five Errors in the Reasoning of Alan Dershowitz", Levinson Ed. *op. cit.*, at 286.

¹³² See generally Moher, "The Lesser of Two Evils?: An Argument for Judicially Sanctioned Torture in a Post 9/11 World", (2004) 26 *Thomas Jefferson Law Review* at 469.

of the case in question.¹³³ It is a complete contradiction therefore to say that in the extreme circumstance of a ticking bomb terrorist an officer would have the time or opportunity to get to a judge, present his evidence, argue his case that a torture warrant is required and wait for a judicial decision.

Fourthly, if one looks again to the traditional warrant system for search and seizure, every country in the modern world has had to deal with the fact that, in situations where the stakes are considerably lower than the use of torture, law enforcement officials have embellished the truth in their efforts to serve the perceived ends of law enforcement. This is a flaw that has yet to be remedied in the current warrant system and one that I would contend that Dershowitz's torture warrant system cannot safeguard against. Dershowitz argues against *post facto* ratification of an interrogator's decision to torture an alleged terrorist as this places intense pressure on a torturer to make the right decision for fear of being sent to prison. I would contend that a judge is just as fallible as an interrogator and just as capable of ordering the torture of an innocent person. The difference is that a judge is much more removed from the situation. If the decision rests with the interrogator, he¹³⁴ has to be so certain that torture is necessary that he is willing to sacrifice his own freedom. What consequences exist for a judge who gets it wrong?

The final flaw in Dershowitz's reasoning is the effect such legalisation would have on the world as a whole. The civilised world has considered torture illegitimate for over a century. Legitimation of torture by the US, even reserved for extraordinary situations, would subject the world to an incredible setback in the campaign for Human Rights and would provide justification for the use of torture across the world. If we were to change course now, depart from our international obligations and seek to create a legal structure for authorising officials to use torture – even if only in the face of the most urgent threat and in the most extreme circumstances – our principled opposition to its use would be lost. The moral authority that enables us to seek to persuade others to abandon the practice would be extinguished. In this context it is important to remember that:

What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and objective justness of the Government's war depend entirely on upholding the laws of the State: by conceding this strength and this justness, the Government serves the purposes of the enemy. Moral weapons are

¹³³ See generally Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience" *loc. cit.*, at 1481.

¹³⁴ "He" is used to refer to both male and female torturers.

no less important than any other weapon, and perhaps more important. There is no weapon more moral than the rule of law.¹³⁵

Writing in *The New Republic* in 2002, Richard Posner, a judge on the US Court of Appeals for the Seventh Circuit, expressed reservations about Dershowitz's proposal but he argued that "if the stakes are high enough, torture is permissible. No one who doubts that this is the case should be in a position of responsibility."¹³⁶ With this in mind I propose an alternative to Dershowitz's torture warrants – a *post facto* necessity defence.

Israel's Legacy: A New Necessity Defence

The defence of necessity is essentially a "state of nature" plea. If one finds oneself in an impossible position requiring one to choose between violating the law and preventing a greater harm, such as the taking of innocent life – and one has no time to seek recourse from the proper authorities – society authorises one to act as if there were no law. In other words, since society has broken its part of the social contract with you, namely to protect you, it follows that you are not obligated to keep your part of the social contract, namely to obey the law. Thus it has been said, "necessity knows no law."¹³⁷ I would contend that such a defence is clearly appropriate in the ticking bomb paradigm – i.e. a defence for an interrogator who tortures a suspected terrorist supposedly in possession of the information necessary to defuse the ticking time bomb and save countless innocent lives. However, a clear condition of such a defence would be that it is *only* appropriate where all the constituent elements of the ticking bomb scenario are present. Hence, in order to qualify as a ticking bomb case it is essential:

1. That the investigator had reasonable grounds to believe that the suspect had direct knowledge which could be used to prevent the weapon from detonating;
2. That the weapon posed an imminent danger to human life;
3. That there existed no alternative means of preventing the weapon from exploding and
4. That the investigator was acting to save human life.¹³⁸

In the ticking bomb scenario it is proposed that torture be used against a suspected terrorist who is responsible for or complicit in the planting of the bomb. The traditional necessity defence concerns force being used against

¹³⁵ HC 320/80 *Kwasama v. Minister for Defence* 593 PD 113 at p. 132.

¹³⁶ Posner "The Best Offense" in *The New Republic* 02/09/2002.

¹³⁷ See generally Dershowitz, *loc. cit.*, at 260.

¹³⁸ Addicott, *loc. cit.*, at 849.

innocent people in order to prevent a greater harm. I do not believe that anyone would regard a ticking bomb terrorist as innocent. Hence the current necessity defence is in need of amendment in this regard. I would contend that in the ticking bomb paradigm, this element of the necessity defence should be amended to reflect our current self-defence law. Unlike necessity, preventing the danger in cases of self-defence does not involve the sacrifice of innocent people's interests. The use of force is not directed at the defenceless but rather at the person who has unlawfully created the danger and is able to avoid the need to sacrifice her interests by ceasing the attack.¹³⁹ The second shortfall of the current necessity defence is that it is generally understood as a defence that responds to circumstances emanating from forces of nature and not from people. When the pressure is from human beings the defence, if applicable, is duress not necessity. However this limitation on the application of the necessity defence can be overcome. According to Addicott the distinction between pressure coming from nature or human beings has disappeared in most modern legal systems and the two defences are capable of merging into a single necessity defence.¹⁴⁰ Hence in terms of the ticking bomb scenario and the possible use of torture I would contend that the defence is applicable regardless of whether the threat comes from human beings or from nature.

Thus, the defence will *only* be available when all the elements of a ticking bomb threat are present and it is not restricted to the torture of the innocent but is instead a defence to the torture of the guilty in the name of the greater good. There are a number of other conditions which I would submit should attach to such a defence.¹⁴¹ First, the prohibition of torture is to be maintained in its absolute form under international law. Torture should always be regarded as a crime when committed. From a practical point of view there is independent value in preserving the absolute ban on torture. The more entrenched a norm is – and the prohibition on torture is among the most entrenched norms – the harder it will be for government to convince the public that violating the norm is necessary.¹⁴²

¹³⁹ See generally Gur-Arye, *loc. cit.*, at 194.

¹⁴⁰ See generally Addicott, *loc. cit.*

¹⁴¹ The conditions, which I believe should attach to a necessity defence, are to some degree similar to those laid down in The American Law Institute's Model Penal Code. This Code recognises a "Choice of Evils" defence. Under this defence the conduct of a person acting to avoid a harm or evil to himself or another is justifiable if: the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offence charged and neither the code nor other law defining the offence provides exceptions or defences dealing with the specific situation involved and a legislative purpose to exclude the justification claimed does not otherwise plainly appear. According to the Code an interrogator who is subject to criminal liability for the torture of a terrorist in a ticking bomb situation would be able to raise this "Choice of Evils" defence. For more on this point see generally Silker, *loc. cit.*

¹⁴² For more on this point see generally Gross, "Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience", *loc. cit.*, at 1481.

The second condition which should attach to the defence of necessity is that it only operate as a *post facto* defence. There should never be prior authorisation of the use of torture, regardless of the circumstances. Such *ex ante* approval of torture proved disastrous for Israel in the 1980s and as set out above, I contend that such authorisation would be open to substantial abuse if introduced today either in the form of torture warrants or any other pre-approved procedure for the torture of human beings. The necessity defence should only be available after the torture has been committed and the interrogator is standing trial for breach of international law.

Certainty of criminal prosecution of alleged torturers should be the third condition of this necessity defence. I endorse Oren Gross's official disobedience model¹⁴³ in this regard. When an interrogator tortures a suspected terrorist he is committing an act of official disobedience. He has no prior permission to use torture as the practice of torture cannot be authorised in advance and he knows he is stepping outside the legal framework, breaching not only domestic but international law, in using torture but he does so in the belief that torture is the last remaining viable option to protect the greater good. According to the official disobedience model, if an official determines that a particular case necessitates the use of torture, he may choose to depart from the absolute prohibition. The personal consequences of violating the law must be determined by a jury of his peers. Hence, society retains the role of making the final determination as to whether the interrogator ought to be punished and rebuked or rewarded and commended for his actions.¹⁴⁴ If a Court determines that the interrogator was justified in his actions then they may relieve him of criminal liability. I would contend that the criminal prosecution of *every* alleged torturer is the most essential condition in such a necessity defence. Otherwise we risk creating a defence analogous to the one operating in Israel whereby the *post facto* defence is so strong that it deters the Court from ever bringing criminal prosecutions, transforming their *post facto* necessity defence into *ex ante* approval of torture.

This type of necessity defence has already gained support from certain quarters. The ICC Statute¹⁴⁵ expressly provides that the defence of necessity is available to persons accused of one of the crimes falling under the jurisdiction of the Court. These crimes include torture as a War Crime and a Crime against Humanity. Article 31(1)(d) requires that the action taken in the face of an imminent threat or danger to the life or limb of the person concerned or of a third person be "a necessary and reasonable reaction to avoid this threat" or danger. The terms necessary and reasonable describe actions that:

¹⁴³ See generally Gross, *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ Article 31(1)(d) of the Statute for the International Criminal Court.

1. Must be appropriate and capable of averting the danger;
2. Cause harm which is limited to that absolutely necessary to forestall the threat and;
3. Do not cause greater harm than the one sought to be avoided.¹⁴⁶

Taking this endorsement by the ICC into account I would contend that the introduction of a necessity defence to acts of torture perpetrated in the most exigent of circumstances would be a reasonable reform of the law on torture. It accommodates the possibility of the ticking bomb case while maintaining the prohibition of torture to the greatest extent possible.

The actions of Israel and the US have sent a very clear message to the world that the absolute prohibition of torture in its current form is incapable of dealing with the reality of modern warfare. Ticking bomb scenarios are no longer mere hypothetical situations conjured up in academic ivory towers and States are searching for every possible weapon to deal with such situations. For many, interrogational torture now represents an extremely powerful weapon for the State in the ticking bomb paradigm. I would offer some words of caution in this regard: while the ticking bomb threat is very real, it is also very rare. Hence, when we set out to chart a general policy on the issue of torture, we must ask ourselves whether our general policy ought to be shaped around the contours of these rare exceptions or whether there is some value in maintaining the prohibition in its absolute form and providing a *post facto* mechanism to deal with the ticking bomb scenario should it ever arise. I would argue that the pertinence of the defence of necessity has to do with the fact that it is specifically designed to cater for those rare and extreme situations that are difficult for the law to encompass specifically since they are, by their rarity, so unforeseeable.

Once we authorise State agents to use interrogational torture in one set of cases, it is unlikely that we will be able to contain such use to that limited subset of cases. Rather, such power and authority are likely to expand far beyond their original intended use. It is primarily for this reason that I reject Dershowitz's torture warrants. Just because I believe in maintaining an absolute prohibition does not mean I am naïve about the frequency with which torture is used. I would contend that introducing a necessity defence as set out above ensures that any use of torture will come before the public in a criminal trial, the public will decide if such torture was warranted and those involved will be held accountable. I accept that this form of exception does not present an ideal solution. The possibility remains that even if a situation appears to qualify as a ticking bomb situation the suspect in question may be innocent. Determining whether a

¹⁴⁶ See generally Gaeta, "May Necessity be Available as a Defence for Torture in the Interrogation of Suspected Terrorists" (2004) *Journal of International Criminal Justice* 2.3 at 785.

situation amounts to a ticking bomb scenario thereby necessitating the use of torture inevitably involves some level of subjectivity; an investigator must have “reasonable grounds” to believe that the suspect has direct knowledge which could be used to prevent a bomb from detonating. With subjectivity comes fallibility and the possibility that an innocent may be subjected to torture. It is at this point that the question if lesser evils becomes paramount. Without reform the danger exists that the prohibition against torture will continue to be ignored and eventually become obsolete. In this scenario countries which at present refrain from using physical pressure in interrogations because of the international prohibition could depart from this position. While many may argue that this is a dramatic leap in logic I would disagree. Since September 11th many countries have reacted in a panicked and somewhat extreme manner to the possibility of a similar terrorist attack. For them torture or CID treatment could represent a

within the definition of torture and so were not absolutely prohibited. They also contended that even if these techniques were illegal, they were justified by a necessity defence, which operated to excuse the actions of Israeli security forces even before the torture was carried out. They then refined this defence so that it only operated after the act in question had taken place, i.e. it could only be used as a defence in a criminal prosecution for torture. However, the defence was so strong that few prosecutions were ever taken, ensuring that torture and ill treatment could occur without consequences for those who practised it. The US likewise manipulated the definition of torture to exclude painful practices from its remit. They also restricted the application of the Geneva Conventions by deciding that many detainees captured during the War on Terror did not qualify for POW status. This reinterpretation of international law allowed severe physical and psychological abuse to be perpetrated against detainees by US forces during the War on Terror. Once again, no consequences attached to these gross violations of international law.

Therefore these States not only attempted to circumvent the law on torture but they succeeded in doing so. While their actions have received international condemnation, there have been no real consequences attaching to these violations. UN bodies like the Human Rights Committee¹⁴⁹ and the Committee Against Torture¹⁵⁰ which monitor the application of certain international treaties prohibiting torture do not have the means to force compliance with those treaties. In the past it has always fallen to other contracting States to call upon countries violating the law to abide by the relevant international standards.¹⁵¹ The sad reality is that it has often been countries like the US which has used its power on the international stage to ensure other countries honour their commitments under international law. Now it is the US itself that refuses to abide by international law. Given this situation, there is a very real danger that the prohibition of torture in its current form will continue to be ignored.

¹⁴⁹ Monitoring Body for the International Covenant on Civil and Political Rights – ICCPR.

¹⁵⁰ Monitoring Body for the UNCAT.

¹⁵¹ Often ignored in the celebrations of the UNCAT is the fact that while it is quite strong in substance, it is remarkably weak in enforcement. The central enforcement procedure in the Treaty is a requirement that States submit reports to the Committee Against Torture, an international body created by the Treaty to oversee the Convention. But failure to abide by even this minimal commitment is frequently ignored. Stronger enforcement procedures are available but wholly optional: countries can agree to allow States and individuals to file complaints against them with the Committee Against Torture but they are not required to do so in order to join the Treaty. Consequently only about 30% of those who have joined the Convention have accepted these additional procedures. According to the sceptical view of international law, these weak enforcement provisions mean that States will never change their behaviour to obey the Convention. Where international institutions do not put in place effective enforcement mechanisms, there is, of necessity, greater reliance on other methods of maintaining compliance, such as domestic enforcement and reputational incentives. For more on this point *see generally* Hathaway, “The Promise and Limits of the International Law of Torture” in Levinson *d. op. cit.* at 205.

Consequently these recent violations of the absolute prohibition of torture not only make a mockery of international law but they send a signal to the rest of the world that certain States may violate the law with impunity. With this in mind the words of Abraham Lincoln offer an interesting solution: “In times of war it is sometimes necessary to suspend our liberties to protect our liberties.”¹⁵² While I am not advocating the suspension of the prohibition of torture, I am seeking a compromise whereby the absolute nature of the prohibition is maintained on the statute books but provision is made for the concerns of countries like Israel and the US through the introduction of a necessity defence for the very rare, real ticking bomb cases. While this may appear to many as selling out, as giving in to the insubordination of a small number of countries I would disagree. This minor alteration to our civil liberties law will ultimately protect our civil liberties as there is a very real possibility that without amendment the prohibition of torture will become obsolete as States disregard international

torture should only ever be used as a last resort. With this in mind it is my respectful contention that while a necessity defence is not the ideal solution it does ensure that the prohibition of torture is maintained as far as practicable, while simultaneously acknowledging the fact that the absolute prohibition of torture has been successfully undermined in the last two decades by a number of independent, democratic and powerful nations.

CASENOTES

COLLATERAL CHALLENGES TO A DECLARATION OF UNCONSTITUTIONALITY: *A v. GOVERNOR OF ARBOUR HILL PRISON*¹

SINÉAD RING*

Introduction

In this case, the Supreme Court considered the retrospective effect of a declaration of unconstitutionality on cases already decided under the statutory provision. In *A*, the Supreme Court was faced with a dilemma in resolving on the one hand, the fact that the provision under which *A* was convicted and sentenced was unconstitutional, and on the other, the desire and duty of the Court to promote the common good.

There were 2 considerations at the heart of this case:

1. A declaration of invalidity has retrospective effect to the party who brought the constitutional challenge;
2. (a) The issue of a collateral attack on a prison sentence based on another person's successful attack on the statute under which it was imposed;
(b) The related question of whether someone who brings a collateral attack will be entitled to redress based on the subsequent finding of invalidity.

The case is a significant departure from the common law rule that the duty of a court is not to “pronounce a new law but to maintain and expound the old one”² and exemplifies the practical implications of the distinction between the Constitution and judicial enforcement of its commands.

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¹ [2006] IESC 45.

² 1 Blackstone Commentaries, 69 (15th ed 1809), cited in *Linkletter v. Walker* 381 US 618 (1965).

History

In 2004 the applicant (A) was convicted on a plea of guilty of the offence of unlawful carnal knowledge of a girl under the age of 15 (also known as defilement of a girl under the age of 15) contrary to section 1(1) of the Criminal Law (Amendment) Act 1935 and was sentenced to 3 years imprisonment to date from 8th November 2004.³

In May 2006, in *CC v. Ireland (No 2)*,⁴ the Supreme Court declared that section 1(1) of the Criminal Law (Amendment) Act 1935 was inconsistent with the provisions of the Constitution. The principle ground for this was that section 1(1) afforded no defence of honest belief as to the age of the girl once the *actus reus* of intercourse was established.⁵ The provision was contrary to the State's obligations under Article 40 of the Constitution.⁶

Three days after the Supreme Court decision in *CC (No 2)*, A applied pursuant to Article 40.4.2° of the Constitution for an order directing his release from custody on the grounds that his detention following his conviction under section 1(1) of the Criminal Law (Amendment) Act 1935 was unlawful. The High Court (Laffoy J.) considered that since section 1(1) was null and void, A's conviction and sentence were nullities. She thus upheld the habeas corpus application and ordered A's release.

The State immediately appealed against the High Court's order. In an *ex tempore* judgment, delivered 3 days after the High Court decision, the Supreme Court allowed the appeal, and a warrant was issued for the arrest of A. He was arrested that evening and returned to custody. The Court delivered its reasons for allowing the appeal on 10th July 2006.

Case Law

In order to understand the High and Supreme Court judgments, it is necessary to first briefly sketch the relevant case law.

³ On the date of the offence, A was 38 and the victim was 12. A's daughter was a friend and a classmate of the victim. It was accepted that A knew the girl was under 15 years of age. Before A had sex with the victim, he gave her alcohol. Hardiman J. stated "It is scarcely possible to think of a less meritorious applicant. I would not grant relief unless obliged to do so."

⁴ *CC v. Ireland, The Attorney General and the Director of Public Prosecutions* [2006] IESC 33; [2006] 2 ILRM 161; Hardiman J.; Murray C.J., Geoghegan, Fennelly and McCracken JJ. concurring: 'the CC case'.

⁵ The decision followed that of *CC v. Ireland (No 1)* [2005] IESC 47 where the Supreme Court upheld Smith J.'s finding that a defence of honest mistake as to age was not available under the section.

⁶ In response to the legislative vacuum created in the wake of *CC (No.2)*, the Oireachtas enacted the Criminal Law (Sexual Offences) Act 2006. Subsequently, a Joint Committee on Child Protection was established to review the substantive criminal law of sexual offences against children and associated issues, including the age of consent in sexual offences.

In *McMahon v. Attorney General*⁷ a majority of the Supreme Court held that the provisions of the Electoral Act 1923 were unconstitutional as they did not ensure the secrecy of the ballot. However, the Court avoided the issue of the validity of Dáil elections which had been held since 1923, since no such argument was made. In *de Búrca v. Attorney General*⁸ a unanimous Supreme Court struck down as unconstitutional the provisions of the Juries Act 1927 which confined juries to rated occupiers and excluded women unless they specifically applied. Again, the Court did not address the retrospective implications of this, though O'Higgins C.J. considered that the "overriding requirements of an ordered society" would defeat any argument as to the invalidity of all criminal trials held under the impugned provisions.⁹ Following on from *de Búrca*, the Supreme Court in *The State (Byrne) v. Frawley*¹⁰ held that the applicant was estopped from claiming his trial had been unconstitutional, since he had raised no objection at the time of his trial, which was in progress at the time of the decision in *de Búrca*, or at any appeal.

The question of the retrospective potential of a finding of unconstitutionality was finally considered in *Murphy v. Attorney General*.¹¹ In *Murphy*, the Supreme Court unanimously held that the provisions of the Income Tax Act 1967 were unconstitutional.¹² Following on from the declaration of unconstitutionality, the plaintiffs sought to have all the overpaid tax refunded to them. This raised the question of the status of other married couples who had similarly overpaid tax. Henchy J. delivered the leading judgment on this point,¹³ and held that the 1967 provisions had been always been a nullity.¹⁴ Furthermore, Henchy J. stated that a pre-1937 law subsequently found inconsistent with the Constitution ceased to operate with the coming into force of the Constitution:

⁷ [1972] IR 69.

⁸ [1976] IR 38.

⁹ [1976] IR 38, at 63.

¹⁰ [1978] IR 326.

¹¹ *Murphy v. Attorney General* [1982] IR 241, O'Higgins C.J., Henchy, Griffin, Kenny and Parke JJ.

¹² The provisions had the effect of taxing the plaintiffs, a married couple, more heavily than an unmarried couple.

¹³ O'Higgins C.J. dissented on this point. He considered that since Article 25.4.1° of the Constitution prescribed that every Bill was to become law upon signature by the President, invalidity subsequently established could not relate back to the moment of enactment; validity only took effect at the date of the declaration of invalidity.

¹⁴ The majority (O'Higgins C.J. and Kenny J. dissenting) held that the plaintiffs were entitled to be repaid from the first day of the financial year immediately succeeding that in which they had challenged the provisions. Up until that year the State was entitled to act on the assumption that the taxes imposed were validly imposed and had altered its position by spending those taxes.

Such a declaration under Article 50, s.1, amounts to a judicial death certificate, with the date of death stated as the date when the Constitution came into operation.¹⁵

Crucially, Henchy J. drew a distinction between the finding of inconsistency and the effects of such a finding, setting out ‘the primary rule’ of redress. He considered that any person affected by transactions done under an invalid statutory provision would normally be entitled to appropriate redress.¹⁶

However, Henchy J. qualified this general rule. There may be certain “transcendent considerations which would make [the provision of redress] undesirable, impractical or impossible.” These included “the irreversible progressions and by-products of time, the compulsion of public order and of the common good”.¹⁷ Redress would not be forthcoming in certain situations: for example “because of a person’s conduct, or because of the irreversible course events have taken”.¹⁸ In *Murphy*, the State was entitled to defeat the vast majority of claims by reason of the common law defence of change in position and its reliance in good faith on the validity of the sections.

*The Decision of the High Court in A*¹⁹

In the High Court, A submitted that following the decision in *CC (No2)*, his conviction and sentence were nullities and of no effect, and that as a consequence, his detention was not in accordance with law.

Laffoy J. observed that there was no decided case on the effect of a declaration that a pre-Constitution statute is unconstitutional. She adopted Henchy J.’s *obiter* comments in *Murphy* to the effect that the provisions were void from the coming into operation of the Constitution. The only relevant consequence of the declaration of unconstitutionality was whether the detention of the applicant was in accordance with law. Laffoy J. noted that:

... it is of significance that in [the *CC (No2)* case] the Supreme Court declared section 1(1) to be inconsistent with the Constitution *in toto*, rejecting an argument made on behalf of the State parties that a declaration of inconsistency should be couched in terms that s.1(1) ‘cease to have force and effect *to the extent that* it precluded an accused from advancing a defence of reasonable mistake.²⁰

¹⁵ [1982] IR 241, at 307.

¹⁶ [1982] IR 241, at 313.

¹⁷ [1982] IR 241, at 314.

¹⁸ [1982] IR 241, at 307.

¹⁹ [2006] IEHC 169, Laffoy J.

²⁰ *CC v. Ireland (No 2)* [2006] 2 ILRM 161, at 181.

Having considered another judgment of Henchy J. in *The State (Royle) v. Kelly*,²¹ this time regarding the test to be applied by a Court when deciding whether to grant an application for habeas corpus, Laffoy J. held:

The defect here could not be more basic. It is that the purported conviction relates to something which is not an offence in criminal law. In my view the conviction is a nullity, as is the sentence.

Accordingly, Laffoy J. ordered the applicant's release from custody.²²

The Decision of the Supreme Court

The Supreme Court rejected the contention that it is a principle of constitutional law that cases which had been finally decided and determined on foot of a statute which is later found to be unconstitutional must invariably be set aside as null and of no effect.²³

The Court observed that while the practice has been not to accord retrospective effect to declarations of unconstitutionality, the issue had not been the subject of an express decision of the Supreme Court. The Court also noted that this was the first time a collateral challenge to a final decision of a court had been brought before the courts based on a subsequent judicial decision.

In the leading judgment, Murray C.J. analysed Henchy J.'s dicta in *Murphy* that a finding of invalidity "normally" involves redress, by focussing on the concept of the administration of justice. The abstract notion of absolute retroactivity was incompatible with the administration of justice envisaged by the Constitution; it would render a legal system uncertain, incoherent and dysfunctional and would cause widespread injustices.

Murray C.J. quoted extensively from the judgment of Henchy J. in *Murphy* in support of this principle of limited retrospectivity, observing

²¹ "Where ... the prisoner has been convicted and sentenced by a court established by law under the Constitution, and the jurisdiction of that court to try the offence and impose the sentence has not been challenged, it would be necessary to show that the procedure has been so flawed by basic defect as to make the conviction a nullity before it could be held that the detention was not in accordance with law.": *The State (Royle) v. Kelly* [1974] IR 259, at 269.

²² Laffoy J. rejected the argument that applicant would have lacked locus standi to challenge the constitutionality of section 1(1) (he admitted knowing the girl was under 15 at the time of the offence). Any appearance of a "windfall bonus" did not affect the fact that his detention was rendered unlawful by the decision in the *CC (No2)* case. Likewise, the possibility of opening up an "appalling vista" was also irrelevant.

²³ For the sake of convenience reference to acts being declared void *ab initio* included reference to a pre-1937 Act not having force and effect from the coming into operation of the Constitution.

that the Court in that case limited the right to recover for public policy reasons.²⁴ The Chief Justice continued:

The law is too old and too wise to be applied according to a rigid abstract logic or a beguiling symmetry. As Henchy J. pointed out [in *Murphy*] for centuries the law has known general principles and transcendent considerations, such as the public interest, which is another way of saying the common good, restricting retrospectivity, especially the setting aside of judicial decisions already finally decided, even though the law on which they are founded is later held to be invalid.

Fundamental interests of public policy required limitations on the retrospective effect of judicial decisions. The legal order and the administration of justice is not one of perfect symmetry.²⁵ The Court had to address the competing interests of the claim of A and the interest of justice, including the victim, having regard to the Constitution generally, the public interest, the common good and social order. The loathsome nature of the crime was only relevant in so far as it engaged the competing constitutional considerations, specifically the need to vindicate the victim.²⁶ A central aspect of this balancing task was the changing nature of concepts such as the common good or social policy, particularly since the Constitution is a living document.²⁷ Absolute retrospectivity based on the notion of an Act being void *ab initio* would be absurd and would “have dysfunctional effects on the administration of justice.” Furthermore, one of the fundamental objectives of the administration of justice—finality and certainty in justiciable disputes—would be undermined.²⁸ Denham J. stated:

²⁴ See also the frank acknowledgments in *Muckley v. Attorney General* [1985] IR 472, at 482 and *O'Rourke v. Revenue Commissioners* [1996] 2 IR 1, at 17 that the potential chaos caused by the number of persons making claims for relief following a finding of unconstitutionality had influenced the Court's reasoning in *Murphy*. See further Hogan and Whyte, *J.M. Kelly, The Irish Constitution*, (4th ed., Lexis Nexis Butterworths, 2003) at 902-906.

²⁵ Murray C.J. The Chief Justice referred to the position in the United States, Canada, the European Union, the law of the European Convention on Human Rights and the decisions of the Supreme Court of India to show that the absolute retrospectivity is “inherently incompatible with the broader notions of legal certainty and justice in an ordered society.”

²⁶ Hardiman J.

²⁷ Murray C.J. referred to his judgment in *Sinnott v. Minister for Education* [2001] 2 IR 545 where he said the Constitution is a living document, and that concepts such as ‘common good’ and ‘social justice’ have a changing, dynamic quality. Denham J. also observed that the power of the courts to declare a valid law null and void “is exercised in the context that neither the law nor the Constitution is frozen in 1937.”

²⁸ Hardiman J. considered that absolute retroactivity would have a chilling effect on the development of constitutional jurisprudence, while Geoghegan J. pointed to the “grave danger that that judges considering the constitutionality or otherwise of enactments would be consciously or unconsciously affected by the consequences”. This concern was also voiced by Walsh J. and O'Higgins C.J. in *The State (Byrne) v. Frawley* [1978] IR 326.

Where a law has been treated as valid law for decades, it is impossible, unjust, and contrary to the common good, to reverse the many situations which have arisen and been affected in all their myriad forms over the decades.

A declaration of unconstitutionality applies in the litigation in which the issue arises, and prospectively, but there is no general retrospective application of such an order.

The Court did not however develop a principle of absolute non-retrospectivity: it was prepared to envisage exceptions to the general rule in wholly exceptional circumstances where it would be “manifestly unjust or oppressive to uphold a completed proceeding having regard to a declaration of unconstitutionality.”²⁹ An Article 40 order might be appropriate in such a situation, but this would be exceptional.

The Court did not consider that there were any grounds for regarding A’s case as exceptional, therefore the general principle applied:

Mr. A., like all persons who pleaded guilty to or were convicted of an offence contrary to s.1.1 of the Act of 1935 had available a full range of remedies under the law. They could have sought to prohibit the prosecution on several grounds including that the section was inconsistent with the Constitution. Not having done so they were tried and either convicted or acquitted under due process of law. Once finality is reached in those circumstances the general principle should apply.³⁰

Comment

The question of whether the phrase ‘unconstitutional law’ is a misnomer throws into sharp relief the limits on judicial power. In *A* the Supreme Court is acknowledging that its judgment in *CC (No. 2)* was the statement of a constitutional norm, but that that norm was stated in an adjudicatory context. In doing so, the Court has avoided the extremes of both natural law and positivist analysis.

The Supreme Court interpreted Henchy J.’s judgment in *Murphy* differently to Laffoy J. Laffoy J. took the view that public policy and equity could not justify an exception to Henchy J.’s rule of primary redress in the case of a person detained under an unconstitutional provision. The Supreme

²⁹ Geoghegan J.

³⁰ Murray C.J.

Court considered that Laffoy J. did not give sufficient consideration to the exceptions to the general rule of redress. In not doing so, Murray C.J. correctly considered that she had conflated the questions of a declaration of inconsistency and the effect of such a declaration.³¹

It is necessary to compare the statements of principle in *Murphy* and *A*. In *Murphy*, Henchy J. set out his primary rule of redress as follows:

Once it has been judicially established that a statutory provision enacted by the Oireachtas is repugnant to the Constitution, and that it therefore incurred invalidity from the date of its enactment, the condemned provision will normally provide no legal justification for any acts done or left undone or for transactions undertaken in pursuance of it; and the person damnified by the operation of the invalid provision *will normally be accorded by the Courts all permitted and necessary redress.*³²

Murray C.J. set out the general principle in *A* thus:

In a criminal prosecution where the State relies in good faith on a statute in force at the time and the accused does not seek to impugn the bringing or conduct of the prosecution, on any grounds that may in law be open to him or her, including the constitutionality of the statute, before the case reaches finality, on appeal or otherwise, then the final decision in the case must be deemed to be and to remain lawful notwithstanding any subsequent ruling that the statute, or a provision of it, is unconstitutional.

In *Murphy*, the Court was dealing with an action which concerned a direct attack on a statute by a person with locus standi to bring the challenge. On the other hand, in *A* the Court was considering a collateral attack brought by a person subsequent to the successful direct attack by CC, and furthermore, by a person who would never have had standing to bring a direct challenge in any event. Perhaps this is why Murray C.J.'s principle is

³¹ Perhaps one reason why Laffoy J. conflated the 2 issues was because of her reading of the Supreme Court's judgment in *CC (No2)*, in particular the Court's declaration that section 1(1) was unconstitutional *in toto*- see above.

³² [1982] IR 241, at 313. Emphasis added. Henchy J. cited *In re Haughey* [1971] IR 217 where the Court declared provisions of the Committee of Public Accounts of Dáil Éireann (Privilege and Procedure Act, 1970 to be unconstitutional, and quashed a conviction and sentence imposed in pursuance of the impugned provisions.

more pragmatic in tone than that of Henchy J.³³ The Court in *A* is imposing checks on the exercise of judicial power. It is refusing to apply a cold logic to the finding of invalidity and instead places more emphasis on the Court's role in administering justice and promoting the common good. This approach is reminiscent of O'Higgins C.J.'s judgment in *Murphy*.³⁴ Indeed, while the general principle enunciated by Murray C.J. is consistent with that of Henchy J., it is suggested that the current Supreme Court has adopted a stance that goes further in limiting the retrospective effect of declarations of invalidity. Instead of bringing *A* within Henchy J.'s transcendent considerations, the Court preferred to state the general principle from the perspective of a person wishing to bring a collateral attack to his detention following a subsequent declaration of invalidity. It is unfortunate that the Court did not explicitly state its position on Henchy J.'s approach in *Murphy*, particularly in light of the *Glavin* case.³⁵ In *Glavin*, also an Article 40.4 inquiry, the applicant had undergone a preliminary examination and been sent forward for trial to the Circuit Court, where he pleaded guilty and was sentenced to 10 years imprisonment.³⁶ The preliminary examination was conducted by a judge who had reached retirement age and had not been continued in office. The High Court held that since the preliminary examination was null and void, the Circuit Court had no jurisdiction to try him and ordered his immediate release. On appeal, the Supreme Court agreed with Hamilton P, and went on to hold that, once the applicant's conviction was found to be invalid, the High Court must immediately order his release and that it was not within its competence to consider whether the case should be returned to the District Court. Laffoy J.'s judgment in *A* would seem to be in keeping with that of the Supreme Court in *Glavin*. Of course, it could be argued that *Glavin* and *Shelly* were not collateral attacks such as in *A*, and therefore were not directly in point. However, the same could be said of *Murphy*,³⁷ and given that *Glavin* would seem to be at variance with both that case and *The State (Byrne) v Frawley*,³⁸ it is unfortunate that the Court in *A* did not make reference to *Glavin*.

Furthermore, in *A*, Denham J. seemed to indicate a more restrictive approach when she mentioned the possibility that "a Court may consider it appropriate in certain extreme circumstances to suspend a declaration that a law is unconstitutional so that the Oireachtas might address the issue if it

³³ However, it could be argued that in *Murphy* the prospect of an avalanche of claims by affected third parties was an influential factor -see footnote 24, above.

³⁴ *Murphy v. Attorney General* [1982] IR 241, at 292.

³⁵ *Glavin v. Governor of Mountjoy Prison* [1991] 2 IR 421. See also the *Shelly* case, which preceded *Glavin*: *Shelly v Mahon* [1990] 1 IR 36. Both cases concerned the same District Court judge, and both applicants had locus standi.

³⁶ This was reduced to 6 years on appeal.

³⁷ [1982] IR 241.

³⁸ [1978] IR 326.

wished.” It remains to be seen whether the Court will choose to make this possibility a reality.³⁹

³⁹ The authors of *Kelly, The Irish Constitution* suggest that the courts should draw the line rather at the point where really serious embarrassment to the State would be the result of accepting claims from the operation of an unconstitutional statute. See Hogan and Whyte, *JM Kelly, The Irish Constitution* (4th ed., Lexis Nexis Butterworths, 2003) at 906.

BRIAN CURTIN and CLERK OF DÁIL ÉIREANN AND ORS¹

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Introduction

In this case note, the authors consider the Supreme Court's recent judgment in *Curtin v. Clerk of Dáil Éireann*. In its ruling, the Supreme Court examined whether the process put in place by the Oireachtas to facilitate the investigation of a Circuit Judge, prior to his possible impeachment by both Houses of Oireachtas, was constitutional. Significantly, it outlined the limits of the Oireachtas power in this regard. The authors will then discuss the proposed changes in judicial conduct and ethics generally in this jurisdiction.

Facts:

The applicant was appointed as a judge of the Circuit Court in November 2001. In 2004, he was acquitted of possession of child pornography, an offence under section 6 of the Child Trafficking and Pornography Act 1998. In the Circuit Court, the trial judge, Judge Moran, ruled that a search warrant authorising the search of the applicant's house and seizure of a personal computer was spent at the time of its execution. As a result, the seizure was unconstitutional and evidence obtained from the personal computer was inadmissible. He directed the jury to find the applicant not guilty. Once the applicant was acquitted by the Circuit Court, the government began steps necessary to bring about the possible impeachment of the applicant.

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¹ [2006] IESC 14; [2006] 2 ILRM 99.

Main issues before the Supreme Court:

Since the applicant is a Circuit Court Judge, he is cloaked with special protection from removal from office. Part of the protection of judicial independence is that the Constitution provides added defence to judges, and they cannot be removed from office except for ‘stated misbehaviour’.

Article 35.4.1° of the Constitution states that a judge of the Supreme or High Court shall not be removed from office except for ‘stated misbehaviour or incapacity’ and only then upon resolutions passed by the Dáil and Seanad calling for such removal. Although Circuit Court Judges are not expressly covered by Article 35.4.1°, legislative provisions have the effect of imbuing them with Article 35.4.1° protection. Section 39 of the Courts of Justice Act 1924 (as carried forward by section 48 of the Courts (Supplemental Provisions) Act 1961) provides that Circuit Court judges hold office by the same tenure as the Judges of the High Court and the Supreme Court. On that basis, Article 35.4. 1° applies with equal effect to Circuit Court judges.

As part of the scheme to enable the Oireachtas to deal with the case of the applicant, the Government proposed, and the Oireachtas passed, two pieces of amending legislation which came into force in June 2004, and also amended Oireachtas Standing Orders. The Oireachtas response entailed three separate steps to facilitate the investigation of the applicant: clearly those steps had constitutional resonance, treading the fine line separating the functions, powers and investigative remit of the Government, legislature and judiciary. First, the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 (‘the 1997 Act’) was amended by Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 2004, to render judges compellable witnesses in investigations into their behaviour.² Secondly, an amendment was made to the Child Trafficking and Pornography Act 1998, by the Child Trafficking and Pornography (Amendment) Act 2004 to exempt both the applicant and the Oireachtas Committee from any criminality by the reason of the possession or distribution of child pornography, actions pursuant to the investigation conducted by the Oireachtas Committee. Possession or

² Section 3(4) of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997 provides in general that judges are immune from being called before a Committee of the House of the Oireachtas pursuant to section 3(1) of the 1997 Act. Section 3A(a) of the 1997 Act, as inserted by the 2004 Act, now provides:

“Section 3, in so far as it relates to a committee established for the purposes of, or in connection with, a matter arising under section 4 of Article 35 of the Constitution or pursuant to section 39 of the Courts of Justice Act 1924 or section 20 of the Courts of Justice (District Court) Act 1946, shall, notwithstanding subsection (4) of section 3, apply to a judge of a court that is specified in that subsection and to which judge the matter relates.”

distribution of child pornography is an offence under the 1998 Act. Thirdly, standing orders were adopted for the appointment of a Joint Committee to investigate a judge's behaviour or capacity for the purposes of Article 35.4.1°. These standing orders (63A in the case of the Dáil and 60A in the Seanad) stated that due process and fair procedures would be afforded to Judge Curtin in the Committee's investigation and provided for the procedures governing a motion for the removal of a judge pursuant to Article 35.4.1°. The purpose of the Committee was to formulate a motion on whether the judge should be removed for stated misbehaviour or incapacity while avoiding making any finding of fact from the adduced evidence.

On foot of these actions, the Oireachtas committee requested the applicant to explain the circumstances of how the original search warrant had come about, and to submit any materials relating to that warrant to the Committee including the personal computer. The personal computer had in fact remained in the possession of the Gardaí. This direction, under Section 3A of the amended 1997 Act, as amended by the 2004 Act, was challenged on judicial review brought by the applicant, who also challenged the constitutionality of that section and the procedures of the Joint Committee, including the standing orders. The applicant's claim was dismissed in the High Court (Smyth J) and on appeal by the Supreme Court (Murray C.J., Denham, McGuinness, Hardiman, Geoghegan, Fennelly and McCracken JJ).

Delivering the principal judgment in the Supreme Court, Murray C.J. noted the legal significance of the Curtin case as it "was one of the few occasions in the annals of legal history that such a proposal [removal of judge] has been considered by a court and the first time since foundation of the State".³

Lack of procedure in Article 35 and the Twenty-Second Amendment of the Constitution Bill

The lack of procedure in relation the removal process pursuant to Article 35.4.1° was identified by Hogan and Whyte. They noted that unlike the impeachment of the President under Article 12.10, Article 35.4.1° "does not set out any procedures in respect of matters such as notice to the Judge concerned or the right of the accused party to appear before the Houses of the Oireachtas and to be represented at the hearing of the charge."⁴ A similar view was expressed by the Constitutional Review Group and they also recommended that the simple majority vote in the Houses of the

³ [2006] IESC 14; [2006] 2 ILRM 99, at 106.

⁴ Hogan and Whyte, *JM Kelly: The Irish Constitution*, (4th ed, Lexis Nexis, Butterworths, 2003) at 1010.

Oireachtas be replaced with a two third majority identical to that for the removal of the President under Article 12.10.⁵ This recommendation was considered by the Government and it agreed that this recommendation was a sensible one. In 2001, the Government published a Twenty-Second Amendment of the Constitution Bill 2001.

This Bill provided for the amendment of Article 35 of the Constitution in order that a judge is afforded the right to appear and be represented at the hearing of a charge made against him. Further, it provided that a two-third majority of the Houses of the Oireachtas would be required to remove the judge in question. Finally, the Bill proposed for the establishment of a body (majority of members would have been judges) to investigate whether a judge engaged in conduct constituting ‘misbehaviour’ or were affected by incapacity. This Bill was withdrawn when it failed to obtain opposition support, as they were of the opinion that the Bill would compromise judicial independence.

Previous removal of Judge:

Murray C.J. made reference to the only previous removal of judge in this jurisdiction.⁶ This case involved Judge Jonah Barrington who presided over the Irish Admiralty Court. In 1828, a select committee found him guilty of misconduct in office. Specifically, he was found guilty of financial impropriety in relation to funds in his court. The funds in question which the proceeds of the sale of two derelicts. Hearings were held before both the House of Lords and Commons and each passed resolution for his removal. These were presented to King and, on foot of these, Judge Barrington was removed from office in 1830.⁷

The High Court judgment:⁸

Mr. Justice Smyth in the High Court rejected the applicant’s argument that as he had been acquitted of all charges in a criminal trial, he could not be tried by the Houses of the Oireachtas for effectively the same offence. Smyth J. found that the investigation of alleged stated misbehaviour was a constitutional function of the Oireachtas and the procedure under Article 35.4.1^o was in place to protect public confidence in the judiciary.

⁵ The Constitutional Review Group, *Report of the Constitutional Review Group*, (Stationary Office, 1996), at 182.

⁶ [2006] IESC 14; [2006] 2 IRLM 99, at 131.

⁷ Osborough “The Irish Legal System” in Costello ed., *The Four Courts: 200 years: Essays to commemorate the Bicentenary of the Four Courts* (Incorporated Council of Law Reporting for Ireland 1996) at 55.

⁸ See [2005] IEHC 163; [2006] 2 ILRM 99, at 116-119.

Main findings of the Supreme Court:

First, the Supreme Court was satisfied that it was within the powers of the Houses of Oireachtas to adopt Standing Order 63A and 60A respectively and to give the Joint Oireachtas Committee the power to report without making findings of fact. The Court was also satisfied that Committee and Houses would allow the applicant his full constitutional rights.

Secondly, the Supreme Court had to consider the applicant's argument that section 3A of the 1997 Act is repugnant to the Constitution as it was an impermissible encroachment on the independence of the Judiciary, in that it compelled Judges to give evidence/produce articles on the basis of mere allegation. The Supreme Court found there was no improper or unconstitutional invasion of rights. On the contrary, it found that the power (Article 35.4) is included in the constitution for the purpose of ensuring the fitness and integrity of the Judiciary.

The third issue before the Supreme Court was the lawfulness of direction made by the Committee under section 3 of the 1997 Act requiring him to produce to the Committee computer materials, which were unlawfully seized by Gardaí under defective warrant. This argument was based on three grounds:

- (a) The direction was an invasion of his privilege against self incrimination;
- (b) the materials were not in law or fact in his possession or power;
- (c) the direction was infringement of constitutional rights as it represented the fruits of unconstitutional search.

The Court found that the right not incriminate oneself does not extend to compulsory powers requiring person to produce item. It is merely concerned with respect for the will of the accused to remain silent. The Court found consequent to the coming into force of section 13 of the Child Trafficking and Pornography Act 1998, inserted by act of 2004, the computer materials were within his power or possession as it was lawful for him to take possession of the computer for the purpose of complying with direction of Committee. This section was introduced to exempt any proceedings of the Oireachtas from criminality by reason of the possession or distribution of child pornography. These actions are offences under the 1998 Act. The Supreme Court also found that the Committee's direction to produce was a legitimate means of ensuring that the committee fulfil their constitutional functions where those functions are legitimately concerned with such an issue.

Finally, the applicant also claimed that the investigation of the allegations by the Oireachtas Committee amounted to double jeopardy. The Supreme Court found that the committee was considering an entirely

different matter wholly different to trial on criminal charge before a court. This was whether the accused had conducted himself in respect of matters to the extent that this constitutes stated misbehaviour.

Judgement of the Supreme Court in more detail:

The Standing Orders

The applicant argued that the Houses of the Oireachtas did not have the power to appoint a committee as contained in Standing Orders 63A of the Dáil⁹ and 60A of the Seanad, as the Select Committee were specifically prohibited from making findings of fact or recommendations, or express any opinion on either of these.¹⁰ He argued that the power of removal of a judge, pursuant to Article 35.4.1^o could only occur where an allegation made against a judge has been proved by process of adjudication or trial, whether this is internal or external to the House. He further argued that the procedure in place in the Standing Orders was deficient as it placed too little emphasis on the concept of judicial independence, as the Committee was not vested with fact finding powers. According to the applicant, all the Committee could do was collect evidence. The Committee was not empowered to consider the evidence, rule on the admissibility of evidence or give weight to the creditability of witnesses. These arguments were based on a strict or literal reading of the Standing Orders. The applicant was of the opinion that all of the evidence once gathered by the Committee would merely be handed over to the Houses of the Oireachtas in an undigested form. This, argued the applicant, would amount to an unfair hearing before either House.

Briefly, these standing orders contained the procedures governing a motion for the removal of a judge pursuant to Article 35.4.1^o. They contained matters such as what details are to be contained in the motion for the removal of a judge for stated misbehaviour; the principle that the select committee shall at all times have due regard for the constitutional

⁹ Dáil Standing Order 63A sets out what is to be included in any motion for removal of a judge pursuant to Article 35.4.1^o. Any such motion must include:

“state such matters upon which it is contended by the proposer of the said motion that the Judge who is the subject matter of the motion should be removed for stated misbehaviour or that he or she is incapacitated.”

¹⁰ Standing Order 63A(2) of the Dáil and Standing Order 60A (2) of the Seanad, are identical and provide as follows:

(2) Where such an Article 35.4.1 motion is put on the Order Paper for any day, the Dáil/Seanad may either reject the said motion, or on a motion made to adjourn the debate may by motion appoint a Select Committee to take evidence in respect of the aforesaid Article 35.4.1 motion, provided that the Select Committee shall make no findings of fact nor make any recommendations in respect of same or express any opinions in respect of same.”

principles of basis fairness of procedures; and the procedure for the Committee to send its Report to the Dáil and the Judge.

In dealing with the applicant's argument, first, the Court acknowledged the presumption of constitutionality that attaches to Dáil and Seanad Standing Orders. The main case cited by the Court in favour of this proposition was *Pigs Marketing Board v. Donnelly (Dublin) Ltd*¹¹, where the Court set the principle that "it must, be accepted as an axiom that a law passed by the Oireachtas, the elected representatives of the people, is presumed to be constitutional unless and until the contrary is proven".¹² In the *Curtin* case, the Supreme Court, in what amounts to evidence of judicial restraint and deference, justified its reasoning on the basis that the Constitution expressly and exclusively designates and assigns the power to pass resolutions for the removal of judges to the Houses of the Oireachtas. Therefore the court was not minded to intervene.

The Court found no difficulty with either of the Standing Orders, mainly because the terms of the Standing Orders expressly guaranteed to have due regard for the natural and constitutional rights of the applicant. The Court came to this conclusion by considering whether the procedures could allow the Committee, as a designated organ of government, to act in 'clear disregard' of the applicant's constitutional rights. They also examined the text of Article 35.4.1° and from this could see that the Article did not prevent a Committee to be set up devoid of fact finding or recommendation power.

The Court also rejected the applicant's contention that he would not have the right to give or call witnesses before the Houses. The Court stated that there was nothing in the Standing Orders that prevented the Houses hearing evidence, despite this being a rare event. The court did acknowledge that this it may be necessary to have this take place, given the restrictive powers given to the Committee. Later on in its judgement, the Court took the view that powers of the Committee were not as restrictive as that suggested by the Applicant. The Court opinion that the Committee could provide the Houses with a report which included reference to areas where there are conflicts of evidence or where issues have arisen. It is clear from the judgment of the Court that the powers vested in the Oireachtas Committee are not as limited as the applicant argued. The Court based its reasoning on the text of the Standing Orders which themselves precluded the Committee from making findings of fact or any recommendations or opinions arising from those facts. It is worth setting out the Court's opinion in this regard:

¹¹ [1939] IR 413.

¹² [1939] IR 413, at 417.

It should be added that the powers of the committee need not be interpreted as restrictively as the appellant suggests...There is a distinction between the report and the associated raw evidence which will be in the form of transcripts and audio material. The paragraph [(8) of the Standing Order 63A] proceeds to require that “Committee shall first send its report to the Clerk of the Dáil, who shall arrange in the first instance for the report to be circulated to the members of the Dáil and to the Judge...”. None of this prevents the committee nor could it ever have been intended, from organising the evidence gathered into a manageable form. It may and probably must prepare indices and summaries of the evidence. Those summaries may be related to distinct issues of fact raised in the resolution including the introductory paragraphs of the resolution...While the committee may express no opinions, it is not prevented from pointing out issues or conflicts in the evidence. In short, the committee is required to produce a report which will act as a useful guide to the members for their consideration, when debating the resolution, and the appellant and his advisors in representing him.¹³

The issue then considered by the Court was to what extent could the Oireachtas investigate and deliberate on questions of fact regarding the activities non-Oireachtas members, normally the preserve of the Courts. The Court acknowledged that it would have been more beneficial to have a committee empowered to deliver to the Dáil a considered report and opinion, rather than the undigested evidence as contained in the Standing Orders. It is this portion of the judgment, is it submitted, that makes the most interesting reading. The Court gave guidance to the Oireachtas on what powers could be given to future Committees dealing with this constitutional provision. The Court stated that

A committee empowered to hear evidence, rule on admissibility, resolve conflicts of evidence and report on its findings to the Houses of the Oireachtas would have obvious advantages. The committee would have been in a position to schedule hearings, hear and evaluate the evidence of witnesses, eliminate irrelevant material, concentrate on the principal points at issue and furnish a coherent and cogent report to the Houses. In the opinion of the court it would have been open to the Houses to have chosen such a committee, but they have not done so.¹⁴

¹³ [2006] IESC 14; [2006] 2 ILRM 99, at 145-6.

¹⁴ [2006] IESC 14; [2006] 2 ILRM 99, at 145.

The Court opined that the same powers entrusted to the Committee by the Oireachtas were probably a result of its judgment in *Maguire v. Ardagh*.¹⁵ In that case, the Supreme Court had deemed the scope of that committee's work outside the powers of the Oireachtas as, among other things, it involved fact-finding of a non-Oireachtas member which encroached into the judicial sphere, given that it purported to assess culpability for an unlawful killing. The Supreme Court in *Curtin* distinguished this case as the current case involved the Oireachtas acting in accordance with a power expressly placed on it by the Constitution. In *Maguire*, the Supreme Court considered whether the power of the committee established to investigate a fatal shooting and to make findings of fact and conclusions on the personal culpability of individuals who were ordinary citizens was repugnant to the Constitution. The Court in *Maguire* was of the view that as there was no power contained in the Constitution, either express or implied, to conduct such inquiries, the committee's powers were not constitutional.

Finally, the Court acknowledged the principle contained in Article 15.10 of the Constitution that it is within the power of the Houses of the Oireachtas to regulate their own procedure. The Court was very aware of

this business benefits from the presumption of constitutionality. These powers however must be wielded with regard to constitutional justice and fair procedures, a requirement adhered to by section 3A of the 1997 Act. Having balanced constitutional justice with the Oireachtas' designated role to remove a judge, it had fulfilled its role in a constitutionally acceptable manner.

The Court does not consider that the power to call a judge as a witness or to produce articles as evidence involves any improper or unconstitutional invasion of judicial power or judicial independence. On the contrary, the power is included in the Constitution for the purpose of ensuring the fitness and integrity of the judiciary.¹⁸

In general terms, the Supreme Court noted that Article 35.4.1^o did not represent a complete scheme contemplating how a judge could be removed by the Oireachtas and thus other Constitutional provisions had to be relied on. *Obiter* it was remarked that constitutional history showed parliamentary constraint in encroaching on judicial independence, and “in the event of irrational or irresponsible abuse of power, as by the proposal of a resolution in response to an unpopular judicial decision, or otherwise maliciously or in bad faith, it is not to be doubted that the courts would be prepared to exercise an appropriate level of judicial review”.¹⁹

The Lawfulness of the section 3A direction

(a) Direction was an invasion of his privilege against self incrimination; This argument was not pursued in the Supreme Court, however the Court distinguished potentially incriminatory practices, such as a compelled making of a statement, from an instruction to produce documents for inspection. The latter practice included police rights to search a house with a warrant or DNA or breath sample or livestock be produced for inspection. As such, they did not violate the right to silence, and fell within ECHR delimitations set out in *Saunders v. United Kingdom*²⁰.

(b) The materials were not in law or fact in his possession or power; The Applicant argued that a direction under section 3(1)(c) of the 1997 Act applies only to a thing in his “possession or power”. Physically, the Gardaí held the computer materials and having now learnt that the computer contained child pornography as proscribed by the Child Trafficking and Pornography Act 1998, it was no longer in his power to take possession of the materials.

¹⁸ *Ibid.*, at 141.

¹⁹ *Ibid.*, at 142.

²⁰ (1997) 23 EHRR 313.

The Court accepted that a power equated to an “enforceable legal right” as set out in *Bula Ltd v Tara Mines Ltd*²¹. However, this right had not been set to nought neither by its factual police possession nor by the potential that it contained illegal images. The Court drew attention to amendment of the 1998 Act by section 1 of the Child Trafficking and Pornography (Amendment) Act 2004 which allows for compliance with a direction of the Oireachtas, without necessarily giving the evidence directly.²² Thus, the whereas Court found the applicant’s argument unconvincing at first instance by virtue of its circularity, it further found that even if any problem of illegality of the materials were to hinder the applicant handing them over, he could still comply with the direction.

(c) Direction was infringement of constitutional rights as it represented the fruits of unconstitutional search.

The applicant relied on Walsh J’s dictum in *People v. O’Brien*²³ in his contention that the Court must vindicate his constitutional rights by refusing to allow evidence, which had previously been deemed unconstitutionally gained for the purposes of a criminal trial, to be available to the Committee. The applicant characterised the direction to him, rather than to the Gardaí who in fact held the computer materials in question, as a device to side-step the applicant’s rights in this regard. The defendants sought to de-couple the existence of the computer from the unconstitutional taint by arguing that it, and the knowledge that it housed child pornography, had existed independently of the unconstitutionally executed warrant, and thus there was an entitlement to seek it.

The Court removed the facts of the present case from the general ambit of the exclusionary rule, citing its particular facts. The current location of the computer (with the Gardaí) stemmed from the applicant’s refusal to take it back encumbered with illegal material, rather than as the direct result of its unconstitutional collection by virtue of the spent warrant. In the event of its return to the Applicant, the computer would not be forever beyond the scope of investigation:

²¹ [1994] 1 ILRM 111.

²² Section 13 of the *Child Trafficking and Pornography Act, 1998* now provides that:

Nothing in this Act prevents—
(a) the giving of or compliance with a direction under section 3 of the Committees of the Houses of the Oireachtas (Compellability, Privileges and Immunities of Witnesses) Act 1997,.....”

²³ [1965] I.R. 142 at 170: “The defence and vindication of the constitutional rights of the citizen is a duty superior to that of trying such citizen for a criminal offence. The Courts in exercising the judicial powers of government of the State must recognise the paramount position of constitutional rights and must uphold the objection of an accused person to the admissibility at his trial of evidence obtained or procured by the State or its servants or agents as a result of a deliberate and conscious violation of the constitutional rights of the accused person where no extraordinary excusing circumstances exist, such as the imminent destruction of vital evidence or the need to rescue a victim in peril.”

If the computer could have been and had been returned to his possession it could not be said that the exclusionary rule means it was forever immune, in all circumstances, from a lawful seizure or order for production. In the present case the order for production might be regarded as legitimately triggered, apart from any other consideration, by the applicant's express and public reliance, in the course of the Article 35 process, on the assertion that his computer material was affected by the placing on it of unlawful material albeit which he did not want and had not sought.²⁴

Thus the Court found that by none of the three challenges levelled at the direction was it successfully impugned.

Double jeopardy

The Applicant also argued that the Oireachtas committee could not be tried by the Oireachtas committee as he had been acquitted by a criminal court. He considered that the actions of the Oireachtas committee amounted to a further trial of the issues, and as he had been acquitted by a criminal court, the actions of the Oireachtas committee amounted to double jeopardy. The court did not consider this issue in huge depth, but nonetheless did make worthwhile comments. The Court found that the committee was considering an entirely different matter wholly different to trial on criminal charge before a court. This was whether the accused had conducted himself in respect of matters to the extent that this constitutes stated misbehaviour.

Reform in conduct of judges generally:

The applicant in the Curtin case is not the first Judge to have been at the centre of controversy in recent years. The Sheedy affair and the consequent resignation of a Supreme Court Judge and a High Court Judge are within the recent memory of most. Both of these incidents have caused the question of how to adequately deal with the conduct of judges generally to be considered.

The current procedure for removal of a Judge of the Supreme, High or Circuit Courts is unduly cumbersome for conduct falling short of serious judicial misconduct. District Judges benefit from three additional statutory protections, which allow for a more informal approach to be taken.²⁵ To date, in relation to Circuit, High and Supreme Court Judges, the only

²⁴ [2006] IESC 14; [2006] 2 ILRM 99, at 151-152.

²⁵ Section 21 of Courts of Justice (District Court) Act 1946, Section 10(4) of the Courts (Supplemental Provisions) Act 1961 and section 36(2)(a) and (b) of Courts (Supplemental Provisions) Act 1961. Once the Judicial Council Act is in force, these will be repealed.

procedure available for the removal such judges is the impeachment process provided by Article 35 of the Constitution.

Reform in this area has long been called for.²⁶ A number of reports called for the self-disciplining of judges. The first of these to note the need for reform in the area of regulation of the judiciary generally was that of the Constitutional Review Group. The Group recommended that the conduct of judges in general terms should be by the judiciary themselves within the framework of a Judicial Council. The Group recommended that an amendment of Article 35 was required to facilitate this. The Working Group on a Courts Commission also concluded that it would be beneficial to establish a Judicial Council. They recommended that the Chief Justice establish a committee to examine their report, consult with relevant bodies and to advise if it is appropriate for such a body to be established.²⁷ Such a committee was established as the Committee on Judicial Conduct and Ethics ('the Keane committee') and was chaired by the Chief Justice of the time, Mr. Justice Keane.

The Keane committee recommended that a judicial council be established on a statutory basis and all judges be automatic members of the Council. However, the Committee did not advise that there be lay representation on the Council. The Keane Committee recommended that the judicial council act in a filtering capacity with complaints received about judges and if the committee was satisfied that the complaint was of a sufficiently serious nature to necessitate further investigation, to refer the complaint to Panel of Inquiry. The Keane Committee expressed the view that lay participation on the panel of inquiry would be important to ensure transparency and public confidence in the system. Accordingly they recommended one lay representative be on the panel of inquiry and this lay member be one of three lay representatives appointed to the pool of representatives to the panel of inquiry. The panel would conduct its hearings in public and then report back to the judicial conduct and ethics committee. The judicial conduct and ethics committee would then recommend actions, if required, to be taken. These would range from a private or public reprimand through to recommending that the matter be handed over to the Oireachtas for impeachment proceedings.

²⁶ See The Constitutional Review Group, *Report of the Constitutional Review Group*, (Stationary Office, 1996), Working Group on a Courts Commission, *Sixth Report of the Working Group on a Courts Commission*, (Stationary Office, 1998); Committee on Judicial Conduct and Ethics, *Report of the Committee on Judicial Conduct and Ethics*, (Stationary Office, Pn 9449,2000), The All Party Oireachtas Committee on the Constitution, *Fourth Progress Report of the All-Party Oireachtas Committee, The Courts and the Judiciary* (Stationary Office, Pn 7831,1999)

²⁷ Working Group on a Courts Commission *Sixth Report of the Working Group on a Courts Commission Report with Summary* (1998, Stationary Office, Pn 6533) at 175.

The Judicial Council Bill:

The legislation introducing judicial ethics legislation is not expected to be published until 2007.²⁸ The main reason for the delay is to allow consideration of the issue generally and time to digest the Curtin decision. The Judicial and Ethics Bill was first promised in 2001.²⁹

It is expected that the judicial council will be modelled on Keane Report (the Committee on Judicial Conduct and Ethics) and will provide for a judicial council which would represent the entire judiciary. It will have a disciplinary committee with lay representation as members. Further it will be able to hear complaints and impose a wide range of sanctions including a recommendation that the conduct of the judge complained of be referred to the Oireachtas for impeachment.³⁰

Conclusion

The Curtin judgment effectively gives guidance both to the Oireachtas in the framing of the Judicial Council Bill and to the Committee examining the current scenario. It empowers the Committee in the current case, and the Oireachtas in devising a framework for the future committees, to call witnesses, analyse evidence and report back to the Oireachtas. The Supreme Court took an expansive view of the current committee, despite the limitations imposed by its establishing Standing Orders. The current committee may highlight conflicts of evidence to present that evidence in a cogent manner to the Houses. The powers suggested by the Supreme Court for future committees go considerably further. The fact that they may schedule hearings, eliminate irrelevant material having heard and evaluate evidence amounts to the influential editing of evidence for the consideration of the Houses, coupled with the ability to comment on which evidence is contradictory or for whatever reason unsound. This sails very close to a power to make findings of fact, that final element being reserved for the House of the Oireachtas themselves.

²⁸ O'Hallaran, *Minister defends delay in judicial ethics Bill*, The Irish Times, 28 April 2006.

²⁹ *Ibid.*

³⁰ See Coulter, "Grievance body for court users needed", The Irish Times, 18 October 2005.

BOOK REVIEW

LIES IN A MIRROR: AN ESSAY ON EVIL AND DECEIT BY PETER CHARLETON*

(Blackhall Publishing, 2006, €25)

Peter Charleton is well known in the Irish legal community for his co-authorship of the key text on Irish criminal law, among other publications. In *Lies in a Mirror*, Charleton departs from a discussion of substantive criminal law and undertakes an examination of the nature of evil. He sets out with the avowed objective of showing how deceit is the engine of evil and how, by extension, “there is a lie behind every crime”. Wisely, however, this book is not contextualised within the sphere of criminal law, but rather attempts to unearth the primordial causes of human destructiveness. Indeed, a question posed early in the book asks whether a recurrent pattern of violence can be explained by logic or rather, does apparent logic and reason belie a more fundamental impulse toward destruction, which can correspond to or be catalysed by myth and self-deception. The role of the myth is curiously a chief consideration of Charleton, as he seeks to ascertain how individuals and groups come to hate others and eventually seek to destroy them – his manifold illustrations of this phenomenon retell folkloric stories of perceived good and evil, but in contrived and sinister circumstances occurring throughout the course of human history, which saw an inversion of an individual’s or group’s compulsion to destroy. This is most palpable, says Charleton, when intrinsic evil impulses harboured by an individual or collective group personality are projected on to intended victims of destruction. Examples used to illustrate this device include the demonisation by the Hutu ascendancy of the Tutsi minority in Rwanda and the abject fictionalisation of internal dissent and rebellion by those at the top of the communist party hierarchy in Stalinist Russia.

What is left largely unanswered by this discussion, however, is the notion that those orchestrating such a projection of evil do so because they recognise the need to discharge their moral incumbency, whether that be before the scrutinous eyes of a state’s populace or the international

community. While Charleton rightly points out that a myth of victimhood is typically created by those that seek to do evil, he does not fully address the realpolitik dimension to the creation of such a myth, that as well as being the driver of evil, that same myth may be merely a pragmatic response to prevailing pressures amounting to moral influence and suasion. Therefore, such a myth can be said to come on foot of or anticipate reactions by external forces to preordained conduct in order to satisfy those forces of the conduct's righteousness. Or, to borrow from Charleton's own analogy, the myth is less the engine of destruction than the vehicle being powered by that engine, which itself represents the public face of the underlying substantive purpose. In any event, by way of examples drawn from Ireland's own brand of criminality, such as the violent robbery of elderly isolated farmers and IRA terrorism, and other examples plucked from humanity's ignominious history, Charleton effectively conveys the saliency of his key proposition: that deceit and evil are in lockstep in the manifestation of human destructiveness.

Charleton's method of developing and expressing his hypothesis relies heavily on his own experience as an accomplished criminal lawyer and on surmising as to the underlying factors that drove key historical acts of evildoing. This is framed by a selective use of psychological doctrine, which very usefully sets out the notional wellspring of evil latent in each individual, such as Freud's Narcissus and Jung's unconscious shadow. Discussing the latter in particular, Charleton incisively identifies that the theory of there being a congenital instinct toward an archetype and its concomitant patterns of behaviour, inherited over millennia, is relevant to the wider discussion of the imagery of destruction which individuals can feel compelled to breathe life into. The stimuli which serve to excite this shadow, or indeed provoke an evil and violent response from Freud's Narcissus are illustrated by examples from Charleton's own career, such as the self-inflated, dominating boyfriend, who loses control and murders his habitually supplicant girlfriend when she ends the relationship. Received wisdom calls this manner of offence a crime of passion, and it is understood to represent the uncontrollable urge of an individual subjected to immense pressure and acute anxiety on a massive scale. This corresponds with the aforementioned doctrines, and to a certain extent is explained by them, but there is an important distinction between this manner of act and an organised act or series of acts characterised by reason and logic such as, using Charleton's example, the drawing up of lists by the Rwandan *genocidaires* of those they intended to kill first. This distinction is not considered in great detail; however, it appears to bear heavily on the question that I referred to earlier relating to the possibility that a reasoned and logical pattern of destruction is a sophisticated manifestation of the unconscious or indeed subconscious vindication of the myth, and thereby springs from the same progenitor that gives rise to crimes of passion. It is

unclear whether the respective provenances of emotional explosions of violence and systematic prosecution of a destructive and violent course are being posited as one and the same. That said, Charleton's attempt to identify the parentage of the two forms of evil, while not comprehensive, provides considerable insight into the non-conscious machinations of the psyche in knitting together disparate concepts of impulse, instinct and intention.

In addition to discussing the origination of evil, *Lies in a Mirror* also addresses some of the same issues that proved so turbulent for Raskolnikov in Dostoevsky's *Crime and Punishment*. Indeed, one of the central themes of that novel – the purgative power of redemption upon banishment of self-deceit – is given a comprehensive treatment in the opening chapter of Charleton's book. This discussion, above all others, represents the most accessible and indeed truest account of the nature of deceit. Charleton sagely recounts anecdotes from his own experience and draws on evidently wide research into the nature of guilt to chart the apocalyptic effect on an individual when a deception of the self is forcibly revealed, the apparatus of deceit is removed and all vestiges of the lie give way to truthfulness and admission. His compassionate treatment of this process of catharsis stands in stark contrast to the subsequent austerity of his examination of the overwhelming power and potential for destructiveness of evil and deceit. Over the course of the book this examination feeds into an erudite account of the common insignia which have characterised the emergence, development, conduct and occasional demise of regimes of evil, whether personal or collective. Charleton parses this continuum by examining in detail its component parts, in particular the initial tracing of evil intent to self-deception, the dehumanisation and demonisation of others, common patterns of destruction, the cult of personality, the inculcation of a pliant people, aberrations in impulses toward evil and the wholesale abrogation of responsibility for evildoing.

While he covers a lot of ground in this interesting work, Charleton acknowledges the impossibility of answering many of the questions he poses; but in attempting to do so, he brings to bear a valuable and insightful analysis on the malignant and inexorable characteristics of the existential human condition. The text is a valuable addition to a sparse corpus of work in this area. It will serve to remind those who read it of the fragile nature of a secure and peaceful society and the relative ease with which destruction can be wrought and evil can be fomented.

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