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EDITORIAL

I am pleased to introduce the new, improved annual edition of the *Nottingham Law Journal* which features a series of thematically linked articles in addition to several, erudite submissions on themes of contemporary legal interest. Our thematically linked pieces derive from the Restorative Justice Conference hosted by *Nottingham Law School* in 2011 and are introduced by Professor Jonathan Doak. Jonathon was a founding member of Nottingham Law School's *Centre for Conflict, Rights and Justice* and I would like to take this opportunity to wish him every success in his new post at Durham Law School.

Volume 21 also includes illuminating articles on principles of judicial review, commercial contracts, immunity in the European parliament and House of Lords reform. We are delighted that so many authors who have previously submitted articles to the Journal for consideration continue to make the *Nottingham Law Journal* their chosen publication. Although a small team, we work hard to ensure that the reviewing process is both thorough and timely so that authors can be assured that their work is given the attention that it deserves.

This is a challenging time in higher education and the end of the teaching year sees the start of a particularly busy research schedule for many academics. All three research centres at *Nottingham Law School* have busy programmes ahead. The *Centre for Legal Education* will be formally launched on 3rd May with contributions from members of the legal profession, former students and academics. Under the new direction of the NLJ's former editor, Tom Lewis, the *Centre for Conflict, Rights and Justice* will shortly be hosting Professor Barry Mitchell's seminar examining mandatory life sentences for murder convictions. As we go to press, NLS is hosting the Dignity In Donation Conference providing a forum for healthcare professionals, policy-makers, lawyers and academics to critically consider the general nature and significance of dignity and its actual and potential influence on organ donation law, policy, and practice. Our third centre, the highly acclaimed *Centre for Business and Insolvency Law*, will be co-hosting the INSOL Europe Academics Forum conference "Too Big to Fail? Large National and International Failures Under the Spotlight." For further details of this event and others please see our research centre web pages at: http://www.ntu.ac.uk/nls/research/centre_corporate/news_events/index.html

I would like to take this opportunity to sincerely thank all our contributors, subscribers and reviewers for the vital part they play in supporting the journal. This year our call for papers led to an unprecedented number of submissions which, I believe, indicates that the journal is going from strength to strength. Finally, I must thank the rest of the editorial team and extend special thanks to the indispensable Carole Vaughan for reasons that are too numerous to list.

DR HELEN O'NIONS

ARTICLES

THE ADMINISTRATIVE COURT, THE UPPER TRIBUNAL AND PERMISSION TO SEEK JUDICIAL REVIEW

SARAH NASON*

INTRODUCTION

The constitutional function of Administrative Court judicial review is to craft and apply legality standards derived from constitutional values such as the rule of law and respect for fundamental rights. However, these legality standards are increasingly being applied by bodies other than the Administrative Court based at the Royal Court of Justice (RCJ) in London. The RCJ's historic monopoly over judicial review litigation is breaking down for a number of reasons. One reason is the establishment of four new regional Administrative Court Centres outside London. Another more significant reason is the statutory delegation of judicial review type functions to other inferior courts and tribunals such as the statutory jurisdiction of the county courts in homelessness cases and the judicial review jurisdiction devolved to the recently established Upper Tribunal. On the one hand it can be argued that this fragmentation of legality review threatens to undermine the constitutional authority of the High Court's supervisory jurisdiction exercised by the Administrative Court. On the other hand, the common law has always been pluralist and fragmented in nature, particularly with its emphasis on remedies rather than causes of action.¹ The centralisation of administrative law legality review within a single highly specialised court is a relatively recent development. Its origins lie more in policies aimed at dealing with the influx of asylum and immigration litigation than in constitutional principle.

In two recent Judgments the Supreme Court has examined the constitutional status of the new Upper Tribunal, in particular the susceptibility of its decisions to judicial review in the Administrative Court and supervision by the Scottish Court of Session.² In these cases the Supreme Court was inevitably commenting upon the constitutional status of those two higher courts. The case of *Cart and MR* provided the Supreme Court with an opportunity to clarify the unique role of Administrative Court judicial review in light of the increasing fragmentation of legality review, the breadth of administrative justice, and changing perceptions of the constitutional role performed by the Administrative Court.

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¹ See for example, Dawn Oliver, "Public Law Procedures and Remedies – do we need them?" [2001] PL 91.

² *R (Cart) v. The Upper Tribunal and R (MR (Pakistan)) (FC) v. The Upper Tribunal (Immigration & Asylum Chamber) and Secretary of State for the Home Department* [2011] UKSC 28, *Eba v. Advocate General for Scotland* [2011] UKSC 29.

The Tribunals Courts and Enforcement Act 2007 (TCEA) created the Upper Tribunal to stand at the apex of a new structure designed to systematise tribunal justice. The TCEA describes the Upper Tribunal as a “superior court of record”.³ Prominent commentators assumed that this designation would endow it with constitutional authority equal to that of the High Court, therefore rendering its decisions unsusceptible to judicial review.⁴ The TCEA contains no specific clause purporting to oust judicial review and so the matter was left for the courts to determine. In *Cart and MR* the Supreme Court considered whether the Administrative Court could judicially review a certain type of un-appealable Upper Tribunal decision. Namely, where the Upper Tribunal refuses permission to appeal to itself and the TCEA excludes any further right of appeal to the higher courts. In *Eba* the Supreme Court examined the same issue with respect to the supervisory jurisdiction of the Court of Session. In both Judgments the Supreme Court concluded that access to judicial review should only be granted if the second-tier appeals criteria are satisfied. These are that the claim would raise an important matter of legal principle or practice, or there is some other compelling reason for the appellate court to hear it.⁵ The application of these criteria signalled the Supreme Court’s significantly non-interventionist approach to external judicial supervision of the Upper Tribunal.

It was said that these criteria provide a proportionate balance between the right of access to justice and the need to ensure the fair allocation of scarce judicial resources. The resource concern in England and Wales was the likelihood of the Administrative Court being overwhelmed by supposedly unmeritorious asylum and immigration claims in which the Upper Tribunal had already refused permission to appeal. In *Eba*’s case the second-tier appeals criteria were applied to the Court of Session despite the fact that there were no significant judicial resource concerns in Scotland. Appeals from the Upper Tribunal to the Court of Session were already subject to second-tier restrictions. The Supreme Court concluded that it would be inconsistent with Parliament’s intent if Court of Session *judicial review* of un-appealable Upper Tribunal decisions were more readily accessible than *legal appeals* to that same judicial body. The upshot of the Judgments in both *Cart and MR* and *Eba* is the implicit assumption that in some circumstances judicial review may be constitutionally indistinguishable from a second-tier appeal on a point of law. The argument of this paper is that whilst the second-tier appeals criteria may have provided a useful pragmatic solution in the context of judicial review of the Upper Tribunal, particularly in the asylum and immigration field, the Supreme Court missed the opportunity to clarify the unique constitutional status of Administrative Court judicial review within our constitutional system. The focus of this paper will be on the law of England and Wales, though the Scottish situation will be referred to where illuminating.

Following the Supreme Court’s Judgment in *Cart and MR*, the second-tier appeals criteria now effectively supplant the current judicial review permission test in England and Wales, the “arguable case” criterion, as far as judicial review of the Upper Tribunal is concerned. The “arguable case” test has been criticised in light of ever declining permission success rates and inconsistent judicial decision-making, inconsistency which early indications suggest has been exacerbated by regionalisation of the Administrative Court.⁶

³ Tribunals Courts and Enforcement Act (TCEA), ss 1(3) and 3(5).

⁴ Sir Andrew Leggatt, “Tribunals for Users: One System, One Service” (Her Majesty’s Stationery Office 2001) [6.3], SA De Smith, Lord Woolf and Jeffrey Jowell, *Judicial Review of Administrative Action* (6th edn, OUP 2007) [1–093], HWR Wade and CFF Forsyth, *Administrative Law* (10th edn, OUP 2009) 780. There was no similar assumption with respect to judicial supervision by the Court of Session, as the epithet “superior court of record” is not operative in Scots law.

⁵ Civil Procedure Rules 52.13.

⁶ Sarah Nason and Maurice Sunkin, “The Regionalisation of Judicial Review: Constitutional Authority, Access to Justice and Legal Services in Public Law” *forthcoming*.

The argument of this paper is that a proper examination of the respective constitutional status of the Administrative Court and the Upper Tribunal can be used as a springboard from which to devise a new judicial review permission test applicable to all claims in the Administrative Court. The new test better respects the unique constitutional position of the High Court's supervisory jurisdiction now exercised by the Administrative Court in light of the increasing fragmentation of legality review and the development of broader conceptions of administrative justice. It also provides greater guidance to practitioners and judges than the thin "arguability" standard. Broadly speaking the constitutional preserve of the Administrative Court is its duty to provide authoritative interpretations of constitutional values and fundamental rights, which it transmutes into legality principles that can be applied by inferior courts and tribunals. This role is constitutionally distinct from a second-tier appeal on a point of law even though it may often appear similar in practice. The proposed new permission test reflects this constitutional position explicitly, therefore providing more guidance (and possibly a higher burden) than the "arguability" test. Clarifying the proper constitutional role of Administrative Court judicial review should assist in maintaining the authority and gravitas of that Court, without damaging access to justice in deserving cases.

The test developed in this paper concludes that an applicant should be granted permission to seek Administrative Court judicial review where their claim raises an issue of constitutional principle or practice, or where otherwise necessary to protect fundamental rights. Other instances of legality review, such as the roles carried out by the county courts and the Upper Tribunal should not be subject to a permission test, but rather hopeless cases can be filtered out by procedural rules allowing for strike out⁷ and summary judgment.⁸

THE CREATION OF A SPECIALISED ADMINISTRATIVE COURT AND THE CURRENT JUDICIAL REVIEW PERMISSION TEST

Though its place in our public law system is at times controversial,⁹ the aim of the permission stage in judicial review proceedings is to filter out unmeritorious claims in the interests of protecting public bodies from costly litigious abuse and maintaining the efficiency of the court system. The applicant must prove they have "sufficient interest" in the matter to which their claim relates and that they have an "arguable case".¹⁰

The RSC Order 53, modernised public law redress mechanisms. It was intended to improve access to justice by consolidating previously diverse and technical routes to accessing public law remedies into one streamlined procedure, whilst still retaining appropriate protections for public body defendants. Under this procedure the purpose of the "leave" requirement, now the "permission" stage, was to prevent vexatious litigation by busybodies, the test was not a difficult one to surmount. The hypothetical door to public law justice was thrown open with *Donaldson LJ* (as he then was) warmly inviting applicants in, even to the extent of reprimanding the citizenry for their lack of awareness and use of the High Court's supervisory jurisdiction.¹¹

⁷ Civil Procedure Rules 3.4 (with an equivalent provision to be applied as part of tribunal procedure rules).

⁸ Civil Procedure Rules Part 24 (with an equivalent provision to be applied as part of tribunal procedure rules).

⁹ *Oliver* (n 1) 91.

¹⁰ Civil Procedure Rules 54.4, *R v Secretary of State for the Home Department ex parte Rukshanda Begum* [1990] COD (CA) 107, 108. An arguable case exists "if there is a point fit for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law".

¹¹ *Parr v Wyre BC* (1981-82) 2 HLR 71, 80.

The days of the open-door policy did not last. By as early as the mid-1980s the number of judicial review applications had increased exponentially, turning the tide so sharply that Lord Brightman castigated claimants in homelessness cases for making “prolific use” of the procedure, adjudging that leave should only be granted in exceptional circumstances.¹² Aside from the proliferation of homelessness cases another more substantial wave of litigation was on its way. The major growth in immigration, coupled with the dubious policies adopted by numerous governments designed to control such immigration led to major delays in the court system. One consequence of this growth in claims is that it commended to politicians and the courts’ service a vision of administrative law as highly specialised, necessitating the development of separate public law principles applied by a select cadre of elite judges. The academic argument may have been that specialisation was necessary in the interests of safeguarding the constitutional authority of the High Court’s supervisory jurisdiction and its role in protecting the rule of law. However, the political and the legal branches of state were drawn to specialisation on the basis that concentrated expertise might also increase speed and coherence in the determination of the ever-growing number of claims. The Administrative Court began life as a Crown Office List, with nine nominated judges chosen on the basis of their administrative law credentials. This is just one example in the recent history of public law in England and Wales where developments were based on an amalgam of policy and pragmatism, with legal and constitutional principle exerting a peripheral influence.¹³ Susan Sterrett remarks that the specialised Administrative Court was “created as a reaction to a concrete problem in the administration of the courts rather than an innovation based on on-going lawyers’ debates about balancing individual rights and collective welfare”.¹⁴

Given the growing caseload of the time it is no coincidence that the 1980s saw the development of “procedural exclusivity”, a policy which even further limited access to the list of specialist administrative law judges. Lord Diplock’s judgment in *O’Reilly v Mackman*,¹⁵ established the judicial review procedure as the exclusive route for public law challenges. Procedural exclusivity was intended to prevent claimants from circumventing aspects of the procedure designed to protect public bodies, most notably the permission stage. The decision also reflected a desire to consolidate the special status of the newly established elite cadre of administrative law judges. No longer would claimants have the choice of accessing the High Court’s supervisory jurisdiction by way of actions for declaratory relief or applications for an originating summons in the Chancery Division.¹⁶ The implicit assumption was that this would maximise opportunities to develop public law in a manner consistent and sensitive to constitutional and policy issues, thereby reinforcing the practical efficiency and authority of judicial review. Sterrett summarises procedural exclusivity coupled with the strictness of the “leave” requirement at the time as leading to a situation in which: “The courts and policies governing their use constitute an effort to limit the reach of legal rationality while acknowledging the importance of review”.¹⁷

¹² *Puhlhofer v Hillingdon LBC* [1986] AC 484.

¹³ Ivan Hare, ‘The Law Commission and Judicial Review: Principle Versus Pragmatism’ (1995) 54(2) CLJ 268, considering the Law Commission’s 1994 Report, *Administrative Law: Judicial Review and Statutory Appeals*.

¹⁴ Susan Sterrett, *Creating Constitutionalism? The Politics of Legal Expertise and Administrative Law in England and Wales* (The University of Michigan Press 2000) 106.

¹⁵ [1983] 2 AC 237.

¹⁶ Arguments now associated with the common law grounds of judicial review – legality and natural justice – were regularly employed in a wide range of proceedings, including during the 19th and 20th Century in Chancery proceedings and, since the early 20th Century in actions for declaratory relief. Leading decisions of the 1960s, *Ridge v Baldwin* [1964] AC 40 and *Anisminic* [1969] 2 AC 147, for instance, came to court as actions for declaratory relief rather than by way of the prerogative order procedure.

¹⁷ Sterrett (n 14) 107.

This practical restriction on access can be understood in relation to a particular theoretical model of judicial review, known as the *imperium* model. This can be traced back to Austin's command theory of law and associates judicial review with the policing of public decisions to ensure compliance with the express or implicit will of the sovereign legislature. In such a model whether individuals have access to the court is relatively unimportant because judicial review is concerned less with individual rights and more with policing the legality of government action.¹⁸ In a sense the *imperium* model could be associated with the *ultra-vires* doctrine which some commentators take as explaining the constitutional status of judicial review, both theories are anchored in legal positivist jurisprudence and respect for Parliamentary sovereignty. However, even prominent *ultra-vires* supporters were among the majority who criticised the decision in *O'Reilly* as an emphatically wrong turn.¹⁹ Wrong, not least because it was contrary to the recommendations of the Law Commission Report that preceded it.²⁰ Strict procedural exclusivity would unacceptably damage access to justice and the *imperium* model fails to respect the rights of individual citizens to seek public law redress even if their claim is not one of broader legal principle.

Despite the pull of *imperium* and the unanimity of their Lordships, *O'Reilly* departed from much of the informed thinking at the time, and represented a significant attempt to shift our public law away from its pluralist common law base. The grand *imperium* image of an elite, specialised judiciary with high constitutional authority to defend the broader common good tends to lose sight of what Peter Cane has referred to as "bureaucratic judicial review", namely judicial review of "street level bureaucracies".²¹ These bureaucratic claims have little, if any, impact beyond the rights of the particular parties to the case, but this does not mean that they should be more vulnerable to being filtered out of the system, at least not if there is no other alternative avenue for redress. A matter can involve constitutional principle and fundamental rights even if its impact is restricted to just one person. The simple fact that a claimant has no other satisfactory route to legal justice in respect of the particular issue renders any denial of access to the courts unconstitutional.

A better approach to understanding the history, and especially the recent history of our public law is through the prism of a pluralistic or community-based approach to judicial review. Broadly speaking this stresses judicial review's role in protecting and promoting: "independent values of various kinds which are in some sense rooted in culture or society and which serve as an essential matrix for evaluating government practices".²² Community-based approaches present a "bottom up" or organic conception of the system. History shows that many developments in our common law are too pluralist in character (and locally based) to be squeezed into the rigidly centralised model reflected in *O'Reilly*, not least common law's emphasis on remedies. Community based approaches also sit well with the group of theories known collectively as common law constitutionalism which emphasise the historic tradition of the common law as embodying the community's conception of justice and the common good.²³

¹⁸ See Maurice Sunkin, "The Problematic State of Access to Judicial Review" in Brigid Hadfield (ed) *Judicial Review: A Thematic Approach* (Gill & Macmillan 1995) referencing Roger Cotterrell, "Judicial Review and Legal Theory" in Generva Richardson and Hazel Genn (eds) *Administrative Law & Government Action* (OUP 1994).

¹⁹ HWR Wade, "Procedure and Prerogative in Public Law" (1985) 101 LQR 180 and CFF Forsyth, "Beyond *O'Reilly v. Mackman*: The Foundations and Nature of Procedural Exclusivity" (1985) 44(3) CLJ 415.

²⁰ The Law Commission recommended that the judicial review procedure should not be the only route to challenge issues of legality and procedural fairness. Law Com No. 73 *Report on Remedies in Administrative Law* (Law Com 1976).

²¹ Peter Cane, "Understanding judicial review and its impact" in M Hertogh and S Halliday (eds) *Judicial Review and Bureaucratic Impact* (CUP 2004).

²² Cotterrell (n 18) 19.

²³ Paul Craig, "The Common Law, Shared Power and Judicial Review" (2004) 24(2) OJLS 237, TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (OUP 2003).

The unfairness of procedural exclusivity was ameliorated in later cases on the grounds of fairness and access to justice and a by-product of this relaxation is that public law claims can now be entertained in an increasing array of courts and tribunals beyond the specialised Administrative Court. In some circumstances public law principles can also be utilised collaterally in private law claims, for example illegality has been raised in a private law action for restitution²⁴ and a defence to possession proceedings can be raised under the Human Rights Act 1998 where no other defence is available.²⁵ This particular expansion of public law redress can be understood as based on constitutional principle, namely the necessity of securing access to justice in the face of procedural irregularities that could not have been helped. However, there have also been a number of examples of the statutory creation of a form of judicial review type jurisdiction beyond the Administrative Court that have been guided by a strange amalgam of principle, policy and pragmatism, similar to the tripartite considerations that led to the establishment of the Administrative Court itself. The judicial review jurisdiction of the Upper Tribunal is one prominent example that will receive particular attention in this paper.

Returning to the issue of permission, the “sufficient interest” element of the test has been relaxed in recent years to allow claims to be pursued in the interests of justice, even if the only link to the facts is via the conduit of a “single public-spirited taxpayer”.²⁶ It was the apparent change in legal policy ushered in by Lords’ Denning and Diplock that has been significantly responsible for the relaxation of the “sufficient interest” element of the permission test. However, of greater interest to the theme of the present paper is the “arguability” element which is not a test of standing but rather of the merits of the case. In the early days of the RSC Order 53 procedure the “arguability” element was merely a deterrent to vexatious litigation, however in light of the increasing caseload “arguability” gained sharper teeth. This was reflected clearly in Lord Donaldson MR’s striking reversal of opinion when he noted that, “. . .the judicial review jurisdiction is to be exercised very speedily and, given the constraints imposed by limited judicial resources, this necessarily involved limiting the number of cases in which leave should be given”.²⁷ He later noted that, “. . .leave ought to only be given if prima facie there was already clearly an arguable case for granting the relief claimed. That was not necessarily to be determined on a ‘quick perusal of the material’, although any in-depth examination was inappropriate”.²⁸ In consequence a more nuanced test was established that required judges to distinguish between Lord Diplock’s criterion of “hopelessness” and Lord Donaldson’s criterion of “potential arguability”. There was also a seemingly finer distinction between claims that were “prima facie clearly arguable” where leave should be granted, and those that were only “potentially arguable” where leave should be denied.

These fine gradations of “arguability” provide judges with little guidance and if anything they invite considerable confusion.²⁹ Leave grant rates fell substantially from the early 1980s to the mid-1990s and the decline continues. For example, in 1981, 71 per cent of claims passed the leave requirement, by 1996, 58 per cent of applications were granted permission, by 2006 only 22 per cent of applicants passed the permission stage and by 2010 permission was being granted in approximately 16 per cent of cases.³⁰

²⁴ *Bloomsbury International Limited v The Sea Fish Industry Authority* [2010] EWCA Civ 263.

²⁵ *Manchester City Council v Pinnock* [2010] UKSC 45.

²⁶ *R v Inland Revenue Commissioners ex parte National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617.

²⁷ *R v Panel on Takeovers and Mergers Ex p. Guinness Plc* [1990] 1 QB 146, 177–178.

²⁸ *R v Legal Aid Board Ex p. Hughes*, *The Times*, October 29, 1992.

²⁹ Varda Bondy and Maurice Sunkin, “Accessing Judicial Review” [2008] PL 647.

³⁰ Statistics from Administrative Court Office Data.

At least as far as the mid-1990s the continued trend towards adopting Lord Donaldson's more restrictive approach may have been significantly responsible for declining permission success rates. However, reforms introduced by the Bowman Review in 2000, intended to tackle the predicted increase in caseload as a consequence of the coming into force of the Human Rights Act 1998, had the effect of further limiting permission success. The upshot of these reforms was that further information would be available to all concerned prior to the permission decision thus allowing greater potential for settlement and withdrawal prior to permission, or at least for the judge to have more substantive information to go on when deciding whether or not to grant permission.³¹

Commentators were initially sceptical about the impact of these reforms on access to justice for claimants.³² However research by Sunkin and Bondy concluded that whilst the Bowman Reforms may have "heightened the de facto barrier facing claimants"³³ greater numbers of claims are now being resolved in favour of the claimant prior to the permission stage. There is evidence that the permission stage does work to focus the minds of the parties. Also post-Bowman "...settlement evidence strongly suggests that access to justice (in terms of achieving outcomes that are at least as beneficial as those possible had cases been pursued to final hearing) has, if anything, improved".³⁴ Declining permission success rates do not necessarily equal poorer outcomes for claimants. Nevertheless, a number of recent empirical research studies have concluded that inconsistency in the way particular judges approach the "arguability" criterion of the permission test is causing significant concern to practitioners, litigants and interested parties.³⁵ Respondents to research studies have remarked that the only consistency is consistent inconsistency and that the award of permission is equivalent to winning a lottery. Judges have been criticised for manipulating the test to grant or refuse permission based on personal political proclivities, distrust of a certain class of claimant, or inherent bias against public body defendants. Even in the absence of such political and social class influences, the more benign point remains that the nuanced distinctions between "clear arguability" and "potential arguability" are confusing and invite errors even from the most erudite judges. The establishment of four regional Administrative Court Centres outside London has further exaggerated concerns about consistency at the permission stage. The Centres are "fully operational" dealing with the issue, listing and hearing of most Administrative Court claims. Early findings indicate that worries about the consistency of regional judicial decision-making are well founded and that permission success rates in the first few years of operation of the regional Centres have been variable.³⁶

It is true that low permission success rates do not necessarily equate to a reduction in access to justice. In the field of asylum and immigration the number of permission applications continues to rise at an astronomical rate and it is perfectly understandable

³¹ Under the Bowman reforms the claimant lost the right to an oral hearing, which will now only occur if the court directs or following renewal from an initial refusal of permission on the papers. Permission became *inter partes*, requiring the defendant to file an acknowledgement of service setting out the reasons, if any, for contesting the claim.

³² Tom Cornford and Maurice Sunkin, "The Bowman Report, Access and the Recent Reforms of the Judicial Review Procedure" [2001] PL 11: The rules were "...re-crafted from an essentially summary ex parte filter of arguability to a procedure which is both a filter of access and an *inter partes* procedure of the sort familiar in ordinary civil litigation. ...These two roles are hard to reconcile. They are likely to produce a complex procedure that is difficult to work with in practice, creates additional obstacles to access, and fails to achieve the expected gains in efficiency".

³³ Varda Bondy and Maurice Sunkin, *The Dynamics of Judicial Review Litigation: The resolution of public law challenges before final hearing* (Public Law Project 2009) 73.

³⁴ *ibid* 69.

³⁵ Bondy and Sunkin, *Dynamics* (n 33) and Nason and Sunkin, *Regionalisation* (n 6).

³⁶ Nason and Sunkin, *Regionalisation* (n 6).

that as the caseload grows the proportion of cases too weak to progress may also expand. Nevertheless, we should still ask whether it is appropriate to continue to accept the current permission test under which success rates have reduced to less than 16 per cent and which is widely regarded by practitioners as indeterminate and open to inappropriate political manipulation resulting in inconsistency and dis-satisfaction.

This paper argues that a new permission test and related guidance should be established. The crux of this new test is not “arguability” loosely based on reference to established legality principles. Rather, it pays greater heed to the proposition that “arguability cannot be judged without reference to the nature and gravity of the issue to be argued. . .”³⁷ There is sustained and academic and judicial debate concerning the constitutional status of Administrative Court judicial review, yet such is rarely recognised by policies aimed at reforming the caseload and procedures of the Court. This paper argues that with a simple change to the permission test, theory and practice could be brought more closely into line to the benefit of both. The *Cart and MR* and *Eba* litigation represented an opportunity to consider the current role practically performed by the Administrative Court in light of its ideal constitutional function. However, the courts’ failed to properly tackle the issues of constitutional principle at stake, reverting instead to “judicial policy”. The central aim of the new permission test proposed in this paper is not to assess “arguability” in the abstract, but rather to examine whether the matter at issue is one truly suitable for resolution by the Administrative Court alone as a matter of principle given its constitutional status. Therefore a key first step is to examine the nature of that status.

THE CONSTITUTIONAL FOUNDATIONS OF ADMINISTRATIVE COURT JUDICIAL REVIEW

In the debate over the constitutional foundations of the High Court’s judicial review jurisdiction exercised by the Administrative Court, many of the earlier differences between *ultra-vires* supporters and common law constitutionalist detractors are now redundant. The two sides reached a practical impasse, agreeing that in developing the principles of judicial review the High Court is tasked with expounding components of a liberal-democratic account of the rule of law.³⁸ All supporters of judicial review agree that the primary function of the procedure is the interpretation and application of rule of law requirements. Judges and commentators veer between describing these standards as warranted by the “rule of law” or alternatively by the principles of “legality”, and it seems that these labels are interchangeable. However, disagreement remains as to the precise content of rule of law or legality standards, and how they interact with Parliament’s expressed intentions.³⁹ Differences of opinion also remain as to the moral and political status of interpretation in accordance with the rule of law. As David Dyzenhaus has argued, this is because “. . .one answers questions about the rule of law and judicial review by first settling the great questions of political theory”.⁴⁰ The

³⁷ Lord Bingham and Lord Walker delivering the opinion of the Privy Council in *Sharma v Brown-Antoine* [2006] UKPC 57 [2007] 1 WLR 780 [14(4)].

³⁸ TRS Allan, “The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretive Inquiry” (2002) 61(1) CLJ 87, 88, CFF Forsyth and Mark Elliott, “The Legitimacy of Judicial Review” [2003] PL 286, 287–290.

³⁹ Craig (n 23), TRS Allan, “Legislative Supremacy and Legislative Intent: A Reply to Professor Craig” (2004) 24(4) 563, Adam Tomkins, *Our Republican Constitution* (Hart Publishing 2005), Jeffrey Goldsworthy *Parliamentary Sovereignty: Contemporary Debates* (CUP 2010).

⁴⁰ David Dyzenhaus, “Form and Substance in the Rule of Law: A Democratic Justification for Judicial Review” in CFF Forsyth (ed), *Judicial Review and the Constitution* (Hart Publishing 2001) 144.

counter-veiling opinion, expressed notably by Forsyth, that legal and political theory has very little influence on judicial review in practice,⁴¹ is itself a political argument.⁴²

Recent debates have moved in a more normative direction in which rule of law standards or legality principles are openly acknowledged as developing in accordance with legal and political theory.⁴³ Many contemporary arguments no longer focus on conceptual analytic tests such as *ultra-vires* and the related notion of jurisdictional error, rather they argue for the restriction or expansion of judicial review for political reasons.⁴⁴ The rise of various forms of normative political constitutionalism, that go beyond J.A.G. Griffith's historical assertion that the constitution is merely "what happens", are good examples.⁴⁵ These accounts challenge so-called "liberal legal constitutionalists" on their own terms by proposing competing interpretations of value-laden moral and political concepts such as democracy, equality, liberty and legality itself. Although these theoretical divergences may lead to differences of judicial opinion in complex cases, for the majority of the time judges will agree upon the concrete content of rule of law principles as applied to particular situations. The key is that the debate must be an open one not hidden behind conceptual doctrines, including the concept of "arguability" at the permission stage. Similarly Forsyth and Elliott are likely correct that for the most part judicial review decisions are still based predominantly upon statutory interpretation,⁴⁶ whether the judge involved sees the statute as sovereign or just one compelling factor in a broader assessment of constitutional value.⁴⁷

The judiciary's increasing confidence in their task of developing judicial review in accordance with rule of law standards is evidenced by the sophisticated expansion of the grounds of review in recent years. It is also evidenced by refusals to countenance any exclusion of review.

In *Cart* in the Divisional Court, Laws LJ concluded that the High Court's supervisory function, dating back many centuries,⁴⁸ could not be ousted merely by deeming the Upper Tribunal a "superior court of record".⁴⁹ He further concluded that in any case the Upper Tribunal is not a "superior court of record" but rather a court of limited statutory jurisdiction.⁵⁰ All other courts in England and Wales, aside from the Court of Appeal and Supreme Court, are effectively inferior to the High Court because they do not have the common law power to determine the reach of their own jurisdictions. It is worth noting that recent fragmented instances of legality review, such as the role of the county courts in homelessness cases and the judicial review power of the Upper Tribunal, have their origins in statute therefore giving the executive a considerable degree of control over their breadth and functioning. The Leggatt Report, which preceded the establishment of the Upper Tribunal, had recommended a statutory provision excluding decisions of second-tier tribunals from judicial review. However,

⁴¹ Wade and Forsyth (n 4) 7–8.

⁴² Dyzenhaus (n 40).

⁴³ Graham Gee and Gregoire Webber, "What is a Political Constitution?" (2010) 30(2) OJLS 273.

⁴⁴ Stuart Lakin, "Debunking the Idea of Parliamentary Sovereignty: The Controlling Factor of Legality in the British Constitution" (2008) 28(4) OJLS 709.

⁴⁵ Tomkins (n 39).

⁴⁶ Forsyth and Elliott (n 38).

⁴⁷ Legal positivists and anti-positivists can both reach the conclusion that Parliamentary sovereignty should only be accepted if it is considered normatively valuable. For the anti-positivists see Lakin (n 44). For the positivists see Adam Tucker, "Uncertainty in the Rule of Recognition and in the Doctrine of Parliamentary Sovereignty" (2001) 31(1) OJLS 61.

⁴⁸ *Cart* (Admin) [28]–[42].

⁴⁹ *ibid* [32].

⁵⁰ In *Eba's* case, the Court of Session concluded not only that the term "superior court of record" has no legal effect in Scotland, but also that under Scots law the Upper Tribunal is not even a court because of its lay membership. *Eba* (Court of Session) [47] (Lord President Hamilton).

the government chose not to propose an ouster clause, presumably due to its previous altercation with the judiciary over attempts to exclude certain asylum and immigration cases from the scope of judicial review.⁵¹ For good or for ill the increasing asylum and immigration caseload has had a major (and possibly distorting) impact on the development of judicial review in England and Wales

Applications for asylum and immigration judicial review have risen from 1,748 claims in 1996; to 4,084 in 2006; to 8,139 in 2010, to over 10,000 in 2011.⁵² Successive governments have sought to curb the expansion of asylum and immigration judicial review by purporting to either exclude or limit access to the Administrative Court. Back in 2002 the Home Office proposed to designate the former Immigration and Asylum Tribunal (IAT) a “superior court of record”, arguing that there should, “be no scope for judicial review of its decisions, particularly of refusals to grant leave to appeal that are made in an attempt to frustrate removal”.⁵³ Parliament rejected this proposition and a High Court statutory review process was developed to replace judicial review of IAT refusals of permission to appeal. The Court of Appeal accepted that the statutory review procedure was a lawful alternative to judicial review.⁵⁴ However, within four months of the procedure being implemented, the government proposed the Asylum and Immigration (Treatment of Claims, etc) Bill 2003 purporting to further reform the system. A controversial and ultimately rejected clause of the 2003 Bill attempted to oust all grounds of judicial review. Not surprisingly, this proposition sparked a constitutional outcry. Jeffrey Jowell opined that:

the unwritten constitution contains nothing, in law or logic, to prevent the courts interpreting some rights, upon which democracy depends, as inviolable. The right to a democratic franchise may be one of these. The right to judicial review may be another.⁵⁵

It follows from the primacy of fundamental rights and democracy that the elected government cannot violate due process of law; in our society it is the law that ultimately furnishes Parliament’s power to act. This effectively common law constitutionalist account echoes comments made by a number of judges beginning with Lord Denning,⁵⁶ to Lords Woolf⁵⁷ and Steyn⁵⁸ and Lady Hale,⁵⁹ and academics such as Craig⁶⁰ and Allan.⁶¹ Parliament may legitimately modify or restrict certain grounds of judicial review in order to advance its policies in specific contexts. This may be acceptable, particularly in times of emergency, or where other sufficient routes to challenge the legality of administrative decisions are available. The judiciary can endorse such modifications or restrictions if they find them to be compatible with constitutional values and fundamental rights. However, the total exclusion of judicial review cannot be acceptable on any coherent interpretation of constitutional values.

⁵¹ Andrew Le Sueur, “Three strikes and it’s out? The UK Government’s strategy to oust judicial review from immigration and asylum decision making” [2004] PL 225–233.

⁵² Such claims now constitute at least 80 per cent of all judicial review applications issued in the Administrative Court. All statistics that appear in this article are taken from Administrative Court Office Data.

⁵³ Government White Paper, *Secure Borders, Safe Haven* (2002) [4.66].

⁵⁴ *R(G) v Immigration Appeal Tribunal* [2004] EWCA Civ 1731 [2005] 1 WLR1445.

⁵⁵ Jeffrey Jowell, “Immigration Wars” Guardian Newspaper (London 2004). <<http://www.guardian.co.uk/world/2004/mar/02/law.immigration>>

⁵⁶ *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574.

⁵⁷ Lord Woolf, “The Rule of Law and a Change in the Constitution” (2004) 63(3) CLJ 317.

⁵⁸ *R (Jackson) v Attorney General* [2005] UKHL 56 [102].

⁵⁹ *ibid* [159] and [120] (Lord Hope).

⁶⁰ Paul Craig, “Political Constitutionalism and Judicial Review” in CFF Forsyth et al (eds) *Effective Judicial Review: A Cornerstone of Good Governance* (OUP 2010).

⁶¹ Allan (n 23).

In *Cart* Laws LJ concluded that Parliament's statutes must be mediated by an authoritative and independent judicial source of power of which the High Court is the "prime example". He further described such judicial mediation of statute as a "condition" of Parliament's sovereignty, arguing that:

the need for such an authoritative judicial source cannot be dispensed with by Parliament. This is not a denial of legislative sovereignty, but an affirmation of it: as is the old rule that Parliament cannot bind itself. The old rule means that successive Parliaments are always free to make what laws they choose; that is one condition of Parliament's sovereignty. The requirement of an authoritative judicial source of interpretation of law means that Parliament's statutes are always effective; that is another.⁶²

Some commentators have taken this pronouncement as an endorsement of the view that Parliament is subject to limitations that originate in constitutional morality.⁶³ However Laws LJ did not express any further conclusions as to the meaning of "effectiveness". The role of the judiciary in rendering Parliament's statutes "effective" could simply extend to ensuring linguistic clarity; "effectiveness" does not necessarily imply interpretation in accordance with substantive moral criteria. In his extra-judicial writings Laws LJ ascribes to the view that Parliament is bound by certain "higher order" principles that inform the content of the rule of law concept and which ultimately exist as a matter of moral value.⁶⁴ On the one hand the continued reluctance of the judiciary to voice such views clearly from the bench is disappointing. Nevertheless, there is also force in the view that such delicately balanced issues need not be brought out into the open. This view is encapsulated by the debate as to whether the fig leaf *ultra-vires* principle provides sensible protection for judicial modesty or an opaque disguise that should be avoided.⁶⁵ In a sense it is like the Emperor's New Clothes for few believe that the *ultra-vires* garb really disguises anything so long as we are minded to look.

In *Cart and MR*, Lord Phillips avoided examining the constitutional status of the High Court by stating that:

The proposition that Parliamentary sovereignty requires Parliament to respect the power of the High Court to subject the decisions of public authorities, including courts of limited jurisdiction, to judicial review is controversial. Hopefully the issue will remain academic.⁶⁶

On the contrary, this paper argues that there is growing consensus concerning the constitutional role of Administrative Court judicial review, particularly its unique task of enumerating fundamental values and rights and acting effectively as a first-instance constitutional court.⁶⁷ This is a "constitutional review" function. In this paper "constitutional review" is taken as referring to any litigation that engages interpretation of constitutional values and rights. However, more commonly, the label applies only to instances where the judiciary can strike down primary legislation as unconstitutional. It has been argued that under current interpretations of the British Constitution, the judiciary ought to have the power to strike down primary legislation

⁶² *Cart* (Admin) [38].

⁶³ CJS Knight, "Striking Down Legislation Under Bi-Polar Sovereignty" [2011] PL 90 and TRS Allan, "Questions of Legality and Legitimacy: Form and Substance in British Constitutionalism" (2011) 9(1) *IJCL* 155.

⁶⁴ Sir John Laws, "The Constitution: Morals and Rights" [1996] PL 622.

⁶⁵ CFF Forsyth, "Of fig leaves and fairy tales: The ultra vires doctrine, the sovereignty of parliament and judicial review" (1996) 55(1) *CLJ* 122.

⁶⁶ *Cart and MR* (Supreme Court) [73].

⁶⁷ Many academics take this view, as do judges off the bench and some to an extent from the bench (*Jackson* case in particular, n 58 and n 59 above). In response to recent research by the Universities of Bangor and Essex, Administrative Court Managers and lawyers were also of this view. S Nason and M Sunkin, *Regionalisation* (n 6).

as unconstitutional where it interferes with fundamental human rights, common law constitutional rights, European and international legal norms.⁶⁸ This provides further support to the assessment that the Administrative Court is a first instance constitutional court. The absence of a codified British Constitution generally perpetuates an inherent fear of describing any action or decision as constitutional or un-constitutional. In much the same way our desire to respect cultural and religious pluralism tends to lead us to eschew any discussions of morality, right and wrong, virtue and vice in British politics. These two difficulties are related because constitutional principle is ultimately a species of moral argument. I propose, as commentators have done before with respect to application of the proportionality test, that more open references to constitutional morality are necessary, particularly because even if they are not made explicit moral conclusions still need to be reached and the alternative is to couch them in the opaque language of balanced or proportionate.⁶⁹

Whilst this is a particularly extreme view, the central argument of this paper, that the judicial review “arguability” test should be replaced with an alternative formulation that makes direct reference to constitutional principles and fundamental rights, is one that could be accepted by those of a more modest disposition. The debate is not so much whether the Administrative Court is a first instance constitutional court dealing with values and rights, I propose that this is now undeniable; the joinder of issue is as to the precise content and interpretation of our constitution and its concomitant values and rights. That joinder of issue would become clearer if the constitutional role of the Administrative Court is explicitly referred to in its permission criteria and even by a change of name, from Administrative Court to Constitutional Court. It has always been difficult to draw any sharp distinction between constitutional and administrative law, hence the prevalence of the generic phrase “public law”. The new permission test proposed in this paper categorises constitutional law as generated by claims raising matters of constitutional principle or practice, most notably where fundamental rights are engaged. Administrative law is something that is practiced far beyond the Administrative Court, with the new tribunal edifice being a much greater hive of activity. The Administrative Court caseload in any given year is roughly equivalent to just over one per cent of the million claims per-annum handled by tribunals.⁷⁰ This paper postulates a distinction between the administrative expertise of the tribunal edifice with respect to particular areas of law and the constitutional expertise of the Administrative Court (that would be better re-named the Constitutional Court). The issue of demarcating specialisations is complex and the two categories suggested here admittedly overlap, they are presented in contribution to a broader argument about the role of specialist tribunals and courts to which the paper now turns.

UPPER TRIBUNAL ADMINISTRATIVE JUSTICE AND ADMINISTRATIVE COURT CONSTITUTIONAL JUSTICE

Since the expansion of the welfare state the number and diversity of tribunals had evolved unsystematically and there was no consistency in the provision of onward appeal and review routes to challenge their decisions. The aim of the Tribunals Courts

⁶⁸ CJS Knight (n 63).

⁶⁹ Stavros Tsakyrakis, “Proportionality: An Assault on Rights?” (2009) 7(3) *IJCL* 468.

⁷⁰ Ministry of Justice, *Quarterly Statistics for Tribunals* <<http://www.justice.gov.uk/publications/statistics-and-data/tribunals/quarterly.htm>>

and Enforcement Act 2007 (TCEA) was to harmonise tribunal justice into one self-contained edifice with provision for internal appeal and review.

Almost all existing tribunals in England and Wales have been transferred into the new system. The previously distinct jurisdictions now comprise specific Chambers⁷¹ within the First-tier or Upper Tribunal depending upon their status as first instance or appellate bodies, the seniority of their members and the subject matter of their expertise.⁷² Membership of both the First-tier and the Upper Tribunal is diverse. Various styled, judges, commissioners, and lay-members of the existing disparate tribunals have been “transferred-in”⁷³ to the new structure. Alongside rights of appeal from the First-tier to the Upper Tribunal,⁷⁴ the TCEA provides opportunities for both tiers to review their own decisions.⁷⁵ There are also provisions for second-tier appeals to the Court of Appeal and Court of Session and if the Upper Tribunal refuses to grant permission the applicant can seek permission directly from these appellate courts.⁷⁶ However, where an applicant appeals from a decision of the First-tier to the Upper Tribunal, the Upper Tribunal may refuse permission and in such circumstances, there is no further redress under the TCEA.⁷⁷ This was the situation facing *Cart* and *MR* who subsequently sought judicial review in the Administrative Court. The Supreme Court concluded that judicial review in such circumstances should be restricted to cases that were more than just “arguable” but that also passed the second-tier appeals criteria. Namely that the claim raises a matter of important legal principle or practice or there is some other compelling reason for the higher court to hear it. This restriction was imposed due to an assessment of the proportionate balance between the right of access to justice and the appropriate use of scarce judicial resources. A significant factor weighing in the balance was the specialist expertise of the Upper Tribunal within its particular fields of competence.

It has been increasingly recognised that conceptions of administrative justice extend beyond the traditional textbook principles of administrative law often treated as equivalent to the grounds of judicial review. Administrative justice also encompasses tribunal justice and first-instance administrative decision-making.⁷⁸ Carnwath LJ, the first Senior President of tribunals, envisages that the Upper Tribunal will have a distinctive role to play in the delivery of administrative justice and that it may be assisted in that role by the higher courts taking a light-touch attitude towards external supervision.⁷⁹

A growing body of case law locates the distinctive benefit of tribunal justice in the high degree of specialisation evident within expert tribunals.⁸⁰ This specialisation can

⁷¹ TCEA s7.

⁷² For example, the Upper Tribunal has taken over both the first instance and appellate jurisdictions of the former Lands Tribunal. The Administrative Appeals Chamber acquires the jurisdiction of the former Transport Tribunal and the Tax and Chancery Chamber subsumes the competence of the former Financial Services and Markets Tribunal. Though the Upper Tribunal mainly exercises an appellate function its Chambers have some first instance jurisdiction to hear cases that are complex or raise matters of public importance within their specialist fields

⁷³ TCEA ss4–6.

⁷⁴ TCEA s11.

⁷⁵ TCEA ss9 and 10.

⁷⁶ TCEA s13.

⁷⁷ TCEA ss13(8)(c) and 11(4)(b).

⁷⁸ Emma Laurie, ‘Assessing the Upper Tribunal’s Potential to deliver Administrative Justice’ *Public Law* [2012] forthcoming. Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243 (July 2004).

⁷⁹ Robert Carnwath, “Tribunal Justice – a New Start” [2009] PL 48.

⁸⁰ *R (Wiles) v Social Security Commissioner* [2010] EWCA Civ 258, *AH (Sudan) v Secretary of State for the Home Department*, [2007] UKHL 49 [2008] AC 678, *Cooke v Secretary of State for Social Security* [2001] EWCA Civ 734 [2002] 3 All ER 279, *AA (Uganda) v Secretary of State for the Home Department* [2008] EWCA Civ 579 [2008] INLR 307 [46].

be broken down into two elements, on the one hand the fact that specialist tribunals may only deal with one or a handful of unique topics such as social security, asylum and immigration, lands or mental health. The second element is the perceptible difference in the manner in which tribunals generally approach their task when compared to the higher courts. The classically cited advantages of tribunals are their more flexible, often inquisitorial, less costly and less cumbersome procedures.

In terms of providing an appropriate boundary between Upper Tribunal authority and higher court supervision the subject-specialist/generalist dichotomy may provide a useful starting point. For example, some cases have stressed that the proper construction of statutory provisions is a generalist activity more suited to the higher appellate courts.⁸¹ Others have noted that matters of procedural propriety, including the provision of adequate reasons are equally of generalist ilk.⁸² However, in reality this apparent dichotomy admits of no clear boundary lines. For example, both statutory construction and procedural propriety can be understood as context-specific matters.⁸³

There are other more practical reasons why the apparent subject-specialist/generalist cleavage cannot form the appropriate test for accessing the Administrative Court's judicial review jurisdiction in the context of the Upper Tribunal. The new tribunal edifice created by the TCEA is not as neat and coherent as initial appearances suggest, due to the diversity of jurisdictions that come under the umbrella of both the First and Upper tiers. For example, the jurisdiction of the Special Commissioners of Income Tax and the Vat and Duties Tribunal has been assigned to the First-tier, yet their expertise and the importance of the decisions they make suggests that they should be of equivalent standing to the Social Security Commissioners, who as appellate judges are assigned to the Upper Tribunal. The four Chambers of the Upper Tribunal have responsibility for relatively specialised fields of law, namely Lands, Tax, Immigration and Asylum, and Administrative Appeals. However, the jurisdiction of the Administrative Appeals Chamber is broad, encompassing appeals from various First-tier jurisdictions such as Health, Education and Social Care and Armed Forces Compensation. There is a danger, particularly within this Chamber, that the amalgamation of a range of diverse fields of law could lead to watered down rather than concentrated legal expertise. Thus the degree of specialisation evident within the Upper Tribunal is questionable.

Concerns do not just relate to the substantive speciality of particular institutions of the tribunal structure, but also to their procedures. Some procedures of the new tribunal edifice, particularly those under which both the First-tier and Upper Tribunal can review their own decisions, are based on a "curious amalgam"⁸⁴ between a first instance merits decision, factual appeal, and legality review. The reviewing body is the same tribunal possessed of the same power and authority, just with different members sitting. It can therefore substitute its own decisions, rather than remitting the case back to other tribunal members. There is some evidence from Australian experiences to suggest that where the same body exercises first instance decision-making, appellate jurisdiction, and judicial review, it may be difficult to keep these functions distinct.⁸⁵ The danger is then that these functions could overlap in a manner that is inconsistent

⁸¹ *Cawsand v Stafford* [2007] EWCA Civ 231.

⁸² *Viggers v Secretary of State for Defence* [2009] EWCA Civ 132 and *SM(Iran) v Secretary of State for the Home Department* [2010] EWCA Civ 371.

⁸³ *R(S) v A Social Security Commissioner* [2008] EWHC 3096 (Admin).

⁸⁴ Peter Cane, "Judicial Review in the Age of Tribunals" [2009] PL 492.

⁸⁵ *ibid*, 487.

with constitutional principles protected by the rule of law such as the avoidance of bias and the need to ensure separation of powers (a more complex and nuanced separation of administrative and legal powers as well as the traditional tripartite model of legislature, executive and judiciary). Nevertheless, this concept of function creep between the different roles of the new tribunal institutions is not necessarily a bad thing. Carnwath LJ has noted that one of the benefits of the new tribunal edifice is its capacity to transcend traditional conceptual distinctions between fact and law, and between merits and legality in order to do justice in individual cases.⁸⁶

An additional problem is that of institutional authority. This paper highlights general concerns about the fragmentation of legality review functions beyond the Administrative Court based at the RCJ in London. The Administrative Appeals Chamber of the Upper Tribunal has an innovative power to conduct legality review of some unappealable decisions of the First-tier. These reviews predominantly relate to First-tier decisions made under the Tribunal Procedure Rules and issues involving the Criminal Compensation Tribunal.⁸⁷ In England and Wales this function must be conducted by a High Court judge on the same legal grounds as Administrative Court judicial review, in accordance with the same procedures and providing the same remedies.⁸⁸ In the event that claims within the Upper Tribunal's legality review jurisdiction are commenced in the Administrative Court, they will be automatically transferred to the Upper Tribunal.⁸⁹ Other judicial review claims instigated in the Administrative Court may be subject to discretionary transfer.⁹⁰ The existence of this peculiar power greatly influenced the Divisional Court's decision in *Cart* to designate the Upper Tribunal as the "alter ego" of the High Court within its specialist subject areas of law.⁹¹ However, the better view is that of Sedley LJ in the Court of Appeal who noted that the judicial review power of the Upper Tribunal is endowed and circumscribed specifically by the TCEA. The High Court's judicial review function on the other hand, stems from its unique and unlimited common law jurisdiction. Sedley LJ concluded that, "far from standing in the High Court's shoes...the shoes the [Upper Tribunal] stands in are those of the tribunals it has replaced".⁹² The provisions of the TCEA conferring a limited legality review power on the Upper Tribunal were necessary precisely because the Upper Tribunal and High Court "are not meant to be, courts of co-ordinate jurisdiction".⁹³

Both the Upper Tribunal and the regional Administrative Courts suffer from the criticism that they may not secure the same level of public confidence as the RCJ in London when it comes to perceptions of their ability to hold the government to account for decisions made contrary to constitutional principle. The Constitutional and Administrative Law Bar Association (ALBA) expressed concern that regionalisation could lead to increased use of Deputy High Court judges. Deputies are of the same standing as full High Court judges, but work on a part-time basis. Under section 9 of

⁸⁶ Carnwath (n 79) 57.

⁸⁷ From October 2011 "fresh claim" asylum and immigration judicial review applications, in which a legal determination of the issue has already been reached by the Upper Tribunal, but where further evidence comes to light and the Home Office still refuses the claim, will also be handled by the Upper Tribunal. These account for in the region of 1,500 to 2,000 judicial review claims per-annum.

⁸⁸ TCEA ss15, 16, 17 and 18.

⁸⁹ Senior Courts Act s31A(2).

⁹⁰ Senior Courts Act s31A(3). In Scotland, the Upper Tribunal can only determine claims that are referred either mandatorily or discretionarily from the Court of Session and it must comply with the same doctrinal principles, procedural and remedial conditions, as apply in the Court of Session. TCEA ss20 and 21.

⁹¹ *Cart* (Admin) [77].

⁹² *Cart* (Court of Appeal) [19].

⁹³ *ibid* [20].

the Senior Courts Act 1981, practitioners, Recorders and Circuit Judges can also sit as deputies in the High Court. ALBA's worry was that such judges lack the necessary constitutional authority of full High Court judges. ALBA argued that access to High Court judges, "must be regarded as part of the cornerstone to the rule of law".⁹⁴ In the Upper Tribunal the vast majority of judicial review applications are likely to be determined by High Court judges, however there remains a provision under which the Lord Chief Justice and the Senior President of Tribunals, can agree to allow other "persons" to entertain claims.⁹⁵ ALBA's concern over the use of judges below full High Court level was linked to worries that judicial review outside the RCJ in London will not be taken as seriously by public body defendants. This might weaken the constitutional impact of the procedure as a necessary check on public power. It could be argued that even full High Court judges regularly determining cases in the Upper Tribunal might become institutionalised to the extent of being unconsciously less willing to find fault with tribunal colleagues.

A further related worry is the relative isolation of the new body of tribunal administrative law that will be created. The Upper Tribunal can set precedents that will be binding on the First-tier. In *Cart and MR* Lady Hale expressed concern about the insularity of this kind of "local law".⁹⁶ Lord Neuberger, speaking extra-judicially has also highlighted the "tendency of specialists to regard the law in their area as 'our law' and that this may 'lead to error'".⁹⁷ In *Cart* in the Court of Appeal Sedley LJ referred to the Upper Tribunal's, "potential to develop a legal culture which is not in all respects one of lawyers' law – a system, in other words, of administrative law".⁹⁸ One might propose that the prospect of an isolated local administrative law would have Dicey turning in his grave. Of course his account of the rule of law has been subjected to sustained analysis and it would be unsophisticated to suggest that he would have, and indeed we should, automatically reject tribunal administrative law as constitutionally dubious.⁹⁹ Nevertheless, these attempts to draw a distinction between the generalist ordinary law of the land, or lawyers' law, on the one hand, and specialist tribunal administrative law on the other are instructive. The purported distinctions gloss over a range of issues such as the dubious levels of specialisation within the new tribunal edifice and the multiplicity of functions it performs, its possible lack of authority and its institutionalised and isolated nature. For present purposes, however, the issues of specialisation and institutionalisation are not the only important considerations. Also of interest is the notion that tribunal justice is different in nature to legal justice and turns upon different factors including the potential for prioritising matters of administrative policy over matters of legal principle and individual rights. Whilst a great degree of debate surrounds the meaning of both these concepts, there is a compelling view that in tribunal administrative justice the *administrative* should be stressed. This implies adjudication based on balancing individual justice against broader policy considerations such as government targets and the need for effective and efficient administration within budgetary constraints. On the contrary in the case of

⁹⁴ *Regionalisation of the Administrative Court: Response of the Constitutional and Administrative Law Bar Association* Constitutional and Administrative Law Bar Association (2008) <<http://www.adminlaw.org.uk>>[60].

⁹⁵ TCEA s18(8). In Scotland claims must be determined by Court of Session Judge or other persons as agreed by the Lord President and Senior President of Tribunals.

⁹⁶ *Cart and MR* (Supreme Court) [42].

⁹⁷ Lord Neuberger, "Talk to the Upper Tribunal on the Relationship Between the Tribunals and the Higher Courts" 6 July 2009, www.tribunals.gov.uk [9], SH Legomsky, *Specialized Justice: Courts, Administrative Tribunals, and a Cross-national Theory of Specialization* (Clarendon Press 1990) 15.

⁹⁸ *Cart* (Court of Appeal) [42].

⁹⁹ Allan (n 23) 13–21.

legal justice dispensed by the higher courts, emphasis should be placed on the *legal* element which implies decision-making in accordance with matters of moral principle, rejecting broader reference to public policy considerations.¹⁰⁰ It is admittedly unhelpful to resort to outmoded conceptual distinctions such as those once proposed to exist between judicial, administrative, quasi-judicial and quasi-administrative decisions and procedures.¹⁰¹ Nevertheless, the argument of this paper is that there is an important context specific normative (rather than conceptual descriptive) distinction between the Upper Tribunal's distinctive role in delivering administrative justice and the Administrative Court's role in delivering constitutional justice. These roles exert checks and balances upon each other.

A CONSTITUTIONAL REVIEW PERMISSION TEST

Whilst the Supreme Court applied the second tier-appeals criteria to judicial review of certain un-appealable decisions of the Upper Tribunal this leaves unaffected the status of the "arguability" test for all other forms of judicial review application. This paper uses the deficiencies in the second-tier appeals criteria and "arguability" to develop a new constitutional review permission test to be applied by the Administrative Court as a constitutional court in all cases. Permission should be granted where an application raises a matter of constitutional principle or practice or where otherwise necessary to protect fundamental rights. The following sections examine how this test might operate and addresses some potential criticisms of it.

A constitutional review permission test is too restrictive

One obvious initial criticism is that the Supreme Court only adopted the more restrictive second-tier appeals criteria as opposed to standard "arguability" in the case of the Upper Tribunal because judicial review in this instance would constitute a second appeal on a point of law. Since the vast majority of judicial review permission decisions provide the first judicial examination of an issue it follows that any test that is more restrictive than mere "arguability" would create an unacceptable restriction on access to justice. This problem can be addressed by reference to the historic and it is submitted, the continuing, basis of the High Court's supervisory jurisdiction. The prerogative writs were united under one common purpose, namely that no legal wrong should be without remedy, traditionally it was under the King's prerogative of justice that a remedy could be granted, though latterly this power was devolved to the King's judges.¹⁰² Lord Coke CJ noted of the King's Bench that:

this court hath not only jurisdiction to correct errors in judicial proceedings, but other misdemeanours extrajudicial tending to the breach of the peace, or oppression of the subject. . . or any other manner of misgovernment; so that no wrong or injury, either public or private, can be done but that this shall be reformed or punished by due course of law.¹⁰³

¹⁰⁰ Michael Adler, "Understanding and Analysing Administrative Justice" in M Adler (ed) *Administrative Justice in Context* (Hart Publishing 2010) 130, Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing 2009) 218 and Jerry L Mashaw, *Bureaucratic Justice* (Yale University Press 1983).

¹⁰¹ Distinctions rendered otiose by *Ridge v Baldwin* [1964] AC 40.

¹⁰² Oliver (n 1).

¹⁰³ *Bagg's Case* (1615) 11 Co Rep 9, 98a and see Lord Mansfield in relation to mandamus "... it ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one. . . Within the last century, it has been liberally interposed for the benefit of the subject and the advancement of justice. . . If there be a right, and no other remedy, this should not be denied". *R v Barker* (1762) 3 Burr 1265, 1267.

It remains a matter of constitutional principle and practice that an appropriate remedy should be available in the case of public body decisions that breach rule of law or legality principles. Thus it follows that access to judicial review will always pass the constitutional review permission test where no other remedy would be available or sufficient.¹⁰⁴

On the subject of restrictiveness, it is worth also mentioning the inadequacy of the second-limb of the second-tier appeals criteria. This limb, “some other compelling reason”, has been interpreted to include precisely the same examples referred to and rejected in *Cart and MR* as unduly restrictive “exceptional circumstances”. In *Uphill v. BRB (Residuary) Ltd*¹⁰⁵, upheld on this aspect in *James Cramp v. Hastings Borough Council; Rainbow Phillips v. London Borough of Camden*¹⁰⁶, Dyson LJ, as he then was, concluded that the prospect of success must be very high, indicating something, which is “perverse or plainly wrong”, “compelling means truly exceptional”.¹⁰⁷ In *Cart and MR* the Supreme Court made it clear that the “exceptional circumstances” approach alone would be far too restrictive, therefore it is hard to see that any benefit is gained from the second-limb of the second-tier appeals criteria. The “exceptional circumstances” test stems from a bygone era when the central basis for judicial review was considered to be where a public body had acted *ultra-vires* or beyond jurisdiction by exceeding the powers delegated to it by Parliament. Two situations were said to constitute “exceptional circumstances”: pre-*Anisminic*¹⁰⁸ review for jurisdictional error of law and severe procedural error leading to a denial of fundamental justice. Laws LJ’s examination of the historical record demonstrated that patrolling the boundaries of inferior jurisdictions had formed the basis of the High Court’s supervisory function for over four centuries.¹⁰⁹ The historic approach, however, was concerned with abating the damage to fundamental values and abuse of individual citizens that would be caused when public bodies, including courts, breached rule of law standards.¹¹⁰ It was not based on supposedly descriptive concepts of Parliamentary sovereignty or *ultra-vires*, concepts which emerged later, most notably with the rise of 19th and 20th Century legal positivism.¹¹¹

Not surprisingly the Supreme Court accepted that the concept of jurisdiction “has many meanings” and a return to the “technicalities of the past” should be avoided.¹¹² The examples of pre-*Anisminic* review to which the lower courts referred were where the Upper Tribunal proposes to grant a monetary remedy that it is not authorised to deliver, or if a disqualified member purports to hear a case. When these incidents are added to the second “exceptional circumstance” i.e. severe procedural errors, such as failing to provide an individual with even the gist of the case against them, what

¹⁰⁴ Recent research conducted by the Universities of Bangor and Essex surveyed 80 solicitors professing specialist expertise in the field of public law, and 78 per cent of respondents indicated that the existence of an alternative avenue for redress (such as an appropriate tribunal or ombudsman) was a frequent and significant reason for advising clients not to issue a judicial review permission application. The notion that judicial review is generally a legal procedure of last resort is fairly commonplace. The second-limb of the constitutional review permission test, where otherwise necessary to protect fundamental rights, also ensures that access will never be restricted in truly deserving cases.

¹⁰⁵ [2005] EWCA Civ 60 [2005] 1 WLR 2070.

¹⁰⁶ [2005] EWCA Civ 1005 [2005] 4 All ER 1014.

¹⁰⁷ *Uphill* [24].

¹⁰⁸ [1969] 2 AC 147.

¹⁰⁹ *Cart (Admin)* [28]-[42].

¹¹⁰ Oliver (n 1).

¹¹¹ David Dyzenhaus, “Positivism’s Stagnant Research Programme” (2000) 20(4) OJLS 703 and David Dyzenhaus, “The Genealogy of Legal Positivism” (2004) OJLS 24(1) 39.

¹¹² *Cart and MR* (Supreme Court) [40] (Lady Hale). Lord Dyson was especially critical, *Cart and MR* (Supreme Court) [110] – [111].

remains is less a coherent check upon the legality of Upper Tribunal actions, more a set of examples indicating serious miscarriage of justice.

However, the Divisional Court and Court of Appeal were on the right track. The pre-*Anisminic* jurisdictional review examples are clear instances of where the Upper Tribunal has acted unconstitutionally by breaching fundamental principles. The second “exceptional circumstance”, denial of fundamental justice, captures situations that breach rule of law requirements and the right to a fair trial. These are paradigm instances in which the Administrative Court should grant permission to seek judicial review on the basis that the claim raises an issue of constitutional principle or practice.

A constitutional review permission test lacks certainty

To some extent the inherent uncertainty in the phrase, a matter of constitutional principle or practice, must be accepted as a criticism. However, it is submitted that this phrase on the whole is no less certain than the current “arguability” criterion which is already inconsistently applied. Neither is it less certain than the “importance” limb of the second-tier appeals criteria. Constitutional principle or practice at least refers to the subject matter of potential claims rather than relatively free-floating concepts of “arguability” or “importance” that some judges try to assess without proper relevance to the specific matters of principle at issue in the application.

To my mind “constitutional” refers to established constitutional doctrines such as the rule of law, separation of powers and the maintenance of liberal-democratic values (equality, liberty, dignity, autonomy and the like). Critics may find these concepts too vague. My response is that guidance should be provided on the interpretation of the constitutional review permission test, and that any indeterminacy should be resolved in favour of the applicant. An assessment of potential constitutional issues should not be beyond specialist nominated judges. ALBA argues that “there is a compelling case for developing a smaller and more specialist cadre of Administrative Court judges”¹¹³ and this proposal may fit well with the more specific constitutional review permission test offered here.

Certainty in the resolution of legal disputes is itself a constitutional value.¹¹⁴ In particular it is one of the values supporting the restriction of second appeals on a point of law. Protracted litigation damages weaker parties who do not have the same capacity to bare costs, and uncertainty pending the execution of a judgment that is currently under appeal or review can cause serious and irreparable damage. Certainty also denotes the broader public interest that legal judgments be treated as authoritative. Precedents must not be subject to such consistent challenge that it is impossible to determine what the law is in a particular field at any one point in time. One argument for restricting judicial review of Upper Tribunal refusals of permission to appeal to itself was the concern that the Upper Tribunal decision might become no more than one stage in an extended judicial review permission procedure. The argument for the constitutional review permission test is that respect for constitutional values such as certainty must be taken into account when a judge is determining a permission application and that this is better achieved by direct reference to the constitutional values raised by each scenario rather than by application of the second-tier appeals criteria.

¹¹³ ALBA (n 94) [34] and [60]. A similar conclusion was drawn from a survey of practitioners conducted by the Manchester Bar and Law Society in which all respondents ‘... identified the presence of a resident High Court judge in each of the Queen’s Bench and Chancery Divisions as “essential” and “very important” and for most this was the factor most likely to encourage them to issue more cases out of Manchester’. *Justice Outside London* [72].

¹¹⁴ Allan (n 23) Chapter One referring to Lon Fuller’s eight precepts of the rule of law including certainty.

The first-limb of the second-tier appeals criteria, an important matter of legal principle or practice, is also not as certain as the Supreme Court appeared to conclude. In *Uphill*, the Court of Appeal applied the first-limb of the criteria restrictively and determined that it would only allow a second appeal if it was being asked to establish a new legal principle or if the case was otherwise truly exceptional. It would not permit a second appeal if the lower court had incorrectly applied an existing precedent. In *James Cramp*, however, a differently constituted Court of Appeal applied a less restrictive test. Brooke LJ drew a distinction between cases where there had already been two judicial determinations of the matter prior to the second-tier appeal and cases, which although technically second appeals, had only been subject to one previous judicial determination. The decision appealed from was an exercise of statutory review of a local authority decision under the Housing Act 1996. The local authority is responsible for the first decision, which a county court judge then reviews. This function is another example of fragmented legality review. Judicial review of local authority housing decisions used to be the preserve of the High Court, however it was devolved to the county courts as the large number of cases involving homelessness required more immediate judicial consideration. In circumstances such as this, Brooke LJ concluded that incorrect application of the law could satisfy the first-limb of the criteria. An important point of practice would be evident if two or more county court judges had made the same mistake in applying the law. This would be evidence of a “worrying tendency in judges at that level”.¹¹⁵ *James Cramp* then, suggests that the first-limb of the second-tier appeals criteria extends to correcting the erroneous application of settled law, not just the creation of incorrect precedents.¹¹⁶ In *Cart and MR Lady Hale* assumed that judicial review would lie in cases where the Upper Tribunal has misapplied an existing precedent as well as where it sets an erroneous precedent of its own, since such misapplication could become entrenched. However, the later case of *PR (Sri Lanka) and others v Secretary of State for the Home Department*¹¹⁷ lays down a very restrictive interpretation of the second-tier appeals criteria.

A constitutional review permission test would allow greater flexibility in that the permission decision would be based on assessing whether the matter is truly one that engages constitutional values and/or fundamental rights rather than merely whether it is “arguable” in relative abstract or affects the system of legal precedent. The comparative expertise of the body under review and all the circumstances of the case must be taken into account. This was recognised by Laws LJ in *Cart* by his reference to the so-called “Muldoon test”.¹¹⁸ Academic commentators have also proposed a

¹¹⁵ *James Cramp* [68].

¹¹⁶ On one reading of *James Cramp* the less restrictive interpretation applied only because of an “odd quirk” under which the second appeal was effectively the first judicial decision. On the other hand, Upper Tribunal refusals of permission to appeal are clearly second judicial decisions. It could be said, that the *more* restrictive interpretation should apply and that judicial review should only be allowed if the Upper Tribunal has created an erroneous precedent as opposed to consistently misapplying an existing precedent. *James Cramp* also highlights the limited administrative law competence of county court judges, suggesting that the *less* restrictive interpretation applies due to the comparative expertise of the judicial body as well as the gravity of the erroneous decision. Upper Tribunal judges are clearly more competent in dealing with administrative law issues than most county court judges are, hence a *more* restrictive interpretation of the second-tier appeals criteria would be appropriate.

¹¹⁷ [2011] EWCA Civ 988.

¹¹⁸ “...all the relevant features of the tribunal in question including its constitution, jurisdiction and powers and its relationship with the High Court in order to decide whether the tribunal should be properly regarded as inferior to the High Court, so that its activities may appropriately be the subject of judicial review by the High Court”. Goff LJ in *R v Cripps, ex parte Muldoon* [1984] QB 68, 87. Also applied to determine the relationship between the High Court and a Parliamentary Election Court in *R (Woolas) v Parliamentary Election Court* [2010] EWHC 3169 (Admin), [2011] ACD 20.

similar approach,¹¹⁹ and the argument of this paper is that such statements could potentially be adapted and incorporated into guidance notes alongside the constitutional review permission test. Though the details would require considerable further examination, the test and notes would essentially take the form of a new Practice Direction to be drawn up after substantial consultation, ideally via the Law Commission process.

A constitutional review permission test determined as a matter of legal principle and not judicial or administrative policy would not be restrictive enough

The constitutional review permission test should be determined as a matter of principle and not of so-called “judicial policy”. One difficulty with the *Cart* litigation was the courts’ failure to clearly distinguish between matters of policy and principle. The policy-principle demarcation was one that puzzled both Laws and Sedley LJ. Laws LJ opined that there is an “un-principled” distinction between the lawful extent of the High Court’s jurisdiction, and circumstances to which the jurisdiction could lawfully extend but where judges will refuse to exercise it as a matter of discretion.¹²⁰ He appears to argue that judges can use their discretion to withhold judicial review on grounds of judicial policy not constitutional principle. Sedley LJ also drew a distinction between legal principle and judicial policy, arguing that the role of the courts was to “arrive at a proper judicial policy” as to the appropriate balance between accessing judicial review and the autonomy of the new tribunal edifice.¹²¹ In *Eba’s* case, the distinction between policy and principle marked a relevant difference between the Court of Session’s supervisory jurisdiction and judicial review in the Administrative Court. The Lord President argued that:

English courts have set the parameters of judicial review by reference to the appropriateness of such review as a feature of the general administration of justice. . . . Although it may be expressed as a matter of law, it involves on the face of it, essentially a delimitation. . . . on policy grounds.¹²²

In Scotland judicial review is available as of right, based on legal principles including an equitable jurisdiction to do justice where any body, public or private, has abused its powers and no other remedy is available.¹²³ The argument of this paper is that Administrative Court judges should be approaching the issue of permission to seek judicial review as a matter of constitutional legal principle rather than judicial policy. However, constitutional legal principle, properly understood, does invite reference to what the Lord President refers to as “the general administration of justice”. In my view, the best way to distinguish between matters of principle and policy in judicial review is to utilise the test proposed by Ronald Dworkin. A matter is one of legal principle where the decision turns upon the elucidation of individual rights. A true policy question, one that the judiciary should not entertain, is whether the decision or course of action could lead to an enhanced or ideal state of community to which no

¹¹⁹ For Paul Craig the amenability of a particular body to judicial review for error of law should be based upon a “normative judgment” and one that “centres around the correct balance between judicial control and agency autonomy” this would recapture the principled approach of the 18th and earlier 19th Century courts rather than the apparently neutral logic of more recent conceptual analytic approaches. Paul Craig, *Administrative Law* (6th edn, Sweet and Maxwell 2008) 466.

¹²⁰ *Cart* (Admin) [94] and [98].

¹²¹ *Cart* (Court of Appeal) [35].

¹²² *Eba* (Court of Session) [60].

¹²³ De Smith, Woolf, and Jowell (n 4) [14–023].

individual can be said to have a right.¹²⁴ This distinction can be further explained with reference to the issues raised by the recent litigation.

Lady Hale's Judgment in *Cart and MR* recognised the central issue in relation to judicial review of the Upper Tribunal was a matter of proportionate access to justice.

the scope of judicial review is an artefact of the common law whose object is to maintain the rule of law. . . Both tribunals and the courts are there to do Parliament's bidding. But we all make mistakes. No-one is infallible. The question is, what machinery is necessary and proportionate to keep such mistakes to a minimum?¹²⁵

However, the Supreme Court did not address why and how such mechanical concerns fall appropriately within the purview of judicial consideration. At first blush one might assume that the allocation of resources for the administration of justice is a policy matter for the elected branches of state. Nevertheless, the issue is within the constitutional cognisance of the judiciary because access to justice is a fundamental right guaranteed by the rule of law. The proportionate allocation of judicial resources can be perceived as a rights question and therefore a matter of principle as it goes to determining the extent of an individual's right of access to justice. This should not be balanced against some undefined reference to the broader common good in the efficient administration of justice. Rather it should be examined specifically in light of the damage to the rights of other individuals that may be caused by the diversion of a disproportionate amount of resources into judicial review of the Upper Tribunal. As Peter Cane put it with respect to the Australian administrative tribunal system, ensuring Lexus justice for the few should not be achieved by removing access to Lada justice for the masses.¹²⁶ The result is not the balancing of individual rights against the common good, but rather the conclusion, as a matter of principle, that a particular individual's right of access to justice does not admit unrestricted access to Administrative Court judicial review in these circumstances. A matter of policy on the other hand, would be raised for example if the judiciary purported to restrict access to judicial review of asylum and immigration decisions on the basis that the settlement of further immigrants in England and Wales is generally considered by them to be bad for society. The more recent case of *PR (Sri Lanka)* also commended that delimiting the accessibility of judicial review should be a matter of "judicial policy".¹²⁷ If "judicial policy" is merely a shorthand applied to situations which raise the same matters of legal principle, then this is constitutionally legitimate and practically efficient. My concern is that "judicial policy" should not be applied so stringently as to constitute what the courts themselves refer to as "over-rigid policy". The constitutional review permission test accepts that many cases will raise the same issues and that shorthand guidance may apply, but the guidance must be determined as a matter of principle and it must be flexible.

In the context of asylum and immigration litigation substantial detriments to the rights of others can be seen to have followed from the high volume of judicial review applications, thus making the issue a matter of principle. The ever-expanding caseload, coupled with repeated but ultimately unsuccessful attempts to reform the asylum and immigration appeal and review system, had led the Administrative Court to a crisis point. In late 2007 delays in the Administrative Court became so severe that the Public

¹²⁴ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) and Ronald Dworkin, *Law's Empire* (new edn, Hart Publishing 1998) 223, Stephen Guest, "The Role of Courts in the Making of Policy" (2006) 25(6) UQLJ 307.

¹²⁵ *Cart and MR* (Supreme Court) [37].

¹²⁶ Cane (n 84) 487.

¹²⁷ *PR (Sri Lanka)* (CA) [25], [33] and [39].

Law Project issued a letter before claim, alleging breaches of the common law right of access to justice and Article 6 of the European Convention on Human Rights.

Measures taken at the time to “blitz” the backlog of cases had varying degrees of success. One more recent policy innovation to ease pressure on the Administrative Court was the effective transfer of certain asylum and immigration decisions to the Upper Tribunal. Previously, an appeal on a point of law from the former Asylum and Immigration Tribunal would be subject to initial determination by a senior immigration judge. If this judge refused the appeal, the applicant could apply to a High Court judge for statutory “reconsideration”. Since February 2010, this process has been subsumed within the new tribunal edifice and “reconsiderations” are undertaken ultimately as appeals to the Upper Tribunal on a point of law. Taking into account previous “reconsideration” statistics, this means that upwards of 5,000 claims per annum could ultimately result in an Upper Tribunal refusal of permission to appeal to itself. Having just rid itself of these claims the Administrative Court does not want them re-appearing in the guise of applications for judicial review of the Upper Tribunal.

Access to the Administrative Court should not be restricted merely due to the amount of possible claims. A large number of cases can be the product of a large number of errors and it is Parliament’s job to provide more resources for dealing with these applications. However, present concern stems not from the large number of cases, but from the high proportion of these cases that appear to lack legal merit. In *Cart and MR* Lord Brown argued that:

refusal of permission to appeal to the Upper Tribunal (by both tribunals) tends to indicate the unlikelihood of there having been a genuinely arguable error of law in the first place. . . The rule of law is weakened, not strengthened, if a disproportionate part of the courts’ resources is devoted to finding a very occasional grain of wheat on a threshing floor full of chaff.¹²⁸

A Sub-Committee of the Judges’ Council of England and Wales, recently argued that, “No-one derives any legitimate benefit” from the vast majority of applications for judicial review of tribunal decisions in the asylum and immigration field.¹²⁹ Low permission success rates, less than 12 per cent in asylum and immigration compared to 29 per cent in other subjects, also suggest a prevalence of unmeritorious claiming. Asylum and immigration applicants understandably wish to make their road to legal redress as long as possible and unscrupulous lawyers can exploit this desire.¹³⁰ However, the Supreme Court failed to make clear enough that these resources

¹²⁸ *Cart and MR* (Supreme Court) [100].

¹²⁹ “In the great majority of cases, there had already been an adverse merits decision by the Secretary of State giving rise to an unsuccessful appeal on the merits to the Asylum and Immigration Tribunal or the First-tier Tribunal. Judicial review in these cases is the second – or sometimes the third or fourth – bite at the cherry. Most claims fail, most of the claims which fail are without merit, and many are wholly abusive of the court’s process” Sub-Committee of the Judges’ Council of England and Wales, *Response to the Government’s Consultation Paper CP12/10 Proposals for the Reform of Legal Aid in England and Wales* (2010) <<http://www.justice.gov.uk/consultations/docs/legal-aid-reform-consultation.pdf>>

¹³⁰ However, the role of policy makers and initial administrative decision-makers should not be ignored. There is poor decision-making on a regular basis by both the UK Border Agency and the Home Office. Policies can always be criticised, but even clearly valuable policies are poorly implemented at the operational level. Mistakes are made, documentation is lost, and considerable potential for legal challenge results (see for example, House of Commons Home Affairs Committee, *The Work of the UK Border Agency (November 2010 – March 2011)* (Her Majesty’s Stationery Office 2011). One might conclude that any legal action commenced would be entirely meritorious, but it is not as simple as that. A system that is unfit for purpose is likely to generate both meritorious and unmeritorious legal action, as the process is so lacking in respect that applicants will grasp at any opportunity to challenge it. It is a shame that whilst the Supreme Court referred to its “partnership” with Parliament in terms of responsibility for the expedient administration of justice (*Cart and MR* (Supreme Court) [80] (Lord Phillips)) it did not feel able to criticise the shambolic asylum and immigration system.

considerations (and probably also the merit problems) only apply to asylum and immigration applications. For example, whilst the tribunal system also deals with a large number of social security claims, there were just 29 social security related applications for permission to seek judicial review in the Administrative Court in 2010.¹³¹ The comparative scarcity of judicial claims outside the asylum and immigration field suggests that applications for judicial review in other subjects are likely to comprise precisely those claims that raise matters of constitutional principle or practice or affect fundamental rights. The suggestion to apply the second-tier appeals criteria originated not only in earlier case law but also in the submissions of Mr *Cart's* counsel as to the beneficial relationship between the specialist subject area expertise of the Social Security Commissioners and the constitutional expertise of the Administrative Court. It is submitted that the proposed constitutional review permission test shares the benefit of the second-tier appeals criteria in that it is more restrictive than mere “arguability”. However, it is also more appropriate as a matter of constitutional principle because it better reflects the true division of constitutional responsibility and technical expertise that exists between the Administrative Court and inferior courts and tribunals.

Sullivan LJ further addressed the issue of specialist subject matter as a preliminary issue in *MR's* claim,¹³² however the argument before him was whether asylum and immigration applications ought to admit of *unrestricted* access to judicial review, compared to other subjects of claim in which a more restrictive test might apply.¹³³ He rightly concluded that all subject areas of tribunal competence could be affected by fundamental rights breaches. We would be living in a strange form of society if blanket restrictions on judicial review were imposed in respect of some fundamental rights and not others, even though it is accepted constitutional jurisprudence that some rights may be seen as more important than others.¹³⁴ The importance of the rights at issue could be included within the first-limb of the constitutional review criteria, constitutional principle or practice. However, it is submitted that the second-limb, where otherwise necessary to protect fundamental rights, is necessary as a specific example highlighting the issues of constitutional principle that will most regularly come before the Administrative Court. The Senior President of Tribunals has expressly recognised the Administrative Court’s “central role as guardian of constitutional rights” as something which demarcates it from the technical subject-speciality functions of the Upper Tribunal.¹³⁵

CONCLUSION

The constitutional review permission test proposed in this paper aims to address concerns about proportionate access to Administrative Court judicial review in the

¹³¹ As Lord Bridge once said: “it cannot be right to draw lines on a purely defensive basis and determine that the court has no jurisdiction over one matter which it ought properly to entertain [in this case perhaps social security] for fear that acceptance of jurisdiction may set a precedent which will make it difficult to decline jurisdiction over other matters which it ought not to entertain [in this case unmeritorious asylum and immigration applications]”. *Leech v Deputy Governor of HMP Parkhurst* [1988] AC 533, 566.

¹³² *R (Rana) v Upper Tribunal (Immigration and Asylum Chamber)* [2010] EWHC 3558 (Admin).

¹³³ Referring to *Sivasubramaniam* in which the Court of Appeal had noted that: “most cases are asylum cases...often including the right to life and the right not to be subjected to torture. The number of applications for asylum is enormous, the pressure on the tribunal immense and the consequences of error considerable. The most anxious scrutiny of individual cases is called for and review by a High Court judge is a reasonable, if not an essential, ingredient in that scrutiny”. *Sivasubramaniam* (Court of Appeal) [52] (Lord Phillips).

¹³⁴ *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26 [2001] 2 AC 532 [28] (Lord Steyn).

¹³⁵ Carnwath (n 79) 68.

light of the proper constitutional function of that procedure. It also aims to tackle concerns about the indeterminacy of the “arguability” permission test and its inconsistent application. The test allows reference to be made to all the circumstances of the case at issue including the nature of the rights engaged and the gravity of the alleged damage done to them. Highlighting the special constitutional role of the Administrative Court does not, however, commend a return to the *imperium* model marked by elitism and exclusivity that has been breaking down ever since it was wrongly instigated by the policy of Lord Diplock in *O’Reilly*. The constitutional role proposed here is anchored in the community-based model of judicial review and common law constitutionalist theory, both of which commend wide access to judicial review in light of the common law’s need to reflect community conceptions of justice and fairness. Therefore this approach also supports access to adequately resourced regional Administrative Courts and the broader political localism agenda.¹³⁶ This paper also supports the practical necessity for “fragmented” instances of legality review beyond the Administrative Court as these are well known to the pluralist history of the common law. They also reflect the subsidiarity principle that legal issues should initially be determined closest to those they affect the most, whether this is as a matter of geographical locality or subject matter expertise. It is submitted that beyond the Administrative Court (i.e. the legality review functions of other inferior courts and tribunals) access should be wide and there is no necessity to apply any kind of permission test, but rather general provisions of strike out and summary judgment are sufficient to tackle hopeless cases. The danger of fragmented legality review and broader tribunal administrative justice is the level of executive control involved and the closeness of tribunal members to administrative policy. The Administrative Court, as a first instance Constitutional Court provides the necessary principled check on legality review functions performed by other courts and tribunals. The constitutional review permission test renders explicit the nature and jurisdiction of the Administrative Court as a constitutional court.

¹³⁶ Conservative Party, *Control Shift: Returning Power to Local Communities*, Responsibility Agenda, Policy Green Paper No. 9 (Conservative Party 2009) and Mark Elliott and Stephen Bailey, “Taking Local Government Seriously: Democracy, Autonomy and the Constitution” (2009) 68(2) CLJ 436.

THE INTERPRETATION OF COMMERCIAL CONTRACTS: TIME FOR REFORM

MASOOD AHMED*

INTRODUCTION

In 2005 Lord Nicholls, writing extra-judicially, spoke of the need to give a ‘gentle stir’ to the debate concerning the exclusionary principle in English contract law: the long established but controversial rule that evidence of prior negotiations cannot be admitted when courts are tasked with interpreting the meaning of a contract¹. His Lordship’s arguments for the need to reconsider the legitimacy of the exclusionary principle within the jurisprudence of contractual interpretation were persuasively and forcefully presented. Despite this valuable contribution to the debate, the House of Lords in *Chartbrook v Persimmon Homes Limited*² reaffirmed the exclusionary principle. To some, this was not only inevitable but necessary as the rules of interpretation as formulated by Lord Hoffmann in *Investor Compensation Scheme Ltd v West Bromwich Building Society (No. 1)*³ (which reaffirmed the exclusionary principle) have provided a clear framework within which the courts are able to conduct the complex task of interpreting contracts.⁴ However, in the opinion of the author, the House of Lords in *Chartbrook* missed a valuable opportunity to reform the exclusionary principle in the interest of greater certainty and fairness.

This paper is a call to reform the exclusionary principle. Section one of this article will explore the origins, development, and justification for the exclusionary principle. In section two a detailed critical analysis is made of the exclusionary rule and the judicial comments which were made in *Chartbrook* in defending the rule. Finally, in section three the author will seek to put forward a case for how the exclusionary principle could be reformed. In particular, the author will seek to rely upon the approach taken by the Supreme Court in *Oceanbulk Shipping & Trading SA v TMT Asia Limited*⁵ (in which the Court permitted an exception to the without prejudice rule on the grounds of justice) in arguing that the exclusionary rule should be relaxed from its current position as an absolute rule and this would be justified (in the light of the arguments in section two) in the interest of justice. This article will also consider how the court’s case management powers can be utilised in controlling the relevance and quantity of evidence of pre-contractual negotiations which may be admitted as part of the interpretation process.

HISTORICAL DEVELOPMENTS OF THE EXCLUSIONARY RULE

The rule that prior negotiations are prohibited from forming the body of evidence, which the courts will consider when tasked with interpreting contractual terms, can be

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¹ Donald Nicholls, ‘My Kingdom for a Horse: The Meaning of Words’ (2005), L.Q.R., 577.

² [2009] UKHL 38.

³ [1998] 1 WLR 896 (HL).

⁴ See for example John Javis QC & Adam Kramer, ‘Refining or Reforming Construction’ (2009), 9 JIBFL, 522.

⁵ [2010] UKSC 44.

traced back over a lengthy period of time. However, the orthodox approach taken by the majority of contract law textbooks begins with the comments of Lord Wilberforce in *Prenn v Simmonds*,⁶ which comments are taken to have - at least - laid the foundations to the modern approach to contractual interpretation and which reaffirmed the exclusionary principle. It would, however, be useful for our purposes to delve deeper into the past as this will be relevant to our discussion of the judgments in *Chartbrook* and for the wider consideration of the issue of reform. This is especially the case as Lord Hoffmann in *Chartbrook* feared that to remove the exclusionary principle from the rules of contractual interpretation would require the House of Lords to “. . .depart from a long and consistent line of authority, the binding force of which has frequently been acknowledged.”⁷

Our starting point is the case of *Millers v Miller*⁸ in which the Earl of Eldon LC, when interpreting a marriage contract, dismissed correspondence which had passed between the parties before the marriage contract was concluded. To allow such correspondence was ‘dangerous’.⁹ This strict adherence to the exclusionary principle was later followed by the House of Lords in *Inglis v John Buttery & Co*¹⁰. That case concerned the question of whether the shipbuilders to a commercial contract could put before the court various correspondence which had passed between the parties before the contract was concluded in order to assist in the interpretation of the contract. The House did not find it difficult to dismiss the shipbuilder’s arguments and confirm the principle that prior negotiations should not form part of the interpretation process. Lord Blackburn expressed his opinion thus:

Now, I think it is quite fixed—and no more wholesome or salutary rule relative to written contracts can be devised—that where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look to the formal deed and to that deed alone. . .The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. . .There can be no doubt that this is the general rule, and I think the general rule, strictly and with peculiar appropriateness applies to the present case.¹¹

A number of points can be made in the light of Lord Blackburn’s judgment. Historically the courts adopted a literal approach to the interpretation of contracts and therefore simply reverted to the four corners of the written agreement between the parties as this was perceived as reflecting the parties’ true, express intentions as to the legal obligations which they had imposed upon each other. The court was not (and is not) interested in the subjective intentions of the parties as to what the parties individually thought the contract meant. To allow evidence of subjective intent into the interpretation process would defeat the very purpose of having a written contract. As Lord Blackburn stated, the written word was simply serving the purpose of

⁶ [1971] 1 WLR 1381.

⁷ Per Lord Hoffmann at par. 30. Lord Hoffmann went on to cite the cases of *Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657 and *Alexious Campbell* [2007] UKPC 11 in support of his comments that the binding force of the rule has been acknowledged.

⁸ (1822) 1 Sh App 309 at 317.

⁹ The Lord Chancellor did not (at 317) hesitate in rejecting evidence of previous correspondence “My Lord, all the previous correspondence I lay entirely out of the case, because I cannot conceive that anything can be more dangerous than the construing deeds by the effect of letters and correspondence previous to the execution of them.”

¹⁰ (1878) 3 App Ca 552.

¹¹ At 577.

“...carrying out the will of the parties.”¹² Otherwise why would the parties reduce their agreement to a written, binding contract with the intention of giving it the force of law? English law was able to maintain its literal approach to contractual interpretation by excluding evidence of prior negotiations.

Further, and as acknowledged by Lord Blackburn, the rule that evidence of prior negotiations should not form part of the interpretation process is strict and was and continues to be applied strictly, regardless of whether one of the parties to the dispute may face injustice as a result. This strict approach to interpretation was also confirmed by Cozens-Hardy MR in *Lovell and Christmas Ltd v Wall*¹³ in which his Lordship held “it is irrelevant and improper to ask what the parties, prior to the execution of the instrument, intended or understood. What is the meaning of the language that they used therein? That is the problem, and the only problem.”¹⁴

The principal advantage of the court’s approach in adopting a strict literal approach to contractual interpretation was that the parties to a dispute were able to obtain a relatively quick decision from the courts as the courts would not be required to consider any evidence other than the written contract. But the inevitable consequence of this was that valuable evidence (including evidence of prior negotiations) which may assist the courts in ascertaining the true meaning and effect of a contract (such as the commercial context within which the contract was concluded between the parties) was excluded and this had the undesired but obvious effect of causing injustice in some cases.

The tide began to turn on the literal approach to contractual interpretation with the House of Lords decision in *Prenn v Simmonds*¹⁵ in which Lord Wilberforce adopted a purposive approach to interpretation. Despite this major shift in the approach of the courts to contractual interpretation, Lord Wilberforce preserved the exclusionary principle.

The dispute between the parties in *Prenn* centred on the meaning of “profit” and whether this related to the profits of one company or the profits of a group of companies. Delivering the leading judgment, Lord Wilberforce moved the focus of contractual interpretation away from one of a literal approach and adopted a purposive approach. He held that courts should go beyond the written contract and should also consider the surrounding circumstances within which the contract was concluded when seeking to ascertain the meaning of the contract.¹⁶

Despite this change in approach to a wider means of interpreting contracts, the House decided to maintain the exclusionary principle. The court could not have recourse to evidence of prior negotiations in construing the meaning of the contract even though the surrounding circumstances would encompass evidence of prior negotiations. His Lordship argued that evidence of prior negotiations was simply

¹² At 577.

¹³ (1911) 104 LT 85.

¹⁴ At 85.

¹⁵ [1971] 1 WLR 1381. See also Ewan McKendick, *Contract Law, Text, Cases and Materials* (4th edn, Oxford, 2010).

¹⁶ See also Lord Wilberforce’s judgment in the case of *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 in which he reiterated the purposive approach to the interpretation of contracts: “No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as ‘the surrounding circumstances’ but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is clearly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating...” Further, Lord Steyn noted the shift in the court’s approach to interpretation in *Deutsche Genossenschaftsbank v Burnhope* [2995] 1 WLR 1580 when he observed (at 1589) that: “parallel to the shift during the last two decades from a literalist to a purposive approach to the construction of statutes there has been a movement from a strict or literal method of construction of commercial contracts towards an approach favouring a commercially sensible construction.”

unhelpful as the parties' positions were constantly changing before the final written agreement is concluded.¹⁷ This shifting of the parties' positions during the negotiation process would be unhelpful to a court as it would be difficult to ascertain what the true objective intentions were of the parties. Evidence of prior negotiations simply reflected the parties' subjective intentions of what the contract meant not their objective agreement. It was the final document which recorded the consensus of the respective parties. But before the final written contract is concluded one cannot truly ascertain the parties' true consensus. There was one exception though – recourse could be had to evidence of objective facts which were known to the parties. Lord Wilberforce stated “it may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense this is true: the commercial or business object of the transaction, objectively ascertained, may be a surrounding fact.”¹⁸

It was not until 27 years after Lord Wilberforce's judgment in *Prenn* that the modern principles of contractual interpretation were restated by Lord Hoffmann in the leading case of *Investor Compensation Scheme Ltd v West Bromwich Building Society*¹⁹ ('ICS') and it is these principles which have stirred up many debates and have proven controversial to some²⁰. Sir Richard Buxton is quite correct with his observations that, “Rarely has what was presented as merely a statement of orthodox doctrine so completely captured an area of the law as have Lord Hoffmann's principles set out in ICS.”²¹

No work on the jurisprudence of English contract law can be said to be complete without mentioning Lord Hoffmann's principles of contractual interpretation and it is necessary to set out those principles verbatim. Drawing a great deal from Lord Wilberforce's judgment in *Prenn*, Lord Hoffmann summarised the modern approach to contractual interpretation into the following five principles:

- (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
- (2) The background was famously referred to by Lord Wilberforce as the “matrix of fact,” but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
- (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation differs from the way we would interpret utterances in

¹⁷ Sir Christopher Staughton prefers Lord Wilberforce's argument that subjective evidence of the intentions of the parties is excluded because it is unhelpful rather than being excluded on grounds of practical policy as argued by Lord Hoffmann in *Investors Compensation Scheme*. Sir Christopher argues that such evidence: “does not tell one what one needs to know – the common intention of the parties when the contract was made.” (C. Staughton, ‘How do the Courts Interpret Commercial Contracts?’ (1999) C.L.J. 58(2), 303–313).

¹⁸ At 1384.

¹⁹ [1998] 1 WLR 898. Although judges have attributed the modern approach to contractual interpretation to Lord Hoffmann it is interesting to note that Lord Hoffmann himself pointed to Lord Wilberforce as the instigator of the modern approach to interpretation. This is evident when Lord Hoffmann stated “the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce”. For recent cases which illustrate the application of Lord Hoffmann's principles, see the Court of Appeal cases of *Mediterranean Salvage & Towage Limited v Seamar Trading & Commerce Inc* [2009] EWCA Civ 531 and *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353.

²⁰ See, for example, E. McKendrick ‘The Interpretation of Contracts’ (2005) L.Q.R. 121 (Jan), 158–161; and C. Staughton ‘How do the Courts Interpret Commercial Contracts?’ (1999) C.L.J., 58(2), 303–313.

²¹ Richard Buxton, “‘Construction’ and Rectification after *Chartbrook*” (2010) C.L.J., 69(2), 253–262.

ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] 2 W.L.R. 945

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents.²²

Thus the approach to be taken by the courts in construing the meaning of contracts is this: unless the words have a technical meaning, they are to be construed in their natural and ordinary meaning set in the context of the contract as a whole. The court must then have regard to the matrix of facts, that is, any information which would have been available to the parties when the contract was formed. This matrix of facts may include the commercial purpose of the contract but excludes evidence of prior negotiations.²³ Therefore, Lord Hoffmann preserved the English objective approach to contractual interpretation – the courts will be concerned with the express intentions of a person but not his actual subjective thoughts. As McMeel makes clear, "Indeed the objective approach is a distinguishing hallmark of the Anglo-American private tradition."²⁴

Lord Hoffmann's principles have been the subject of distinguished academic and extra-judicial criticism. Sir Christopher Staughton has contended that Lord Hoffmann's reference to the matrix of facts encompassing 'absolutely anything' was far too wide and would lead to the parties bearing increased litigation costs and time. He argued:

It is hard to imagine a ruling more calculated to perpetuate the vast cost of commercial litigation. In the first of the Mirror Group Newspaper cases I said that, as it then appeared to me, the proliferation of inadmissible material with the label "matrix" was a huge waste of money and of time as well.²⁵

Sir Christopher also questioned the scope of Lord Hoffmann's matrix of facts, "But Lord Wilberforce went nowhere near saying that matrix was as wide as Lord Hoffmann makes it."²⁶

In *BCCI v Ali*²⁷ Lord Hoffmann took the opportunity to address some of the criticisms levelled against his reference to the matrix of facts as including 'absolutely anything'. He argued that what he meant by 'absolutely anything' was anything which a reasonable man would have regarded as relevant. He confirmed that "It is not, for example, confined to the factual background but can include the state of the law."²⁸

²² At 912–913.

²³ For recent examples of the principles of interpretation being applied see *Best Buy Co. Inc. v Worldwide Sales Corporation Espana S.L.* [2011] EWCA Civ 618 and *Arqiva Ltd v Everything Everywhere Ltd* [2011] EWHC 1411 (TCC).

²⁴ Gerard McMeel 'Language and the Law Revisited: An Intellectual History of Contractual Interpretation' (2005), CLWR 34 3(256).

²⁵ At 303–313.

²⁶ Christopher Staughton, 'How do the Courts Interpret Commercial Contracts?' (1999) C.L.J. 58(2), 303–313.

²⁷ [2001] 2 WLR 735.

²⁸ At 39.

These are only some of the criticisms which have been advanced against Lord Hoffmann's principles. It is not the intention of the author to analyse all the ICS principles nor is it the author's intention to review all of the criticisms of those principles but to concentrate upon those principles which are relevant to our discussion of the exclusionary rule.²⁹ The principles which we are primarily concerned with are one and two and most importantly three.

CHARTBROOK AND THE PROBLEMS WITH THE EXCLUSIONARY RULE

In the case of *Chartbrook*, the last case to be heard in the House of Lords, and the final case upon which Lord Hoffmann presented his judgment before retiring, the House was invited to reconsider the exclusionary rule. As Lord Hope observed, "Every so often the rule that prior negotiations are inadmissible comes under scrutiny. That is as it should be. One of the strengths of the common law is that it can take a fresh look at itself so that it can keep pace with changing circumstances."³⁰ However, although being presented with a prime opportunity to reform the exclusionary rule, their Lordships decided to reaffirm and reinforce the rule. There is much to pour over the judgments of the members of the House of Lords and it is to those judgments to which we now turn.

Despite accepting 'in principle' the argument that some evidence of prior negotiations may be relevant to the interpretation of contracts, Lord Hoffmann, following a review of the arguments which justified the validity of the exclusionary rule, found in favour of maintaining the rule.³¹ First, he stated that if evidence of pre-contractual negotiations were admissible in the interpretation process then this would create "great uncertainty of outcome in disputes over interpretation and add to the cost of advice, litigation or arbitration."³² In his Lordship's opinion, the need to maintain predictability and certainty in the law of contract was paramount - this could be severely undermined if the rule was removed. He argued

...the law of contract is an institution designed to enforce promises with a high degree of predictability and that the more one allows conventional meanings or syntax to be displaced by inferences drawn from background, the less predictable the outcome is likely to be.³³

Accepting that objective facts which are known by the parties would be admissible evidence, Lord Hoffmann held that statements in the course of pre-contractual negotiations will be drenched in subjectivity. To depart from the rule would mean a departure from the objective theory in English contract law – the courts would be confronted with a difficult and daunting task of trying to ascertain what the true

²⁹ For detailed discussions of Lord Hoffmann's principles see Christopher Staughton, 'How do the Courts Interpret Commercial Contracts?' (1999), CLJ, 58(2); Kim Lewison, *The Interpretation of Contracts* (4th Edn, 2007, London, Sweet & Maxwell); Gerard McMeel, *The Construction of Contracts: Interpretation, Implication and Rectification* (2007, Oxford); David McLauchlan 'Contract Interpretation: What Is It About?' (2009), Sydney Law Review 31(5); Ewan McKendick 'Publication Review: The Interpretation of Contracts', (2005), LQR, 121 (Jan), 158–161; Ewan McKendick, *Contract Law*, (2009, Palgrave Macmillan Law Masters); Richard Buxton, "'Construction" and the Rectification after *Chartbrook*' (2010), CLJ, 69(2), 253–262; Paul S Davies 'Negotiating the Boundaries of Admissibility' (2011), CLJ, 70(1) 24–27.

³⁰ At par. 2.

³¹ A relaxation or departure from the exclusionary rule was also judicially advocated by Thomas J in *Canterbury Golf International Ltd v Yoshimoto [2001] 1 NZLR 523*. However, Lord Hoffmann, giving the judgment of the Privy Council in that case, declined to re-examine the law surrounding the admissibility of pre-contractual negotiations in construing contracts and simply reaffirmed Lord Wilberforce's argument that this type of evidence would be "unhelpful".

³² At par. 35.

³³ At par. 37.

intentions of the parties were but these intentions would be purely subjective and therefore, as Lord Wilberforce had previously argued in *Prenn*, would be unhelpful.

At first instance in *Chartbrook*, Briggs J was strongly of the opinion that to remove the exclusionary rule would create unfairness to third parties who took an assignment of the contract or advanced money on its security. The third party would not have been privy to the negotiations between the original parties to the contract and therefore would not be aware of what discussions had taken place and how those discussions would impact on the agreement.³⁴ However, both Lawrence Collins LJ in the Court of Appeal and Lord Hoffmann disagreed with Briggs J's emphasis on the importance of the third party issue – yes it was a valid reason to uphold the exclusionary rule but it was not as significant as Briggs J made out. The same point could be made of the admissibility of any form of background.

In the Court of Appeal, Lawrence Collins LJ added a further justification to maintain the exclusionary rule when he argued that 'without such a rule sophisticated and knowledgeable negotiators would be tempted to lay a paper trail of self-serving documents'.³⁵ Again, this would be unhelpful to the courts and would inevitably lead to an increase in litigation costs to the parties concerned.

Some who argue in favour of removing the exclusionary rule point to various international treaties which allow evidence of pre contractual negotiations to be used in the interpretation process.³⁶ The practice in civilian systems is to allow evidence of pre contractual negotiations in the interpretative process. Indeed the Principles of European Contract Law states: 'In interpreting a contract, regard shall be had, in particular, to: (a) the circumstances in which it was concluded, including the preliminary negotiations. . .'.³⁷ Also the Unidroit Principles of International Commercial Contracts provides that regard shall be made to prior negotiations in ascertaining the meaning of a contract.³⁸ Lord Hoffmann strongly rejected any call to adopt these practices into English law. He observed that the approaches reflected in those treaties were a reflection of the French philosophy of contractual interpretation which was different to the position in English law: "One cannot in my opinion simply transpose rules based on one philosophy of contractual interpretation to another. . .".³⁹

Reinforcing the exclusionary rule, Lord Hoffmann sought to provide some reassurance that any injustice which may result to the parties as a consequence of the exclusionary principle would be avoided by reverting to the 'safety devices' of rectification and estoppel by convention. These 'safety devices' would have to be specifically pleaded and clearly established to have effect. He also emphasised the need to maintain predictability and economy over the occasional situation in which injustice may occur. He held:

The rule may well mean, as Lord Nicholls has argued, that parties are sometimes held bound by a contract in terms which, upon a full investigation of the course of negotiations, a reasonable observer would not have taken them to have intended. But a system which sometimes allows this to happen may be justified in the more general interest of economy and predictability in obtaining advice and adjudicating disputes.⁴⁰

³⁴ A similar policy approach is taken in respect of the law surrounding the incorporation of arbitration clauses. For discussion see Masood Ahmed 'Arbitration Clauses: Fairness Justice and Commercial Certainty' (2010) *Arbitration International*, Vol 26 (3) 409–419.

³⁵ *Chartbrook Limited v Persimmon Homes Limited* [2008] EWCA Civ 183 at 111.

³⁶ For example Lord Nicholls and Ewan McKendick, *Contract Law* (8th Edn, 2009, Palgrave MacMillan).

³⁷ Principles of European Contract Law 1999, article 5.102.

³⁸ Unidroit Principles of International Commercial Contracts 2010, article 4.3.

³⁹ At par. 39.

⁴⁰ At par. 41.

Lord Hoffmann then went on to consider the case of *Partenreederei MS Karen Oltmann v Scarsdale Shipping Co Ltd (The Karen Oltmann)*⁴¹ which appeared to create an exception to the exclusionary rule. Indeed, Lord Nicholls noted that this case and the subsequent case of *Shell Tankers (UK) Ltd v Astro Comino Armadora SA (The Pacific Colocotronis)*⁴² which followed the approach of the court in *The Karen Oltmann*, had only been dealt with briefly in textbooks and observed “But for a reason not altogether clear, their full significance seems not to have been widely appreciated. They have not received the attention they deserve.”⁴³

In *The Karen Oltmann*, Kerr J held that he was entitled to consider pre-contractual negotiations between the parties in order to interpret the meaning of words which were embodied in the final contract. Kerr J provided the following justification for allowing evidence of negotiations:

If a contract contains words which, in their context, are fairly capable of bearing more than one meaning, and if it is alleged that the parties have in effect negotiated on an agreed basis that the words bore only one of the two possible meanings, then it is permissible for the court to examine the extrinsic evidence relied upon to see whether the parties have in fact used the words in question in one sense only, so that they have in effect given their own dictionary meaning to the words as the result of their common intention. Such cases would not support a claim for rectification of the contract, because the choice of words in the contract did not result from any mistake. The words used in the contract would *ex hypothesi* reflect the meaning which both parties intended.⁴⁴

Therefore, Kerr J allowed the evidence for the purpose of showing that the parties had agreed on how a particular word would be understood by them – this subsequently became known as the ‘private dictionary principle’ and was regarded by some commentators as an exception to the exclusionary principle.⁴⁵ However, Lord Hoffmann in *Chartbrook*, with whom Lord Rogers agreed, strongly rejected the argument that *The Karen Oltmann* carved out an exception to the exclusionary principle. In his lordship’s opinion, *The Karen Oltmann* was: “...an illegitimate extension of the ‘private dictionary’ principle which, taken to its logical conclusion, would destroy the exclusionary rule and any practical advantage which it may have.”⁴⁶

There are a number of important criticisms which can be made to counter Lord Hoffmann’s defence of the exclusionary rule and it is to those criticisms to which we now turn.

The contention that to permit pre-contractual evidence would result in uncertainty and unpredictability does not hold weight. In disputes concerning misrepresentation and mistake, for example, the courts must grapple with a great deal of pre-contractual evidence in order to ascertain whether the claim satisfies the fundamental ingredients of the particular area of law. For example, in an action for misrepresentation it is for the claimant to prove that he relied upon the false statement of fact made by the defendant in entering into the contract. The need to prove this basic but fundamental element of reliance often involves the court having to plough through a mass of written and oral pre-contractual evidence. There is no evidence to suggest that this has caused uncertainty in outcome in those cases. Rather, by reviewing and considering pre-contractual evidence, the courts are equipped with valuable evidence to draw clear

⁴¹ [1976] 2 Lloyd’s Rep 708.

⁴² [1981] 2 Lloyd’s Rep. 40.

⁴³ Donald Nicholls, ‘My Kingdom for a Horse: The Meaning of Words’ (2005), L.Q.R., 577.

⁴⁴ At 712.

⁴⁵ See the arguments of David McLaughlan “Contract Interpretation: What is It About?” (2009) 31 Syd LR 5 at 14.

⁴⁶ At par. 47.

conclusions as to whether misrepresentation has occurred, the type of misrepresentation which has occurred and the remedy or remedies the innocent party may be entitled to.

Further, the courts have recourse to extensive pre-contractual evidence when trying to discern whether a contract has been concluded. Having sight of this evidence will be the only means by which the court will be able to carry out its task. By admitting such evidence the courts have been able to provide greater certainty in outcome. Similarly, by admitting evidence of pre-contractual negotiations as an aid to interpret contracts will also provide greater certainty of outcome as it will mean the courts will have possession of evidence which may assist in ascertaining the true meaning of the contract. As Lord Nicholls has stated, “Where the pre-contract negotiations furnish a clear insight into the intended meaning of the disputed provision, admission of that evidence can hardly promote uncertainty”⁴⁷. By excluding such evidence, uncertainty and unfairness is created as it allows one of the parties to the dispute to pursue a meaning which he knows was not intended during negotiations. This was also acknowledged by Lord Hoffmann in *Chartbrook*.

Another difficulty relates to the exclusionary principle and its relationship with Lord Hoffmann’s other principles of interpretation. It will be remembered that the first principle of interpretation in ICS is the need for the court to consider all necessary ‘background knowledge’ or matrix of facts which would reasonably have been available to the parties in the situation in which they were at the time of the contract. Lord Hoffmann’s reference to the matrix of facts and background knowledge presents a paradox when one considers the role of the exclusionary principle. Let us take an example to illustrate the point: Party A wishes to sell widgets to Party B. Both begin to discuss the broad terms of the transaction including what is to be brought, the quantity and delivery date. Following a subsequent meeting between the parties and their legal advisors, Party B’s legal team writes to Party A’s legal team to inform them that the widgets are to be transported directly onto their distributors who are based in China and that Party A must ensure that the widgets are to be stored within special reinforced metal containers and Party A’s legal advisors also explain Party B’s intentions of including the clause. The final written contract, however, contains a clause which simply states that the widgets are to be stored in ‘appropriate’ storage containers. After the contract is concluded Party B realises that Party A did not use the special metal containers which was discussed before the contract was concluded. This now means that Party B must incur additional expenditure in restoring the widgets before they leave for China.

A dispute arises between Party A and B as to the meaning of the clause which deals with storage. Now, any reasonable person in the shoes of Party B would argue that Party B should be permitted to have recourse to its letter which contained information regarding the metal containers. The letter would, a reasonable person in Party B’s shoes argue, form part of Lord Hoffmann’s first principle namely that it forms part of the ‘factual matrix’ and therefore should be admitted as evidence in the interpretation process. To exclude this from being used in subsequent litigation between the parties would be wholly unfair, especially given the fact that the evidence will be hugely relevant to the facts and issues in dispute between the parties. It is not surprising, therefore, that Lord Nicholls has forcefully contended “It is difficult to see how this exclusion, as a rule of universal application, can be justified, how it can be rationalised”⁴⁸.

⁴⁷ At 587.

⁴⁸ Donald Nicholls, ‘My Kingdom for a Horse: The Meaning of Words’ (2005), L.Q.R., 577.

The need to place the court in the shoes of the parties by permitting evidence of prior negotiations in order for the court to ascertain the meaning of a contract was a significant issue which was carefully noted by Lord Moncreiff in *Inglis* when he maintained that: “the court is entitled to be placed in the position in which the parties stood before they signed.”⁴⁹ This was dismissed by Lord Blackburn in the same case and Lord Hoffmann followed Lord Blackburn with approval in *Chartbrook*. This is, it will be noted, the literal approach which appears to be maintained by *Chartbrook* despite the fact that the jurisprudence surrounding construction has evolved from a literal to a purposive approach which is now confirmed in principle five of ICS. Therefore, the exclusionary rule rests uncomfortably with the other principles of contractual interpretation.

The argument that to permit pre-contractual negotiations as evidence would be unhelpful also fails. Indeed, Lord Hoffmann in *Chartbrook* conceded that not all pre-contractual evidence will be unhelpful. But he failed to follow the argument through and to explain how such evidence would be helpful and what circumstances would qualify for allowing such evidence to be admitted. He simply stated that “In principle, however, I would accept that previous negotiations may be relevant”⁵⁰. Lord Nicholls has correctly argued that there will be occasions where the pre-contract negotiations will shed light on the meaning the parties intended to convey by the words they used. Take our example of the widgets. Clearly it would be helpful to the court to have sight of the letter which Party B sent to Party A in ascertaining the meaning of the clause which dealt with the issue of the storage of the goods. This would enable the notional reasonable person to be fully informed of the background context. By carefully exercising its powers through the case management process in litigation, the courts will be able to maintain firm control over which pieces of evidence may be relevant and which may not be relevant. This would address any concern that to allow pre-contractual negotiations as admissible evidence would subvert the English objective theory to the interpretation of contracts.

It is universally accepted practice for counsel to plead rectification of the written agreement when pleading his client’s case on grounds of interpretation of the written agreement. By doing this, evidence of the parties’ actual intention will be before the court⁵¹. Indeed, this took place in *Chartbrook* when counsel for Persimmons pleaded a case for rectification as well as presenting its arguments on interpretation and Lord Hoffmann went onto “summarise the relevant pre-contractual exchanges between the parties”⁵², and it was as a result of the plea for rectification and Lord Hoffmann’s judgment on the issue which prompted Baroness Hale to confess:

I would not have found it quite so easy to reach this conclusion had we not been aware of the agreement which the parties had reached on this aspect of their bargain during the negotiations which led to the formal contract. On any objective view, that made the matter crystal clear.⁵³

The practice of pleading rectification alongside interpretation raises problems when confronted with the arguments against permitting evidence of prior negotiations on the grounds of subjectivity. What remains perplexing is this: there is no clear rational argument for maintaining that the courts may have recourse to pre-contractual

⁴⁹ At 64.

⁵⁰ At par. 33.

⁵¹ See Janet O’Sullivan’s comments on this point in her note on *Chartbrook* ‘Say What You Mean and Mean What You Say: Contractual Interpretation in the House of Lords’ (2009) C.L.J 68(3) 510–512.

⁵² At par. 49.

⁵³ At par. 99.

evidence in a plea for rectification but that this should not be allowed in respect of a plea for construction. The subjective intention of the parties will be open for judicial scrutiny in a claim for rectification so why not reform the exclusionary rule so as to allow evidence of prior negotiations which will also reveal the parties' subjective intentions but may reveal important evidence which may assist the courts in ascertaining the true meaning of the contract. Evidence of this uncomfortable relationship between which evidence is admissible and which evidence is not admissible is also evident from judicial comments. For example, in the case of *Excelsior Group v Yorkshire Television*⁵⁴ Flaux J stated that the line between admissible and inadmissible evidence was a fine one. And more recently, Lord Clarke in *Oceanbulk* appeared to acknowledge the difficult relationship between the two areas of law when he noted "...the problems with which both the principles of rectification and the principles of construction...grapple are closely related."⁵⁵

It is not sufficiently reasonable, in the opinion of the author, to simply rely upon the 'safety devices' of rectification and estoppel by convention as a means of providing justice to a party who may fail on the issue of construction if relevant evidence of prior negotiations is excluded. In his thorough examination of the interrelationship of the doctrines of construction and rectification, Sir Richard Buxton convincingly argues that rectification should transcend its current position as a safety net in cases where the inadmissibility of prior negotiations in issues of construction produces a conclusion that those negotiations show to be wrong. He states: "Rectification should in future occupy the whole field when it is necessary to correct errors in the formal expression of a contractual consensus."⁵⁶

The latter argument brings me to my next argument. It will be remembered that the first justification for maintaining the exclusionary rule was that to allow evidence of pre-contractual negotiations would create uncertainty of outcome in disputes over interpretation and add to the cost of litigation or arbitration. As to uncertainty of outcome it can be argued that uncertainty in the law and uncertainty to the parties already exists (and will continue to exist) if the rule remains in its present form. This uncertainty is clearly evident from the comments of Baroness Hale's comments *Chartbrook* when she stated:

But I have to confess that I would not have found it quite so easy to reach this conclusion had we not been made aware of the agreement which the parties had reached on this aspect of their bargaining during the negotiations which led to the formal contract. On any objective view, this made the matter crystal clear. This, to me, increased the attractions of accepting counsel's eloquent invitation to reconsider the rule in *Prenn v Simmonds* [1971] 1 WLR 1381...⁵⁷

It was by having recourse to evidence of prior negotiations when dealing with the issue of rectification that Baroness Hale knew that the interpretation reached by Lord Hoffmann accorded with the negotiations which took place between the parties. But should such 'confessions' be necessary at all? Would it not be better for the exclusionary rule to be reformed so that it is more flexible and thereby allow the courts to assess the relevance and strength of evidence of prior negotiations? Surely this would have the desired consequence of avoiding judges having to rely upon the doctrine of rectification to ease their consciences that they have arrived at the correct judgment.

⁵⁴ [2009] EWHC 1751 (*Comm*) at 25. See also comments by Paul S Davies 'Negotiating the boundaries of admissibility' (2011) CLJ 70(1), 24–27.

⁵⁵ At par. 45.

⁵⁶ Richard Buxton, "'Construction' and the Rectification after *Chartbrook*' (2010) CLJ 69(2), 253–262.

⁵⁷ At 99.

The argument advanced regarding the unhelpful nature of the evidence for it would be ‘drenched in subjectivity’ also fails to hold weight as our discussion on the anomaly which exists between construction and rectification has already illustrated. A party who fails in his claim on construction will continue to proceed with his claim on the grounds of rectification – the evidence before the courts in a rectification claim will certainly be drenched in subjectivity.

Before proceeding to consider the various ways in which the exclusionary rule can be reformed, a few more words must be said in respect of the comments of the other members of the House in *Chartbrook*. Lord Hope acknowledged that the issue of the admissibility of pre-contractual evidence raised was important but, like Lord Hoffmann, confirmed the legitimacy of the rule on policy grounds. There were no valid grounds, in Lord Hope’s opinion, upon which departure from the exclusionary rule could be justified. Departure from the rule could only be justified: “...if your Lordships were confident that the rule was impeding the proper development of the law or contrary to public policy...”⁵⁸ He also stated that one of the strengths of the common law is that “it can take a fresh look at itself so that it can keep pace with changing circumstances.”⁵⁹ In the opinion of the author, Lord Hope’s comments do not appear to be convincing. It is clear that there exist major difficulties with keeping the exclusionary principle. In particular, the distinction between interpretation and rectification is becoming increasingly difficult to maintain and the line between admissible and inadmissible evidence is difficult to maintain. As Flaux J noted in *Excelsior Group Productions Ltd v Yorkshire Television Ltd*⁶⁰ when he said:

It seems to me that there is a very fine line between looking at the negotiations to see if the parties have agreed on the general objective of a provision as part of the task of interpreting the provision and looking at the negotiations to draw an inference about what the contract meant (which is not permissible), a line so fine it almost vanishes.⁶¹

When one considers the problems outlined above, surely the common law should recognise, contrary to Lord Hope’s observations, that the exclusionary principle is, in fact, impeding the development of the law and therefore is in need of reform.

REFORM

The author now puts forward the ways in which the exclusionary principle may be reformed in order to achieve key objectives in the interpretation process namely for it to be more effective in ascertaining the true meaning of the contract, to introduce greater certainty in the interpretation process and for it to be fair to the parties concerned. The following three elements are paramount in achieving the above objectives.

- (i) Adopting Lord Nicholls’ proposition that the exclusionary principle should not be seen as an absolute rule but should be flexible. The reason for this relaxation of the law would be justified on the grounds that it is fair and just;
- (ii) The courts should consider evidence of prior negotiations on a case-by-case basis in order to ascertain whether the evidence being tendered is relevant and, more importantly in the opinion of the author, whether it would be fair to allow that evidence to be introduced into the interpretation process; and

⁵⁸ At par. 4.

⁵⁹ At par. 2.

⁶⁰ [2009] EWHC 1751.

⁶¹ At par. 25.

(iii) So as to avoid the courts being flooded with evidence which may not be relevant, the courts will be able to control the quantity of evidence and also consider its relevance through exercising its case management powers.

FLEXIBILITY OF THE RULE AND JUSTICE

As we have already noted, the exclusionary rule is a rule which is strict and absolute. It is applied stringently to exclude all evidence of pre-contractual negotiations, without considering whether that evidence may, in fact, be relevant. Indeed, Professor Collins observes that the rule is stated too broadly and this is where the problem with the rule lies⁶². The natural consequence of having a strict and broad rule is that relevant evidence will be excluded – evidence which may actually assist the court in trying to ascertain the true meaning of a contract. Lord Nicholls has convincingly argued that the exclusionary rule should be perceived as being flexible rather than absolute so that evidence of pre-contractual negotiations which is relevant is admissible if it would influence the notional reasonable person in his understanding of the meaning the parties intended to convey by the words they used. And Lord Nicholls justifies this change in the law, *inter alia*, on the basis that it would mean that injustice is not done to one of the parties. There is a real danger, however, that injustice may be done if the exclusionary principle continues to stand as a strict and rigid rule.

Therefore, by adopting Lord Nicholls' approach in considering the exclusionary rule as being flexible rather than strict would afford the courts with the opportunity to consider evidence of pre-contractual negotiations and to form a view as to whether the evidence is relevant to the interpretation process.

The author would argue that relaxing the exclusionary rule on the grounds of justice can be achieved by reflecting upon the practice of the Supreme Court in the recent case of *Oceanbulk Shipping & Trading SA v TMT Asia Limited*,⁶³ and the approach adopted by Lord Clarke in that case, in carving out an exception (known as the 'interpretation' exception) to the without prejudice rule – a long established rule of evidence which advocates that communications (whether oral or written) which are made during settlement discussions are privileged and therefore cannot be disclosed in court proceedings.

Oceanbulk concerned the scope of the exceptions to the without prejudice rule.⁶⁴ The question arose as to whether it was permissible to refer to anything written or said in

⁶² Hugh Collins 'Objectivity and Committed Contextualism in Interpretation' in Sarah Worthington (ed) *Commercial Law, Commercial Practice* (2003, Hart Publishing), at 189–190.

⁶³ [2010] UKSC 44.

⁶⁴ The without prejudice rule is firmly established on public policy grounds which were confirmed in the recent House of Lords case of *Ofulue –v- Bossert* [2009] UKHL 16. The majority of their Lordships dismissed the claimants' appeal to admit without prejudice correspondence and reaffirmed the need to protect the public policy behind the rule which was to encourage the negotiation and settlement of disputes. Lord Scott dissented and argued that issues between the parties which is 'common ground' and which have been discussed during without prejudice negotiations should be permitted to be used as evidence in subsequent proceedings. Lord Scott warned (at par. 34): "A public policy rule should not be allowed to extend further than the public policy in question requires and to apply the rule mechanically, without regard to the limits that the purpose underlying the rule should dictate, cannot, in my respectful opinion, be right." Lord Neuberger (at par. 98), however, voiced caution in creating exceptions to the rule and argued that such a practice would "...severely risk hampering the freedom parties should feel when entering into settlement negotiations." For an analysis of their Lordships' judgments in *Ofulue* see Masood Ahmed, 'Protecting the Without Prejudice Rule' CJK Vo. 28 Issue 4 2009. Professor Zukerman in his article 'Without Prejudice Interpretation – With Prejudice Negotiations' (2011) Evidence and Proof 15(3), has voiced concern with the Supreme Court's ruling in *Oceanbulk*. Professor Zukerman argues that the Supreme Court's ruling means that settlement negotiations are now "without prejudice except for interpretation", with the result that parties have to be much more careful about what they say in the course of settlement discussions and therefore has the undesired effect of undermining the valid policy reasons upon which the rule stand. He warns: "It is possible that negotiating parties would be more circumspect and careful in their exchanges now that they can no longer be sure that what they say would not be used to their disadvantage later on."

the course of without prejudice negotiations to help interpret a settlement agreement which resulted from negotiations.

The parties to the dispute were engaged in placing bets on the freight market either going up or down and this was done by entering into forward freight agreements (“FFA”). Oceanbulk and TMT entered into a large number of FFA with Oceanbulk betting that the market would go up and TMT betting that the market would go down. By May 2008 TMT owed Oceanbulk approximately \$40.5 million and a settlement agreement was reached. Clause 5 of the settlement agreement, which was at the centre of the dispute, provided:

In respect of FFA open contracts between TMT Interests and [Oceanbulk] for 2008, the parties shall crystallise within the ten trading days following 26th June 2008, as between them, 50% of those FFAs at the average of the ten days’ closing prices for the relevant Baltic Indices from 26th June 2008 and will co-operate to close out the balance of 50% of the open FFAs for 2008 against the market on the best terms achievable by 15th August 2008.

Although the first 50% of FFAs were crystallised a dispute arose as to the last part of the clause. Oceanbulk argued that TMT had failed to close the remaining FFAs with the result that Oceanbulk owed TMT money. TMT raised an argument of construction and contended that co-operation was required as Oceanbulk had liabilities to counterparties and therefore these had to be ‘closed out’. Oceanbulk argued that FFAs had to be closed as part of its agreed contract with TMT.

In support of its arguments, TMT attempted to rely upon representations which it said Oceanbulk had made in the course of negotiations leading up to the settlement during which Oceanbulk stated that the transactions entered into between them and TMT were ‘sleeved’ transactions. This meant that Oceanbulk had made a directly equivalent contract with a counterparty under which they were liable to pay to that counterparty the same sum which TMT were liable to pay Oceanbulk.

Oceanbulk counter argued that any representations made about sleeving were made as part of without prejudice discussions and were therefore protected from being disclosed in court proceedings. TMT contended that, just as without prejudice discussions can be referred to for the purpose of determining whether a settlement agreement was concluded and what the terms were⁶⁵, so too can they be referred to as an aid to the construction of those terms if there is a dispute about the meaning.

Reversing the judgment of Longmore LJ in the Court of Appeal, Lord Clarke held that justice clearly demanded that the interpretation exception should be recognised as an exception to the without prejudice rule.⁶⁶ Without recourse to the without prejudice materials the agreement could not be properly construed in accordance with ICS principles that objective facts which emerge during negotiations are admissible as part of the factual matrix in order to assist courts to interpret an agreement in accordance with the parties true intentions. The process of interpretation of a settlement agreement should be the same, whether the material was without prejudice or not. Furthermore, without prejudice negotiations were admissible in order to establish whether a

⁶⁵ *Unilever Plc v Procter & Gamble* [2000] 1 WLR 2436.

⁶⁶ In *Unilever Plc v Procter & Gamble* Robert Walker LJ described three of the most relevant exceptions to the without prejudice rule at page 2444: “(1) . . .when the issue is whether without prejudice communications have resulted in a concluded compromise agreement, those communications are admissible . . . (2) Evidence of the negotiations is also admissible to show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence . . . (3) Even if there is no concluded compromise, a clear statement which is made by one party to negotiations and on which the other party is intended to act and does in fact act may be admissible as giving rise to an estoppel. That was the view of Neuberger J in *Hodgkinson & Corby Ltd v Wards Mobility Services Ltd* [1997] FSR 178, 191 and his view on that point was not disapproved by this court on appeal.”

compromise agreement has been reached and, in Lord Clarke's view, no sensible line could be drawn between this and admitting such evidence to establish the content of such an agreement. Lord Clarke carved out an exception to the without prejudice on the grounds that justice demanded it. He concluded: "...I would hold that the interpretation exception should be recognised as an exception to the without prejudice rule. I would do so because I am persuaded that, in the words of Lord Walker in *Ofulue*. . . justice clearly demands it. . ."⁶⁷

So the Supreme Court found that a further exception could be made to a well-established rule of evidence on the basis of justice. Clearly the approach taken by Lord Clarke was to relax the without prejudice rule in the interest of justice. It was just to allow the without prejudice evidence as it formed part of the matrix of facts. It was just to allow the without prejudice evidence as it assisted the court in interpreting the contract. And it was on the basis of justice that the without prejudice rule, which is deeply grounded upon public policy reasons, was relaxed by the Supreme Court.

Although we do not have, as we have with the without prejudice rule, similar authorities which provide the same level of flexibility to the exclusionary principle, it could be argued, in the opinion of the author, that in light of the many problems which currently exist with the exclusionary rule, a similar approach to that which the Supreme Court took in *Oceanbulk* should also be adopted in respect of the exclusionary rule. In order to ensure that justice is achieved and to avoid the danger of injustice being done the exclusionary rule should be relaxed in order to allow courts to consider whether pre-contractual negotiations would be relevant to the interpretation process. Clearly justice demands such a relaxation of the exclusionary rule.

CASE MANAGEMENT AND FAIRNESS

If we proceed on the assumption that the exclusionary principle is relaxed, how then would the courts deal with circumstances where a party to litigation pleads that a certain meaning was intended to a particular clause in a contract and that meaning was clear during discussions prior to the contract being formed? How would the courts manage and control the litigation process so as to ensure that only relevant evidence is admitted and that the court is not overwhelmed with masses of documents and evidence which may not be relevant? What would the courts powers be in this situation? How would they exercise those powers? And what would the parties be expected to do in assisting the courts in discharging its duties in ensuring that only relevant evidence is introduced into the litigation process? All of these questions can be answered by reflecting upon the court's case management powers and various key aspects of the civil procedure rules. It is these court powers which will be fundamental in ensuring that justice is done to the parties.

The court's case management powers as embodied in the Civil Procedure Rules present an effective method of controlling the quantity of evidence and, more importantly, will play a key role in distilling which evidence is relevant and which evidence will assist the court in carrying out its task in interpreting the contract.

Since their inception, the Civil Procedure Rules have greatly enhanced the courts' case management powers over civil matters. In his final report, *Access to Justice*, Lord Woolf identified the failure of the courts in taking responsibility of the conduct of civil cases as being primarily responsible for the acute problems with the civil justice system

⁶⁷ At par. 46.

- those problems being the disproportionate amount of costs and time which was being incurred by the courts and the parties in the litigation process. This ultimately defeated the true role of the courts which was to manage cases justly. In order to restore the court's role as an effective and pro-active judicial body, Lord Woolf introduced enhanced case management powers which required the courts to adopt a greater pro-active stance in respect of all cases coming to its doors. Lord Woolf rejected concerns that his new case management powers would undermine the adversarial nature of the courts. In defending the new case management role of the courts he argued: "I do not see the active management of litigation as being outside a judge's function. It is an essential means of furthering what must be the objective of any procedural system, which is to deal with cases justly."⁶⁸

And it was the need to ensure that cases are dealt with justly that lead to the birth of the central plank of the Civil Procedure Rules – the Overriding Objective. Enshrined in Rule 1.1 of the CPR, the Overriding Objective places a positive duty on the court to deal with cases justly. Dealing with cases justly includes, inter alia, dealing with the case in ways which are proportionate to the amount of money involved; to the importance of the case; to the complexity of the issues; and to the financial positions of each party.⁶⁹ The Overriding Objective also places a positive duty on the parties to litigation to assist the court in furthering the Overriding Objective.⁷⁰

Therefore, as a starting point, the court will be under a positive duty to discharge its duty in furthering the Overriding Objective by dealing with cases justly. For our purposes this would mean dealing with cases justly and if a particular case concerns an issue of interpretation then the court must deal with that case according to its complexity. Further, the parties will also be required to assist the court from the outset in identifying the key issues of interpretation and to bring to the court's attention the potential of using evidence of prior negotiations in the interpretation process. The courts will then resort to their case management powers under the Civil Procedure Rules when controlling the amount and relevance of evidence from prior negotiations.

The courts active case management powers are set out in Rule 1.4(1). Those powers include identifying the issues at an early stage; deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others; and deciding the order in which issues are to be resolved. These case management powers are significant in controlling the time frames within which the cases proceed to trial and the costs which the parties will incur in the litigation process as well as managing the courts resources. Thus, the court must identify any issues of contractual interpretation at an early stage and must decide whether those issues require further investigation – this may involve the need to consider whether there is any evidence of prior contractual negotiations which may be of relevance to the interpretation process. Again this would involve the parties being fully engaged in the early stages of the litigation process and assisting the court in discharging its duty to further the overriding objective. The parties would also be required to clearly identify in pleadings and even at the pre-action stage any issues of interpretation and any evidence of prior negotiations which may assist the court.

There will also be specific stages in the litigation process when the courts will exercise their case management powers in controlling the admissibility of evidence of pre-contractual negotiations, both in terms of relevance of the evidence and quantity

⁶⁸ The Right Honourable the Lord Woolf, Master of the Rolls, Access to Justice Final Report., July 1996, Final Report to the Lord Chancellor on the civil justice system in England and Wales..

⁶⁹ Rule 1.1 (2).

⁷⁰ Rule 3.1.

of the evidence. One of the most significant stages at which the courts and the parties will be required to further the overriding objective will be at the allocation stage.⁷¹ The parties will be provided with allocation questionnaires to complete which will provide the courts with valuable information regarding the case (such as the number of witnesses the parties are likely to call, the likely length of the trial etc.). At this stage a party wishing to raise the issue of the admissibility of prior-negotiations will be required to complete the last section of the allocation questionnaire in detail (the last section asks whether the court should be made aware of anything other than the information already provided to the court). The party seeking to rely upon evidence of prior negotiations will be required to provide detailed particulars of the evidence which it seeks to adduce and provide clear reasons as to why the evidence is relevant to the issues (i.e. how it would assist the court in interpreting the contract).

The court should then consider this information and convene a case management conference to explore the issues and evidence in more detail. In the Commercial Court the judge would be able to rely upon the List of Issues in highlighting which potential issues the parties will rely upon and whether the party will seek to raise arguments relating to the admissibility of prior negotiations. At the case management conference the court, with the assistance of the parties, will explore the issues further and it may ask relevant questions of the party seeking to tender evidence of prior negotiations in order to form a view as to whether the issues require that evidence to be admitted. The judge conducting the case management conference will also consider whether it would be just to allow the admissibility of the evidence in light of the issues as pleaded. If evidence of prior negotiations is to be allowed then the quantity of the evidence will be controlled by the judge by making directions for only relevant evidence to be disclosed bearing in mind the need to maintain proportionality in the disclosure process. These directions would be made pursuant to the court's general power to control evidence by making directions as to the issues on which it requires evidence; the nature of the evidence; and how it is to be placed before the court.⁷² If necessary, a further case management conference may be called as a means of reviewing the evidence which has been disclosed and to consider its relevance to the issues.

CONCLUSION

Clearly there are difficulties which currently exist with the exclusionary principle in its pure form and it is difficult to see how the rule can continue to be upheld. The proposals for reform may go some way in trying to achieve a balance between maintaining a rule which protects the English objective theory in contract law but at the same time providing some flexibility, in the interest of justice, to permit evidence which is relevant to the interpretation process. Some may rightly argue, however, that the ultimate way in which reform may be achieved is by abolishing the rule entirely. As Baroness Hale noted: "In the end abolition may be the only workable legislative solution, as eventually happened with the hearsay rule. . ."⁷³

⁷¹ Civil Procedure Rule 26.3 and Practice Direction 26. Practice Direction 26 begins with a reminder of the other CPR rules when dealing with allocation and those rules include the Overriding Objective (Part 1) and the court's case management powers (Part 3).

⁷² See CPR 32.1(1).

⁷³ At 99.

IMMUNITY OF PARLIAMENTARY STATEMENTS

JONATHAN STEELE*

Democracy depends on more than voting. It presupposes a polity where citizens are informed about the actions of their representatives and where those representatives themselves can raise their concerns and those of their constituents without fear of legal action to constrain their words.

This is well understood both in the context of member states of the European Union and in the context of the European Parliament itself. If a counter-lesson were needed, it could be drawn from certain states outside the Union where citizens are indeed allowed to vote, and even face a choice of candidates or parties, but where the absence of the preconditions of informed public debate and freedom of speech for elected representatives mean that no real democracy is possible. For example, the presidential election in Belarus in December 2010 was marked by "*Faked votes, cracked skulls, a jailed opposition, beaten-up protesters and relations with Europe in tatters...*"¹ The President of the European Parliament stated "*The Lukashenko government clearly lacks democratic legitimacy and continues, regrettably, as one of the last authoritarian states in Europe...*"² Nonetheless, the external trappings of any election were present.

In the European Parliament, the Rules of Procedure provide at Rule 5(1): "*Members shall enjoy privileges and immunities in accordance with the Protocol on the Privileges and Immunities of the European Union.*" This Protocol provides at Article 8: "*Members of the European Parliament shall not be subject to any form of inquiry, detention or legal proceedings in respect of opinions expressed or votes cast by them in the performance of their duties.*"³

This seems very clear: the utterances of Members of the European Parliament - at least those made in the performance of their duties - are completely privileged as regards legal action. However, there is a further question about how far that privilege extends. Does it go so far as to cover the subsequent publication by others of those privileged utterances?

The question is important because in a Union of 500 million citizens few can be physically present in debates in Strasbourg or Brussels: they must rely on press reports, broadcasts or materials published on-line to inform themselves about the words spoken in Parliament and decide whether their interests or concerns are being defended. Even if the Member of Parliament can speak with impunity, can the broadcaster or even the interpreter in the booth reproduce those words without fear of any adverse consequences?

This paper will examine the question in the light of the parliamentary traditions of four Member States of the European Union: the United Kingdom, France, Sweden and Italy, before examining it in the context of the European Parliament itself.

Position in the United Kingdom

In the ferment of the flight (or deposition) of James II and the accession of William of Orange in 1688, Parliament passed the Bill of Rights, making clear its own view of

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¹ "A Nasty Surprise in Belarus", *The Economist*(London, 29 December 2010)

² "Buzek condemns presidential elections in Belarus and calls for an immediate end to the violence against activists" (European Parliament press release) <http://www.europarl.europa.eu/former_ep_presidents/president-buzek/en/press/press_release/2010/2010-December/press_release-2010-December-27.html>accessed 18 April 2012

³ OJ C310/261

the extent of its privilege: "...that the freedom of speech, and debates or proceedings in Parliament ought not to be impeached or questioned in any place out of Parliament..."

Members of Parliament can and do use their privilege to raise matters which would otherwise be difficult to bring to public attention. For example, John Hemming, the member for Birmingham Yardley, used parliamentary privilege on 10 March 2011 to reveal the existence of an injunction brought by Sir Fred Goodwin (as he was then known), a former chief executive of the Royal Bank of Scotland.⁴ The terms of this injunction were so wide-ranging as to prevent Sir Fred Goodwin's being identified as a banker in press reports, but the fact that a Member of Parliament had raised the matter in Parliament provided an effective cover for press reports of his words (and indeed for this present publication).

The extent of the privilege of freedom of expression as regards proceedings in Parliament was tested in the case *Stockdale v. Hansard*⁵. A report by prison inspectors, published by order of the House of Commons, referred to a book published by Stockdale found to be in circulation in prisons. Stockdale considered that he had been libelled and sued Hansard (Parliament's official printer). The House of Commons ordered Hansard to raise the defence of Parliamentary privilege: This defence was rejected by the Court of Queen's Bench, which held that the publication fell outside the scope of Parliamentary privilege. As a reaction to the decision to award libel damages against Hansard, Parliament passed the Parliamentary Papers Act 1840, which had the effect of conferring absolute privilege on statements in Parliamentary papers.

In a bizarre sequel to the case, the Sheriff of Middlesex, a local judicial officer, sought to recover the damages awarded by the court and found himself the subject of an arrest by the House of Commons. His application for *habeas corpus*, on the grounds that the Speaker's warrant was general with no statement of facts, was dismissed. In some respects, Parliament is itself considered as a court, and it was inappropriate for one court to examine another's findings of fact.

So in the domestic law of the United Kingdom there is provision⁶ for absolute privilege from civil or criminal action in respect of reports of Parliamentary proceedings made under Parliament's authority.

The question of whether Parliamentary privilege could cover fraudulent statements in documents was considered by the Supreme Court in *R v Chaytor and others (Appellants)*. The appellants in that case were the defendants in criminal proceedings, who were charged with offences of false accounting contrary to Section 17(1)(b) of the Theft Act 1968. Each defendant had been a member of the House of Commons at the time of the alleged offences, and each adduced a claim of Parliamentary privilege in defence. The charges related to claims for expenses incurred of performing the duties of a Member of Parliament. One question was whether the submission of an expenses claim of this nature constituted "proceedings in Parliament" in the sense of Article 9 of the Bill of Rights 1689.

The Supreme Court did not favour a broad interpretation of "proceedings in Parliament". Lord Phillips took the view that the principal end to which Article 9 was directed was the freedom of speech and debates in the Houses of Parliament and in Parliamentary committee: "Scrutiny of claims by the courts will have no adverse impact on the core or essential business of Parliament, it will not inhibit debate or freedom of speech."

⁴ "Sir Fred Goodwin, former RBS chief, obtains super-injunction", *The Daily Telegraph* (London, 10 March 2011)

⁵ *Stockdale v Hansard* [1839] 9 Ad & E 1

⁶ Parliamentary Papers Act 1840 (3&4 Vict., c. 9)

A further question was whether the general criminal court had jurisdiction, or whether Parliament itself had exclusive jurisdiction over the matter. Although Parliament is itself a Court in some respects, it is clear that its right to punish extends only to contempt of the House of Commons (or Lords is the case may be) and not to other offences. Both Lord Phillips and Lord Rodger referred to the assassination of the then Prime Minister, Mr Spencer Percival, in the lobby of the House of Commons in 1812. "John Bellingham was arrested, prosecuted, tried for murder at the Old Bailey, convicted and executed - all according to the common law of England. If the assassin had been a fellow MP, then by the law of England he too would have committed murder."

The court distinguished between offences which could be regarded as "ordinary crimes" and those falling into the category of matters over which the House of Commons would claim a privilege of exclusive cognizance. This latter category could well include, for example, a charge of sedition in respect of a statement made by a member in the House of Commons.

A notable failure by the House of Commons, or at least its officers, to defend its privileges occurred on 27 November 2008, when police searched the House of Commons office of Damien Green MP, at the time shadow immigration minister, and arrested him. He was arrested on suspicion of misconduct in public office, but not subsequently charged. The (alleged) misconduct in question was the reception of leaked government documents. A report by the House of Commons Public Administration Select Committee listed the reasons for the decision as including the high threshold required (i.e. the level of misconduct to be proven is very high), the significant hurdle of a public interest defence, the fact that the documents in question did not relate to national security and their imminent publication under the Freedom of Information Act.⁷

One of the remarkable features of the case is that the Serjeant at Arms, the senior official of the House responsible for security, allowed police officers to conduct a search of the office of a Member of Parliament. The Serjeant consented to the search; that is, it was carried out without a search warrant.

The documents in question were from the Home Office (interior ministry) and for the most part connected with Mr Green's responsibilities as shadow immigration minister. If the distinction between 'ordinary crimes' and others is a sound one, the offence on suspicion of which this arrest took place would be a strong candidate for the latter category. Of course, no case against the Member ever came to court in this connection. One can speculate that if the House of Commons had taken a more robust view of its privileges, the Metropolitan Police Commissioner might have had to face being summoned to the House of Commons itself for contempt of Parliament (a fate to which no non-Member has been subjected since 1957).

It should be noted that the privileges of the House of Commons are not necessarily stable over time if the House chooses not to exercise them. The clearest example of this is the right of the House of Commons to determine its own composition, which can no longer be considered to exist in its former extent. This is illustrated by the 1768 case of John Wilkes, "the rake, wit and radical demagogue, who was elected to the House of Commons; the corrupt House decided that he was unfit to share their company, and expelled him."⁸ It is safe to assume that a modern Wilkes would not find himself excluded from the House by a vote of its members. The power of the House to

⁷ *Leaks and Whistleblowing in Whitehall*, Tenth Report of Session 2008–09 (The Stationery Office Limited, London, 2009) para 44

⁸ S A de Smith, *Constitutional and Administrative Law* (3rd edn, Penguin, 1977) 311

determine its composition has effectively been ceded to election courts. So, for example, the successful action by Elwyn Watkins, a losing candidate in the 2010 general election in Oldham East and Saddleworth, was brought in the Queen's Bench Division of the High Court. The matter was not resolved by a vote in the House of Commons itself, and it is not probable that any future disputed election returns will be considered a matter for the House of Commons rather than the courts.

In fact, there seems to be a secular process of facilitating the jurisdiction of the courts in matters which might once have been reserved to Parliament. The Parliamentary Standards Act 2009 creates a specific criminal offence at Section 10 of furnishing false or misleading information in support of a claim under the members' allowances scheme, which offence can only be committed by a member of the House of Commons. The Bribery Act 2010 sanctions corrupt conduct and clearly applies to Parliament as well as to other public and private bodies. The jurisdiction of the ordinary courts over matters in Parliament is on the increase.

Position in France

France presents an interesting contrast with the United Kingdom in the manner in which the privileges of parliament have been defended. The concept of parliamentary immunity comprises two branches: non-accountability (*'irresponsabilité'*) and inviolability. Non-accountability, as provided for in the first paragraph of Article 26 of the Constitution⁹, protects the member from prosecution or civil suit on the basis of his or her actions in the exercise of the parliamentary mandate. It does not cover actions taken outside the exercise of the mandate. It is however established that it covers persons other than parliamentarians engaged in the work of the parliament, such as persons giving evidence to a parliamentary committee. Inviolability has quite a different character: it protects members from prosecution even for acts outside their functions.

In 1989 the Constitutional Council (*'Conseil constitutionnel'*), which is a judicial body established to give preliminary rulings on constitutional questions before the courts as well as dealing with other matters such as election disputes, considered as unconstitutional a draft amendment to the law on the freedom of the press which would have had the effect of forbidding any action in respect of a report made by a parliamentarian in the execution of a mission entrusted to him by the government. The logic of the Constitutional Council was based on the separation of powers: such a mission could be entrusted to a person who was not a parliamentarian, and did not fall within the scope of parliamentary functions.¹⁰

Interestingly for the purposes of the present discussion, there is case law¹¹ showing that non-accountability does not extend to remarks made in the course of a press interview and subsequently published, even though those remarks concerned a parliamentary committee of enquiry for which the parliamentarian in question was *rapporteur*. An association of Jehovah's Witnesses considered that certain published remarks, suggesting their involvement in organised crime, were defamatory and took civil action against the parliamentarian, the managing director of the publication and the publishing company. The parliamentarian sought to raise on appeal the defence of immunity. However, the appeal court (*'Cour de cassation'*) found as a matter of fact that the offending remarks did not correspond to any part of the parliamentary

⁹ "Aucun membre du Parlement ne peut être poursuivi, recherché, arrêté, détenu ou jugé à l'occasion des opinions ou votes émis par lui dans l'exercice de ses fonctions." Constitution de la République française, Article 26, first para, version as amended 23 July 2008, Journal officiel de la République française, 24 July 2008

¹⁰ F Luchaire, G Conac and X Prétot, *La Constitution de la République française*, (3rd edn, Economica, 2009) 791

¹¹ B Jean-Pierre, B Stakimet I la Sté, Cour de cassation, cited in Luchaire, Conac and Prétot, op. cit. p. 790.

committee's report on the matter. Even if this had been the case, however, it is unlikely that the defence of immunity would have succeeded.

His status as a parliamentarian did not protect Mr Noël Mamère from prosecution for defamation of a public official in respect of remarks made on a television programme in October 1999. He described the head of the French national radiological safety authority at the time of the Chernobyl disaster as a 'sinister character' (*'personnage sinistre'*) and both Mamère and the broadcaster France 2 were convicted and fined. In subsequent proceedings in the European Court of Human Rights¹² there was found to have been a violation of Article 10 of the European Convention on Human Rights, as the conviction for defamation went beyond what was necessary in a democratic society.

The law on press freedom of 29 July 1881¹³ (as amended) explicitly covers the question of secondary immunity by providing at Article 41 that no action shall lie in respect of a speech made in the National Assembly or the Senate or reports of any other item printed by order of either assembly. A similar provision covers a report (*'compte rendu'*) of public sittings of those assemblies made in good faith (*'de bonne foi'*) by newspapers.

So it can be seen that the French and British parliamentary traditions have followed very different routes to arrive at similar destinations. The reason for the divergence is plain enough: the British constitutional settlement is distinguished by a lengthy secular process reaching back at least to Magna Carta in 1215, passing via the development of *habeas corpus*, whereby all individuals were protected from arbitrary power, rendering superfluous any special protection for the persons of parliamentarians. The French experience was rather of a sudden revolutionary sloughing-off of absolute monarchic rule. Honoré Mirabeau dramatically invited the National Assembly in 1789 to defy the power of the bayonets and to make safe its works, by declaring the persons of the deputies of the Estates General to be inviolable.¹⁴ So the inviolability provided for in the second paragraph of Article 26 of the French constitution, ultimately derived from that proclaimed on 23 June 1789, has no British counterpart: criminal prosecutions of British parliamentarians can and do take place. However, on the specific matter of liability for reports of proceedings in parliament, a degree of convergence can be discerned.

Position in Sweden

The fundamental law the Instrument of Government provides at Article 1: "All public power in Sweden proceeds from the people. Swedish democracy is founded on the free formation of opinion and on universal and equal suffrage. It shall be realised through a representative and parliamentary polity and through local self-government . . ."¹⁵ It is instructive that this constitutional proclamation of the basis of Swedish democracy refers to the free formation of opinion as having no less importance than universal suffrage.

Sweden has enjoyed a long tradition of freedom of expression with respect to official documents of all kinds. The right of citizens to take knowledge of official documents dates from 1766. The Freedom of the Press Act granting this right is a fundamental law and so is entrenched in Swedish constitutional tradition.¹⁶

¹² *Mamère v. France*, no 12697/03 (ECHR 2006-XIII)

¹³ Loi du 29 juillet 1881 sur la liberté de la presse, Bulletin Lois n° 637, 125

¹⁴ C de Nantois, *Le Député : une étude comparative, France, Royaume-Uni, Allemagne* (Bibliothèque constitutionnelle et de science politique, Paris, 2010) 215

¹⁵ Instrument of Government, Chapter 1, Article 1, Kungörelse 1974:152, Justitiedepartementet, 28 February 1974

¹⁶ There are four such fundamental laws (*"grundlagar"*): the Instrument of Government, the Act of Succession, the Freedom of the Press Act and the Fundamental Law on Freedom of Expression.

The basic provision which enshrines the principle of public access is found at Chapter 2, Article 1 of the Freedom of the Press Act: *"To encourage the free exchange of opinion and availability of comprehensive information, every Swedish citizen shall be entitled to have free access to official documents."*

It is noteworthy that the availability of comprehensive information is considered good in itself. It might then be expected that the free availability of all kinds of official documents constituted the basis for unfettered reporting of proceedings in the *Riksdag*.

The Instrument of Government provides for inviolability of parliamentarians similar to that we have seen in the French context. The exact provision is:

"Legal proceedings may not be initiated against a person who holds a mandate as a member of the Riksdag, or who has held such a mandate, on account of a statement or an act made in the exercise of his or her mandate, unless the Riksdag has given its consent thereto in a decision supported by at least five sixths of those voting.

Nor may such a person be deprived of his or her liberty, or restricted from travelling within the Realm, on account of an act or statement made in the exercise of his or her mandate, unless the Riksdag has given such consent thereto.

*If, in any other case, a member of the Riksdag is suspected of having committed a criminal act, the relevant legal provisions concerning apprehension, arrest or detention are applied only if he or she admits guilt or was caught in the act, or the minimum penalty for the offence is imprisonment for two years."*¹⁷

The condition based on severity of penalty in the final sentence quoted above could not therefore apply to defamation which even in its aggravated form (*"grovt förtal"*) attracts a maximum penalty of two years' imprisonment.

As regards other offences, there have in fact been criminal cases against a serving member of parliament. In 1995 a member was found guilty of aggravated fraud, with the verdict confirmed on appeal in 1996, for giving false information about costs incurred by a company which he represented and thereby causing public funds to which the company was not entitled to be paid to it. In addition to the usual sentences of fines and a suspended prison sentence, the court ordered that the member be removed from his functions as a member of parliament, in accordance with the provisions of article 7 the fourth chapter of the Instrument of Government, he having shown himself *"manifestly unfit to hold a mandate by reason of a criminal act..."*¹⁸

There are offences under the Freedom of the Press Act, which are detailed in Chapter 7 of the Act. Interestingly for our purposes, the list of offences includes defamation (*"förtal"*).¹⁹ The offences under the Freedom of the Press Act must satisfy a double requirement for criminal liability to be established: they must fall within the list in Chapter 7 and also fulfil the requirements for criminal liability under the Criminal Code (*"Brottsbalken"*).²⁰

The requirements are set out in the first article of Chapter 5 of the Criminal Code. If one accuses another of being criminal or blameworthy in his way of life or gives information likely to expose that person to others' contempt (*"missaktning"*), the offence is committed. The truth of the statement is not a defence in itself. To be exact, there is a defence if "...[the defendant] was obliged to express him/herself or with regard to the circumstances it was justified to give information in the matter and [the

¹⁷ Instrument of Government, Chapter 4, Article 12, Kungörelse 1974:152, Justitiedepartementet, 28 February 1974

¹⁸ Case B1660-95, Hovrätten för Västra Sverige, decision of 24 May 1996

¹⁹ Freedom of the Press Act (1949:105), Chapter 7, Article 4, para 14.

²⁰ L Carson, *The Fundamentals of Swedish Law* (Studentlitteratur, Lund, 2009) 60

defendant] demonstrates that the information was true or that [the defendant] had compelling reason so to do". So the truth of a statement is not a defence if the assessment of the circumstances leads to the conclusion that giving the information in question was not justified.

The fact that it is irrelevant whether the accusation is true or not marks a distinction between defamation in the legal sense and in the popular sense. It appears that the test of whether or not a given statement is likely to expose someone to the contempt of others is an objective test, in the sense that it is not sufficient for someone merely to feel insulted. The question is assessed by reference to its likely effect on others, although not necessarily as judged by the standards of society as a whole. A narrower reference group may be taken. There is an assessment from case to case of whether it was appropriate to make the offending statement. The relevant factors here include the direct circumstances of the statement (when, where and to whom it was made) as well as the purpose of the statement.²¹

As an illustration of the latitude which the courts have recognised the press to enjoy in reporting matters which could be considered defamatory, the newspapers *Expressen* and *Aftonbladet* were found in 2002 to have been justified in identifying in 1996 a named person as the murderer of the former prime minister Olof Palme in 1986. Although on the facts of the case the publication constituted defamation, with regard to the public interest in the matter, publication could be considered as justified.²²

It seems likely that the fact that a statement had previously been made in parliament could be considered as one of the circumstances tending to justify publication. Moreover, the first condition above - circumstances where there is a duty to speak - could conceivably apply to some parliamentary functions. There is however no absolute defence.

Position in Italy

The Italian legislature comprises two chambers, the *Camera dei Deputati* and the *Senato*. The Italian constitution provides at the first paragraph of Article 68 that members of parliament cannot be called to account for opinions expressed or votes cast in the performance of their functions.²³ This is the non-accountability which we have already encountered in the context of the French parliament. However, each chamber has its own rules providing for the president of the chamber to exercise a degree of scrutiny over the content of acts of members. This is less evident as regards the *Senato*, in the case of which Article 146 of its rules of procedure provides for the President to determine that a question is not formulated in unbecoming terms ("*in termini sconvenienti*"). Article 139 (second part) of the rules of procedure of the *Camera dei Deputati* provides for the President to assess the admissibility of parliamentary acts: among the considerations to be taken into account are the protection of private life and the good name of individuals ("*[la] tutela della sfera personale e [l']onorabilità dei singoli...*"). The same provision prohibits the publication of unbecoming expressions ("*espressioni sconvenienti*"). The President has the discretion to put the matter to a vote.

The Italian legislature passed a law in 2003 suspending criminal proceedings against the President of the Republic, the Presidents of the *Senato* and *Camera dei Diputati*,

²¹ O Norbäck, "*Förtal på Internet*" (University of Lund, 2009) <<http://www.lu.se/o.o.i.s?id=19464&postid=156079>>accessed 19 April 2012

²² Case B2146-00, Svea hovrätt, decision of 21 February 2002

²³ "I membri del Parlamento non possono essere chiamati a rispondere delle opinioni espresse e dei voti dati nell'esercizio delle loro funzioni." Costituzione della repubblica italiana, version as amended 30 May 2003, *Gazzetta Ufficiale*, serie Generale, no 134 of 12 June 2003

the President of the Council of Ministers (i.e. the prime minister) and the President of the Constitutional Court. This law therefore had the unusual feature of according a special immunity to the presidents of the chambers of parliament which was not accorded to the ordinary members of those bodies. The Constitutional Court found this law unconstitutional for violation of the principle of equality and the right of defence. The existing protections for members of parliament in article 68 of the Italian constitution would not have been affected.²⁴

The Italian Constitutional Court has ruled on the question of whether the constitutional protection of parliamentarians in respect of opinions expressed extends to acts which the President of the Camera has considered inadmissible in the sense of the above Article 139 (second part). The case²⁵ concerned a member of the Camera, Domenico Gramazio, who had in November 1998 presented a written question to the President asking whether a certain named person was employed by a company providing services under contract to a public television company, of which her husband, Stefano Balassone, was a director. Gramazio released a statement to the press about this question, before the President had made any decision on its admissibility, and the matter was reported on in a daily newspaper.

The President subsequently ruled the question inadmissible in accordance with the above Article 139 (second part). Balassone then brought an action for defamation against Gramazio, who raised the defence of parliamentary immunity in the sense of Article 68 of the constitution. On appeal, the constitutional court then had to address the question of whether parliamentary immunity was applicable to acts such as the press release in this case. The court found that the utterances in question were in fact parliamentary acts covered by Article 68 immunity, in spite of the conclusion of inadmissibility in respect of the question at the origin of the matter.

Even in this case, however, it was Gramazio who was the defendant, rather than the newspaper reporting his comments. The general principle seems to be that utterances in an interview may have privileged status if related to parliamentary activities: a *ratione materiae* condition.

European Parliament

There are various avenues available to a Member of the European Parliament who wishes to raise a matter of concern. These include written and oral questions directed to members of the Commission or to the Council. They also include written declarations, which become adopted texts of the Parliament if signed by a majority of Members. In the specific case of written declarations, Parliament's Rules of Procedure now provide at Rule 123 that "*Authorisation shall be given by the President on a case-by-case basis*" which implies a discretion on the part of the President to exclude a written declaration. The wording of this rule gives no indication of the criteria which the President is to use in considering whether to exercise this discretion. One possible interpretation would be that the President is expected to apply the criteria in the rule itself; that, to consider whether the text of the draft declaration covers a "*matter falling within the competence of the European Union which does not cover issues that are the subject of an ongoing legislative process.*" Another criterion in the rule is that the text "*... may not go beyond the form of a declaration and may not, in particular, contain any decision on matters for which specific procedures and competences are laid down in these Rules of Procedure.*" On this view, the President could justifiably exercise the discretion

²⁴ Hardt & Eliantonio, "*Thou shalt be saved (from trial)? The ruling of the Italian Constitutional Court on Berlusconi's immunity law in a comparative perspective*", *European Constitutional Law Review*, (2011) 7(1), 17–39

²⁵ Judgment no 379/2003 of 18 December 2003.

not to authorise a declaration only in cases where these criteria were not satisfied. Another possible interpretation would be that the President is obliged to take a wider view and consider the lawfulness of the text in the light of, for example, the data protection law of the Union.

Certainly the European Data Protection Supervisor considered in a decision on a complaint that the publication in the Official Journal of a written declaration was a matter subject to data protection legislation, as explained in the Supervisor's Annual Report for 2010:

*"A complaint was received about the publication of highly sensitive personal data in the Official Journal of the European Union and in the minutes of a European Parliament session. Following an inquiry into the matter, the EDPS concluded that the opinion of the Member of Parliament could have been expressed and the political message of the Written declaration could have been transmitted effectively without revealing the identities of the persons concerned. The EDPS requested the deletion of the names of the persons invoked by the Member in the Written declaration and in any other medium. He also requested that a formal and effective procedure be established in order to ensure that definitive versions of documents published in the Official Journal and on the internet site of the Parliament take into account modifications introduced by the services in charge of the preparation of documents."*²⁶

The Supervisor had good reason to consider that the publication was subject to data protection law, as the relevant provision reads "This Regulation shall apply to the processing of personal data by all Community institutions . . . insofar as such processing is carried out in the exercise of activities all or part of which fall within the scope of Community law."²⁷ Whichever view one takes of the specific question of written declarations, it remains the case that other forms of Parliamentary proceedings are not subject to any similar discretion. A question of data protection has arisen, for example, in the context of a written question which concerned a child abduction matter where a mother (a dual citizen of a member state and a state outside the Union) of the child concerned was accused before a court in the latter state of abducting her child. The text of the question alleged manipulation of the justice system of another member state, carried out by a family member of the father of the child, an official in the national administration concerned. In terms of the provisions of Regulation (EC) no. 45/2001, this question could therefore have been considered an excessive use of data, in terms of Article 4 of the Regulation in particular.

So to summarize, in view of the above, the first question that needs to be considered is whether Members of the European Parliament, in exercising their functions, enjoy an absolute (or qualified) privilege as regards the content of their utterances or whether they are subject to the provisions of Regulation (EC) no. 45/2001.

A further question is whether any privilege that a Member of the European Parliament enjoys in exercising his or her mandate extends to subsequent reporting of the Member's words, whether reported in the Official Journal or by other means, such as in a summary on the institution's Internet site.

In the case *Marra v. De Gregorio and Clemente*²⁸, which presents some parallels with *Stockdale v. Hansard*, the Court of Justice of the European Union has had to consider

²⁶ European Data Protection Supervisor, *Annual Report 2010* (Publications Office of the European Union, Luxembourg, 2011) 36. It should be pointed out that the facts of this case took place at a time before the Rules of Procedure of the European Parliament provided for authorisation of written declarations by the President.

²⁷ Regulation (EC) no. 45/2001, Article 3(1), OJ L 008/4

²⁸ Joined cases C-200/07 and C-201/07 *Marra v de Gregorio & Clemente* [2008] I-07929

the extent of the immunity of a Member of the European Parliament. The case concerned leaflets distributed by Alfonso Marra, at the time a Member of the European Parliament, which De Gregorio and Clemente considered defamed them.

The elements of defamation are given in article 595 of the Italian Criminal Code²⁹ as communicating with several persons and offending the reputation of another. Insult is covered by article 594.

The action for damages was successful at first instance and was upheld by the Naples appeal court. These two instances had taken the view that the distribution of the leaflet did not constitute part of Marra's parliamentary activities. On appeal to the Corte di cassazione (the Italian supreme court), Marra argued that the action for damages was in contravention of the European Parliament's Rules of Procedure, and that prior authorisation from the Parliament was a necessary precondition for the action. Marra had - successfully - requested the defence of his immunity before the Parliament. However, the Parliament's decision to defend his immunity was never communicated to the national courts. The Court of Justice held that in those circumstances, the national court is competent to rule on whether immunity applies. If, however, the national court is informed of a Member's request to Parliament to defend his immunity, it must stay proceedings and await Parliament's decision on the matter. This is a situation where there should be loyal co-operation between the national instance and the institution of the Union. The Court of Justice did not address the question of whether the leaflet distributed by Marra was an opinion expressed in the exercise of his parliamentary duties, as this was not the question put to it by the national court.

It can be concluded that the immunity which Members of the European Parliament enjoy under Article 8 of the Protocol on the Privileges and Immunities of the European Union is a procedural bar on actions which does not alter the unlawful nature of an act which would be actionable if performed by a non-Member. The substantively unlawful nature of such an act still subsists, even though the person aggrieved has no effective remedy.

This leads us to an important distinction between the facts in *Stockdale* and those in *Marra*. Alfonso Marra was distributing his own leaflets: the Parliament's printing and distribution service had no part in the matter.

In the United Kingdom, an important forum for libel litigation, the common law position has been amended by the Defamation Act 1996. This act specifically recognises material published by the European Parliament as attracting qualified privilege under the law of libel. To attract qualified privilege under section 9 of that Act the statement must comprise a "... *fair and accurate copy of or extract from a notice or other matter issued for the information of the public by or on behalf of (a) a legislature in any member State or the European Parliament . . .*"

It is clear from Rule 6 of the European Parliament's Rules of Procedure that the purpose behind immunity is to protect the functioning of the Parliament rather than to grant any personal advantage to the Member, which is why an individual Member may not renounce immunity (although the Member's consent is required for another Member to invoke immunity on his or her behalf). Immunity is in general not waived for misdemeanours of a political nature or where the prosecution appears to be seeking to hamper the exercise of the Member's mandate.³⁰ The defence of the integrity of the Parliament and the independence of Members are the goals sought.

It is interesting to consider whether a Member of the European Parliament would have been in danger of arrest if in receipt of leaked documents as was (allegedly)

²⁹ Codice penale, Gazzetta Ufficiale, 26 October 1930, no. 251

³⁰ Jacqué, *Droit institutionnel de l'Union européenne*, (6th edn, Dalloz, 2010) 256

Damian Green MP in 2008. The answer, counter-intuitive though it may be, is that a British MEP would be safe from arrest in any of the other Member States, but in danger of arrest in the United Kingdom. Article 9 of the Protocol on the Privileges and Immunities of the European Union provides that MEPs enjoy (during sessions) "*in the territory of their own State, the immunities accorded to members of their Parliament...*" while having "*immunity from any measure of detention and from legal proceedings...*"³¹ in any other Member State. Since there is in fact as we have seen no immunity in this sense for Members of the Westminster Parliament, a British MEP is paradoxically less safe from arrest in the United Kingdom than in any other Member State. Indeed, as recently as 22 February 2012, a British Member of the European Parliament was arrested by West Midlands Police on suspicion of conspiracy to defraud the European Parliament.³²

The fact that the protection of the functioning of the Parliament is the objective being sought has recently been illustrated in a reference for a preliminary ruling.³³ The case concerned criminal proceedings before the Tribunale di Isernia in Italy. A Member of the European Parliament, Mr Patriciello, was charged with making false accusations against a public official in the performance of her duties, an offence under Article 368 of the Italian criminal code. The Court of Justice, which considered the matter in the light of Article 8 of the Protocol, did in fact address the question of whether the remarks were made in the course of Mr Patriciello's parliamentary functions. It determined this by reference to the character and content of the utterance. The fact that it was made outside the premises of the European Parliament was not a determining factor in this context. In order to benefit from immunity, the statement made by a Member must amount to a subjective appraisal having a direct and obvious connection with the performance of parliamentary duties. This question was answered negatively in the instant case, the position of the European Parliament itself notwithstanding. The Court reiterated the position set out in *Marra* that there should be loyal cooperation between the national court and the European Parliament: this did not however imply any obligation on the national court to state its reasons for departing from the position of the Parliament.

So it is clear that the rationale for the immunity of Members of the European Parliament is to protect the functioning of the Parliament as an institution. What is less clear is whether this protection necessarily extends to subsequent reports of the utterances of Members. It would be unwise, in my view, for any newspaper editor, or indeed blogger, to assume that there is any special protection attached to reports of utterances in the European Parliament, except where this is specifically provided for under national legislation. Parliamentary immunity, while a necessary shield for the parliamentarian, constitutes impedance for a citizen who considers himself or herself wronged by an utterance. It sits a little uneasily with the right of access to the courts and indeed the principle of equal treatment under law.

³¹ OJ C 310/263

³² "MEP Nikki Sinclaire arrested in expenses probe" *The Daily Telegraph* (London, 23 February 2012)

³³ Case C-163/10 Judgment of the Court (Grand Chamber) of 6 September 2011 (not yet published in ECR)

9/11 AND SELF-DETERMINATION

*ELIZABETH CHADWICK**

ENOUGH! Enough pain, enough tears, enough suffering, enough control, limitations, unjust justifications, terror, torture, excuses, bombings, sleepless nights, dead civilians, black memories, bleak future, heart-aching present, disturbed politics, fanatic politicians, religious bullshit, enough incarceration! WE SAY STOP! This is not the future we want! We want to be free. We want to be able to live a normal life. We want peace. Is that too much to ask?¹

INTRODUCTION

The excerpt above originates from the group “Gaza Youth Breaks Out”, but the heartfelt plea it conveys reflects the pain, frustration and exasperation felt by many today around the world. While such discontent has no single cause, it is the purpose of this discussion to attribute much of it to the inequality endemic to many regions, but also, to the actions adopted by states in their collective reactions to the terrorist atrocities of 9/11. With 11 September 2001 – the day the Al-Qaeda-led terrorist attacks destroyed buildings and lives in New York, Washington, D.C., and Pennsylvania - many governments felt a renewed and urgent need to join together to co-operate in fighting against any and all violent non-state actors, no matter where located. In so doing, governments worldwide have indeed constructed a new era in post-Cold War political co-operation, and have transformed their state domestic anti-terror laws into political tools for use both at home and abroad. This collective pursuit by states of state-nominated violent actors has in turn helped to create what today appears to be an image of invincible state power, such that it now seems the United Nations would stop at little, if to do so would allow a “terrorist” threat (however defined) to endanger the existing map of states.

Inasmuch as states in the UN Charter era have agreed on their most basic purpose as the pursuit of international peace and security, the contemporary international order of states is underpinned by an equally strong principle of non-interference in the domestic affairs of each other. Despite this principle of non-interference, a degree of international scrutiny has long been turned to the democratic deficits and human rights records within each other’s domestic systems, but it did not take long before states sought to re-insure their own mutual survival by use of the new anti-terror tools put at their disposal at UN, international and trans-national levels. It can now be said that the former mutuality of democratic scrutiny, the search for “legitimacy” of many governments, and the institutional respect to be demonstrated for principles of equal human rights and the self-determination of peoples, are today much more easily disregarded, numbering among the first casualties of the post-9/11 anti-terror co-operation among states.² Instead, *any* state-nominated group or political opponent

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¹ Excerpt. Ana Carbajosa, ‘Gazan youth issue manifesto to vent their anger with all sides in the conflict’, The Observer (2 January 2011) <<http://www.guardian.co.uk/world/2011/jan/02/free-gaza-youth-manifesto-palestinian?INTCMP=SRCH>> last accessed 3 March 2012.

² See, e.g., the US Re-designation of Foreign Terrorist Organizations Act, 68 Fed Reg 56,860, 56,861 (2 October 2003); Elizabeth Chadwick, ‘The 2005 Terrorism Convention: A Flexible Step Too Far?’ [2007] 6(2) NLJ 29.

operating anywhere, including those seeking greater human rights and self-determination,³ can be criminalised without much further enquiry,⁴ and an already tense geo-political environment has been made more so, due in no small part to new anti-terror arrangements which incorporate Western-style regulatory frameworks foreign to many cultures.⁵

Internal civil unrest within states has been the result. On the basis that many internal state conflicts – although of course not all – are or will be fought for greater rights of self-determination, in the sense of non-discriminatory policies, public accountability, and an end to the exercise of arbitrary rule, the anti-Western sentiment represented by such groups as al Qaeda,⁶ and the social and political upheaval currently being unleashed throughout the Arab world and beyond,⁷ constitute separate testaments if any were needed that, in the decade since 9/11, old struggles can be re-ignited in certain states if driven by a new generation keen to pursue their own vision of a better life. Therefore, the purpose of Part One in this brief discussion is to highlight the political and economic linkages between the aftermath of 9/11 and the struggles for greater self-determination as are currently unfolding in the Middle East and elsewhere. Part Two concentrates on the efforts by states to contain the politics of self-determination in the aftermath of 9/11, while it is concluded that the repressive policies adopted collectively by states to stamp out “terrorism” may only have sewn the seeds of future “revolutionary” struggles.

STATE RESPONSES TO 9/11 AND NEW STRATEGIC CONSIDERATIONS

The linkages between 9/11 and the recent uprisings as in the “Arab Spring” can be traced on many levels. Commentators have remarked for years at the steady erosions in state sovereignty at the international level, particularly those caused by globalised market imperatives.⁸ While it is trite international relations theory to state that the structures and mechanisms of domestic state governance are in large part sourced in the need to control lives internally in order to project the nation externally, the unrelenting economic pressures currently being brought to bear by global capital markets are forcing many governments to re-double their efforts to maintain control over all inhabitants within state territorial borders. In turn, it is this writer’s view that

³ For example, see Case Comment, Keller and Sigron, ‘State security v. freedom of expression: legitimate fight against terrorism or suppression of political opposition?’ [2010] 10(1) HRLR 151; Alexandra Orlova, ‘Russia’s Anti-Money Laundering Regime: Law Enforcement Tool or Instrument of Domestic Control’ [2008] 11(3) J Money Laundering Control 210.

⁴ See, e.g., *Bouyahia Maher Ben Abdelaziz, et al. (Preliminary Enquiries)* [24 January 2005] Supreme Court of Cassation (Italy) <http://www.adh-geneva.ch/RULAC/pdf_state/Nourreddine.pdf last accessed 21 March 2012, regarding which see Lucia Aleni, ‘Distinguishing Terrorism from Wars of National Liberation in the Light of International Law: A View from Italian Courts’ [2008] 6 J IntCrim J 525; Antonio Cassese, ‘The multifaceted criminal notion of terrorism in international law’ [2006] 4(5) J IntCrim J 933.

⁵ See Rowan Bosworth-Davies, ‘The Influence of Christian Model Ideology in the Development of Anti-Money Laundering Compliance in the West and Its Impact, Post 9–11, Upon the South Asian Market: An Independent Evaluation of a Modern Phenomenon’ [2008] 11(2) J Money Laundering Control 179.

⁶ See Thomas Lauren Friedman, ‘The Bin Laden Decade’, *The New York Times* (31 May 2011) <http://www.nytimes.com/2011/06/01/opinion/01friedman.html?_r=1&sep=1&sq=%22The%20Bin%20Laden%20Decade%22&st=cse> last accessed 3 March 2012. See also A.P.V. Rogers and Dominic McGoldrick, ‘Assassination and targeted killing - the killing of Osama Bin Laden’ [2011] 60(3) ICLQ 778.

⁷ See, e.g., John M. Owen, IV, ‘Why Islamism is Winning’, *The New York Times* (6 January 2012) <<http://www.nytimes.com/2012/01/07/opinion/why-islamism-is-winning.html?sep=1&sq=%20Islamism%20is%20Winning%E2%80%99%20%20Owen&st=cse>> last accessed 3 March 2012.

⁸ Commentary, Hutton, ‘We could be leading’, *The Observer* (5 June 2011) 9. See also Wendy Brown, *Walled States, Waning Sovereignty* (Zone Books 2010).

the aftermath of 9/11 has further compounded this erosion in state sovereignty, due largely to the impact on daily life of the many new mandatory anti-terror obligations imposed on states at the international level, e.g., those requiring states to adopt more repressive legislation, to tighten bank scrutiny, to prevent terrorist funding, and many others, particularly those obligations imposed by the UN Security Council.⁹ Nonetheless, many stresses have not been due so much to the new rules as to the particular interpretations of those new rules which certain states have chosen to adopt, thereby causing an accelerating development from a pre-existing “military-industrial complex” into a global “security-industrial” one.¹⁰

Evidence that 9/11 has entrenched a “security-industrial complex” mounts daily as state sovereignty shrinks at the international level, for the following reasons. In order for states to control their populations internally, they are obligated to prevent “international terrorism”. The causation this implies means that states must monitor their populations, particularly in terms of the physical and economic mobility of people either within or beyond state borders should opportunities such as employment arise. This monitoring process presents gargantuan challenges for many governments in terms of the overall capacity of existing state infrastructures to ascertain who is and is not present legally. Nonetheless, onerous challenges of governance present new opportunities for private industry, particularly those commercial concerns which specialise in developing and/or maintaining people-monitoring technologies. Population monitoring tasks lead many governments to out-source such day-to-day regulatory operations commercially to the private sector – which hands over a high level of surveillance capability otherwise reserved solely to governments. Many states, particularly in the developed world, have long been content to create entire privatised sectors of the economy in this way, but one crucial concern is thereby posed for the public at large: public-private co-operation in security matters transfers entire areas of public accountability into the secret realms of “commercial confidentiality”.¹¹

Once governments choose to rely on corporate interests, e.g., to invest in, to develop, and to strengthen the ever-expanding safeguards deemed necessary for “national security”, the corporate world expands, and can grow to encompass external security matters such as em-/immigration and border checks, and the regulation and management of prisons, police functions, tax collection, education, health, and so on. Precautions deemed necessary to ensure the health and safety of the population at large encourage the development of ever more sophisticated “compliance control” cultures, in the sense of data mining, credit reference agencies, and so on, which equally can be out-sourced to private concerns by any government desiring to amass any and all information to satisfy international demands for the “terrorist” (and criminal) profiling projects ostensibly required today at UN, international, and regional levels. Nonetheless, within the context of the huge expense necessitated at individual state level by the regulatory and anti-“terror” frameworks devised in the aftermath of 9/11, the public is told repeatedly there is “no choice”, particularly as contracting-out and/or the privatisation of public goods and services will save taxpayer expense.

⁹ Most notably, see UNSC Resolutions 1373 (28 September 2001) on Threats to International Peace and Security Caused by Terrorist Acts, UN Doc S/RES/1373 (2001), and 1566 (8 October 2004), UN Doc S/RES/1566 (2004), concerning the same topic. See also Michael Levi, ‘Combating the financing of terrorism: a history and assessment of the control of ‘threat finance’ [2010] 50(4) BrJCrIm 650.

¹⁰ Notably, see Colin Bennett and Kevin Haggerty (eds.), *Security Games: Surveillance and Control at Mega-Events* (Routledge 2011).

¹¹ See, e.g., Solomon Hughes, *War on Terror, Inc.: Corporate Profiteering from the Politics of Fear* (Verso 2007); Clive Walker and Dave Whyte, ‘Contracting out War? Private Military Companies, Law and Regulation in the UK’ [2005] 54 ICLQ 651.

Of course, the UN Security Council in Resolution 1373 (2001) created not only a highly bureaucratic compliance and enforcement system which has plagued many states with needless paper chasing, and bureaucratic stress;¹² it also emphasised a high degree of inter-state peer pressure, i.e., a pressure which forces states to strive individually to be seen to comply with international anti-“terror” regulatory measures – measures which notionally must out-rank or trump equally important issues in domestic state governance. Such externally-imposed obligations can generate huge apprehension in any state unfortunate enough to miss one or other enforcement or compliance target, due to the danger that that state could find itself named on an international “watch” or “black list”. While corporate interests always seem to be available to contribute “solutions” to such recalcitrant states (including by the provision of private soldiers and/or security personnel and/or the installation and upkeep of technological security systems which make more efficient the “know your client” or financial tracing capacities), the demands made on states to utilise corporate services in this way increases their debt burdens and carries a risk of further entrenching the deep economic disparities which already exist between the first and third worlds, whilst simultaneously disrupting the cultural and financial traditions of many regions.

As was recognised by the drafters of the 1999 UN International Convention for the Suppression of the Financing of Terrorism,¹³ too close a surveillance over the global movements of capital can interfere with legitimate financial transactions,¹⁴ yet the new anti-terror arrangements have contributed very little if anything to the reform of globally weak financial instruments which allegedly caused today’s turmoil in credit markets in the first place. The initial shock of 9/11 may by now have worn off, but the rapid development of public-private synergies in the related fields of security and defence have done little to preserve the public sphere, in contrast to the private sphere, against the demands of post-credit crunch austerities, which has caused the further erosion of state sovereignty externally, and public accountability in internal state affairs. In turn, the increase in number alone of “homeland defence” powers which are controlled today by private interests at multiple levels makes it quite clear that the penetration of corporate power over individual lives and livelihoods can scarcely be distinguished from that power once considered the preserve of states alone.¹⁵

The price of 9/11 has thus been high, in more ways than one - an observation that brings matters back to the longer term pressures placed on states at the international level - pressures which are as capable of massaging flexibility from states as are those exerted by private security concerns, such as Interpol,¹⁶ when the time arrives to negotiate extradition formalities, and/or the requisite state consent to the extra-territorial reach of another state’s criminal, or financial, laws.¹⁷ Hughes is one commentator who has noted that the aftermath of 9/11 has been highly profitable for some:

¹² UNSC Resolution 1373, *supra* note 9. See also Security Council Counter-Terrorism Committee, Mandate and Documents <<http://www.un.org/en/sc/ctc/>> last accessed 3 March 2012. Omer Yousif Elagab, ‘Control of Terrorist Funds and the Banking System’, [2006] 21(1) *Journal of International Banking Law & Regulation* 38.

¹³ UNTC Ch. XVIII No. 11, adopted by the General Assembly of the United Nations in Resolution 54/109 of 9 December 1999 (entered into force 10 April 2002). Preamble para 6 calls for regulatory measures “to prevent and counteract movements of funds suspected to be intended for terrorist purposes without impeding in any way the freedom of legitimate capital movements”.

¹⁴ See Bosworth-Davies, *supra* note 5.

¹⁵ See, e.g., David G. Barnum, ‘Warrantless Electronic Surveillance in National Security Cases: Lessons from America’ [2006] 5 *EHRLR* 514.

¹⁶ For example, UNSC Resolution 1699 (8 August 2006), on General Issues relating to Sanctions, extended the role of Interpol in anti-terror matters <http://www.un.org/Docs/sc/unscl_resolutions06.htm> last accessed on 3 March 2012.

¹⁷ See, e.g., the UK’s Landsbanki Freezing Order 2008, No. 2668.

In January 2003 investors were invited to give their cash to men who promised they could make big profits from the aftermath of the terrorist attacks of 11 September 2001. Potential shareholders were told that the war on terror ‘offer[s] substantial promise for homeland security investment’...Uniquely, this new application of force depended heavily on private companies: from the wars in the Middle East to the databases and systems of detention at home, the new weapons in the ‘war on terror’ were both supplied and operated by corporations.¹⁸

The quotation above is not included for purposes of arguing there is no place for private enterprise in state security matters – far from it. It is employed instead to illustrate how the incentives offered to corporate chancers have facilitated speculation as to how official investigatory powers could be broadened in the face of crisis against “suspect” persons, whilst inflated and imaginative terrorist “possibilities” could simultaneously be devised. Moreover, although it is true that governments have always sought financing for their quarrels and defence needs from private interests, even when doing so is likely to place the national economy under enormous strain for years to come, it is also the case that official misuse of public money has always occurred.¹⁹ In similar vein, the global circulation of investment capital shares many characteristics with money laundering, particularly as cash that starts as “clean” can easily become quite “dirty”, and *vice versa*.²⁰ However, wherever market finance can be sought from a global financial system in crisis – and secured to prop up corrupt, dictatorial and/or unresponsive governments – the outbreak of civil unrest cannot be far behind. Accordingly, the rush to commence a “war against terror” after 9/11 not only transformed global capital into a highly effective political player in state decision-making; it also widened yet further “a corrupted [and privatised] divide between internal and external policing and between the police and the military”.²¹

The Middle East for example has long had a reputation for dictatorial governments and institutional disdain of ordinary people.²² The region has the added challenges of radical Islam, a huge population gap between the (few) old and (many) young, and high levels of unemployment. Individual gun ownership is widespread in many areas,²³ while street protests and resistance politics remain the only viable options for most to engage in public life. More widely, socioeconomic inequality has not hindered a growing generation gap in the use of new technology. For this reason alone, “national” (in the narrow sense) security experts have for some time been concerned regarding the so-called “dual use” communications technologies such as the Internet, inasmuch as technological “virtual” worlds make it more difficult to distinguish between “legitimate” and “terrorist” communications, and corporeal and capital movements. Even more problematic (and, fraught with interpretational bias) is the distinction between “terrorists”, and “ordinary” persons who may be merely aggrieved at their lack or loss of personal freedom and autonomy, the frequent security checks, the threat posed by criminal profiling, tighter restrictions on movement, etc., but who are at least able to move online and network with new acquaintances both at home and abroad.

¹⁸ Hughes, *supra* note 11, at 1 and 5.

¹⁹ See, e.g., Chris Harding, ‘The Offence of Belonging: Capturing Participation in Organised Crime’ [2005] CrimLR 690

²⁰ Elagab, *supra* note 12.

²¹ Brown, *supra* note 8, at 25. Of further interest, see Jyoti Belur, ‘Why do the police use deadly force? Explaining police encounters in Mumbai’ [2010] 50(3) BrJCrim 320.

²² Jack Shenker, ‘Scratching away Mubarak’s legacy, one map at a time’, *The Saturday Guardian* (21 May 2011) 24, citing comments by Heba Morayet, an Egyptian human rights activist.

²³ See, e.g., Ian Black, and Shatha Al-Harazi, ‘Attempt to kill president as Yemen slides towards civil war’, *The Saturday Guardian* (4 June 2011) 1, 4.

As state elites consolidate and co-ordinate their sovereign and security flexibilities, devise ever more draconian “anti-terror” legislation and people-controls, and even arrest and prosecute “terrorist” criminals and political opponents *before* any “crimes” have occurred,²⁴ the survival of any governments which have never bothered to devote time or thought to public accountabilities merely adds to an impression of legal impunity, if not immunity.²⁵ Crony capitalism, failed neo-liberal economic policies, botched privatisations, cosy armaments deals, and the manufacturing of “fear-politics”, have all taken their toll on the daily lives of individuals in the post-9/11 environment, such that in structural economic terms, much of the world today remains unemployed, undernourished, and destitute, and exists in over-populated lands where disease is rampant, life expectancy, low, and education, non-existent.²⁶ Oppressive governments continue to rule their populations through psychological sabotage or infantilising policies, and until recently, would no doubt have been rewarded by the international community for maintaining “international peace and security”. However, even the incessant rhetoric, e.g., of stability over freedom, in the decade since 9/11 has not prevented many governments from confronting a groundswell of domestic revolt.

NEW CONTEXTS FOR SELF-DETERMINATION

It would be hugely ironic if from the rubble of 9/11 a new and collective form of inter-state psychosis has grown which today induces many governments to travel to the dangerous crossroads of self-determination, even though rights to self-determination have never been without controversy, due in large part to the phrase itself and the many questions it begs, e.g., who or what is the “self” wishing to “determine” itself? Given a measure of content initially during the League of Nations era, largely in the form of Minorities Treaties, the right of self-determination acquired more substance in 1945 in the UN Charter.²⁷ Nonetheless, the victorious powers of World War 2 did not believe the phrase pertained to their own colonies and non-self-governing territories, but attempted instead to confine the right strictly within an anti-colonial framework aimed at breaking up the trading empires of their former enemies.²⁸ Despite this initial focus, the UN General Assembly supported the right of “all” peoples to their self-determination throughout the anti-colonial era, and peoples inhabiting lands administered by the victors themselves, as well as those never having inhabited colonial lands at all, quickly demanded their right to participate in choosing their form of governance.²⁹

Internal armed conflicts – many for self-determination - would eventually comprise nearly 80% of all conflicts between 1945 and 1977, yet the 1949 Geneva Conventions for the protection of the victims of war only made provision for non-international armed conflicts in Article 3 common to the four Conventions, which article merely extends minimal humanitarian protections to persons taking no part in the hostilities.

²⁴ See Jude McCulloch and Sharon Pickering, ‘Pre-crime and counter-terrorism: imagining future crime in the “war on terror”’ [2005] 49(5) BrJCrIm 628; Keller and Sigron, *supra* note 3.

²⁵ For example, see the list of dubious activities in recent years of what is now called “Xe Services”, ‘Times Topics: Blackwater Worldwide’, *The New York Times* (25 April 2011) <http://topics.nytimes.com/top/news/business/companies/blackwater_usa/index.html?scp=1&sq=Blackwater%20%20%22Times%20Topics%22&st=cse> last accessed 3 March 2012.

²⁶ See, e.g., Mark Duffield, ‘Global Civil War: The Non-Insured, International Containment and Post-Interventionary Society’ [2008] 21(2) JRefStud 145, at section entitled ‘The Strategic Nature of Development’.

²⁷ UN Charter Articles 1(2) and 55.

²⁸ See Edward A. Laing, ‘The Norm of Self-Determination, 1941–1991’ [1992] 22 CalifWestern IntLJ 209, at 216 – 220.

²⁹ Examples of which are provided in Mark Weller, *Escaping the Self-determination Trap* (Martinus Nijhoff Publishers 2008).

The early synergies developed by the UN General Assembly, particularly by developing and (former) socialist states, for self-determination were thus fundamental in the 1960s and 1970s to elevating liberation wars (at least in theory) into international armed conflicts.³⁰ Even though the use of armed force by a non-state “people” struggling for their self-determination had always been characterised by a threatened government as “terrorism”,³¹ due to the diplomatic embarrassment of admitting a lack of domestic control, once the UNGA approved the right of peoples to use “*all available means*” to achieve their self-determination in Resolutions 3070 (XXVIII) of 30 November 1973, and 3246 (XXIX) of 29 November 1974, it was not difficult to imagine what the words “all available means” might mean in terms of the use of armed force. Pejorative government labels attached to liberation tactics thus only encouraged the international community by 1977 to modernise International Humanitarian Law (IHL): Additional Protocol 1 of 1977 supplements the rules for international armed conflicts and extends those rules to certain liberation struggles, while Additional Protocol 2 of the same year does this for certain internal armed conflicts not having such pronounced “liberation” characteristics.

Modernising humanitarian law instruments did not however facilitate a new government willingness to comply with the rules. Even though Additional Protocol 1 Article 1(4) extends IHL in full to “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination”, the legal status of liberation fighters and of the territorial area over which they struggle cannot be altered merely by the objective fact of an armed conflict; there must first emerge a clear victor for that to occur. Article 4 of the Protocol states that

The application of the Conventions and of this Protocol . . . shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.

Equally, the legal status of “insurgent combatant” in internal wars does not exist, so as not to encourage “bandits” and “terrorists”. As the modernisation of rules for use in internal armed conflicts continues to be restrained by such governmental concerns, the applicability of Protocol 2 is quite strict, specifically excluding “internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature”.³² Protocol 2 is applicable only to conflicts which occur within state territory between a government and dissident armed forces (not between such groups), while the insurgents must demonstrate responsible command, a measure of territorial control, and the ability to implement the Protocol. Most crucially, as Protocol 2 Article 3 mandates that the state remains responsible for re-establishing law and order, nothing in the Protocol is to be used to justify intervention by third states in the conflict.

On a more promising note, the vast majority of former colonies and non-self-governing territories have by now had an opportunity to exercise their UN Charter

³⁰ See also Sadia Tabassum, ‘Combatants, not bandits: the status of rebels in Islamic law’ [31 March 2011] 881 IntRevRedCross, accessed at <http://www.icrc.org/eng/resources/documents/article/review-2011/irrc-881-tabassum.htm>.

³¹ See, e.g., Raphaële Branche, ‘Torture of terrorists? Use of torture in a “war against terrorism”: justifications, methods and effects: the case of France in Algeria, 1954–1962’ [30 September 2007] 867 IntRevRedCross, accessed at <http://www.icrc.org/eng/resources/documents/article/review/review-867-p543.htm>.

³² Additional Protocol 2 of 1977 Article 1.

right of self-determination, but many new and unexpected “liberation” conflicts - having nothing to do with colonialism - continue to utilise the rhetoric of self-determination in their struggles for associated rights entitlements. For example, many persons involved in the Yugoslav dissolution wars of the 1990s, including most recently in Kosovo, referred throughout to rights of self-determination, as have those engaged in the recurring armed conflicts in Chechnya and Algeria. The recent declaration of independence by Kosovo’s (non-colonial) majority Albanian population rests upon the notion of their “right” as a “people” to self-determination.³³ For this reason, the efforts made in the late 1970s to create a pathway for the international regulation of “civil” wars, including those for self-determination, is instructive, as was the approach initially adopted by the International Committee of the Red Cross (ICRC) to the interpretation of the right to self-determination, as referred to in Additional Protocol 1 Article 1(4).

The ICRC’s view in 1977 when sponsoring Protocol 1 Article 1(4) was straightforward and non-political: it considered that self-determination is a right of any “people” sharing certain human values and a political will to live together.³⁴ In contrast, this open-ended approach has been forgotten since 9/11, as states return to “the very old trend of resorting to the notion of ‘terrorism’ to stigmatise political, ethnic, regional or other movements they simply do not like”.³⁵ Otherwise, with the “anti-colonial” agenda today largely a footnote in history, any lingering sense of “imperial responsibility” for human existence in the former colonies is largely dissipated, in preference for mutually beneficial economic arrangements. Inasmuch as self-determination continues to be a highly adaptable right and a strong principle for guiding a people towards greater autonomy and control over their political, economic and cultural lives, the action adopted more recently by states in solidarity against “terror” appears merely retrograde, particularly by muddying the self-determination and “terrorist” waters.³⁶ In other words, as all states can arrest and prosecute members of a group in the post-9/11 era once one state tags that group as “terrorists”, there is even less reason today for official attention to be paid to the grievances within a population.

In strictly legal terms “armed conflict” and “terrorism” are quite separate phenomena,³⁷ but state decision makers find the disregard of IHL obligations far too useful, preferring to utilise their own domestic rules for deterring “terror” (however defined).³⁸ Efforts by many liberation actors to utilise organised and responsible force, and to

³³ ‘Full text: Kosovo Declaration’, BBC (17 February 2008) <<http://news.bbc.co.uk/1/hi/world/europe/7249677.stm>> last accessed 3 March 2012.

³⁴ Yves Sandoz, Christophe Swinarski, and Bruno Zimmermann, *Commentary on the Additional Protocols of 8 June 1977* (Martinus Nijhoff Publishers 1987), at 52.

³⁵ Report of the Special Rapporteur, ‘Promotion and Protection of Human Rights’, Commission on Human Rights, 62nd session, agenda item 17, UN Doc E/CN.4/2006/98, para 56(a). See also UNSC Resolution 1566 of 8 October 2004, Article 9: “Decides to establish a working group consisting of all members of the Security Council to consider and submit recommendations to the Council on practical measures to be imposed upon individuals, groups or entities involved in or associated with terrorist activities, other than those designated by the Al-Qaeda/Taliban Sanctions Committee, including more effective procedures considered to be appropriate for bringing them to justice through prosecution or extradition, freezing of their financial assets, preventing their movement through the territories of Member States, preventing supply to them of all types of arms and related material, and on the procedures for implementing these measures; . . .”.

³⁶ Compare Isabel Kershner, ‘Israeli Soldiers Shoot at Protesters on Syrian Border’, The New York Times (5 June 2011) <http://www.nytimes.com/2011/06/06/world/middleeast/06_mideast.html?scp=1&sq=Kershner%20%22Israeli%20Soldiers%20Shoot%20at%20Protesters%20on%0Syrian%20Border%22&st=cse> last accessed 3 March 2012.

³⁷ See the analysis of the meaning of “armed conflict” by the International Law Association’s Use of Force Committee: ‘Final Report on the Meaning of Armed Conflict in International Law’, submitted to the 74th ILA Annual Conference (The Hague, 15 – 20 August 2010) <<http://www.ila-hq.org/en/committees/draft-committee-reports-the-hague-2010.cfm>> last accessed 3 March 2012.

³⁸ For example, the US over-turned its 1976 ban on political assassination in 2001. See, e.g., Scott Shane, ‘US Approves Targeted Killing of American Cleric’, The New York Times (6 April 2010) <<http://www.nytimes.com/2010/04/07/world/middleeast/07yemen.html?scp=1&sq=Shane%20%22US%20approves%20targeted%20killing%22&st=cse>> last accessed 3 March 2012.

remain faithful to the spirit, if not always the letter of IHL,³⁹ mean laws of armed conflict are likely to be ignored by governments which downgrade the human rights standards of their citizens, place sectors of the community under heightened suspicion, and prosecute political opponents. For instance, should a citizen who happens to be Muslim join an anti-vivisection demonstration staged without official permission, it becomes possible to construct religious affiliation as an aggravating factor. This makes it far too easy in the decade since 9/11 for governments to sanction any multi-faceted opposition, whether or not there is a reasonable suspicion of “terrorism”, while the very over-use in official circles of such terms as “terror”, “terrorism”, and “terrorist” makes a mockery of the personal sacrifices and risks run every day by persons who act in pursuit of their democratic rights, as well as those who place themselves at great personal risk by distancing their “causes” from al-Qaeda inspiration.⁴⁰

Ever since the fall of the Berlin Wall in late 1989, it has been evident that regime change and/or revolution can be achieved “peacefully”, and without undue loss of life, but the readiness of governments to utilise force against their populations – often with impunity – makes it less likely that peaceful means can effect real change. The deep conflict between autocratic and democratic values is also mirrored at UN level in the continuing disunity regarding the draft Comprehensive Terrorism Convention.⁴¹ As the devising of a “universal” definition of terrorism continues to elude finalisation by the Organisation, doubt remains whether a “global” definition of terrorism is even useful. If so, there is controversy over whether the draft convention should include or exclude liberation acts in its characterisations of terrorism. Such continuing disunity despite 9/11 thus underscores that the security-industrial complex deepened by 9/11 remains entrenched within public-private synergies which states are encouraged to exploit competitively. Equally, so long as the securitisation by states of the military instrument remains firmly in place, a principle of self-determination, while lacking hard substance, retains much useful flexibility.⁴²

It is in other words the very indeterminacy of the Charter right of self-determination that provides the underlying principles of the right with the mutually-reinforcing keys of human flexibility and tolerance. Although it has been noted elsewhere that “a revolution’s consequences need not follow from its causes”,⁴³ and while it is likely that new patrons of self-determination “causes” will continue to emerge, those struggles which are unfolding or have ended - and in particular, in predominantly Muslim countries such as Bosnia, Chechnya, Algeria, and Kosovo, alongside the spread of radical Islam - should not be viewed as wars fought purely for religion. Al-Qaeda “spokespersons” in their hysterical ramblings may if they wish continue to take credit for any and all uprisings in Muslim countries around the world,⁴⁴ just as the winners

³⁹ See, e.g., Jason Burke, Declan Walsh, and Paul Harris, who note that the use of terror-methods appears to be diminishing: ‘In focus: the end of Osama’, *The Observer* (8 May 2011) 27, 29.

⁴⁰ Insight, Meleagrou-Hitchens, ‘Al-Qaeda interpretations of the Libyan Uprising’ (The International Centre for the Study of Radicalisation April 2011) <<http://icsr.info/newsletters.php>> last accessed 3 March 2012. See also Liz Alderman, ‘Aid Pledge by Group of 8 to Bolster Arab Democracy’, *The New York Times* (27 May 2011) <http://www.nytimes.com/2011/05/28/world/europe/28_g8.html?scp=1&sq=Alderman,%20%E2%80%98Aid%20Pledge%20by%20Group%20of%208%20&st=cse> last accessed 3 March 2012.

⁴¹ See ‘Background, etc., Draft comprehensive convention on international terrorism’, accessed at ‘Inventory of International Non-proliferation Organizations and Regimes, Center for Non-proliferation Studies (last updated 10 May 2010), <http://cns.miis.edu/inventory/pdfs/intlterr.pdf>> last accessed 3 March 2012.

⁴² The International Court of Justice avoided questions on this topic when considering the legality of the Kosovan Declaration, *supra* note 33, in *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Advisory Opinion)* [22 July 2010] ICJ General List No. 141 (2008) <<http://www.icj-cij.org/docket/files/141/15987.pdf>> last accessed 3 March 2012.

⁴³ Owen, *supra* note 7.

⁴⁴ Meleagrou-Hitchens, *supra* note 40.

in the recent electoral contests across Tunisia and Egypt for example may indeed come from religious parties, but this is to be expected, and sits squarely within the meaning and import of the phrase “self-determination” – as a right to determine the self. Nonetheless, “victory for the people” can so easily become factional, as in-fighting breaks out to achieve “victory” for “some” people, so the following note is understandably sobering:

Bin Laden may be gone but one of his legacies is a hugely greater degree of polarisation across the Middle East. Though violence has been rejected, a rigorous interpretation of Islam and deeply conservative identities, customs and worldviews are now much more widespread than they were previously. Levels of anti-Americanism are also at recent historic highs. This is particularly true in Pakistan.⁴⁵

While the quotation above signals more a symptom than a cause of deep and widespread discontent, the Manifesto statement of “Gazan Youth Breaks Out”, as highlighted earlier and as follows, surely reflects the fact that so many of the governed appear simply to have “had enough”:

We are sick of being caught in this political struggle; sick of coal-dark nights with airplanes circling above our homes; sick of innocent farmers getting shot in the buffer zone because they are taking care of their lands; sick of bearded guys walking around with their guns abusing their power, beating up or incarcerating young people demonstrating for what they believe in; sick of the wall of shame that separates us from the rest of our country and keeps us imprisoned in a stamp-sized piece of land; sick of being portrayed as terrorists, home-made fanatics with explosives in our pockets and evil in our eyes; sick of the indifference we meet from the international community, the so-called experts in expressing concerns and drafting resolutions but cowards in enforcing anything they agree on. . .⁴⁶

CONCLUSION

The over-arching obligations of states to each other in the UN Charter era are essentially in place in order to maintain “international peace and security”, but in recent years, the importance of “security” in international relations has seemingly trumped that of “peace” – that is, unless peace is construed merely as an absence of war, which in terms of relevant legal frameworks, is unlikely to be waged against “terrorists” in any event.⁴⁷ Although it was acknowledged early in a “realistic” Charter era that ideological differences had to be tolerated, as did tribal politics, sovereign independence, official discretion, and state control of the military instrument, the counter-forces of equal rights and the self-determination of peoples were also put in place to encourage governments to speak to and of their responsibility to govern with representative and non-discriminatory “legitimacy”, as well as in order that everyone has a right to be protected equally *from* his or her government. Nonetheless, omitted from the Charter is any direct reference to international law as the primary legal yardstick for Organisational decision-making,⁴⁸ which gap has become glaringly obvious today in the context of the overly-broad, anti-terror agenda.

⁴⁵ *Ibid.*

⁴⁶ Carbajosa, *supra* note 1.

⁴⁷ See the full discussion on this point by the ILA Use of Force Committee, *supra* note 37.

⁴⁸ As was included in the League of Nations Covenant. Leo Gross, ‘The Charter of the United Nations and the Lodge Reservations’ [1947] 41 AJIL 531, 538 – 544. Instead, there is only UN Charter Article 103.

As the relationship between government and the governed comes to depend increasingly on new and technologically-driven forms of mutual mistrust, the meaning and import of state sovereignty and individual human rights are each likely to shrink, changing and transforming the reasons why and how power is to be distributed in the world. As existing disparities between the first and third worlds are further entrenched by a strengthening corporate grip on the “global” securitisation of individual life, the current over-emphasis in certain political circles on the survival of an existing map of states is likely to produce its own weaknesses, even. For these reasons, the inherent conditionalities which exist within both international and internal contexts of peace and security are such that the politics of self-determination will doubtless continue to inspire until they are no longer needed.

A SUMMARY OF THE DEVELOPMENTS IN THE REFORM OF THE HOUSE OF LORDS SINCE 2005

MARK RYAN*

INTRODUCTION

In May 2011 the Deputy Prime Minister unveiled a White Paper on completing the reform of the House of Lords which included a draft House of Lords Reform Bill.¹ This was the third White Paper on the reform of the House of Lords that had been issued in four years and followed on from the White Papers issued by the previous Labour Government in 2007 and 2008. The origin of the 2011 White Paper lay in the May 2010 Coalition Agreement's programme for political reform which included proposals for reforming the House of Lords.² In announcing this latest White Paper (which, like its predecessors, proposed to introduce the principle of democratic elections into the second chamber), the Deputy Prime Minister argued that "People have a right to choose their representatives. That is the most basic feature of a modern democracy."³ This article is the first of two which will consider the various proposals to reform the House of Lords in recent years. This first article will chart the key developments and context of the three White Papers as a precursor to a more detailed comparison of them, together with an examination of more recent developments.

THE 2007 WHITE PAPER

In 2005 the Labour Government was re-elected with a manifesto commitment to continue with the reform of the House of Lords.⁴ In particular, it promised to remove the remaining hereditary peers and enable a free parliamentary vote to take place on how the reformed second chamber should be composed. In addition, following a review by a parliamentary joint committee, agreement would be sought on the codification of the constitutional conventions which regulate the House of Lords. In due course, therefore, in May 2006 Parliament established the Joint Committee on Conventions which reported at the end of that year. This report set out its formulations of these conventions, but did not recommend that they should be codified.⁵ In February 2007 the Government unveiled its third White Paper⁶ on Lords reform, adding to those issued previously by it in 1999⁷ and 2001⁸ (rather optimistically, the latter had been entitled *Completing the Reform*).

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¹ Cabinet Office, *House of Lords Reform Draft Bill* (Cm 8077, 2011).

² Cabinet Office, *The Coalition: our programme for Government* (2010) 27.

³ Nick Clegg MP, HC Deb 17 May 2011, vol 528, col 155.

⁴ "Britain *forward* not back" (Labour Party, 2005) 110.

⁵ Joint Committee on Conventions, *Conventions of the UK Parliament* (First Report) (2005–2006, Volume 1, HL 265-I, HC 1212-I) 4–5.

⁶ *The House of Lords: Reform* (Cm 7027, 2007).

⁷ *Modernising Parliament - Reforming the House of Lords* (Cm 4183, 1999).

⁸ *House of Lords, Completing the Reform* (Cm 5291, 2001). In addition, in 2003 the Government issued a Consultation Paper DCA, *Constitutional Reform: Next Steps for the House of Lords* (CP 14/03, 2003).

The purpose of the 2007 White Paper was to set the context for the parliamentary votes which were scheduled to take place in March 2007 on the future composition of a fully reformed second chamber. The Paper set out the principles which the Government contended should underpin any reformed second chamber (irrespective of the composition finally agreed upon). These principles were: firstly, that the primacy of the Commons should be retained. Secondly, the second chamber should complement the lower House (thereby being distinctive in terms of its membership). Thirdly, the House should be more democratically legitimate than at present. Fourthly, there should be no overall majority in the chamber for any political party. Fifthly, the reformed chamber should contain an independent (i.e. non-party political) element. Sixthly, the House should be more representative and, lastly, it should have a continuity of members. The Paper then reviewed the different types of possible membership of a fully reformed House (i.e., wholly appointed, wholly elected or hybrid).

In terms of composition, the White Paper proposed a hybrid option. This was on the basis that in a modern democracy it was difficult to justify an upper chamber with a complete absence of any elected members. The 2007 Paper, rather surprisingly, suggested that once a hybrid House had bedded down, it would always be open to Parliament to decide whether the proportions were still appropriate. The difficulty with this, of course, is that it implied that a hybrid House was an inherently unstable constitutional settlement. As a working illustrative model, the White Paper put forward a 50% elected House (Jack Straw viewed this proportion as a figure around which a consensus of opinion might gravitate).⁹ The model envisaged that elected members would be elected by the partially open list system using the large multi-member constituencies adopted for elections to the European Parliament. Elections would be staggered with members being elected in thirds every five years in tandem with European Parliamentary elections. The appointed element would comprise a combination of independent/non-party political and party-political members (20% and 30% of the House, respectively). Appointments would (effectively) be made by a statutory Appointments Commission which would be independent of Government, but accountable to Parliament. Appointments would be made in thirds in concert with the elected members. The House would retain the Church of England Bishops (albeit a reduced number) and hereditary membership of the House would end. The overall size of the chamber would number 540 with both elected and appointed members serving long, non-renewable fixed terms of 15 years. It was accepted (quite wisely) that there would be a long transitional period in order to realise the completion of a fully reformed second chamber.

In March 2007 both Houses of Parliament voted on the different options for future composition.¹⁰ These models ranged from a fully appointed option through to a wholly elected option, together with five varying hybrids in-between¹¹ and were the same as those voted on in the previous parliamentary votes on Lords reform held in February 2003.¹² The House of Commons endorsed both the wholly elected option (with a majority of 113 votes)¹³ and the 80% elected option (by 38 votes),¹⁴ whilst rejecting all

⁹ HC Deb 6 March 2007, vol 457, col 1393.

¹⁰ For an analysis of these votes in Parliament see Mark Ryan, "A consensus on the reform of the House of Lords?" (2009) 60 NILQ 325.

¹¹ These were: 80% appointed/20% elected, 60% appointed/40% elected, 50% appointed/50% elected, 40% appointed/60% elected and 20% appointed/80% elected.

¹² For a consideration of the 2003 debates and votes see Mark Ryan, "Parliament and the Joint Committee on House of Lords reform" (2003) 37 *The Law Teacher* 310 and Iain McLean, Arthur Spirling and Meg Russell, "None of the Above: The UK House of Commons Votes on Reforming the House of Lords, February 2003" (2003) 74 *Political Quarterly* 298.

¹³ HC Deb 7 March 2007, vol 457, col 1623.

¹⁴ *ibid* col 1619.

other five models. In two additional votes exclusive to the Commons, MPs rejected unicameralism (by 253 votes)¹⁵ and voted to remove the hereditary peers (by 280 votes).¹⁶ One week later the House of Lords voted by a majority of 240 in favour of a fully appointed House¹⁷ and rejected decisively the other options.

THE 2008 WHITE PAPER

A few months after these parliamentary votes, the Labour Government made it clear in its Green Paper *The Governance of Britain*,¹⁸ that it intended to proceed with reform on the basis of the votes cast in the House of Commons (the ultimate demonstration of the primacy of the Commons) and in July 2008 issued another White Paper.¹⁹ The Paper stated that widespread consensus already existed in relation to the role of the upper House (viz., scrutinising legislation, holding the executive to account and undertaking investigations). There does indeed appear to be a general consensus around these ascribed roles. The Paper also asserted that the principle of retaining the primacy of the Commons was “acknowledged as beyond debate.”²⁰ As the proposals in the 2008 White Paper were framed in the context of the votes cast in the Commons, only two models for a fully reformed chamber were on offer: either a wholly or an 80% elected House. The Government, rather interestingly, made no attempt to indicate a preference between them on the basis that *both* options had been approved (albeit of course with majorities of different strengths). This is despite the fact that the two options are contradictory – one is hybrid whilst the other is an absolutist model. In other words, they represent fundamentally different constitutional propositions. It is perhaps regrettable therefore, that the Government did not indicate expressly, or at least give a clearer steer to Parliament and the wider public, which of the two options it viewed as preferable.

In terms of composition, the White Paper indicated that since 2000, there had been a widespread consensus that elected members should serve (normally) a term of 12–15 years which would be non-renewable. The Paper argued that for the purposes of determining composition, the following four principles were important: that the elected representative basis of membership should be different from that of the Commons, members should serve long terms and bring an independent judgement to bear. Finally, membership should take account of the prevailing political views in the country, but also enable the representation of minority and independent views. The Paper proposed that elections would be staggered (in tandem with elections to the Commons) with members serving the equivalent of three electoral cycles. According to the Government, the use of large multi-member constituencies could help to ensure that the House was distinctive and also reduce any constituency conflict with MPs. Although the Government argued that any elections should be direct rather than indirect, it failed to put forward its preferred electoral system. In fact, the Paper conceded, rather unsurprisingly, that there was no general consensus within the Cross-Party Group talks (which preceded the Paper) about which system to adopt. For example, whereas the Conservatives advocated First Past The Post, the Liberal Democrats favoured the

¹⁵ *ibid* col 1601.

¹⁶ *ibid* col 1632.

¹⁷ HL Deb 14 March 2007, vol 690, col 742.

¹⁸ Ministry of Justice, *The Governance of Britain* (Cm 7170, 2007) 42.

¹⁹ Ministry of Justice, *An Elected Second Chamber: Further reform of the House of Lords* (Cm 7438, 2008).

²⁰ *ibid* 4.

Single Transferable Vote. Although the Paper was silent as to the Government's own preference, it sought views on the following systems: First Past The Post, Alternative Vote, STV or a list system (open or semi-open).²¹ One problem clouding the issue of the electoral system is that although the House of Commons voted for elections, the term had not been particularised so as to specify exactly what 'elections' meant.

In the context of an 80% elected House, the Paper proposed that appointed members would serve, like their elected counterparts, a non-renewable term comprising three electoral cycles. The Government viewed (quite rightly) that the key advantage for having any appointed element was so as to retain an independent/cross-bench element. One clear benefit of a 20% appointed element is that it could help to achieve the principle – on which there appears to be a general consensus – that no one political party should enjoy an overall majority of seats. The 2008 Paper proposed a statutory Appointments Commission and also recommended the retention of a reduced number of Bishops (however, they would not form part of a fully elected House). The remaining hereditary peers would leave, although there was no specific recommendation as to timing. The Paper stated that during the transition to a reformed House the hereditary by-elections (to fill vacancies left by hereditary peers who had died) would be abolished. Finally, in order to achieve a fully reformed House, the Paper proposed that there would need to be a long transitional period (there appears to be a general consensus on this aspect of reform).

The 2008 White Paper stated that in terms of the "Next steps" for Lords reform, it was the intention of the Government to formulate as a manifesto commitment "a comprehensive package of reform" which could be put before the people at the next General Election.²² Notwithstanding this, in June 2009 the Prime Minister in a statement on constitutional renewal asserted that "The Government will come forward with published proposals for the final stage of House of Lords reform", including the next steps to resolve the issue of the hereditary peers and other matters.²³ The subsequent reform proposals which formed part of the Constitutional Reform and Governance Bill unveiled by Jack Straw in July 2009, however, proved to be rather more limited in scope than those promised. In brief, the Bill proposed *inter alia* to end hereditary by-elections, provide for the removal of members in certain circumstances (e.g. following bankruptcy or conviction for a serious criminal offence) and enable members to resign. Finally, at the Committee Stage of the Bill in the Commons, a Part was added which would have the effect of treating both MPs and peers as deemed resident and domiciled in the United Kingdom for tax purposes. Although during the passage of the Bill the Government claimed that draft clauses designed to achieve fundamental reform of the Lords would be published,²⁴ these never materialised.

In April 2010, as a result of the General Election being called, the Constitutional Reform and Governance Bill slipped into the uncertainties of the wash up process which involved frantic negotiations taking place in order to determine which remaining legislative measures would make it onto the statute book. The wash up negotiations were particularly devastating for the Bill as many of its provisions were excised, including the provisions concerning the House of Lords. The exceptions were the tax provisions (now sections 41 and 42 of the Act) which clearly had cross-party consensus.

²¹ *An Elected Second Chamber: Further reform of the House of Lords* (n 19) 5 & 38. In fact, the Paper projected different possible compositions of the House using extrapolations from each electoral system (see pp 24–37 and Annex 2). The Paper did concede that this modelling was necessarily an artificial process.

²² *ibid*, para 1.9.

²³ Gordon Brown MP, HC Deb 10 June 2009, vol 493, col 798.

²⁴ For example, see Michael Wills, the Minister of State, Ministry of Justice: HC Deb 26 January 2010, vol 504, col 742.

As a result, any reform of the House of Lords, other than in relation to tax, would therefore have to wait until after the 2010 General Election.

THE 2011 WHITE PAPER AND DRAFT BILL

In terms of the manifestos for the 2010 General Election, all three of the main political parties proposed to reform the composition of the House of Lords. Both Labour²⁵ and the Liberal Democrats²⁶ pledged to introduce a fully elected House (albeit the former proposed this after a national referendum had taken place). The Conservatives instead proposed to work towards a consensus on a mainly elected upper House.²⁷ In other words, all three manifesto commitments were consistent with the two votes carried in the House of Commons in March 2007 which had endorsed both a largely and a wholly elected House. The inconclusive 2010 General Election resulted in a Coalition Conservative/ Liberal Democrat Government which in May 2010 stated in its Coalition Agreement that it would “establish a committee to bring forward proposals for a wholly or mainly elected upper chamber on the basis of proportional representation. The committee will come forward with a draft motion by December 2010.”²⁸ Accordingly, in June 2010 a cross-party committee headed by the Deputy Prime Minister was established, although it was not until a year later, in May 2011, that he unveiled a White Paper (*not* a motion) which included a draft House of Lords Reform Bill. Baroness Royall of Blaisdon pointedly insisted however that the draft Bill was “a stand-alone Bill - a coalition Bill.”²⁹ Shortly afterwards, in July 2011 a joint committee comprising 13 peers and 13 MPs (chaired by Lord Richard) was established to examine the draft Bill and was scheduled to report in late April 2012. The expectation, thereafter, was for the Government to introduce a fully-fledged Reform Bill in the 2012–13 session of Parliament in order that the first tranche of elections could take place to the second chamber in 2015.

The Government’s draft House of Lords Reform Bill hardly made for an authoritative and decisive document as in places it was hedged with reservations. In fairness, the Government did make the point in the White Paper that the Bill was a draft (for the purposes of pre-legislative scrutiny) and so was not necessarily definitive. The Government proposed no change to the powers of the House and, rather interestingly, inserted a ‘general saving’ clause (clause 2) in the draft Bill. This stated that the legislation did not affect the primacy of the House of Commons (clause 2(1)(b)) or affect the conventions which govern the relationship between the two Houses (clause 2(1)(c)). This is notwithstanding the earlier conclusion of the 2006 Joint Committee on Conventions that its findings concerning the conventions of the House were confined to the current arrangements of the House. As a result, they would have to be examined again in the context of a different constitutional landscape (i.e. if the House of Lords acquired an electoral mandate).³⁰

Clause 1(3) set out a hybrid chamber comprising a combination of 240 elected members with 60 appointed members (supplemented by Bishops and any ministers). The Government, however, made it clear that it welcomed views on whether the

²⁵ “A future fair for all, The Labour Party manifesto 2010” (Labour Party, 2010) 9.4.

²⁶ “Change that works for you, Liberal Democrat manifesto 2010” (Liberal Democrats, 2010) 88.

²⁷ “Invitation to join the Government of Britain, The Conservative manifesto 2010” (Conservative Party, 2010) 67.

²⁸ *The Coalition: our programme for Government* (n 2).

²⁹ HL Deb 21 June 2011, vol 728, col 1160.

³⁰ *Conventions of the UK Parliament* (n 5) para 61.

composition should instead be wholly elected and that the Bill could be adapted to accommodate this. Elected members would serve for single, non-renewable terms which according to the Government would help enhance their independence and reinforce their distinctiveness from their counterparts in the Commons. The term would amount to “three normal Parliaments”³¹ (albeit technically three electoral periods under clause 6). Since the publication of the draft Bill, the issue of variable parliamentary terms has now been regularised with the enactment in September 2011 of the Fixed-term Parliaments Act 2011 which creates, in effect, fixed terms of five years (however not necessarily in all cases as early elections can still be triggered).³² Elections to the House of Lords would take place at the time of general elections to the Commons (clause 4) and be staggered so that one third (i.e. 80 “ordinary elected members”) would be elected at a time (clause 5). Although the electoral system set out in clause 7(3) was the Single Transferable Vote System, this was seemingly not prescriptive, as although the Government reaffirmed that it was committed to proportional representation, it recognised the case for other proportional systems. The particular advantage of STV advanced by the Government was that it would provide elected representatives with a “personal mandate”³³ with votes cast for specific candidates as opposed to a party. In addition, constituencies would involve large ‘electoral districts’ which according to the White Paper would be closer in size to the areas used for elections to the European Parliament, rather than to the Commons. The draft Bill did not list the electoral districts (Schedule 1) or the number of ordinary elected members which would be returned from each district (Schedule 2).

In terms of appointments, 20 “ordinary appointed members” (clause 18) would be nominated by a statutory House of Lords Appointments Commission (established under Clause 16 and Schedule 4). In constitutional terms, technically, the Commission would recommend members to the Prime Minister who in turn would recommend them to Her Majesty for appointment (clause 18(2)–(5)). Ordinary appointed members would be appointed in thirds at the point of the election of the 80 ordinary elected members (clause 18(1)). Their terms would be the same as for the elected members, comprising three electoral periods (clause 19). The work of the Commission would be overseen by a newly created Joint Committee on the House of Lords Appointments Commission (Clause 17 and Schedule 5). The chamber figure of 300 (as proposed in the White Paper) would not include the *ex officio* Archbishops and Bishops (reduced to a maximum of 12 - clause 1(3)(c)). It would also not include any ministers termed “ministerial members” appointed by the Queen on the recommendation of the Prime Minister (clause 34). The draft Bill proposed a lengthy transitional period comprising two electoral periods (clauses 1 and 3) beginning with the first elections to the House, at which point, a maximum of two thirds of existing peers would be retained for the “first transitional period”. This was, however, not prescriptive as the White Paper set out two other transitional options. Moreover, the draft Bill (no doubt understandably out of deference that the House should decide this for itself) did not set out the selection process for determining which existing peers would be chosen to remain temporarily to act as “transitional members” (clause 35 and schedule 6) during the transition to a fully reformed House. Instead, this would be determined in accordance with House of Lords Standing Orders (Schedule 6). This “grandfathering” system of transitional members had been foreshadowed in the Coalition Agreement and its purpose is to enable experience to be transferred to the new members and for the

³¹ *House of Lords Reform Draft Bill* (n 1) 13.

³² Mark Ryan, “The Fixed-term Parliaments Act 2011” [2012] PL 213.

³³ *House of Lords Reform Draft Bill* (n 1) 14.

chamber to function effectively during the transitional period. The White Paper was clear, however, that all transitional members would be removed at the time of the third House of Lords election. In terms of the hereditary peers, the draft Bill provided for the repeal of the House of Lords Act 1999 and the abolition of hereditary by-elections (Schedule 8).

CONCLUSION

Finally, it is pertinent to take note that in parallel with the Coalition Government's draft Bill and long term objective of implementing fundamental reform, Lord Steel of Aikwood has attempted to achieve more modest reforms of the House. His Private Member's Bill (House of Lords (Amendment) Bill) proposed, *inter alia*, to expel members following a conviction for a serious criminal offence and provide for permanent leave of absence by application or compulsion (the latter in the event of a failure to attend the House). This Bill, which had already passed through the House of Lords, was scheduled to have its Second Reading in the Commons in late April 2012, shortly before the 2010–12 session ended. The interim and secondary reforms set out in Lord Steel's Bill would undoubtedly help in the short term to reduce the ever-burgeoning size of the chamber, which by March 2012 had mushroomed to 786³⁴ and had become a cause for concern. Indeed, only a year earlier in April 2011, a Constitution Unit report called for a moratorium on appointments to the Lords until the chamber fell below 750.³⁵ In light of the history of failed House of Lords reforms, it may be prudent for the Coalition Government to consider the recommendation made in April 2011 by the Political and Constitutional Reform Committee. This was that notwithstanding the objective of long term reform, the Government nevertheless needed to consider urgent incremental reforms to improve the functioning of the current House. This was because the Government "needs to ensure that the country is not left with a bloated, dysfunctional upper House if radical reform were to stall."³⁶

³⁴ <http://www.parliament.uk/mps-lords-and-offices/lords/lords-by-type-and-party/> accessed 1 April 2012

³⁵ Meg Russell, *House Full: Time to get a grip on Lords Appointments* (The Constitution Unit UCL, April 2011) 5.

³⁶ House of Commons Political and Constitutional Reform Committee, *Seminar on the House of Lords: Outcomes* (Seventh Report) (2010–2012, HC 961) 4.

THEMATIC ARTICLES

FEATURED THEME: RESTORATIVE JUSTICE

The expansion of restorative justice in recent years has been nothing short of remarkable, with its potential benefits being increasingly acknowledged by scholars, practitioners and policymakers in the criminal justice arena and beyond. To this end, Nottingham Law School and Durham Law School hosted a joint conference in April 2011 on the theme of *Restorative Justice: Building Consensus In Theory and Practice*. The two-day conference, which was supported by Higher Education Innovation Funding, sought to provide a forum for practitioners and academics to share ideas and learn from their mutual experiences. The four articles contained in this edition of the Journal were first presented as papers at that conference, and together they reflect some of the core themes and ideas that emerged over the course of the two days.

In the first article, David Cornwell considers the numbers crisis which has beset the English penal system for some years. Arguing that policymakers have become 'grid-locked in an obsessive preoccupation with punishing their way out of a situation', he calls for sentencing policy to be reconceived according to a 'restorative ethic' along similar lines as the Finnish experience. In conclusion, Cornwell concludes that punishment and restoration 'are far from being mutually exclusive imperatives within criminal justice' and calls for an end to the public's tolerance of 'a conflict style of political and governmental behaviour obsessed with quick fixes in response to ill-considered and vociferous media pressure.'

Next, David O'Mahony evaluates the extent to which restorative justice has penetrated the youth justice arena in England and Wales. The author surveys a range of recent developments in the youth justice system, which, he notes, have largely been confined to diversionary applications designed to deal with low-level or first-time offenders. Drawing on research evidence from other jurisdictions, O'Mahony is broadly critical of the approach adopted. In particular, he laments the fact that – despite much enthusiastic political rhetoric – restorative justice in the youth arena remains very much underdeveloped.

The third article provides a useful comparative perspective from overseas. Kerry Clamp traces the recent growth of restorative justice in the Czech Republic. Arguing that greater attention needs to be afforded to historical and cultural factors when considering the development of restorative justice, the author illustrates how criminal justice reform was engineered following the Velvet Revolution of 1989. Noting the lack of any corresponding 'punitive turn' within Czech society, Clamp considers the role of social, political, economic and legal factors in the development of restorative justice policy.

Finally, in 'Restorative Justice as Social Justice', Belinda Hopkins offers a fascinating practitioner's insight into the application of restorative justice in educational settings. Although educational settings are the focus of the author's own experiences, she

advocates that restorative justice values are capable of being applied through society generally. For Hopkins, they hold the potential to equip individuals with ‘a set of tools for ensuring greater social justice in every aspect of our lives’.

PROFESSOR JONATHAN DOAK
Durham University

THE NEED FOR CORRECTIONAL LOGIC: ARE PUNISHMENT AND RESTORATION MUTUALLY EXCLUSIVE IMPERATIVES IN CRIMINAL JUSTICE?

DAVID J. CORNWELL*

All this was lost on Alice, who was still looking intently along the road, shading her eyes with one hand. “I see somebody now!” she exclaimed at last. “But he’s coming very slowly – and what curious attitudes he goes into!” (For the Messenger kept skipping up and down and wriggling like an eel as he came along, with his great hands spread out like fans on either side).

“Not at all” said the King. “He’s an Anglo-Saxon Messenger – and those are Anglo-Saxon attitudes. He only does them when he’s happy. His name is Haigha.” (He pronounced it to rhyme with ‘mayor’).

Lewis Carroll (1871), *Through the Looking Glass and What Alice Found There*, Chapter 7

BACKGROUND CONSIDERATIONS

Within many contemporary democracies throughout the world, criminal justice systems display symptoms of crisis: that of England and Wales is no exception, although the extent of its particular *malaise* is wider and deeper than that of many other countries. All too frequently, and such is certainly the case in England and Wales, these ‘systems’ are distinctly un-systematic, rather more resembling collectives of state or regional functions tasked with the maintenance of public order and security, but without a common purpose at the core of their activities. The crises may have different points of origin – historical, cultural, fiscal, political, socio-economic – singly or more frequently in combination, but both the crises and the symptoms display a marked extent of commonality.

In a presentational sense these crises are most frequently of ‘numbers’¹, of political ideology², of ‘conditions’³, and ultimately, therefore, of ‘legitimacy’⁴ (see, for example,

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¹ The number of persons at any stage of being processed within criminal justice agencies, and in particular ‘custodial numbers’ indicating the number of persons held in prison custody or other forms of detention in relation to offences either alleged or for which they have been convicted by the courts.

² In circumstances in which, as in England and Wales at the present time, the main political parties pursue ideologies and policies heavily shaped by media attitudes towards crime and its punishment, and the supposed responses of ‘public opinion’ towards offenders expressed in voting patterns in national and regional elections.

³ In particular prison conditions and the extent to which custodial establishments are crowded beyond authorised levels of occupation for which these were designed and constructed, thus reducing the extent to which constructive regimes can be delivered on a reliable daily basis.

⁴ The term ‘legitimacy’ intended to be understood here implies the extent to which it can be claimed that both custodial and non-custodial sanctions demonstrably meet the primary purposes of reducing rates of re-offending, and in assisting offenders to lead law-abiding lives within their communities as a result of sanctions being imposed. Put another way, perhaps, the term relates to the ‘operational credibility’ of criminal justice systems as the means of crime control and the reduction of recidivism.

Cavadino and Dignan, 1997; Fitzgerald and Sim, 1982)⁵. The term ‘corrections’ within criminal justice has attracted a usage that is widely understood to encompass both the systemic *characteristics* of the agencies employed by governments to control crime and reduce re-offending, and also the *processes* by which these purposes are implemented. Thus the crises may be either of a structural origin or of an operational nature, and the most severe of these crises may be said to display symptoms of both.

Criminal justice agencies in England and Wales presently face both a structural crisis of a ‘top-down’ nature and an operational crisis of a ‘bottom-up’ one. The structural crisis resides in the evident uncertainty within the incumbent Coalition government⁶ over the ultimate direction of criminal justice policy, particularly in relation to the judiciary and sentencing in an era of fiscal retrenchment and a prison population threatening to overspill total accommodation levels without overcrowding. From a ‘bottom-up’ perspective, at an average daily level of more than 85,000 inmates, the present prison population remains at or around the absolute maximum level of occupancy permitted, bearing in mind the differing accommodation needs of male and females, and of different classes of prisoners (e.g. convicted and un-convicted or un-sentenced). Occupancy levels also have to take into account prisoners on temporary release on parole or under Home Detention Curfew conditions, and who are liable to immediate recall to custody in the event of breaching the conditions of their release or committing further offences.

Remarkably, this ‘bottom-up’ crisis has occurred during a period of years (since 1991) during which there has been an overall 11.6% *reduction* in the number of persons found guilty of offences by the courts, and, in particular, a 9.3% *reduction* in the number found guilty of indictable offences by the Crown Courts.⁷ However, during the same period there has occurred a 14% *increase* (from 8.1 to 9.3 months) in the average time served in prison by those released from determinate (fixed term) sentences, and a 50% *increase* in the proportion of persons serving indeterminate sentences (life or imprisonment for public protection – IPP). In addition, there has also become evident an increase in the average time spent in custody by those serving mandatory life sentences from 13 years in 1999 to 17.5 years in 2009.

To make matters even worse within the custodial sector of the penal system, following enactment of legislation within the Criminal Justice Act 2003 affecting serious violent and/or sexual offences committed after 1st April 2004, the sentence of IPP became available to the Crown Courts. By June 2010 there were 6,189 prisoners serving such sentences, 2,468 of whom in January 2010 were serving beyond their ‘tariff’ expiry date.⁸ 466 of these persons in February 2010, were two years or more beyond their tariff expiry dates (Prison Reform Trust, 2010)⁹.

Finally insofar as the ‘crisis of numbers’ is concerned, it is appropriate to note that in 1992–3 the average daily prison population of England and Wales stood at 44,628, and that by mid-2010 this figure had risen to almost 85,000 (including almost 600

⁵ See M. Cavadino and J. Dignan, *The Penal System*, (1997, 2nd edn, SAGE Publications) at pp 8–31, and M. Fitzgerald and J. Sim, *British Prisons*, (1982, 2nd edn, Basil Blackwell) at pp 23–4.

⁶ Formed following the General Election of May 2010 from an alliance between the Conservative Party led by David Cameron without an overall majority in the House of Commons, and the third-placed Liberal Democrat party led by Nick Clegg to provide a working majority.

⁷ Indictable offences include murder, manslaughter, rape, arson, false imprisonment (kidnapping), causing grievous bodily harm with intent, robbery, aggravated burglary, blackmail and conspiracy which are triable only on indictment in the Crown Courts, and certain other offences deemed ‘triable either way’ in Magistrates’ or Crown Courts depending upon mode of trial decisions as to seriousness. The latter offences include causing actual bodily harm, deception, fraud, high-cost criminal damage, lesser burglary, and the possession or supply of certain drugs.

⁸ Such is to say the period of time in custody deemed by the courts as necessary to meet the requirements of retribution and deterrence in relation to the seriousness of offences, and expressed in years and months.

⁹ Prison Reform Trust, *Bromley Briefings: Prison Factfile* (2010 (July), Prison Reform Trust) at pp 3–4.

persons held in the Immigration Removal Centres operated by the National Offender Management Service (NOMS)). This represents an increase of almost 90.5% in the number of citizens that the courts of England and Wales have deemed it necessary to incarcerate over less than two decades in pursuit of law and order policies and public protection. It also represents an imprisonment rate of 154 per 100,000 of our population compared with that of France with its population of similar size at 96 per 100,000, and Germany with 20 million greater population where the rate stands at 88 per 100,000 (ICPS, 2010)¹⁰.

Such behaviour cannot be separated from its inevitable costs, and prisons are extremely expensive places to build, maintain and operate. The average annual cost per adult prisoner place (*exclusive* of healthcare and education expenditure funded separately) in 2009–10 was just over £45,000, and some £60,000 in establishments holding young offenders (House of Commons, 2010: c1251W of 3 March; House of Commons, 2010: c1018 of 15 October). Moreover, the average construction cost of providing new prison places (not all newly built) but *exclusive* of running costs has been estimated as £170,000 per place across the anticipated lifetime of the accommodation (House of Commons, 2009: c141W of 12 October).

Yet measured in terms of outcomes, prisons (and young offender institutions) are not only highly expensive but also, and perhaps more importantly, significantly inefficient other than as a means of denying offenders their liberty. Until recently, re-offending rates have been measured (albeit with dubious accuracy) on the basis of re-conviction in the courts within two years of discharge from custody or completion of a community sanction. This method of analysis has recently been revised by the Ministry of Justice to estimate the “percentage of offenders discharged from custody between January and March [annually] who are re-convicted at court within one year”. In the cases of juveniles the basis of calculation is broadly the same, but includes receiving a reprimand or warning in addition.

The first Compendium of Re-Offending Statistics and Analysis indicates a re-conviction rate of 40.1% for adults and 37.3% for juveniles within twelve months (Ministry of Justice, 2010)¹¹, but these figures need to be treated with considerable caution. Deeper in the text of the Compendium and in the commentary on it compiled by the Prison Reform Trust we read that “49% of adults are re-convicted within one year of being released, and for those serving sentences of less than twelve months this increases to 61%”. For those who have served more than ten previous custodial sentences the rate of re-offending rises to 79%, and 74% of children released from custody in 2008 re-offended within a year (Prison Reform Trust, 2010)¹². While evidently there is a significant difference between re-offending and re-conviction, the resulting confusion requires clarification before these statistics can be accepted as reliable.

As if this were not dismal reading enough, a recent Report by the National Audit Office (NAO) includes the broad statement that “based on previous work done by the Home Office, we estimate that, in 2007–8, re-offending by all recent ex-prisoners cost the economy between £9.5billion and £13billion, and that as much as three-quarters of this cost can be attributed to former short-sentenced prisoners: some £7billion to £10billion a year” (NAO, 2010).¹³

¹⁰ International Centre for Prison Studies, www.kcl.ac.uk/schools/law/research/icps, (King’s College, 2010).

¹¹ Ministry of Justice, *Compendium of Re-offending Statistics and Analysis: Results from the 2008 Cohort* (2010 (March), Ministry of Justice) *passim*,

¹² Prison Reform Trust (2010), *op cit* n.9, at p 5.

¹³ National Audit Office, *Managing Offenders on Short Custodial Sentences*, (2010 (March), NAO), at p 4.

Now, all of this is presently accommodated in pursuit of penal policies conceived to deliver crime control grounded in belief (however misguided) in the efficacy of criminal punishment based upon retribution and deterrence, that “Prison Works” to quote a former Home Secretary¹⁴, and in adherence to the ‘tough on crime’ mantra that has characterised the essential nature of penal policies in England and Wales for almost two decades past. It is a ‘punitive obsession’ that has proved similarly persuasive in the United States of America and some other countries with equally disastrous outcomes, but which has yet been rejected most emphatically in Scandinavia and by certain other nations whose cultures are less intolerant and more socially focused or communitarian than our own.

This punitive obsession, besides being ill-conceived, is non-accidental, led to a spending of £4.38 billion in 2009–10 (or 2.5% of GDP), and in an era of fiscal retrenchment in public service expenditure is unsustainable. However, as Michael Tonry has so aptly pointed out: “the bottom line is that current policies, political rhetoric and punishment patterns are as they are because politicians, however motivated, wished it so” (Tonry, 2003)¹⁵. As responsible citizens we should at the least question these motivations, and consider seriously other ways of ‘doing justice better’.

THE INGREDIENTS OF RETRIBUTIVE PUNITIVISM

The criminal justice policy-makers of England and Wales, like so many of their counterparts throughout the world, have become grid-locked in an obsessive preoccupation with punishing their way out of a situation in which ‘crime control’ has become the dominant ideological consideration for governments seeking to retain electoral credibility. The tough on crime mantra seemingly cannot be challenged or diluted because to do so publicly would be tantamount to electoral suicide.

The reasons for this situation are deeply rooted in a national psyche that has been conditioned to believe that serious crime is more prevalent than it actually is; by the widely held misconception that crime rates are continually increasing; and that crime control measures expressed in sentencing¹⁶ are too lenient on offenders. Though there is clear and unequivocal evidence that crime rates have been falling widely and consistently throughout Western Europe since 1995¹⁷, and that the likelihood of the average citizen becoming a victim of violent crime has diminished markedly (by more than 24%) over the same period, these misconceptions remain embedded in the public consciousness (see: Tonry, 2003; Garland, 2001; Maruna and King, 2004)¹⁸. Why, then, this Anglo-Saxon obsession with criminal punishment: whose obsession is it: and where does it lead? If these questions can be answered we may be able to discern the basis for a ‘correctional logic’.

¹⁴ The statement of Michael Howard MP (then Home Secretary) to the Conservative Party Conference in October 1993, and that “he did not flinch from measures which would increase the prison population”.

¹⁵ M. Tonry (ed), *Confronting Crime: Crime Control Policy Under New Labour* (2003, Willan Publishing), at p 6.

¹⁶ In particular the sentencing preferences demonstrated by the courts in dealing with what are perceived to be serious offences such as robbery, burglary, rape and other offences that threaten personal security and property.

¹⁷ With some notable exceptions such as non-injurious forms of violence and robbery. See: Cornwell (2007) *op cit*, at pp 19–20.

¹⁸ Here, see: M. Tonry (ed) (2003) *op cit* n.15, at pp 2–5, and also: D. Garland, *The Culture of Control* (2002, Oxford University Press) at pp 143–4, and S. Maruna and A. King, ‘Public Opinion and Community Penalties’ in A. Bottoms, S. Rex and G. Robinson (eds), *Alternatives to Prison: Options for an Insecure Society* (2004, Willan Publishing) at pp 254–5.

Here it is of interest to note that in Britain from the middle of the Twelfth Century (during the reign of Henry II who was William the Conqueror's grandson) two significant shifts of emphasis occurred within the field of criminal law and justice. Prior to that period, there was a well-established understanding of crime as a victim-offender conflict within the context of the community. Resolution of these conflicts was understood to lie in an expectation that the offender would make amends to the victim through reparation and reconciliation, repairing as best as possible any harm done to the satisfaction of the community within which both parties resided (Quinn, 1998; Jackson, 1940, and see in particular Umbreit *et al.*, 2005)¹⁹.

Prior to 1154, Henry I had issued a royal decree securing the State's jurisdiction over certain prevalent offences such as robbery, arson, murder, theft, and other crimes of violence. Henry II subsequently ensured that these offences were to be tried by common law juries and subsequently by travelling Justices of Assize, and by magistrates appointed for the sole purpose of securing the King's Peace, and whose punitive powers were broadly enshrined in the new common law. Though this initiative was designed to protect the interests of the wealthy and powerful Earls and Barons from the depredations of the common people, and the Sovereign's majesty from the depredations of both, it subsequently backfired in a most curious way. Those who through intransigence or inability to make reparation were condemned to execution or outlawry, and the latter, in particular, roamed the country at large – singly or in bands – causing untold disruption to the common 'weal', and beyond the immediate jurisdiction of the communities to which they had originally belonged. To make matters worse, the apprehension and summary killing of outlaws became the praiseworthy duty of the law-abiding citizenry.

The Anglo-Saxon common law (as opposed to the former Roman and civil laws) having been established and implemented through a network of Assizes controlled from Westminster in London, the power of the Sovereign over the feudal hierarchy of the nobility and landowning class was ensured to a marked extent, and reinforced by a draconian array of penalties for non-compliance with royal dicta.²⁰ The corollary of this was, however, the centralisation of state power to dispense justice, and a shift away from the traditional (and communitarian) concept of the offender: victim reparative relationship towards a notion of offences being committed against the state and its laws. We shall return to this critical transition in later discussion.

Successive British monarchs throughout the Middle Ages, and subsequently into the Seventeenth and Eighteenth Centuries, wielded considerable personal power and authority. But, like their earlier predecessors, they never succeeded in de-limiting the power of the Church in matters relating to doctrinal jurisprudence and the implementation of canon law. This resulted in fearful atrocities being perpetrated upon victims of accusations 'investigated' by inquisitorial officials, and in the name of retribution for their alleged misdemeanours. Punishments for criminal offences, many of which were of a relatively minor nature such as poaching, theft and non-payment of rent or dues were both brutal and barbaric, visited upon both offenders and those dependent upon them *pour encourager les autres*.²¹

¹⁹ M.S. Umbreit, B. Vos, R.B. Coates and E. Lightfoot, 'Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls' (2005) *Marquette Law Review*, vol 89, no 2, at pp 254–5, and also: T. Quinn, 'Restorative Justice: An Interview with Visiting Fellow Thomas Quinn' (1998) 235 *NAT'L INST. JUST. J.* 10, 11, and R.M. Jackson, *Machinery of Justice in England* (1940, Cambridge University Press), J.R. Spencer (ed) (1989).

²⁰ These penalties included forfeiture of estates and titles in the event that the nobility defaulted in their responsibilities and liabilities for paying taxes, military service, the provision of knights and their training for combat in the Sovereign's service, etc.

²¹ Following Voltaire's much quoted remark in *Candide* that "in this country [France] we find it pays to shoot an admiral from time to time to encourage the others".

Within our own contemporary society we live in what is frequently described as the post-modern era,²² in which disparities of wealth and opportunity remain considerable in spite of social welfare provision designed to reduce abject poverty to minimum levels. In a criminological sense, however, social control measures designed to ensure the compliance of the citizenry with required standards of normative behaviour are ever-present, technologically complex and highly intrusive. Camera surveillance within our towns and cities is more intensive than that found in most Western-style democracies, and frequently concealed so that we are unaware of its presence.

Yet ours is an increasingly acquisitive society that emphasises differences of wealth and status in almost every aspect of our lives. Our incomes, houses and the furnishings within them, our clothing and accessories, motor vehicles, recreational habits, selection of shopping venues and educational access for our children, and even means of personal inter-communication, are all assumed indicators of status, relative affluence and material prosperity. And like the land-owning nobility of feudal times we strive to protect our material possessions from the depredations of others, and the state tacitly encourages this status preservation with ever-increasing volumes of laws, penalties and prohibitions. The tough on crime mantra of the mid-1990s is but a symbolic expression of this status preservation, almost entirely overlooking the need to be tough on the causes of crime.

The tough on crime agenda stems from a curious cause and effect situation that exists within our post-modern society which is dominated by an immensely influential and powerful media. This media, in the forms of newspaper and television journalism, penetrates every aspect of our daily lives, and is highly invasive of our cultural perspectives. However, in order to survive in an extremely competitive marketplace, it has to attract and retain its audiences and meet their cultural expectations in terms of presentation and appeal, editorial policy, social alignment, and, ultimately, of credibility and political orientation. Crime reportage as a social phenomenon that has almost universal appeal to these audiences has therefore to compete in this competitive marketplace, and consequently the journalistic 'virtues' of investigative persistence, revelation, cognitive impact, sensationalism and salaciousness are critical to success.

Serious crime reportage both appals and enthrals the public consciousness and its sentiments: it cries out for the perpetrators of atrocity to be hunted down, brought to 'justice', publicly humiliated and severely punished. It cries out also in impotent sympathy for the victim and close others affected by the crime as gestures of compassion and humanity. But the resolution of the wrong rests with the due course of law.

The punitive and retributive instincts of the tough on crime mantra have discernible (if often unintended) consequences. Alleged increases in reported crime lead to governmental concern in relation to crime control, to questioning of the credibility of the judiciary in relation to sentencing leniency, and to a public perception that the threat of victimisation is increased. Out of a need to be seen to react, governments respond with hastily conceived and enhanced crime control legislation, and provisions for increased severity in sentencing as a palliative to increased demands for public protection. Increased sentencing severity leads inexorably to the crisis of numbers in the prisons, to offenders being merely incarcerated but neither reformed nor rehabilitated,

²² A period which is widely described in a criminological context as extending from that following upon the decline of the rehabilitative ethic in the mid-1970s to the present time within the philosophical, political, artistic and musical areas of cultural life. The post-World War 1 and immediately post-World War 2 eras until the rise of 'post-modernism' are similarly described as 'modern' or 'modernistic' (see, for example, Garland, (2002) *op cit* n.18, at pp 40-41, and A.E. Bottoms, 'The Philosophy and Politics of Punishment and Sentencing' in C. Clark and R. Morgan (eds), *The Politics of Sentencing Reform* (1995, Clarendon Press).

and thus to increased recidivism on release from custody. And so the cycle is repeated as they re-offend, are re-incarcerated, and the self-fulfilling prophecy is completed.

But the law in its detachment and impartiality is unsentimental and indifferent in these circumstances. As Anatole France once famously observed, “the law in its majestic equality forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.”²³ It is this very Anglo-Saxon detachment combined with the illogical pursuit of predominantly retributive and deterrent justice that leads us into the final part of this discussion.

THE CASE FOR A RESTORATIVE ETHIC

The post-World War 2 history of British criminal justice makes for depressing reading as earlier discussion has made clear, but criticism alone is insufficient if the prevailing situation is to be halted and reversed. Moreover, as the title of this inquiry indicates, our search is for a correctional logic that will provide us with a more effective system of justice in the future. This much stated, however, it is entirely fanciful to suggest the slaughter of an entire sacred herd in order to remedy the symptomatic defects of one or a few of its members. It is similarly fanciful and inappropriate to enter into a state of denial that wrongdoing does not deserve appropriate sanction, but appropriate sanctions should be considerate, constructive and corrective of illegal behaviour.

Correctional logic demands that whatever we do in the name of justice delivers outcomes that enhance the potential for law-abiding behaviour while at the same time reducing the impact of repetitive offending within our society. But ever since the demise of the ‘rehabilitative ideal’ with all its dubious quasi-medical underpinnings in the 1970s, flirtation with the ‘justice model’ of corrections based upon proportionality in punishment during the 1980s, and a return to retribution and deterrence in the 1990s, the outcomes of the criminal justice process have deteriorated to the point of being unsustainable into the future.

Earlier in this discussion we noted the more communitarian mode of justice that prevailed until the Plantagenet era of Henry II when law-enforcement in Britain became more centralised. The same mode exists to this day among the First Nation peoples of North America, the Aboriginal cultures of Canada and Australasia, the Maori of New Zealand, in African tribal councils, in the Afghani practice of *Jirga*, the Arab and Palestinian commitment to *Sulha*, and in many of the ancient Celtic aspects of the Brehon laws of Ireland until the Seventeenth Century. In every instance these forms of law placed primary emphasis on restitution rather than retribution, and on peace-making rather than punishment which was strictly reserved for those who would not respond to the processes of reparation and restoration.

Here we may discern the roots of what has come more recently to be known as restorative justice since the early 1990s when it emerged primarily with the work of Howard Zehr at the Eastern Mennonite University of Harrisonburg, Virginia, USA.²⁴ Much has subsequently been written about restorative justice which has become a world-wide concept (and some would claim it to be a movement), though it has emerged in a number of different forms in practice, according to the perceived needs

²³ A. France, *Le Lys Rouge*, (1894, Paris - publisher unknown) at ch 7. Anatole France was Nobel Laureate in Literature 1921.

²⁴ Howard Zehr is widely recognised as the ‘grandfather’ of restorative justice through his direction of the first victim: offender conferencing programme in the USA, and in particular his two seminal works *Changing Lenses: A New Focus for Crime and Justice* (1990, Good Books) and his *Little Book of Restorative Justice* (2002, Good Books).

for intervention processes in which it has come to be used.²⁵ Within the field of criminal justice, the principles of restorative justice are clearly specified since it expresses a different view of offending which may be summarised in the following terms:

1. Traditional criminal justice regards crime as a violation of the law and the state: restorative justice perceives crime as a violation of people and relationships;
2. In criminal law terms, violations create guilt: restorative justice insists that violations create obligations;
3. Criminal justice requires the state to determine blame (guilt) and impose pain (punishment): restorative justice involves offenders, victims and community members in an effort to put things right;
4. The central focus of criminal justice is offenders getting what they deserve: restorative justice focuses on victim needs and offender responsibility for repairing harm. And in addition:
5. Traditional criminal justice asks what laws have been broken: restorative justice asks who has been hurt?
6. Criminal justice focuses on who broke the law: restorative justice focuses on what their needs are.
7. Criminal justice is predominantly concerned with what the guilty deserve: restorative is concerned with whose obligation it is to resolve the harm.

From this synopsis of restorative justice principles it will readily be apparent that the entire concept is forward rather than backward looking: it seeks to repair the harm done by offending and restore the offender to community life rather than to exclude and punish on a retrospective basis. Of equal importance, restorative justice is directly concerned with the situation of victims of crime, and insists that the restoration of offenders is consequent upon them taking responsibility for the harm caused, offering genuine apology for this, and making substantial reparation either to the victim directly or to victims of crime in general.

All of this stands in stark contrast with the way in which most contemporary criminal justice systems behave. Offenders are in no sense obliged to show any concern for victims, to take responsibility for their actions, or to make any form of reparation. It is sufficient that they are found guilty and punished, possibly and marginally more leniently dealt with for showing genuine remorse, but nevertheless punished as necessary retribution for what they have done, and also on the basis that such punishment should deter both them and others who might offend similarly from doing so.

Restorative justice offers no 'soft option' to offenders, and neither is it a universal panacea in all cases of criminal offending. Remorseless and intransigent serious offenders exclude themselves from its potential, and consequently have to be dealt with using the resources of traditional criminal justice systems. This simple fact means that restorative justice cannot *replace* traditional justice entirely, but can operate extremely effectively as a viable alternative strategy for dealing with suitable offenders, and most particularly as an *alternative* to custody or in combination with custody in all but the longest of custodial sentences. It is therefore necessary to examine briefly how this could be given operational effect, how it would contribute to the need for correctional

²⁵ These processes include predominantly Group Conferencing, Victim: Offender Mediation and Healing and Peacemaking Circles, but have expanded to meet the needs of other forms of reconciliation seeking initiatives in schools, business organisations, industrial dispute settlement, and the like.

logic, and the benefits that might flow from its wider adoption for communities, victims and offenders.

BALANCING THE CUSTODY: COMMUNITY EQUATION

It is a self-evident fact that if lesser use were to be made of custodial sentences, then a considerably increased emphasis would have to be placed on sanctions within the community. It is also a fact that community corrections are considerably less expensive to administer than prison sentences, and, properly organised, can be infinitely more beneficial to all the stakeholders in criminal justice – the state, communities, victims of crime, and offenders themselves. Can this actually be achieved, and if so, how?

If, for the purposes of discussion, we were to set on one side existing prejudices for or against the effectiveness of prison sentences, save to agree that these should be used only as measures of last resort (or *ultima ratio*), and also re-draw the map of criminal justice jurisdictions and demarcations, then a number of interesting possibilities might be seen to emerge. But to discern these possibilities we would also have (as Howard Zehr suggested) to ‘change lenses’ and view justice in a rather different perspective. This would mean accepting a few key propositions, stated briefly as follows:

1. That use of prison custody carries with it a real risk of breaking up relationships, and of increasing the possibility of homelessness, separation, unemployment, and therefore of further criminality;
2. That less prisons might mean better and more effective prisons, dealing more constructively with those who necessarily have to be detained. Also that the savings resulting from having fewer prisons could more profitably be used in expanding community correctional facilities;
3. That many offences presently classified as criminal (i.e. committed with malicious intent) might more usefully be defined as ‘civil wrongs’, and dealt with more expeditiously and at less cost in the civil courts with a lesser burden of proof²⁶;
4. That community sanctions have a potential through training and work experience to benefit community amenity, while at the same time improving the employment potential of offenders;
5. That offenders retained in the community stand a better prospect of maintaining family and relationship ties and supporting these, with a reduced cost in welfare benefits from being paid for work completed and training undertaken;
6. That part of the payment for work done on community sanctions could be deducted at source and allocated for the compensation of victims of crime as reparation.

If these propositions were to be accepted, then there would also emerge the possibility of emulating the criminal justice reforms carried out in Finland from the 1950s onwards, but most particularly from the 1970s until the present day. A brief summary of this experience may serve to enlighten our own perspectives.

²⁶ Among such offences might be considered assaults of a minor nature, thefts, public order offences, low-cost criminal damage, failure to pay fines or civil dues, certain drug-related offences, soliciting, burglary without aggravating circumstances, and the like. In addition, many obscure and archaic offences might profitably be removed from statute law altogether. In England and Wales it remains a criminal offence to sell grey squirrels, offer for sale a game bird killed on a Sunday or Christmas Day, enter parliament in a suit of armour, enter the wreck of the Titanic without the permission of the Secretary of State, import Polish potatoes, etc.,

In the 1950s, Finland incarcerated 187 offenders *per* 100,000 of its population: a rate which the government decided was unnecessary, excessively expensive in national resources, and unsustainable. Decisions were made to deliberately restrict the use of imprisonment to the absolute minimum, while at the same time simplifying the penal code to reduce the number of sentencing options open to the courts. By 1960 the incarceration rate had reduced to 154, by 1970 to 113, by 1980 to 106, by 1990 to 69, and by 2000 to 55. In 2010 it stood at a slightly raised level of 68, slightly higher than that of Denmark (66), the same as Norway (68) and lower than Sweden (78 *per* 100,000). The corresponding rates in England and Wales are 154, in France (with the same population) 96, and Germany (with 20 million more) the rate is 88 *per* 100,000 in 2010 (PRT, 2010)²⁷.

Only four general forms of sanction are available in Finland: these comprise the ‘summary penal fee’²⁸, the fine²⁹, community service and imprisonment. Community service is defined as “a punishment in place of unconditional imprisonment”, and consists in at least 20 and a maximum of 200 hours of unpaid work under supervision. It can also be imposed in place of sentences of up to eight months imprisonment. Imprisonment is generally imposed for periods of between 14 days and a maximum of 12 years, or, in the case of multiple offences, 15 years. Murder is punishable by life imprisonment. Sentences of up to two years can be imposed conditionally (suspended) and a subsidiary fine can be attached to conditional imprisonment. In practice, more than half of all sentences of imprisonment in Finland are suspended (Cornwell, 2007)³⁰, and around 60% of all court-imposed penalties and over 90% of all punishments are fines (Lappi-Seppälä, 2010).³¹

All of this has been achieved without any significant increase in the volume of offences recorded by the police that is not common throughout the European Union in which levels of recorded crime have been falling consistently since 2002. Though Finland, like many other European nations has experienced a marginal increase in homicides and crimes of violence against the person (+ 2.2% and 3.0% respectively) over the period 1998–2008, crimes of robbery (-3%), domestic burglary (-5%), vehicle theft (-7%) and drug trafficking (-5%) have all shown consistent decreases (Council of Europe Eurostat, 2009).³²

President Barack Obama came to power in the USA with the campaign slogan ‘Yes We Can!’, and the same might also be claimed in answer to question posed earlier about whether significant criminal justice reform is possible in England and Wales. Finland achieved its reforms through a consensus and agreement on principles within its parliament, civil service, judiciary, universities and research institutes, and with the active encouragement of the other Nordic countries working towards a common identity. In addition, the Finnish media retained a reasonable attitude on issues of penal reform, quite significantly different from that within many other European

²⁷ Prison Reform Trust (2010) *op cit* n.9, at p 4.

²⁸ Imposed for minor traffic offences, littering, etc. And which cannot be converted to imprisonment in default.

²⁹ Finland adopted the ‘day fine’ in 1921 as the first Nordic country to do so. Day fines can extend from one to 120 days, the size being calculated on the monthly income and assets of the offender, but normally one sixtieth of monthly income less taxes and fees, defined by decree, and a fixed deduction for personal expenditure. In cases of persistent default, the fine can be converted to imprisonment at the rate of one day in custody to three day fines. The minimum period in custody in default is four and a maximum of 60 days.

³⁰ D.J. Cornwell (2007) *op cit*, at pp 158–9.

³¹ T. Lappi-Seppälä, ‘Changes to Penal Policy in Finland’ in H. Kury and E. Shea (eds), *Punitivity: International Developments*, (2010, Universität verlag Bochum GE) at p 29.

³² Council of Europe, *Population and Social Conditions*, (2009, Eurostat), C. Tavares and G. Thomas (eds), *passim*.

countries (Lappi-Seppälä, 2010).³³ We in Britain have much to learn from this outstanding example.

CONCLUSION: INCLUDED CITIZENS OR URBAN OUTLAWS?

The common identity that characterises the Nordic group of nations is underpinned by a traditional preference for tolerance in both political and social life, devotion to welfare values, social equality, full citizenship, solidarity and respect for reason and humanity. Moreover, as Tapio Lappi-Seppälä the Director-General of the Finnish National Research Institute of Legal Policy since 1995 has pointed out, 'in the long run, penal policy is dependent on larger scale social and economic conditions, negotiating political cultures which value consistency (instead of conflict and quick fixes), and heed expert knowledge and professionalism (instead of [posturing] common sense and street credibility (*Ibid.*:34). In other words, this means being as tough on the causes of crime as being tough on crime.

Our Anglo-Saxon predisposition to punish offenders at all costs, our media preoccupation with crime, our almost wanton carelessness about victims of crime, and our apparent willingness to tolerate unlimited use of penal incarceration and its massive costs, all lead to the creation of a social under-class ostracised and remote from mainstream society. That this under-class periodically responds with riotous behaviour and wanton destruction on the streets of our cities and within our prisons should scarcely surprise us, since we demonstrate in our national social behaviour an evident disregard for their humanity and isolation. Little, it seems, has substantially changed in 'law and order' terms since the early Middle Ages.

To our shame, and in particular during the past two decades of our lifetimes, we have tolerated an almost doubling of the number of our citizens imprisoned, and for longer periods than ever before. How can this be justified in an era in which crime rates have decreased consistently, and in which the likelihood of the average citizen becoming a victim of crime have almost halved from 1995 levels? It is because we have also tolerated the creation of a conflict style of political and governmental behaviour obsessed with quick fixes in response to ill-considered and vociferous media pressure in its obsession with crime of a violent or salacious nature.

Punishment and restoration are far from being mutually exclusive imperatives within criminal justice. Criminal offences do deserve punishment of an appropriate and constructive nature, but the purpose of imposing sanctions on offenders should be the correction of wrongful behaviour, the encouragement of law-abiding attitudes, and the restoration of those who have offended to full and inclusive citizenship. Until we change our own behaviour we shall continue to create future generations of urban outlaws who will periodically revolt, but persistently remind us of the folly of failing to learn from the positive experiences of more tolerant nations. Creation of a correctional logic is contingent upon these lessons being learned.

In concluding this discourse, it is tempting to call to mind the sage words of Norval Morris recorded more than three decades ago. In a (then) widely read book entitled *The Future of Imprisonment*, he began as follows:

The present intellectual climate is uncongenial to rational speculation directed to social change. There is a pervading sense of rudderlessness, of being captives of social forces beyond our control. We have seen many apparently sound reforms

³³ T. Lappi-Seppälä, (2010) *ibid*, at p 31.

drowned in the complex crosscurrents of sectional interest and political myopia . . . The momentum of futility and brutality in imprisonment is great: and the reformers have no agreed-upon program[me]. They may sometimes concur on what is wrong but they lack the inner compass of shared principles to chart a path to other than ameliorative change. There is a fervour and factionalism, a modishness, in their recommendations that seriously impedes correctional reform. (Morris, 1974).³⁴

As Alphonse Karr so famously remarked: Plus ça change, plus c'est la même chose. [Les Guêpes, 1849].

³⁴ N. Morris, *The Future of Imprisonment*, (1974, University of Chicago Press) at pp 1–2.

RESTORATIVE JUSTICE AND YOUTH JUSTICE IN ENGLAND AND WALES: ONE STEP FORWARD, TWO STEPS BACK

DAVID O'MAHONY*

This article analyses the emergence and impact of restorative justice within youth justice in England and Wales. It critically examines progress that has been made, highlighting how restorative initiatives have been largely targeted towards 'diversionary' applications, low level offending, or first time offenders. It contrasts developments and research evidence from other jurisdictions, which have incorporated restorative justice within youth justice and applied it as a mainstreamed approach to sentencing. The benefits and difficulties of delivering restorative justice within criminal justice are considered, as well as factors which appear to have impeded its development within youth justice England and Wales. Broader implications for the development of restorative programmes in other jurisdictions are considered, in the light of the experience of England and Wales.

INTRODUCTION

Restorative justice is a broad concept encompassing many different practices and used in diverse ways by state and non-state actors seeking 'justice'.¹ This diversity is particularly evident in the field of youth justice, where a wide variety of schemes and practices are labelled as 'restorative'. Some restorative schemes are based in statute and require that offenders are dealt with through a strict framework, while others are practice led, 'voluntary' and may be much more informal. The young person may be referred to restorative schemes at different stages in the criminal justice system, with some programmes taking referrals as diversionary interventions, or as a form of police caution, while others may be referred by the prosecutor or by the courts as an official form of disposal. Programmes can be led by different agencies, such as the police, an independent conferencing service, or even local community organisations. Programmes also differ according to the level of victim involvement, with some using face-to-face meetings, or mediation schemes, while others rarely use direct victim input. Similarly, the extent to which the victim is allowed to participate in decision making regarding how the offence is to be dealt with differs. Some schemes actively engage the victim in the process of arriving at an agreed outcome, to address the harm caused. Others use the victim as a way of bringing home the impact of the crime on the offender. Victim input may be limited, in some cases to letters or statements, read out to the offender. Even the nature of the offence and type of offender differ, with some schemes only open to first time offenders who have committed relatively minor offences, while others deal with a wide range of offences and individuals who have previously offended.

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¹ There are a whole range of differing restorative practices including programmes in areas diverse as corporate crime, see J. Braithwaite, 'Responsive Regulation', *Restorative Justice and Responsive Regulation* (2002, Oxford University Press); to programmes in prisons see E. Elliott, 'Security, Without Care: Challenges for Restorative Values in Prison', *Contemporary Justice Review* (2007) 10, 2, 193–208; and schools, see Morrison, 'Restorative Justice in Schools', in E. Elliott and R. M. Gordon (eds.), *New Directions in Restorative Justice: Issues, Practice, Evaluation* (2005, Willan). Some restorative schemes focus on particular types of offences such as more serious violent crime or domestic violence, see J. Stubbs, 'Beyond Apology? Domestic Violence and Critical Questions for Restorative Justice', *Criminology and Criminal Justice* (2007) 7, 2, 169–87; it has even been used as a form of conflict resolution in relation to broader political conflicts such as in South Africa, to deal with the aftermath of the apartheid regime, see A. Skelton, "Africa" in G. Johnstone and D. Van Ness (eds.), *Handbook of Restorative Justice* (2007, Routledge); or in Northern Ireland as an alternative to punishment beatings and political violence, see H. Mika and K. McEvoy, *Restorative Justice in Conflict: Paramilitarism, Community, and the Construction of Legitimacy in Northern Ireland* (2001) 4 *Contemporary Justice Review* 291–319.

Because of the wide variety of restorative practices, there are obviously differences in the extent to which they can embrace the principles of restorative justice. Taking Marshall's definition of restorative justice, as 'a process whereby all the parties with a stake in a particular offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future', it is clear that many schemes only offer elements of this ideal.² Wilcox and Hoyle make important distinctions in the extent to which schemes are restorative.³ For example, some schemes only provide compensation or reparation for damage caused, which may be direct or indirect, with little input from the victim. Some simply offer victim awareness to offenders, whereby they seek to confront offenders with the consequences of their actions. Such schemes can only be described as 'partly restorative'.⁴ Others offer mediation, which provides victims with the opportunity to meet the offender, in a safe environment with a trained mediator, which can be described as 'mostly restorative'. Some allow for a full interaction between the victim and offender, allowing the parties to deal with the offence and decide collectively how it should be resolved; these can be described as 'fully restorative'. Thus, a distinction can be made between 'restorative justice' and 'restorative practices'. Restorative justice requires the incorporation of all the core elements of what is defined as restorative justice. Practices which fall short of this, being either 'partly restorative' or 'mostly restorative' should only be described as being 'restorative practices'.⁵

This article will argue that the development of restorative justice in youth justice England and Wales has been largely confined to restorative practices. These have been generally restricted to first time offenders, limited to minor offences and have provided little engagement with victims of crime. Though the government has made commitments to place restorative justice heart of the youth justice system,⁶ in reality this has simply not materialised. Furthermore, while there has been a clear agenda of promoting victim rights and the advantages of restorative justice, in reality there has been only limited development of restorative justice in youth justice. It appears the lack of restorative justice is largely due to a lack of commitment to fully embrace the core principles of restorative justice. In advancing this argument, the article will firstly examine how restorative justice has developed in England and Wales. It will then consider examples of successful restorative justice programmes in other jurisdictions, before reflecting on reasons why restorative justice in England and Wales has failed to properly materialise, despite the significant support it has received.

DEVELOPMENTS IN RESTORATIVE JUSTICE AND YOUTH JUSTICE IN ENGLAND AND WALES

Restorative programmes first began to emerge within youth justice in England and Wales with the development of victim-offender mediation schemes, piloted in the 1980s. This led to the emergence of a range of police-led restorative cautioning practices. Further developments occurred with the introduction of reparation orders and referral

² See T. Marshall *Restorative Justice: An Overview*, (1999, Home Office).

³ A. Wilcox and C. Hoyle *National Evaluation of the Youth Justice Board's Restorative Justice Projects*, Youth Justice Board, (2004).

⁴ *Ibid.*

⁵ This is not to suggest that restorative practices cannot deliver some of the aims of restorative justice, such as raising awareness of the impact of the crime, or seeking forgiveness and restitution.

⁶ See Youth Justice Board *Developing Restorative Justice: An Action Plan* (2006, Youth Justice Board); also Home Office *Rebalancing the Criminal Justice System*(2006, The Home Office,).

orders which were designed to incorporate the needs of victims within the process of criminal justice and to extend restorative justice principles within these measures. Most recently, a new restorative justice disposal has been piloted, which allows police officers to use restorative justice principles to deal with young people who have committed offences. The following sections examine how restorative practices have emerged within youth justice in England and Wales before going on to consider practices in other jurisdictions and the extent to which they embrace the principles of restorative justice.

1. Victim-offender mediation

Most victim-offender mediation programmes within the criminal justice sphere have their roots in programmes that were developed in the mid-1970s, in Ontario Canada. They were promoted by the Christian Mennonite movement with an emphasis on the values of personal reconciliation between victims and offenders. Howard Zehr's writings have been highly influential for restorative justice and he has been one of its major supporters, popularising and advocating such practices.⁷

Victim-offender mediation involves bringing together victims and offenders with a facilitator or mediator, who is usually professionally trained. The aim of mediation is to give victims and offenders a safe environment in which they are able to discuss the crime, its impact and the harm it may have caused, and to allow an opportunity to put right the harm caused. Some forms of victim-offender mediation have limited the role of the offender and others have used shuttle type interactions or go-betweens, limiting the victim's contact with the offender. But more commonly, the mediation takes place on a face-to face basis between victim and offender, with the mediator acting as a neutral facilitator.

Victim-offender mediation has proved very popular and is currently the most common form of restorative practice used across the United States.⁸ It has also developed into more general forms of dispute resolution and mediation services which can include neighbourhood disputes, especially where there has been a history of conflict between the parties that has not been resolved by other forms of intervention. It has also gained in popularity across many parts of Europe where it is currently one of the most dominant forms of restorative justice practice.⁹

In the United Kingdom there have been numerous victim-offender mediation projects, which have developed largely on an ad-hoc basis. Generally, they have been relatively small scale and are often local initiatives, rather than national projects. This has largely been the result of a lack of any statutory authorisation or long-term national funding, which has impeded their development.¹⁰ Those that exist have usually been developed through good working partnerships between criminal justice agencies such as probation, the police and social services. But there have also been considerable difficulties over which agency should support and fund such schemes and where referrals come from, which has made their development and operation problematic.¹¹

While there has been official government support for victim-offender mediation in the England and Wales, financial support for such schemes has been limited. A range of schemes were supported in the mid-1980s when the Home Office funded the

⁷ See H. Zehr *Changing Lenses: A New Focus for Crime and Justice* (1990, Herald Press) and H. Zehr and H. Mika 'Fundamental Concepts of Restorative Justice', (1997). *Contemporary Justice Review*, 1: 47.

⁸ J. Dignan, 'Evaluating Restorative Justice from a Victim Perspective: Empirical Evidence', *Understanding Victims and Restorative Justice* (2005, Open University Press).

⁹ D. Miers *An International Review of Restorative Justice* (2001, HMSO).

¹⁰ See J. Dignan and K. Lowey *Restorative Justice Options for Northern Ireland: A Comparative Review*, Criminal Justice Review Research Report No 10 (2000, HMSO).

¹¹ T. Marshall and S. Merry *Crime and Accountability: Victim/offender mediation in practice* (1990, HMSO).

development of pilot projects in England and Wales, however this funding was discontinued.¹² More recently, a range of mediation projects were supported by the Youth Justice Board and various victim support organisations. In 2004 Wilcox and Hoyle evaluated 46 restorative justice projects, including mediation projects that were funded by the Home Office.¹³ While noting a range of differing practices across these programmes, the research was generally positive about their operation and impact, demonstrating that 83% of projects were successfully completed and many had high levels of satisfaction reported by participants. The data provided by local evaluators also demonstrated that most victims and offenders found the process of mediation to be fair and they were well prepared and supported through the process. They believed that the intervention had helped the offender to take responsibility for their offence and helped them understand how it affected victims. However, the research was critical of how such projects relied on short-term funding and lacked independent evaluation from the outset. Particular concern centred on the wide range of projects funded under the umbrella of restorative justice and the poor focus on what they were supposed to deliver.

Further mediation and restorative projects have been funded by the Home Office, the largest of which provides services to adult offenders. These have been subject to an intense evaluation which has demonstrated encouraging results.¹⁴ Thus, a patchwork of mediation programmes continues to exist in England and Wales, some of which deliver excellent services. However, most programmes are still dependent on short term funding grants and have limited capacity to provide services in the longer term. The lack of long term core funding available at a national level has hampered the successful development of mediation programmes and has undermined the development of a consistent practice necessary in the delivery of such programmes.¹⁵

2. Police-led Restorative Cautioning

Police-led restorative cautioning schemes have their roots in Australia where they were developed in the early 1990s, mostly as an alternative approach to traditional formal police cautioning. The approach proved popular and was taken up and used in various forms in New Zealand and America, particularly in Minnesota and Pennsylvania in the mid 1990s.¹⁶ It then spread considerably and the North American programmes have promoted the approach and trained many facilitators worldwide.¹⁷

During the 1990s, police-led restorative cautioning schemes also expanded considerably in England and Wales. The process was championed by the Thames Valley Chief Constable Charles Pollard, who committed himself to incorporating restorative cautioning for young offenders. This also included a broader programme to train police officers and implement a variety of restorative-based processes, including a complaints system and a comprehensive monitoring / evaluation package.

¹² See G.Davis, J.Boucherat and D. Watson 'Pre-Court Decision Making in Juvenile Justice', (1989) *British Journal of Criminology*, 29: 219.

¹³ A.Wilcox and C. Hoyle *The National Evaluation of the Youth Justice Board's Restorative Justice Projects* (2004, Youth Justice Board).

¹⁴ J.Shapland, A. Atkinson, E. Colledge, J. Dignan, M. Howes, J. Johnstone, R. Pennant, G. Robinson and A. Sorsby *Implementing Restorative Justice Schemes (Crime Reduction Programme): A Report on the First Year*, Home Office Online Report 32/04. (2004, Home Office).

¹⁵ Even in relation to providing services through the Reparation Order, only a small proportion of the cases dealt with have resulted in any form of mediation between victims and offenders. See S. Holdaway, N. Davidson, J. Dignan, R. Hammersley, J. Hine and .P Marsh *New strategies to address youth offending – the national evaluation of the pilot youth offending teams* (2001, RDS Occasional Paper No 69, Home Office).

¹⁶ P.McCold 'The Role of the Community in Restorative Justice' in B. Galaway & J. Hudson (eds) *Restorative Justice: International Perspectives* (1996, Criminal Justice Press) .

¹⁷ P. McCold and B. Watchell *Restorative Policing Experiment: The Bethlehem Pennsylvania Police Family Group Conferencing Project* (1998, Community Service Foundation,).

The process of 'reintegrative shaming', which is central to the restorative cautioning approach, attempts to deliver the police caution in a way that is not degrading but performs a 'reintegrative ceremony'.¹⁸ This is achieved by firstly attempting to get the young person to realise the harm caused by their actions to the victim, their family and themselves. The focus is placed on the wrongfulness of the action or behaviour rather than the wrongfulness of the individual. The process then attempts to reintegrate the young person, after they have admitted what they did was wrong, by focusing on how they can put the incident behind them, for example by repairing the harm caused through reparation and apology. Thus, it allows the young person to move forward and reintegrate back into their community and family. The whole process is usually facilitated by a trained police officer and often involves the use of a script or agenda that is followed. The victim is encouraged to play a part in the process, particularly to reinforce upon the young person the impact of the offence on them. However, as Dignan notes, restorative cautioning schemes have (at least initially) placed a greater emphasis on the offender and issues of crime control, than on their ability to meet the needs of victims.¹⁹

The Thames Valley scheme was subject to an intense evaluation from 1998–2001.²⁰ During this period, 1,915 restorative conferences took place at which victims were present. In a further 12,065 restorative cautions, victims were not present, but the cautioning officer attempted to input some form of victim perspective into the proceedings. In the evaluation, the researchers reported that offenders, victims and their supporters were generally satisfied and felt they had been treated fairly. However, a minority of victims and offenders felt they had not been adequately prepared for the process, or felt they had been pressured into participating. Nonetheless, both victims and offenders generally believed that the encounter helped offenders to understand the effects of the offence and induced a sense of shame in them, which is a particularly important goal of a restorative intervention. Over half of the participants reported gaining a sense of closure and felt better because of the restorative session, and four-fifths saw holding the meeting as a good idea. Indeed, almost a third of offenders entered into a formal written reparation agreement at the restorative caution. Within a year, the vast majority of these had been fulfilled.

The researchers found that the implementation of the restorative cautioning model in individual cautions was sometimes deficient, with facilitators occasionally excluding certain participants or asking inappropriate questions (eg, relating to prior offending or attempts to gather criminal intelligence). Some two-fifths of offenders reported feeling stigmatised as a 'bad person' and some officers appeared to pressurise offenders into apologising or making reparation. More generally it was found that some officers tended to dominate discussions and did not allow other participants to freely express themselves. However, the researchers noted that practice improved considerably towards the end of the research period. Overall, their view was that restorative cautioning represented a significant improvement over traditional cautioning, and was more effective in terms of reducing recidivism.²¹ The research also found the police to be enthusiastic and sincerely committed to the restorative process. They had been generally well trained and it was clear from the interviews with the young people and

¹⁸ J. Braithwaite *Restorative Justice and Responsive Regulation*, (2002, Oxford University Press).

¹⁹ J. Dignan, 'Evaluating Restorative Justice from a Victim Perspective: Empirical Evidence', *Understanding Victims and Restorative Justice* (2005, Open University Press).

²⁰ C. Hoyle, R. Young and R. Hill *Proceed with Caution: An Evaluation of the Thames Valley Police Initiative in Restorative Cautioning*, (2002, Joseph Rowntree Foundation).

²¹ *Ibid.*

their parents involved in the process that they had a high degree of confidence and support for the scheme. There was also some evidence that it had other beneficial effects especially in terms of helping improve police/community relations.

In England and Wales the use of restorative principles to shape and guide police cautioning and final warnings for young offenders became standard practice with the introduction of the Crime and Disorder Act 1998.²² The Act followed the Government White Paper 'No More Excuses – A New Approach to Tackling Youth Crime in England and Wales' published in 1997. One of the core aims was to toughen up the approach to dealing with young offenders by limiting the number of times individuals could be cautioned by the police. The Act saw the introduction of a new final warning scheme which replaced the police caution. Importantly, the guidance issued to the police emphasised that final warnings should be carried out using a restorative framework.²³ Police officers administering final warnings were thus advised to organise a restorative final warning for all young offenders that would have been formerly dealt with by way of a traditional caution. Those affected by the offence, including the offender, victim and any relevant supporter / family member could be invited to attend the final warning and police officers received training to facilitate a restorative-based structured discussion about the harm caused by the offence and how it might be repaired.

Restorative-based interventions by the police expanded further with the introduction of the Youth Restorative Disposal in 2008.²⁴ This new disposal allows police officers to deal with minor offences by young people by way of a summary disposal, similar to a reprimand or final warning. It seeks to challenge inappropriate behaviour by using restorative justice principles and is supposed to provide the police with another tool to handle young offenders who have committed low level offences. The disposal is aimed at allowing the victim to take a role in the process. It also enables the early identification of young people by referring cases to the Youth Offending Team where the young person lives. The disposal has been designed to offer police officers more discretion with a quick and effective alternative means of dealing with anti-social and nuisance offending. As such, it is designed to deliver a swift response and reduce the amount of time that police officers spend completing paperwork and attending court.

A recent evaluation²⁵ of the Youth Restorative Disposal has shown it to be effective in delivering a swift response to minor offending by young people, mostly involving shoplifting, assault and criminal damage. It has been shown to be popular with officers, not just because it was perceived to save time, but because they felt that it offered a proportionate response, which was perceived to have a positive impact on young offenders and for victims. In practice the majority of Youth Restorative Disposals are given on the spot, by police officers (usually on the street), with the consent of the offender and victim. The research reveals that the disposal normally entailed not much more than a simple verbal apology to the victim at the scene of the incident and few cases are actually referred to Youth Offending Teams or involve any further intervention. As such, despite being called restorative disposals, there is little to suggest

²² The Crime and Disorder Act 1998 also introduced the Reparation Order.

²³ R. Young 'Just Cops Doing "Shameful" Business? Police-led Restorative Justice and the Lessons of the Research' in A. Morris and G. Maxwell (eds), *Restorative Justice for Juveniles: Conferencing, Mediation and Circles*, (2001, Hart).

²⁴ The Restorative Justice Disposal was launched by the Home Office in a number of pilot areas in England and Wales, see Ministry of Justice web pages: <http://www.justice.gov.uk/guidance/youth-justice/courts-and-orders/disposals/youth-restorative-disposal-pilot-scheme.htm> (accessed Dec 2011).

²⁵ A. Rix, K. Skidmore, R. Self, T. Holt and S. Raybould *Youth Restorative Disposal Process Evaluation*. (Youth Justice Board, 2011) see [http://yjbpublications.justice.gov.uk/Scripts/prodView.asp?idproduct=500&eP=\(accessed Dec 2011\)](http://yjbpublications.justice.gov.uk/Scripts/prodView.asp?idproduct=500&eP=(accessed Dec 2011)).

that they involve any significant restorative intervention or process. In many respects, the disposal simply provides the police with another mechanism to informally deal with minor offending, on the spot, by way of an immediate warning that includes an apology.

Other developments have included the introduction of the Youth Conditional Caution, on a pilot basis from 2010, to extend the use of conditional cautions to young people aged 10–17.²⁶ The Government agreed during the enactment of the Criminal Justice and Immigration Act 2008 that the Youth Conditional Caution would be introduced in stages, beginning with 16–17 year olds. The youth conditional caution aims to reduce the number of young people being taken to court for a low-level offence. The disposal is available for use by the Police and the Crown Prosecution Service if the offender has not previously been convicted of an offence, admits guilt and consents to the caution. The caution can have conditions attached to it that include restorative provisions supporting rehabilitation and effecting reparation. It can also include a fine and/or an attendance requirement. It can be offered to those aged 16 and 17 at the time of the offence (for the duration of the pilots) where there is sufficient evidence to charge with an offence and the young person has admitted guilt. The decision to administer a youth conditional caution has the effect of suspending any criminal proceedings while the young person is given an opportunity to comply with the agreed conditions. The offender can accept or refuse the conditional caution and if the latter option is selected the offender will be placed before the court. Where the conditions attached to the caution are complied with, the case will be discharged and no further prosecution and/or proceedings for the offence(s) will be commenced. However, where there is no reasonable excuse for non-compliance, the caution offer can be withdrawn and criminal proceedings commenced for the original offence(s).

Youth conditional cautions will initially be implemented for 16 and 17-year-olds before being extended to 10–15 year olds. They are intended to provide an additional out-of-court option to deal with offending. They will be used where the offender has either committed an offence which is not suitable to be dealt with by way of a reprimand or final warning, or where the offender has already been subject to the reprimand or final warning scheme.

3. *Reparation Orders and Referral Orders*

A third area where restorative justice is used within youth justice in England and Wales relates to the use of reparation orders and referral orders for young people brought before the courts. The reparation order is available for 10 to 17 year olds who have been convicted of an offence. It is designed to take into account the feelings and wishes of victims of crime and to help prevent the young offender from committing further offences by confronting them with the consequences of their criminal behaviour. The order requires the young offender to make specific reparation either to the individual victim of his crime, where the victim desires this, or to the community which they have harmed.²⁷ Research looking at the operation of reparation orders has found that in practice there has been less focus on involving victims directly in the process than originally envisaged in the legislation. Reparation orders largely focus on indirect reparation for the benefit of the community, which is not dependent on consent or

²⁶ Section 48 of The Criminal Justice and Immigration Act 2008 was amended to include 10–17 year olds.

²⁷ S. Holdaway, N. Davidson, J. Dignan, R. Hammersley, J. Hine and P. Marsh *New strategies to address youth offending – the national evaluation of the pilot youth offending teams* (2001, RDS Occasional Paper No 69, Home Office).

participation from actual victims. Thus, the practical operation of the reparation order shows it to have limited restorative impact because the individual needs of victims and their wishes are often not taken into account in its delivery.²⁸

In relation to referral orders the Youth Justice and Criminal Evidence Act (1999) extended the use of restorative justice to young offenders.²⁹ The referral order is available to the Youth Courts as a primary disposal for offenders if they have not previously been convicted by a court.³⁰ The order is overseen by youth offender panels, which are made up of two community panel members and a member of the local youth offending team. They deal with young offenders referred to them by the courts (on referral orders) and are supposed to address the young person's offending behaviour and decide what form of action should be taken, providing a restorative justice approach. The panels are designed to operate on the restorative justice principles of responsibility, reparation and reintegration. Restorative justice in this context helps enable offenders to become aware of and take responsibility for the consequences of their offending and to have an opportunity to make reparation to victims and the wider community. Victims have the opportunity, if they wish, to say how they have been affected by the offence, ask questions, receive an explanation and/or an apology and discuss how the offender can make practical reparation for the harm that has been caused.³¹

When a young person is referred by the court to a youth offender panel, the panel decides how the offending should be dealt with and what form of action is necessary. If the victim wishes they may attend the panel meeting and describe how the offence affected them. Parents are required to attend panel meetings (if the young person is under the age of 16) and meetings are usually held in community venues. The Government guidelines state that young people should not have legal representation at panel meetings, as this may hinder their full involvement in the process, but if a solicitor is to attend they may do so as a 'supporter'.³²

The panel has to decide on an agreed plan which can provide reparation to the victim or community and include interventions to address the young person's offending. This can include victim awareness, counselling, drug and alcohol interventions and forms of victim reparation. The amount of reparation and length of the plan has to be proportionate to the seriousness of the offence and the young person must agree to the plan. If the young person fails to agree to a plan, they will be referred back to the court for sentencing. Once a plan is agreed it is monitored by the Youth Offending Team and if the young person fails to comply with its terms they may be referred back to court for sentencing.

Research examining the operation of referral orders in 2000 and 2001 found that 'within a relatively short time youth offender panels have established themselves as constructive, deliberative and participatory forums in which to address young people's offending behaviour'.³³ The orders were rolled out across England and Wales in April

²⁸ *Ibid.*

²⁹ The Referral Order was revised under the Criminal Justice and Immigration Act 2008, which came into force on 27 April 2009. The updated guidance on the order is provided the Ministry of Justice, 'Referral Order Guidance (2009)' (2009, Ministry of Justice).

³⁰ The Courts also have discretion to use the Referral Order if a young person has been previously convicted by a court, but not given a Referral Order and exceptionally they may be used under the recommendation of a Youth Offending Team more than once, Ministry of Justice, 'Referral Order Guidance' (2009, Ministry of Justice).

³¹ See 'Referral Order Guidance (2009)' (2009, Ministry of Justice).

³² Home Office *Referral Order, Guidance for Courts* (2009, Home Office).

³³ T. Newburn, A. Crawford, R. Earle, S. Goldie, C. Hale, A. Hallam, G. Masters, A. Netten, R. Saunders, K. Sharpe and S. Uglow 'The Introduction of Referral Orders into the Youth Justice System' (2002, Home Office Research Study 242).

2002.³⁴ The research concluded that the new orders were working well and many young people played an active role in their panel meetings and were happy with their experience.³⁵ It was found that 84% of the young people felt they were treated with respect and 86% said they were treated fairly. The research showed that 75% of the young people agreed that their plan or contract was 'useful' and 78% agreed that it should help them stay out of trouble.³⁶ Parents also appeared to be positive about the orders and, compared to the experience of the Youth Court, appeared to understand the referral order process better and felt it easier to participate.

Despite these positive findings, a number of concerns have been raised about referral orders. For instance, the discretion of magistrates was greatly curtailed in the legislation, whereby minor, first time offenders had to be referred to panels.³⁷ The research by Newburn et al confirms this point, as 45% of the magistrates interviewed felt that the lack of discretion in the legislation undermined their authority.³⁸ Crawford and Newburn also found that some panels had difficulty devising suitable plans because of a lack of local resources, and that panel members believed that adequate local facilities and resources were crucial to the success of panels.³⁹

After the publication of this evaluation of the referral orders, further research was conducted to follow up issues that had arisen.⁴⁰ This resulted in key recommendations to improve the delivery of the orders, including ensuring consistent implementation of guidance on reprimands and final warnings, with a clear process for sending back to the police cases where there was a denial on arrest but a guilty plea at court. There was also a recommendation that referral orders should not be extended to young offenders convicted after a 'not guilty' plea and that in certain circumstances a referral order may be given to individuals with a previous conviction. Subsequently, the Government introduced changes to help address such concerns, contained under the Criminal Justice and Immigration Act 2008.

Research evaluating referral orders has yet to establish whether such orders are having net-widening effects, drawing minor offenders further into the criminal justice system. There are concerns as to whether such orders are proportionate and there are questions over their longer term impact on recidivism, especially by comparison to other disposals.⁴¹ More fundamental problems with the referral order relate to the extent to which they actually embrace the principles of restorative justice. The fact that there is limited victim involvement in the process is a major cause for concern. In their research, Newburn et al, note that a victim attended in only 13% of cases where at least an initial panel meeting was held.⁴² More recently, a joint inspection of youth offending teams in 2007 found that only 8% of referral orders included a victim at the panel

³⁴ *Youth Justice Board Annual Review* (2002, Youth Justice Board).

³⁵ T. Newburn, A. Crawford, R. Earle, S. Goldie, C. Hale, A. Hallam, G. Masters, A. Netten, R. Saunders, K. Sharpe and S. Uglow *The Introduction of Referral Orders into the Youth Justice System* (2002, Home Office Research Study 242).

³⁶ *Ibid*

³⁷ C. Ball 'A Significant Move Towards Restorative Justice, or a Recipe for Unintended Consequences?' (2000) *Criminal Law Review* 211.

³⁸ T. Newburn, A. Crawford, R. Earle, S. Goldie, C. Hale, A. Hallam, G. Masters, A. Netten, R. Saunders, K. Sharpe and S. Uglow *The Introduction of Referral Orders into the Youth Justice System* (2002, Home Office Research Study 242).

³⁹ A. Crawford and T. Newburn, *Youth Offending and Restorative Justice: Implementing Reform in Youth Justice* (2003, Willan Publishing).

⁴⁰ Youth Justice Board *Referral Orders: Research into the issues raised in 'The Introduction of the Referral Order into the Youth Justice System'* (2003, Youth Justice Board).

⁴¹ S. Mullan and D. O'Mahony *A Review of Recent Youth Justice Reforms in England and Wales* (2003, Northern Ireland Office).

⁴² T. Newburn, A. Crawford, R. Earle, S. Goldie, C. Hale, A. Hallam, G. Masters, A. Netten, R. Saunders, K. Sharpe and S. Uglow *The Introduction of Referral Orders into the Youth Justice System* (2002, Home Office Research Study 242).

meeting.⁴³ Such low levels of victim participation obviously greatly limits any chance of ‘encounter, reparation, reintegration and participation’, supposedly central for restorative justice.⁴⁴ Moreover, given these orders are mandatory for the courts, the issue of consent for participants - a crucial element for restorative justice - is seriously undermined.

INTEGRATING RESTORATIVE JUSTICE INTO YOUTH JUSTICE

Reflecting on the development of restorative justice in youth justice in England and Wales it is clear that it has been limited in two broad respects. Firstly, the practice that has emerged has been largely diversionary, targeted towards first time offenders and those who have committed minor offences. Secondly, the measures available involve victims to a limited extent. As noted above, only a small minority of referral orders involve direct participation by victims in the process, despite the underlying importance of victim participation as a key aspect for the successful delivery of restorative justice. Moreover, there is little evidence that referral orders allow victims a meaningful role in deciding how the offence is dealt with. The limited involvement of victims obviously restricts their restorative potential and impact. Thus, while there have been many different initiatives to develop restorative justice across youth justice in England and Wales, these have only resulted in programmes that can be described as restorative practices. They have lacked a commitment to fully embrace the core principles of restorative justice and have only engaged with selective aspects of what is restorative justice. In effect, what has been delivered has only resulted in restorative practices, rather than restorative justice.

However, there are examples of restorative justice being used within youth justice systems elsewhere, which strongly embrace the core restorative justice principles. The following examines two of the most integrated restorative justice programmes, based in New Zealand and Northern Ireland. Both use restorative justice conferencing models that have been successful in involving a high proportion of victims. They deal with a wide range of offences, including very serious crimes. The methods used by both schemes also actively engage victims in the process of deciding how the offender is dealt with. As such, they are good examples of how restorative justice (rather than restorative practices) can be used to allow victims a role in ‘deal[ing] with the aftermath of the offence and its implications for the future’.⁴⁵

New Zealand

Perhaps the best known restorative justice conferencing scheme that has been integrated into a criminal justice system is the family group conferencing model developed in New Zealand under the Children, Young Persons and their Families Act 1989. The model was devised as part of a more general initiative which sought to address difficulties in the way young people, particularly minority group offenders such as the Maori and Pacific Island Polynesians, were being treated in the criminal justice and welfare systems in New Zealand.⁴⁶ The model sought to develop a more culturally sensitive approach to offending that emphasises inclusive participation and collective

⁴³ HM Inspectorate of Probation *Joint Inspection of Youth Offending Teams, 2006/07*. (2007, HM Inspectorate of Probation).

⁴⁴ D. Van Ness and K. Strong, *Restoring Justice* (1997, Anderson Publishing).

⁴⁵ T. Marshall *Restorative Justice: An Overview* (1999, Home Office) p5.

⁴⁶ G. Maxwell and A. Morris *Families, Victims and Culture: Youth Justice in New Zealand*. (1993, Social Policy Agency and Institute of Criminology, Victoria University of Wellington).

decision making, bringing together young people, their families and their communities to determine appropriate means of redress for victims.⁴⁷

The family group conferencing scheme was brought into New Zealand under a reform agenda that emphasised diverting young people away from criminal justice interventions through police cautions or informal resolutions. The legislation made conferencing the main avenue of disposal for all but the most serious offences (such as murder and manslaughter). In effect, family group conferencing became the main statutory method of disposal for young offenders. Young people can only be prosecuted if they have been arrested and referred by the police through a family group conference. The courts are also required to send offenders for family group conferences, they have to consider the recommendations of the conference and they generally do not deal with cases until they have had a conference recommendation.⁴⁸

Family group conferences are administered by the Department of Social Welfare using a youth justice co-ordinator and cases are referred either by the police following an admission of guilt or by the Youth Court for those pleading guilty or found guilty in court. The main aim of the conference is to agree a plan which should involve a process of dialogue between the offender (and his family) and the victim (and community representatives – where appropriate). In the conference the victim and offender participate in the decision about how best to deal with, and make amends for, the offending.⁴⁹ The process aims to meet victims' needs, including helping to make them feel better about what has happened to them, through the process of participation in the conference. It seeks to foster reconciliation between the parties leading to agreements that provide reparative outcomes and broader reconciliation for the offender and victim with their community.⁵⁰

Research evaluating these family group conferences has been carried out over a number of years and has looked at various aspects of their operation, including the process and outcomes. Maxwell and Morris found that young people were able to play an active part in the conference process. Nearly half of young people felt involved in reaching the decision and in coming up with the recommendations.⁵¹ The research found decisions in the conferencing process were very much driven by the young person and their family, rather than being imposed by the coordinator. It was apparent that families of the young people were involved in the conferences, as almost all conferences had family members present and about 40% had extended members of the family involved.

The research found that the young offenders usually felt they had a better understanding of the consequences of what they had done following the conference.⁵² Following interviews with young people after conferences, most said they felt involved in the decision making process and were satisfied with the outcome. The majority of young people said they had the opportunity to say what they wanted and almost all said they understood the decisions that were made.⁵³

⁴⁷ A Morris and G Maxwell 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study' (1998) *Western Criminology Review* 1: 1.

⁴⁸ *Ibid.*

⁴⁹ A. Morris and G. Maxwell (eds) *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001, Hart Publishing).

⁵⁰ K. Daly 'Conferencing in Australia and New Zealand: Variations, Research Findings, and Prospects' in A. Morris & G. Maxwell (eds), *Restoring Justice for Juveniles: Conferencing, Mediations and Circles* (2001, Hart Publishing).

⁵¹ G. Maxwell and A. Morris *Families, Victims and Culture: Youth Justice in New Zealand*. (1993, Social Policy Agency and Institute of Criminology, Victoria University of Wellington).

⁵² G. Maxwell, V. Kingi, J. Robertson, A. Morris and C. Cunningham *Achieving Effective Outcomes: Youth Justice in New Zealand* (2004, Ministry of Social Development).

⁵³ G. Maxwell and A. Morris *Families, Victims and Culture: Youth Justice in New Zealand*. (1993, Social Policy Agency and Institute of Criminology, Victoria University of Wellington.).

Not all young people felt so positively following their conference. Some complained that they did not feel fully involved and felt too intimidated to say what they wanted to. However as Maxwell et al note, the overall picture regarding involvement and participation in conferences was far more positive than for young people who appear in the courts.⁵⁴ Furthermore, there was little doubt that those participants who had experienced court and conferencing preferred the conference.

In relation to victims, the experience of family group conferencing has generally been shown to be positive and research has consistently illustrated that such conferences can more fully involve victims than conventional criminal justice. Importantly, the family group conferences give victims the right to be present in the process. Good preparation is important for victims, so they understand what they can realistically get from it and how it might help them. Victims were generally willing to meet the offender and wanted to be involved in the process. The research showed that only 6% of victims said they did not want to meet the offender.⁵⁵ Later research found that the most common reasons victims gave for not attending conferences were not wanting to meet the young person or their family, or that they wanted to attend but were unable to do so, underlining the importance of adequate victim preparation.⁵⁶

Many victims involved in conferences found it to be a positive process and felt better as a result of participating. Subsequent research showed that those victims who attended conferences were able express their views and were given a chance to explain how the offence had impacted on them.⁵⁷ Indeed, about 60% of victims said they found the conference to be helpful, positive and rewarding. Aspects of the conference they found particularly rewarding included being given the opportunity tell the young person what they felt as a result of the crime and being able to contribute to the decision making process regarding what should happen to the young person.

Early research in New Zealand found that some victims reported feeling worse after attending their conference.⁵⁸ The most frequent reasons were because they thought the young person was not remorseful, or that they were unable to express themselves properly in the conference. Others felt their concerns were not properly addressed, or they had not been listened to. However, later research by Maxwell et al found only 5% of victims said they felt worse following the conference.⁵⁹ The later results may have been a reflection of improved practice in terms of preparing victims before conferences and supporting them after. This research highlights the importance of providing training for effective mediation and managing conferences, so victims' needs are properly met and they have realistic expectations of what can be achieved. This research revealed that many victims felt the conference had helped them put the incident behind them and 81% of victims said they felt better after the conference.

In terms of levels of satisfaction with conference outcomes, generally the research showed high levels of satisfaction, especially from young people and their families. For example, the research by Morris and Maxwell found that 84% of young people and

⁵⁴ G. Maxwell, A. Morris and H. Hayes 'Conferencing and restorative justice' in D. Sullivan and L. Tiftt (eds), *Handbook of Restorative Justice: A Global Perspective* (2006, Routledge).

⁵⁵ G. Maxwell and A. Morris *Families, Victims and Culture: Youth Justice in New Zealand*. (1993, Social Policy Agency and Institute of Criminology, Victoria University of Wellington).

⁵⁶ G. Maxwell, V. Kingi, J. Robertson, A. Morris and C. Cunningham *Achieving Effective Outcomes: Youth Justice in New Zealand* (2004, Ministry of Social Development), by Maxwell et al (2004).

⁵⁷ *Ibid*.

⁵⁸ A. Morris and G. Maxwell 'Restorative Justice in New Zealand: Family Group Conferences as a Case Study' (1998) *Western Criminology Review* 1: 1.

⁵⁹ G. Maxwell, V. Kingi, J. Robertson, A. Morris and C. Cunningham *Achieving Effective Outcomes: Youth Justice in New Zealand* (2004, Ministry of Social Development).

85% of their parents said they were satisfied with the outcomes of the family group conferences.⁶⁰ Only a small number of young persons (9%) and their parents (11%) said they were dissatisfied with the outcome. For parents, an issue that appeared to cause dissatisfaction was the perception that some kind of help or treatment they thought necessary was not offered. For offenders it was more often related to their perceptions of the outcome and whether they felt the penalty was too severe.

Overall the research from New Zealand has been encouraging with respect to family group conferencing. It shows that most victims are usually willing to participate in restorative justice processes and they are generally positive about their experience of the process and outcomes. Family group conferencing appears to be effective in holding offenders to account and it can help them realise the harm they have caused. It also gives offenders constructive opportunities to make amends to their victims by apologising, making reparation, or performing community work or services for victims.

Northern Ireland

In the United Kingdom the only jurisdiction to adopt a mainstreamed statutory-based restorative justice conferencing model for young offenders has been Northern Ireland.⁶¹ The introduction and mainstreaming of restorative interventions into the youth justice system in Northern Ireland was a radical departure from previous responses to young offending. The measures provide for two types of disposal, diversionary and court-ordered conferences. Both types of conference take place with a view to a youth conference co-ordinator providing a plan to the prosecutor or court on how the young person should be dealt with for their offence.

Court-ordered conferences are referred for conferencing by the court; the young person must agree to the process and they must either admit guilt, or have been found guilty in court. An important feature of the legislation is that the courts *must* refer all young persons for youth conferences, except for offences carrying a mandatory life sentence. The court *may* refer cases that are triable by indictment only or scheduled offences under terrorism legislation. In effect, the legislation makes conferencing mandatory except for a small number of very serious offences.

The format of the Youth Conference itself bears much similarity to the general model used in New Zealand. It normally involves a meeting, chaired by an independent and trained youth conference facilitator (employed by the Youth Conferencing Service), where the young person will be provided with the opportunity to reflect upon their actions. The victim, who is encouraged to attend, is allowed to explain to the offender how the offence affected them, in theory giving the offender an understanding of their actions and allow the victim to separate the offender from the offence. Following a dialogue a 'youth conference plan' will be devised which should take into consideration the offence, the needs of the victim and the needs of the young person. The young person must consent to the plan, before it becomes actionable. Typically plans require the young offender to complete acts, such as reparation to the victim, requirements to address their offending and/or restrictions on the young person's conduct or whereabouts. The conference may even recommend the imposition of a custodial sentence to the court.

⁶⁰ G. Maxwell and A. Morris *Families, Victims and Culture: Youth Justice in New Zealand*. (1993, Social Policy Agency and Institute of Criminology, Victoria University of Wellington).

⁶¹ For further information see D. O'Mahony and C. Campbell 'Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: The Experience of Northern Ireland' in *International Handbook of Youth Justice* J. Junger-tas and S. Decker (eds) (2006, Springer Academic Press) p 93–116.

The youth conferencing scheme was subject to a major evaluation in 2006.⁶² The findings were generally very positive concerning the impact of the scheme on victims and offenders and it was found to operate with relative success. Importantly, the research showed that youth conferencing considerably increased levels of participation for both offenders and victims in the process of seeking a just response to offending. The scheme engaged a high proportion of victims in the process: over two-thirds of conferences (69%) had a victim in attendance, which is relatively high compared with other restorative-based programmes.⁶³

Victims were willing to participate in youth conferencing and 79% said they were actually 'keen' to participate. Most (91%) said the decision to take part was their own and not a result of pressure to attend. Interestingly, over three quarters (79%) of victims said they attended 'to help the young person' and many victims said they wanted to hear what the young person had to say and their side of the story. It was apparent that victims' reasons for participating were based around seeking an understanding of why the offence had happened; they wanted to hear and understand the offender and to explain the impact of the offence to the offender. A lot of work was also put into preparing victims for conferencing and they were well prepared.

Youth conferencing was by no means the easy option and most offenders found it very challenging. Offenders found the prospect of coming face to face with their victim difficult. For instance, 71% of offenders displayed nervousness at the beginning of the conference. Despite their nervousness, observations of the conferences revealed that offenders were usually able to engage well in the conferencing process, with nearly all (98%) being able to talk about the offence and the overwhelming majority (97%) accepting responsibility for what they had done.

The direct involvement of offenders in conferencing and their ability to engage in dialogue contrasts with the conventional court process, where offenders are usually afforded a passive role - generally they do not speak other than to confirm their name, plea and understanding of the charges - and are normally represented and spoken for by legal counsel throughout their proceedings. Similarly, victims were able to actively participate in the conferencing process and many found the experience valuable in terms of understanding why the offence had been committed and in gaining some sort of apology and restitution. This too contrasts with the typical experience of victims in the conventional court process where they often find themselves excluded and even alienated, or simply used as witnesses for evidential purposes if the case is contested. A clear endorsement of victims' willingness to become involved in a process which directly deals with the individuals that have victimised them was evident in that 88% of victims said they would recommend conferencing to a person in a similar situation to themselves.

A recent qualitative study by Maruna et al (2007) of the longer-term impacts of youth conferencing process on young offenders in Northern Ireland has also found 'many of the post-conference outcomes were positive',⁶⁴ and a report produced by the Criminal Justice Inspectorate in 2008 has corroborated those findings.⁶⁵ This is not to

⁶² C.Campbell, R. Devlin, D. O'Mahony, J. Doak, J. Jackson, T. Corrigan, and K. McEvoy *Evaluation of the Northern Ireland Youth Conference Service*, NIO Research and Statistics Series: Report No. 12. (2006, Belfast, Northern Ireland Office).

⁶³ See for example, T. Newburn, A. Crawford, R. Earle, S. Goldie, C. Hale, A. Hallam, G. Masters, A. Netten, R. Saunders, K. Sharpe and S. Uglow 'The Introduction of Referral Orders into the Youth Justice System' (2002, Home Office Research Study 242); D.O'Mahony and J. Doak 'Restorative Justice: Is more better?' (2004) *Howard Journal*, 43: 484.

⁶⁴ S.Maruna, S.Wright, J. Brown, F.Van Marle, R. Devlin and M. Liddle *Youth Conferencing as Shame Management: Results of a Long-term Follow-up Study* (2007, Northern Ireland Youth Justice Agency) p. 2.

⁶⁵ Criminal Justice Inspectorate, *Inspection of the Youth Conferencing Service* (2008, Northern Ireland, Criminal Justice Inspectorate).

suggest that the integration of restorative justice within criminal justice through youth conferencing works effectively all the time and in all cases. Some cases are not suitable for conferencing, such as where the young person is unwilling to actively participate, or where the evidence or facts are disputed. However, when used for suitable cases, the research evidence has been largely positive and there is now a considerable international body of research demonstrating advantages of integrating restorative justice within criminal justice for offenders, victims and the broader community.⁶⁶

There is emerging research evidence that shows that the youth conferencing system in Northern Ireland is having positive impacts in terms of reducing reoffending rates. Figures that compare the re-offending rates of young people given a range of sentences in Northern Ireland demonstrate that those given restorative conferencing have a relatively low level of reoffending.⁶⁷ Much of the difference in reoffending rates across disposal types can largely be explained by differences in the characteristics of offenders and the types offences for which they are convicted. However, the research shows that those given court-ordered youth conferences have a lower level of reoffending (45%) than those given community based sentences (54%) or custodial sentences (68%).⁶⁸

A number of studies have looked at the issue of reconviction and restorative interventions more generally. For example, in a wide review of international studies of differing criminal justice programmes it was found that restorative programmes produced a significant reduction in reoffending over a follow-up period.⁶⁹ Programmes which had clear restorative objectives, goals and principles appeared to deliver the strongest reductions in recidivism. Programmes which included more serious offences and violent offenders were also able to produce the most significant reductions in recidivism.⁷⁰

Further recent research in England has shown that the way in which offenders experience restorative interventions is related to subsequent offending.⁷¹ This research reveals that offenders who felt the restorative intervention had made them realise the harm they had caused and found the experience useful, as well as those who had wanted to meet the victim and were observed to be actively engaged in the conference, were significantly less likely to be reconvicted.⁷² These findings support the broad theoretical work on effective practice, which emphasises the importance of the restorative elements, such as: bringing the parties together; working towards meeting needs; seeking to repair injuries caused, and thus restoring relationships.⁷³

Other studies have looked in detail at the experiences of participants in restorative justice and how this is related to recidivism. These broadly confirm the importance of

⁶⁶ See for example: D. Miers *An International Review of Restorative Justice* (2001, Home Office); L. Sherman and H. Strang, *Restorative Justice: The Evidence* (2007, The Smith Institute); J. Shapland, G. Robinson and A. Sorsby, *Restorative Justice in Practice* (2011, Routledge). However, Goldson is critical of restorative youth conferencing, especially as a model for criminal justice reform as proposed by the Commission on Youth Crime and Antisocial Behaviour (2010) in England and Wales: B. Goldson, 'Time for a Fresh Start' (2011) *Youth Justice* 11(1), 3.

⁶⁷ D. Lyness 'Northern Ireland Youth Re-offending: Results from the 2005 Cohort' Statistics and Research Statistical Bulletin (2008, Northern Ireland Statistics and Research Agency).

⁶⁸ D. Lyness and S. Tate 'Northern Ireland Youth Re-offending: Results from the 2008 Cohort' Statistics and Research Statistical Bulletin (2011, Northern Ireland, Department of Justice).

⁶⁹ J. Bonta, T. Jesseman, T. Ruge and R. Cormier 'Restorative Justice and Recidivism: Promises Made, Promises Kept' in D. Sullivan and L. Tift (eds), *Handbook of Restorative Justice* (2008, Routledge).

⁷⁰ For an very complete review of the research evidence see L. Sherman and H. Strang *Restorative Justice: The Evidence* (2007, London, Smith Institute).

⁷¹ J. Shapland, A. Atkinson, H. Atkinson, J. Dignan, L. Edwards, J. Hibbert, M. Howes, J. Johnstone, G Robinson and A Sorsby *Does restorative justice affect reconviction? The fourth report from the evaluation of three schemes* (2008, Ministry of Justice Research Series, 10/08).

⁷² *Ibid.* p iv.

⁷³ R. Classen *Restorative Justice – Fundamental Principles* (1996, presented to the UN Alliance of NGO's Working Party on Restorative Justice).

the impact that the encounter between the victim and offender has in a conference, especially on the offender.⁷⁴ A large study in New Zealand found those who complete restorative conferences were less likely to reoffend when the conference was rated as inclusive, fair and forgiving.⁷⁵ It appears that allowing the young person to 'make up' for what they have done was important, as was avoiding stigmatising them as 'bad' individuals. Thus, the quality of the restorative conference and the experience of the young person is an important determinant of subsequent reoffending. In other words, conferences that succeed in achieving restorative justice goals are more likely to reduce the probability of reoffending.

Discussion

The restorative justice schemes developed in Northern Ireland and New Zealand use conferencing models that adhere closely to what can be described as 'restorative justice'. They are based on voluntary participation and consent. They seek to bring victims and offenders together to discuss the offence and actively involve the parties in deciding how the matter is dealt with. The schemes are set in legislation and require the courts to refer cases for conferencing. They are used for more serious offences, and repeat offenders. The conferencing process is integral to the sentencing process, rather than a diversionary measure. Both systems were brought about through major changes to their juvenile justice systems and they received significant financial investment and support when established. The schemes clearly show that restorative justice can be successfully implemented within youth justice and victims can play an integral part in the process. Furthermore, there is a growing body of evidence to show that schemes which fully embrace restorative principles and deliver restorative justice are effective in producing high levels of satisfaction for participants and reduced levels of reoffending.⁷⁶

However, England and Wales has seen only limited development of restorative justice within youth justice over the last decade. The restorative programmes that have emerged have largely been used as diversionary tools, or as alternative ways of dealing with young people who offend (other than prosecution through the courts). This approach is evident across all of the disposals available, from mediation and final warnings to referral orders. For example, the final warning scheme allows young people who have offended to be given a formal restorative police warning, rather than being prosecuted. Similarly, the recent introduction of the youth restorative disposal gives the police a diversionary method of dealing with young offenders by way of a summary disposal, similar to a reprimand or final warning. It provides the police with a diversionary tool to handle young people who have committed offences, other than prosecution.

The restorative provisions currently available have also been largely directed towards minor offences and first time offenders. Many of the mediation programmes only deal with minor criminal acts or neighbourhood disputes, which are unlikely to be brought through the criminal justice system.⁷⁷ The final warning schemes were specifically designed to deal with young offenders who have not been cautioned or prosecuted

⁷⁴ L. Sherman and H. Strang, *Restorative Justice: The Evidence* (2007, The Smith Institute).

⁷⁵ G. Maxwell, V. Kingi, J. Robertson, A. Morris and C. Cunningham *Achieving Effective Outcomes: Youth Justice in New Zealand* (2004, Ministry of Social Development).

⁷⁶ L. Sherman and H Strang, *Restorative Justice: The Evidence* (2007, The Smith Institute).

⁷⁷ There are also a range of mediation projects for adult offenders that deal with serious offences and offenders in custody, see J.Shapland, A. Atkinson, E. Colledge, J. Dignan, M. Howes, J. Johnstone, R. Pennant, G. Robinson and A. Sorsby *Implementing Restorative Justice Schemes (Crime Reduction Programme): A Report on the First Year*, Home Office Online Report 32/04. (2004, Home Office).

previously and have not committed serious offences. Similarly, the referral order was established for young people brought before the courts for the first time. It allows cases to be dealt with through a youth offender panel, rather than the normal court process. Only recently has the referral order been slightly widened in scope, to include some young people with previous convictions, but this is restricted and the order remains primarily for those appearing before the courts for the first time.⁷⁸

These programmes have also had limited success in involving victims. Though victim involvement is a core element of providing restorative justice, the experience of achieving this in practice in England and Wales has been poor. For example, only a very small minority of referral orders directly involve victims. Research shows only 8–13% of referral orders had a victim attend a panel meeting.⁷⁹ Such low levels of victim participation greatly limits their ability to provide a restorative process or outcomes. Similarly, for final warnings, although these are intended to be delivered restoratively, in reality few involve victims when they are delivered.⁸⁰

Related to victim participation rates, is the extent to which victims are given an input in the restorative process and how the offence is dealt with. There is little evidence that any of the schemes in England and Wales provide a process in which the victim is given a meaningful say in how the offence is dealt with. Even the new youth restorative disposal, which has high levels of victim participation, only achieves very limited involvement of victims in its decision making process. The disposal provides a swift response to minor offending and is popular with police officers because it saves time and it delivers an apology to the victim. But there is little to suggest it involves any significant restorative intervention and few cases are referred on to youth offending teams for further interventions.⁸¹ The disposal largely arms the police with another mechanism to informally deal with offending by way of an immediate warning that includes an apology, rather than providing any substantive restorative justice. Similarly, the referral order lacks a strong restorative justice element. As noted previously, few victims are involved in the process and there is little room for them to play a part in deciding how the offence is dealt with, as this is decided by the youth offending panel.⁸² Victims, when involved, have largely been used to highlight the impact the offence, for the offender's benefit.⁸³ Furthermore, referral orders are mandatory order, which undermines consent, another crucial element needed for the delivery of restorative justice.

As noted previously, there is an important distinction between restorative justice, and what can be described as restorative practices. Restorative justice requires the incorporation of core restorative principles and for the victim to be able to play a part in collectively deciding how the offence is dealt with.⁸⁴ Restorative practices, on the other hand, only include elements of restorative justice. Some include limited victim input (so the offender may better understand the consequences of their actions),

⁷⁸ The scope of the referral order was widened by the Criminal Justice and Immigration Act 2008.

⁷⁹ T. Newburn, A. Crawford, R. Earle, S. Goldie, C. Hale, A. Hallam, G. Masters, A. Netten, R. Saunders, K. Sharpe and S. Uglow *The Introduction of Referral Orders into the Youth Justice System* (London, Home Office Research Study 242, 2002); HM Inspectorate of Probation *Joint Inspection of Youth Offending Teams, 2006/07* (2007, HM Inspectorate of Probation,).

⁸⁰ C. Hoyle 'Restorative Justice Policing in Thames Valley' (2009) *Journal of Police Studies, Cahiers Politiestudies* 2009–2.

⁸¹ A. Rix, K. Skidmore, R. Self, T. Holt, and S. Raybould *Youth Restorative Disposal Process Evaluation* (2011, Youth Justice Board).

⁸² T. Newburn, A. Crawford, R. Earle, S. Goldie, C. Hale, A. Hallam, G. Masters, A. Netten, R. Saunders, K. Sharpe and S. Uglow *The Introduction of Referral Orders into the Youth Justice System* (2002, Home Office Research Study 242).

⁸³ A. Newbury "'I Would Have Been Able to Hear What They Think": Tensions in Achieving Restorative Outcomes in The English Youth Justice System' (2011) *Youth Justice: An International Journal* Vol 11, 3.

⁸⁴ T. Marshall *Restorative Justice: An Overview* (1999, Home Office).

however, they often fall short of providing full restorative justice. In reality, the restorative measures currently available in England and Wales generally facilitate a level of participation that can only be described as partially restorative.

Yet, for over a decade there have been sustained calls to incorporate restorative justice in youth justice and criminal justice in England and Wales. The Crime and Disorder Act 1998 and the Youth Justice and Criminal Evidence Act 1999, were the first pieces of legislation that facilitated a 'restorative justice' approach to the delivery of final warnings and referral orders. Since then, the Home Office, Youth Justice Board, Association of Chief Probation Officers and the Crown Prosecution Office have jointly promoted the further involvement of victims and of using a 'restorative approach to make final warnings more effective and meaningful'.⁸⁵ They highlight the impact of a final warning on a young offender, which can be significantly enhanced by delivering it restoratively. In relation to the introduction of referral orders, the primary aim of the order sought to prevent young people from re-offending and to provide a restorative justice approach for dealing with young offenders. The order sought to emphasise 'responsibility, reparation and rehabilitation', enabling offenders to become aware of and take responsibility for the consequences of their offending and to have the opportunity to make reparation to victims and the wider community. The process was also designed to give victims the opportunity to say how they have been affected by the offence, ask questions, receive an explanation or apology and discuss how the offender can make practical reparation for the harm that has been caused.⁸⁶ As such, this restorative measure was introduced into the youth justice system with the aim of enabling young people to take responsibility for their offending through a system which helps them understand the impact and consequences of their actions on victims and the broader community. The measures were also designed to accommodate victim-offender mediation and to involve service providers (youth offending teams) in a process of restorative justice.

The importance of giving victims a greater role in the delivery of justice and in enabling restorative justice to play a part in criminal justice were specifically outlined by central Government in Home Office publications in 2006.⁸⁷ The Youth Justice Board stated its commitment to 'placing restorative justice at the heart of the youth justice system' and has noted how restorative justice can help reduce offending, better support victims of crime, and help build public confidence.⁸⁸ Thus the rhetoric used by Government and key service providers appears to show them strongly wedded to incorporating restorative justice within youth justice and endorsing it as a beneficial process, advancing the aims of delivering more effective criminal justice.

Similarly, service providers and other organisations have been active in promoting restorative justice within youth justice. The Prison Reform Trust in its publication 'Out of Trouble' in 2009, specifically supported the adoption of an integrated system of restorative justice, along the lines of the model developed in Northern Ireland. They suggest this could bring benefits to victims, offenders and the broad community.⁸⁹ The Prison Reform Trust also advocated the adoption of a system which properly integrates victims into a restorative process, to play an active part in how young people who offend are dealt with. Similarly, the Independent Commission on Youth Crime

⁸⁵ Home Office *Delivering Simple, Speedy, Summary Justice* (2006, The Home Office.).

⁸⁶ Ministry of Justice *Referral Order Guidance* (2009, Ministry of Justice).

⁸⁷ Home Office *Rebalancing the Criminal Justice System*(2006, The Home Office)and Home Office *Delivering Simple, Speedy, Summary Justice* (2006, The Home Office).

⁸⁸ Youth Justice Board *Developing Restorative Justice: An Action Plan* (2006, Youth Justice Board).

⁸⁹ J. Jacobson and P. Gibbs *Out of Trouble* (2009, Prison Reform Trust).

published proposals in 2010 promoting the adoption of restorative justice within criminal justice and youth justice.⁹⁰ They see restorative justice as an approach in which those with a stake in an offence can collectively resolve how to deal with the offence and offender. Thus, offenders agree to discuss the consequences of their behaviour, its effects on the victim(s), and consider how to make amends. Victims are able to make the offender aware of the harm they have experienced and to discuss what remedies would be acceptable. The commission recommended that youth conferencing should become the centrepiece of responses to all but the most serious offences committed by children and young people in England and Wales. Similarly, the Criminal Justice Alliance in 2011, a coalition of organisations and criminal justice service providers, strongly encouraged the Government to place a 'duty on all criminal justice agencies to offer restorative justice' for victims of crime and offenders.⁹¹

The Government's Sentencing Green Paper 'Breaking the Cycle', published in 2010 as part of plans for fundamental changes to the criminal justice system, made clear its commitment to developing the use of restorative justice at all stages of the criminal justice system, for both young and adult offenders.⁹² The paper proposed increasing the range and availability of restorative justice approaches to support reparation and, in appropriate cases, making it a fundamental part of the sentencing process. It suggested that this may be most appropriate as part of a broader approach to support victims and witnesses. In relation to youth justice, the paper broadly endorsed the use of restorative justice.⁹³ Specifically, it proposed strengthening the referral order, so it has a clearer restorative approach. It encouraged the use of restorative justice across the youth justice sentencing framework and recommended drawing from the experience of youth conferencing in Northern Ireland.

However, despite all of the public rhetoric and sustained calls for restorative justice to be incorporated within youth justice, the development and delivery of actual services that can be described as 'restorative justice' has simply not materialised. Making sense of the limited progress over the past decade is difficult to understand, particularly given the strong support. It appears one of the main obstacles that has hindered the emergence of restorative justice has arisen due to a lack of commitment to fully embrace the core principles of restorative justice in youth justice. Thus while the Government has been willing to espouse the importance of giving victims further rights, of providing a fairer system of justice and of supporting the development of restorative programmes within youth justice,⁹⁴ in reality its approach has been much more conservative and limited in scope. In effect, the Government seems willing to promote restorative practices, but it has not been willing to fully embrace what is restorative justice.

This approach is evident in the Government's response to the sentencing Green Paper 'Breaking the Cycle'.⁹⁵ While the paper strongly supports the development of restorative programmes and the broad rights of victims in youth justice, it provides little support for the development of full-blooded restorative justice. It sees restorative measures as only appropriate for low level offenders and suitable as an alternative to

⁹⁰ Independent Commission on Youth Crime *Time for a Fresh Start*, (2010, London).

⁹¹ Criminal Justice Alliance (2011) *Restorative Justice: Time for Action*, See www.criminaljusticealliance.org (accessed Dec 2011).

⁹² Ministry of Justice *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (2010, The Stationary Office).

⁹³ *Ibid*, see chapter 5 Youth Justice, p 67–76.

⁹⁴ *Ibid*, see especially chapter 1 Punishment and Payback and chapter 5 Youth Justice.

⁹⁵ Ministry of Justice *Breaking the Cycle: Government Response* (2011, The Stationary Office).

formal criminal justice action.⁹⁶ The proposals include giving victims a more central role in the criminal justice system, so they have the opportunity to explain the harm crime causes, and that sentences ensure offenders make amends, especially through the use of victim impact statements, which can be submitted prior to sentencing. While the response paper suggests the Government will improve restorative justice provision, this is limited to low-level offending and encourages its use for out-of-court and informal disposals. It calls for the development of minimum standards for youth offending teams using restorative justice and seeks to make the referral order a more restorative disposal for young offenders. This is to be achieved by increasing training given to referral order panel members and by removing some restrictions on when the order can be imposed. As such, the Government's approach to restorative justice appears strong on rhetoric but it is weak on commitments that actually deliver restorative justice.

The lack of commitment to deliver restorative justice has also been reflected in the way many programmes have been funded in the recent past. Poor financial provision has undermined the development of many restorative programmes. For example, restorative based mediation programmes that have been developed have experienced financial difficulties which have undermined their ability provide services. This has also resulted in some good mediation services being developed, but subsequently closed when funding has run out. Likewise, the referral order has been imposed on local youth offending teams, without significant additional financial support. Youth offending teams have to deliver a wide range of services to young offenders under very tight financial constraints. Yet, as the research from Northern Ireland and New Zealand demonstrates, properly engaging victims in a restorative process is a resource intensive and time consuming process, if it is to be conducted properly. Arguably, this has resulted in youth offending teams being unable to prioritise victim involvement, beyond their other statutory obligations.⁹⁷ The Government has also recognised that local agencies lack financial incentives and opportunities to develop effective alternatives to custody for young people.⁹⁸ Furthermore, there are strict time limits in which the referral order needs to be implemented. This makes it even more difficult for youth offending teams and offender panels to properly involve victims, whilst dealing with the needs of offenders and the prompt delivery of the order.

An important point that appears to have undermined the growth of restorative justice relates to the way the programmes in England and Wales have actually evolved. The emergence of new restorative programmes has been largely dependent on the successful implementation and evaluation of existing schemes. In particular, there has been a reluctance to consider new schemes, without clear evidence of success, like showing participants are satisfied with it and reducing re-offending rates.⁹⁹ But the research evidence relating to the effectiveness of restorative programmes shows them to be most effective with more serious offences, when victims have direct role in the process, and when they provide meaningful interactions between the participants, dealing with the offence and its aftermath.¹⁰⁰ However, as noted above, the restorative justice schemes in England and Wales have centred on programmes which have targeted low level offending, first time offenders and have provided limited engagement with victims. They have provided restorative practices, rather than restorative justice.

⁹⁶ Ibid, see especially sections 25 to 30 pages 8–11.

⁹⁷ See also L. Sherman and H. Strang *Restorative Justice*, (2008, Youth Justice Board).

⁹⁸ Ministry of Justice *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (2010, The Stationary Office, p73); Ministry of Justice. *Breaking the Cycle: Government Response* (2011, The Stationary Office).

⁹⁹ Restorative Justice Council *A new way of doing justice: The response of the Restorative Justice Council to the Sentencing Green Paper – Breaking the Cycle* (2011, Restorative Justice Council).

¹⁰⁰ L. Sherman and H. Strang, *Restorative Justice: The Evidence* (2007, The Smith Institute).

These types of schemes are actually the least likely to provide significant positive results, thus it is probably unsurprising that progress has been so slow.

The continued reluctance to extend restorative justice to more serious offences and offenders may be related to a perception that restorative justice is a soft option.¹⁰¹ However, evidence shows that restorative justice is a demanding process and offenders find it very challenging, especially when they have to explain their actions in front of their family and the victim in a conference.¹⁰² The Government approach, which is clearly driven by a political agenda of being seen to be tough on crime, continues to emphasise using restorative interventions for low-level offending, despite it being better suited to dealing with serious offences.¹⁰³

Reflecting on the developments in England and Wales, there are lessons that can be learnt for other jurisdictions considering the adoption of restorative justice. The research from New Zealand and Northern Ireland shows that it is a demanding process and it requires substantial change to be properly established. It requires a significant ongoing investment in terms of resources, time and effort, to be delivered properly. Restorative justice is a challenging process for offenders and victims, and research clearly shows it to be most suitable and effective with more serious types of offences and offenders.¹⁰⁴ Indeed, it has been argued that using restorative programmes to deal with minor offences, can potentially lead to net-widening – drawing young people, who have committed minor offences into demanding criminal justice interventions.¹⁰⁵ Thus, it is questionable whether the widespread use of restorative programmes for minor criminal offences is either desirable, cost efficient, or effective in terms of its impact on offenders or victims.¹⁰⁶

There is now a strong body of research evidence showing the positive results of adopting restorative justice measures within criminal justice for suitable cases and in the right circumstances. This is not to suggest that restorative justice offers some kind of ‘silver bullet’ for all the problems of criminal justice. However, countries considering the adoption of restorative justice can learn much from the evidence available from jurisdictions which have implemented and utilised it effectively. Whilst restorative practices may be helpful in providing elements that are restorative, they are not the same as delivering restorative justice. The experience from England and Wales demonstrates that introducing restorative practices in small steps can actually lead to very little restorative justice being delivered.

¹⁰¹ Ministry of Justice *Breaking the Cycle: Government Response* (2011, The Stationary Office).

¹⁰² D. O’Mahony and C. Campbell ‘Mainstreaming Restorative Justice for Young Offenders through Youth Conferencing: The Experience of Northern Ireland’ in *International Handbook of Youth Justice* J Junger-tas and S Decker (eds) (2006, Springer Academic Press).

¹⁰³ L. Sherman and H. Strang, *Restorative Justice: The Evidence* (2007, The Smith Institute).

¹⁰⁴ *Ibid.*

¹⁰⁵ D.O’Mahony and J. Doak ‘Restorative Justice: Is More Better?’ (2004) *Howard Journal*, 43: 484.

¹⁰⁶ L. Sherman and H. Strang, *Restorative Justice: The Evidence* (2007, The Smith Institute) p. 57.

THE INFLUENCE OF LEGAL CULTURE, LOCAL HISTORY AND CONTEXT ON RESTORATIVE JUSTICE ADOPTION AND INTEGRATION: THE CZECH EXPERIENCE

KERRY CLAMP*

INTRODUCTION

While criminal justice systems and programmes around the world may use similar terms and processes, they are very often shaped by national identity and perceptions of the historical role of criminal justice agencies – police, prosecutors and judges. This is no more evident than in countries that have undergone some form of constitutional settlement and who, in the new democratic order, are faced with transforming a criminal justice system that was once used as an extension of state power to one that will uphold democratic principles as enshrined in international legal documents. During this process of reform, governments increasingly look to other nations for sources of inspiration for new policy strategies.¹ Therefore, while we may see similar trends across societies in terms of the adoption and implementation of programmes or policies, it may be argued that their application is often shaped by historical and cultural characteristics of a particular jurisdiction.

A particular example of this may be illustrated by the momentum of restorative justice within the global criminal justice landscape. Restorative justice has become a popular mechanism for a number of governments attempting to address a legitimacy deficit faced by criminal justice institutions and to stimulate community ownership and responsibility for offending behaviour. In many countries, the legislative use of restorative justice is confined to the youth justice system with only minor or first-time offences qualifying for referral (for example, England and Wales). In others, restorative justice is a mandatory consideration for juvenile offenders with relatively few offences being excluded for referral to conferencing/mediation processes (for example, New Zealand, Northern Ireland and South Africa). A smaller cohort of countries have legislative provision for both adult and juvenile offenders with a range of offences – both minor and serious – being eligible for restorative processes. However, despite the reams of paper devoted to the investigation of this reform dynamic, little is known about the factors that impact on the character and prevalence it ultimately assumes in the formal response to offending behaviour.

Previous research on restorative justice, which emphasises the importance of the role of both victim/s and offender/s participating fully in the outcome of their offence, has traditionally focused on countries that have strong democratic traditions such as the United States, Canada, Australia and New Zealand. While this research has highlighted the effectiveness of restorative justice as a method of crime reduction, its benefits and risks to both victims and offenders, and its effect upon the procedural rights of arrestees, relatively little attention has been paid to *why* and *how* it is adopted and

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¹ C. Bennett, 'What is Policy Convergence and What Causes It?' (1991) 21 *British Journal of Political Science* 215; David Dolowitz, Stephen Greenwold and David Marsh, 'Something Old, Something New, Something Borrowed, But Why Red, White and Blue?' (1999) 52 *Parliamentary Affairs* 719; Michael Tonry, 'Symbol, Substance and Severity in Western Penal Policies' (2001) 3 *Punishment and Society* 517; John Muncie, 'The Globalization of Crime Control – The Case of Youth and Juvenile Justice: Neo-liberalism, Policy Convergence and international Conventions' (2005) 9 *Theoretical Criminology* 35.

implemented within transitional settings.² This paper seeks to provide an initial contribution to that gap in the literature by investigating the experience of one country – the Czech Republic – to learn more about how history and a transition from an undemocratic to a democratic tradition can influence the character of restorative justice during criminal justice reform.

The paper begins by providing a brief overview of the history of the Czech Republic – Communism, legal culture during that period and the issues raised by the transition. The study of historical events is an important element of any analysis on policy choices post-transition due to the impact that it may have on decision-making³ and this exercise provides a context for looking at restorative justice adoption and integration during the process of criminal justice reform in the second part of this paper. The final section seeks to tease out the lessons that may be learnt about the impact of history and legal culture on restorative justice adoption and integration.

LEGAL CULTURE, COMMUNISM AND THE ‘VELVET REVOLUTION’

The Czechs and Slovaks, for hundreds of years, were subjects⁴ of the Habsburg Empire⁴ and their geographical location on the border of Western and Eastern Europe meant that their culture had been influenced somewhat by Western liberal political, economic and religious traditions.⁵ When the Empire collapsed at the end of World War I, the Czechs and Slovaks voluntarily united to form the independent country of Czechoslovakia.⁶ While Czechoslovakia was the only Eastern European country to remain a parliamentary democracy from 1918 to 1938, the signing of the Munich Pact in 1938 gave Hitler the right to invade and claim Czechoslovakia’s border areas and the country remained under German occupation until 1945.⁷

In the aftermath of World War II, many of the nation’s pre-war leaders sought to recreate the political institutions that had been destroyed by the Third Reich and many were re-elected in the same capacity under a coalition government in May 1946.⁸ However, in 1948 the Communist Party attained complete power following a coup d’état which placed the country under Soviet hegemony and imposed a one-party dictatorship demanding strict adherence to Stalinist policies.⁹ The following years were characterised by “economic exploitation and political terror” and contact with Western countries became treasonable.¹⁰ Dissidents were subjected to show trials, persecuted as ‘class enemies’ and housed not only in prisons but also specially constructed ‘remedy-labour camps’, forced to work in uranium mines without protection from radioactivity, and expelled from their homes and cities.¹¹

² Kerry Clamp, ‘Assessing Alternative Forms of Localised Justice in Post-Conflict Societies – Youth Justice in Northern Ireland and South Africa’, in David Frenkel, and Carston Gerner-Beuerle (Ed.), *Selected Essays on Current Legal Issues* (ATINER 2008).

³ Graeme Simpson, Brandon Hamber, and Noel Stott, *Future Challenges to Policy-Making in Countries in Transition*, Centre for the Study of Violence and Reconciliation, Johannesburg. (2001).

⁴ Richard Nyrop, *Czechoslovakia: A Country Study* (U.S. Government Printing Office 1982); Mark Werner, ‘Distant mirror’ *Prague Post* (Prague, 2 November 2005)

⁵ David Meadows, ‘The Effects of Political-Cultural Ideas on Macroeconomic Reform in the Czech Republic and Romania’ (2007) 1 *PRAVO: North American Journal for Central European Studies* 122 .

⁶ Nyrop, *supra* n. 6; Rosalyn Unger, ‘Historical Setting’, in Richard Nyrop, (eds), *Czechoslovakia: A Country Study* (U.S. Government Printing Office 1982); Werner *supra* n. 6

⁷ Hans Renner, *A History of Czechoslovakia Since 1945* (Routledge 1989).

⁸ Ivo Duchacek, ‘The February Coup in Czechoslovakia’ (1950) 2 *World Politics*, 511; Nyrop, *supra* n. 6.

⁹ Duchacek *op cit*; Gordon Wightman, ‘The Collapse of Communist Rule in Czechoslovakia and the June 1990 Parliamentary Elections’ (1991) 44 *Parliamentary Affairs* 94.

¹⁰ Hugh Seton-Watson, ‘Czechoslovakia: 1938, 1948 and 1968’ (1969) 4 *Government and Opposition* 163, 165.

¹¹ Helga Welsh, ‘Dealing with the Communist Past: Central and East European Experiences after 1990’ (1996) 48 *Europe-Asia Studies* 413; Roman David and Susan Choi, ‘Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic’ (2005) 27 *Human Rights Quarterly*, 392.

Between 1948 and 1989 approximately 234 people were judicially executed for political reasons, 262,500 people were jailed and more than 4,000 political prisoners died under unclear circumstances.¹² Acts of violence and coercion were not only directed at the public but also members of the state apparatus (executive, military and administration) who were frequently subjected to blackmail, violent threats and outright homicide (or rather *policide*) as methods of enforcing loyalty to the Kremlin.¹³ Over time, however, physical violence was replaced by structural violence characterised by calculated intimidation and arbitrariness that enabled the population to be effectively controlled.¹⁴ Law played a central role in this process and for this reason, it is important to consider the values and principles underpinning Soviet legal culture. The following section briefly reviews the most influential source of the Soviet tradition – Marxism – and the impact that it had on both the interpretation of law and the perceptions of the legal system under Communism.

Control through Informalism: Soviet Legal Culture

Saunders and Hamilton define legal culture as the “attitudes, values and opinions about not only law per se but also the appropriate way to resolve disagreements and process disputes”.¹⁵ Socialist legal systems resembled those of Western Europe (in terms of judicial organization, formal rules of procedure, and the principle of legalism), what made them distinctive was their basic societal value judgments, social and economic systems, and the interpretation of law under Marxist-Leninist theory.¹⁶ Marxism viewed the state and the law as institutions serving the interests of the dominant class¹⁷ and Communism was thus seen as a revolution of the proletariat against the class system that prevails in the West.

Socialist theorists envisaged Communist society as highly organised, consisting of free and conscious working persons. Only through the emergence of a classless society could the individual realise, as part of the community, “the creativity and purposefulness inherent in his nature”¹⁸. In theory, therefore, the development of Communism depended on the inculcation of a sense of collectivism,¹⁹ which could only be achieved with the subordination of individualism.²⁰ While it was accepted that there would be “occasional excesses by individuals” it was thought that violations of norms of social behaviour would be met by ‘measures’ applied by “public opinion, the strength of the group, and social influence”.²¹

This had specific consequences for the interpretation of law and the principles that underpinned it. Human rights, for example, were recognised within Soviet legal culture but not in an individualistic sense. As Sypnowich argues: “it is the idea of individuals having rights against each other that many Marxists hold to be the most objectionable

¹² David and Choi *op cit*.

¹³ Marek Kaminski and Monika Nalepa, *Judging Transitional Justice: An Evaluation of Truth Revelation Procedures* (UC Irvine: Centre for the Study of Democracy 2004).

¹⁴ Welsh *supra* n. 13; Pøibá, J. ‘From “Which Rule of Law?” to “The Rule of Which Law?”: Post-Communist Experiences of European Legal Integration’ (2009) 1 *Hague Journal on the Rule of Law* 337.

¹⁵ Joseph Saunders and Lee Hamilton, ‘Legal Cultures and Punishment Repertoires in Japan, Russia and the United States’ (1992) 26 *Law and Society Review* 117.

¹⁶ Franz Wieacker and Edgar Bodenheimer, ‘Foundations of European Legal Culture’ (1990) 38 *The American Journal of Comparative Law* 1.

¹⁷ Richard Deane, ‘Beyond Helsinki: The Soviet View of Human Rights in International Law’ (1981) 21 *Virginia Journal of International Law* 55.

¹⁸ *Op cit*, at 63.

¹⁹ Christopher Osakwe, ‘Due Process of Law Under Contemporary Soviet Criminal Procedure’ (1975) 50 *Tulane Law Review* 266; Christine Sypnowich, *The Concept of Socialist Law* (1990, Oxford University Press).

²⁰ *supra* n.19.

²¹ Dennis Lloyd and Michael Freeman, *Lloyd’s Introduction to Jurisprudence* (1985, Stevens & Sons) at 994.

aspect of law”.²² Soviet theorists believed that individuals had no inherent rights but rather that rights were conferred upon individuals by the State in order to encourage them to be loyal, hard-working, well-disciplined, and virtuous.²³

While Marx ultimately saw the ‘withering away’ of law during the advanced stages of Communism, it was initially used as an instrument and educational tool to engineer the demise of the class society.²⁴ All activities and associations were monitored by an extensive system of special organizations and citizens were also enlisted (estimated to be around 140,000) through coercion and threats to provide information on neighbours, friends and suspected dissidents.²⁵ As such, the emphasis was on creating widespread mistrust in which individuals were encouraged to feel suspicious of their fellow citizen, neighbour, or even family member.²⁶

This process involved the removal of the judicial process from the public realm and the monitoring of all verdicts and decisions by political authorities within the framework of a system known as *nomenclatura*.²⁷ Increasingly vague legal provisions were introduced, rapid changes were made to legal rules and their application²⁸ and restrictions on penalties that judges could employ to protect Socialist society from counterrevolutionary forces were removed.²⁹ In 1950, a new Criminal Procedure Code further suppressed due process, transferred the focus of criminal proceedings to the phase of preliminary proceedings, and diminished the rights of the accused and position of the defence counsel.³⁰ Thus, Sypnowich argues that conformism was “often the reality of an atmosphere of fear, where the consequences of protest” were “shrouded in mystery, capable of taking the form of arbitrary and severe punishment”.³¹

The second phase, the ‘state of the whole people’, was characterised by “principles of Socialist legality, Socialist humanism, and Socialist democratism”.³² At this stage, it was believed that the revolution had succeeded in transforming society, thus reducing the need for punitive and arbitrary policies. Krushchev, Stalin’s successor, emphasised “the role of the community in strengthening law and order”³³ and the 1960 Constitution established local people’s courts³⁴ which were entrusted with making decisions and passing judgements on less dangerous offences described as ‘wrongdoings’ for which sentences were passed of an above-all educational nature.³⁵

²² Osakwe *supra* n. 21, at 84.

²³ Harold Berman, ‘Human Rights in the Soviet Union’ (1965) 11 *Howard Law Journal*, 333.

²⁴ Christopher Osakwe, ‘The Four Images of Soviet Law: A Philosophical Analysis of the Soviet Legal System’ (1985) 21 *Texas International Law Journal* 1.

²⁵ John Moran, ‘The Communist Torturers of Eastern Europe: Prosecute and Punish or Forgive and Forget?’ (1993) 27 *Communist and Post-Communist Studies* 95.

²⁶ Cynthia Horne and Margaret Levi, ‘Does Lustration Promote Trustworthy Government? An Exploration of the Experience of Central and Eastern Europe’, in Janos Kornai and Susan Rose-Ackerman, (eds.), *Building a Trustworthy State in Post-Socialist Transition* (2004, Palgrave Macmillan).

²⁷ Grażyna Skąpska, ‘The Rule of Law from the East Central European Perspective’, (1990) 15 *Law and Social Inquiry* 699.

²⁸ Martin Krygier, ‘Marxism and the Rule of Law: Reflections after the Collapse of Communism’, (1990) 15 *Law and Social Inquiry* 633.

²⁹ Osakwe *supra* n. 21.

³⁰ See Zdeněk Karabec, Simona Diblíková and Petr Zeman, *Czech Republic: Criminal Justice Systems in Europe and North America* (2002, HEUNI).

³¹ *supra* n. 21, 73.

³² Osakwe *supra* n. 21, at 270.

³³ *supra* n. 23, at 995.

³⁴ An informal tribunal of neighbours or fellow-workers of the accused, that held the power to issue warnings and reprimands and, in some cases, small fines, see: Harold Berman, ‘The Educational Role of the Soviet Court’ (1972) 21 *International & Comparative Law Quarterly*, 81, at 84.

³⁵ *supra* n. 32.

In achieving these aims, the community (co-workers, social organisations, neighbours, the Young Communist League and other Communist Party organisations) were given a central role in contributing to and, in some cases, even initiating proceedings. Trials were not only held in courtrooms but also at factories and other places of work, apartments or educational establishments to drive home, to all concerned, the moral and social implications of the proceedings.³⁶ The central and explicit purpose of judicial proceedings or Soviet law more broadly was therefore not only to regulate conduct, but also to influence the attitudes and relationships of citizens. In this respect, “the judicial contest” was “more akin to that of a family than to that of an impersonal civil society”.³⁷

Personal interests were perceived to be secondary to collective economic and social rights³⁸ thus the most severe test of the ‘parental’ or ‘educational’ role of the law was in respect of ideological crimes. Any attempts to exercise fundamental rights (freedom of speech, religion, association and liberty) were legally recognised as crimes against Socialism³⁹ as the accused had not only “consciously challenged the very validity of the norms of law and morality that the trial was supposed to make him internalise, but also because such recourse did not arise from his constitutional opportunities”.⁴⁰ Had the Soviets permitted such challenges, they would be allowing an individual claim, a concept completely foreign to the Soviet conception of a ‘right’. Here the educational role of the court was reduced to making the accused an object lesson for others, attempting to humiliate the individual and to make him/her suffer.

Piacentini argues that during this period all crime was regarded as “capital excess” and that punishment was designed to “politically correct deviants”.⁴¹ The criminal justice system was therefore viewed as a political instrument explicitly focused on enforcing compliance with Communist ideals and punishing dissidents. In this context, there was an uncritical reliance on incarceration which resulted in a large prison population; increased recidivism; and difficulties in reintegrating offenders back into the community.⁴² Corruption and nepotism were commonplace and it should, therefore, come as no surprise that this resulted in a severe distrust of state agencies, particularly the police and a general perceived illegitimacy of the criminal justice system as a whole.⁴³

Following the Velvet Revolution in 1989 (so named because of the rapid and relatively peaceful nature with which the transfer of power occurred), the newly elected administration were faced with the enormous task of not only dealing with the social complexities of emerging from an authoritarian regime to a democratic society, but also transforming a “once authoritarian and instrumental view on criminal law towards an understanding of criminal law characterized by the concept of justice”.⁴⁴ The general

³⁶ *supra* n. 21; *supra* n. 31.

³⁷ *supra* n. 34, at 91.

³⁸ R. Makepeace, *Marxist Ideology and Soviet Criminal Law*. (1980, Croom Helm).

³⁹ Leszek Balcerowicz, ‘Institutional Change after Socialism and the Rule of Law’ (2009) 1 *Hague Journal on the Rule of Law* 215.

⁴⁰ *supra* n. 17, 70

⁴¹ Laura Piacentini, ‘Burden or Benefit? Paradoxes of Penal Transition in Russia’, in Kieran McEvoy and Lorna McGregor, (Ed.), *Transitional Justice from Below: Grassroots Activism and the Struggle for Change*. (2008, Hart Publishing) at 221.

⁴² Vira Zemlyanska, *The Development of Restorative Justice in Central and Eastern Europe*. LLM thesis, International Criminal Law, Graduate Centre for Legal Studies, Sussex Law School, The University of Sussex. (2005).

⁴³ Pavel Stern, *Recent Development of the Czech Probation and Mediation Service*. Paper presented at a ‘Conference on Probation and Aftercare’, organized by the Council of Europe in co-operation with the Ministry of Justice of Turkey, Istanbul November 14 – 16 (2005c); Toran Hansen, ‘Restorative Justice in Eastern Europe’ (Centre for Restorative Justice & Peacemaking, School of Social Work, University of Minnesota 2006). <http://rjp.umn.edu/img/assets/13522/RJ_%20in_Eastern_Europe.pdf> Accessed 12 February 2007.

⁴⁴ Hans Albrecht, ‘Countries in Transition: Effects of Political, Social and Economic Change on Crime and Criminal Justice – Sanctions and Their Implementation’ (1999) 7 *European Journal of Crime, Criminal Law and Criminal Justice* 448, at 460.

amnesty granted by President Havel in 1990 signaled the first major rethinking of the penal apparatus under the new regime where the “conceptual purpose of the prison system shifted from a punitive, isolating purpose, to a rehabilitative one”.⁴⁵ As such, democratic values based on human rights and due process were seen as paramount for criminal justice and steps were taken to transform the old system to one which could be seen by the population to uphold these values. The following section considers how restorative justice was adopted and subsequently integrated into criminal justice policy to further these aims.

THE ORIGINS OF RESTORATIVE JUSTICE ADOPTION AND INTEGRATION

The approach to reform was not only characterised by the creation of new laws and sanctions, but also new institutions (Constitutional Courts in particular), with newly graduated personnel being appointed to change culture from within.⁴⁶ The direction that criminal justice reform took following the transition can be seen to have been influenced by both external and internal legal culture. Nelken⁴⁷ defines internal legal culture as the ideas and practices of legal professionals. Western penal systems have been critiqued for developing a ‘punitive turn’ leading to the evaporation of rehabilitation and care narratives⁴⁸; however, this is not evident within the Czech context. According to Praskova et al⁴⁹ from the outset there was a desire within the Czech Republic to take a new direction from the punitive approach associated with the previous regime by including both victims and the community in the administration of justice. Thus, the influence of Anglo-American trends on Czech law has been the development of a penal system based on alternative penalties, sentences and measures that included elements of restorative justice philosophy and practice.⁵⁰

External legal culture, as defined by Nelken⁵¹, refers to opinions, interests and pressures brought to bear on the law by wider social groups. External influences are evident in the reform process following the ratification of a number of international documents relating to criminal justice from 1991 onwards. This placed a responsibility on the successive regime to ensure that all criminal justice legislation was brought up to the standards required by them. However, tangible criminal justice reform and implementation did not take place until some time after the past had been dealt with largely due to the priority attached to economic reform.⁵² The distinction of sources of influence for criminal justice reform as outlined by Nelken provides a useful framework through which to plot and analyse the development of restorative justice within the Czech Republic.

⁴⁵ Tod Clear, Matthew White and Kritsen Presnell, ‘The Offender in the Community: Implications of the Experience in the United States for the New Czech Republic’ (1998) 28 *Crime, Law and Social Change* 243, 252.

⁴⁶ See Ruti Teitel, ‘Post-Communist Constitutionalism: A Transitional Perspective’ (2004) 26 *Columbia Human Rights Law Review* 167; Přibáň *supra* n. 16.

⁴⁷ David Nelken, ‘Using the Concept of Legal Culture’, (2004) 29 *Australian Journal of Legal Philosophy* 1.

⁴⁸ *supra* n.39.

⁴⁹ Martin Praskova, Jana Hruskova and Ondrej Štantejský, ‘Actual Situation in Delivering and Providing of RJ Programmes in the Frame of the Czech Justice and a New Plan of PMS on How to Improve and Strengthen Delivering of RJ Programs’ (2008, EuForum).

⁵⁰ Jan Rozum, Petr Kotulan and Jan Tomášek, ‘Effectiveness of Supervision of Persons Conditionally Released – Final Research Report’ (Institute of Criminology and Social Prevention 2003) <<http://www.ok.cz/iksp/en/publications.html>> Accessed 16 October 2008.

⁵¹ *supra* n. 45.

⁵² See Martin Potůček, ‘Havel versus Klaus: Public Policy Making in the Czech Republic’ (1999) 1 *Journal of Comparative Policy Analysis: Research and Practice* 163.

The Role of External Legal Culture in the Adoption of Restorative Justice Practice

In 1994, Charles University in Prague ran a series of lectures called 'Social Work and Criminal Policy' led by Helena Válková^{53, 54}. During the course of these lectures a desire to expand sanctions and to change the way that punishment was approached developed. Students who attended these lectures, which included the current Director of the Probation and Mediation Service (PMS) – Pavel Stern, were intrigued by the variety of ways in which criminal behaviour could be addressed and subsequently committed themselves to the cause of criminal justice reform.⁵⁵ They began by embarking on a programme of international seminars that were aimed at both gaining knowledge about international best practice⁵⁶ and highlighting these alternatives to Ministry officials, judges and other criminal justice personnel.⁵⁷

These scholars saw the potential that restorative justice had to offer in terms of 'democratising' justice for both victims and offenders and had been exposed to a variety of ways that this system of alternative sanctioning could be implemented. As such, they embarked on a programme of developing a framework for restorative justice that would be suitable for the Czech context. During this period, funding was obtained which resulted in the establishment of an NGO – the Association for Development of Social Work in Criminal Justice (SPJ) – committed to the development of alternative sanctions. Since its inception SPJ has, in particular, sought to develop methods of resolving criminal disputes that address the interests and needs of the victim, the offender, and their social environment.

Válková also had contacts within the magistracy and the Ministry of Justice and she was able to stimulate interest in and support for restorative justice and alternative sentencing. In response to changes in the criminal justice system, SPJ created a number of pilot projects aimed at providing information as well as informing discussion about probation and mediation at different levels of the criminal justice system.⁵⁸ The first of these began in 1994 to evaluate the use of out-of-court mediation and reparation, as well as probation supervision and the use of pre-sentence reports in the administration of criminal justice.⁵⁹ Following this pilot, SPJ prepared an additional project to be carried out by the Ministry of Justice to test the concept of probation and mediation.

In 1999, SPJ in conjunction with the Institute for Education and the Ministry of Justice prepared a qualification program to train authorities and practitioners working in the area of probation and mediation.⁶⁰ Graduates of this pilot program were then prepared to work for the Probation and Mediation Service, following its official establishment. SPJ has thus had a profound impact on the development of restorative justice in the Czech Republic, from engaging in policy transfer, to piloting projects for

⁵³ Válková had become publicly identified with the cause for prison reform when she made a film about conditions in institutions for juvenile offenders, a previously neglected, almost closed subject in the Soviet oriented penal system, see: John Walters, 'Building Alternatives to Custody: Lessons from the Czech Republic and Other European States' (2004) 9 *Vista* 100.

⁵⁴ Stern *supra* n. 41.

⁵⁵ *supra* n. 51.

⁵⁶ In particular, they looked at how Austria, Denmark, Germany, the Netherlands, Norway, and Switzerland were approaching alternative disposals for offenders. Subsequently, SPJ have also established links with institutions in France, Italy, Lithuania, the United Kingdom, and Spain (Catalonia). See: Ludmila Hasmanová, *Striving for Restorative Justice in the Czech Republic* (SPJ 2002). <<http://www.restorativejustice.org/editions/2002/Sept02/Czech/>> Accessed 22 October 2007.

⁵⁷ *Op cit.*

⁵⁸ *supra* n. 54; Vira Zemlyanska, 'Restorative Approaches and Alternative Methods: Juvenile Justice Reform in the Czech Republic', in J. Junger-Tas, and S. Decker, (eds), *International Handbook of Juvenile Justice*. (2006, Springer Publishers).

⁵⁹ Ouřednicková, L., Pavel Stern and Doubravová, D. 'The Czech Republic', in A. van Kalmthout, J. Roberts, S. Vinding, (eds), *Probation and Probation Services in the EU Accession Countries*. (2003, Wolf Legal Publishers).

⁶⁰ *supra* n. 54.

formal implementation and creating training programmes to ensure that those people responsible for carrying out mediation have the necessary skills to conduct their work effectively.

Additional pressures were largely associated with the increasing ascendancy of restorative justice within the European Union (EU). Jan Winkle, English Ambassador for the Czech Republic, in interview described the European Union (EU) as a 'miracle' for previous Communist states as it 'opened things up'. He further argued that the EU had three significant impacts on post-Socialist countries that become Member States. The first was on security as the 'grey zone' between East and West was removed by the end of the Cold War. The second was on the economy which experienced substantial growth due to a dual import/export relationship between EU states and an increase in foreign investment as it 'guaranteed human rights and a free market economy'. Finally, there was a political impact as EU membership made politics more transparent.

For the abovementioned reasons, it is unsurprising that from the outset leaders in the Czech Republic had strong intentions toward EU membership.⁶¹ The Czech Republic was increasingly keen to be seen to be subscribing not only to the standards of the EU but also to the Council of Europe (CoE) and the UN more generally and therefore adopted established measures which dealt with alternative sanctions and the procedure of their enforcement.⁶² Recommendation No. R (92) 16 of the CoE on community sanctions and measures, and UN documents, such as the *Beijing Rules* (United Nations 1985), the *Tokyo Rules* (United Nations 1990) and the *Riyadh Guidelines* (United Nations 1990) were important agreements in relation to the implementation of alternatives to punishment in the criminal justice system.⁶³

Specific measures adopted that related to restorative justice development included: The CoE issued *Recommendation R(99) 19 of the Committee of Ministers of Member States Concerning Mediation in Penal Matters* on 15 September 1999; and the *Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters* of 2002. The rise of the victim in international policy-making and human rights law can also be seen to have been influential in promoting the role of restorative justice within the new criminal justice system with the adoption of the *Council Framework Decision 2001/220/JHA on the Standing of Victims in Criminal Proceedings*.⁶⁴ In this context, restorative justice was seen as a means of developing a more engaged, democratic society and improving the effectiveness of the criminal justice system thereby reducing offending behaviour.⁶⁵

The Role of Internal Legal Culture in the Adoption of Restorative Justice Practice

During the 1990s a flurry of new legislation which sought to democratise the criminal justice system was passed through the legislature. According to Miers⁶⁶ and Hansen⁶⁷ three pieces of legislation were central to the introduction of mediation as a response to offending behaviour. The first of these was passed in 1994 and introduced diversion

⁶¹ also see Meadows, D. 'The Effects of Political-Cultural Ideas on Macroeconomic Reform in the Czech Republic and Romania' (2007) 1 *PRAVO: North American Journal for Central European Studies* 122; Martin Krygier, 'The Fall of European Communism: 20 Years After' (2009) 1 *Hague Journal on the Rule of Law* 195; Přibáň *supra* n. 16.

⁶² Eva Žatecká, 'Probation and Mediation Service in the Czech Republic', in *Pandectele Romane Suptiment* (2007, Wolters Kluwer).

⁶³ Borbala Fellegi, *Meeting the Challenges of Introducing Victim-Offender Mediation in Central and Eastern Europe*. Final Report of the AGIS Project. (European Forum for Victim-Offender Mediation and Restorative Justice 2005).

⁶⁴ See more generally on this: Jonathan Doak, 'The Victim and the Criminal Process: An Analysis of Recent Trends in Regional and International Tribunals' (2003) 23 *Legal Studies* 1.

⁶⁵ Hansen *supra* n. 43.

⁶⁶ David Miers, *An International Review of Restorative Justice* (Home Office 2001).

⁶⁷ Hansen *supra* n. 43.

into the Criminal Code. Stern et al⁶⁸ argue that this was a revolutionary step in the Czech context as it introduced elements of Anglo-Saxon law into the legal system for the first time. The second, in 1996, allowed for out-of-court settlements and community service. Finally, in 1998, probation was permitted. In all of these instances, criminal justice personnel and policy-makers had access to relevant research findings and criminal policy information from other European countries that enabled them to incorporate these new institutions into Czech criminal law.⁶⁹ Despite these developments, there was limited application in practice⁷⁰ which resulted in the then Minister of Justice, Otakar Motejl, submitting a proposal for further reforms to the justice system in 1999.⁷¹

Two specific pieces of legislation were passed that mainstreamed restorative justice, namely the Probation and Mediation Services Act (2000) and the Law on Justice in Juvenile Matters (2003). The first of these came into effect on the 1st January 2001 which created the legal basis for the establishment of PMS.⁷² PMS is responsible for implementing both Acts and providing a service to both victims and offenders. It operates in each of the 74 court districts and each centre employs probation and mediation officers and other assistants, which currently amounts to 340 individuals dealing with around 28,000 cases per annum.⁷³

The three main objectives for mediation in the Czech Republic are outlined as the integration of offenders, victim participation and community protection.⁷⁴ Probation staff are therefore required to filter suitable offenders away from the formal criminal justice system, take necessary rehabilitative steps to reduce the likelihood of recidivism and facilitate offenders in making amends for the harm that their actions have caused.⁷⁵ Mediation is available at all stages of criminal proceedings⁷⁶ for both adults and juveniles – as a diversion option, a means to determine a sentence and as a condition as part of a sentence imposed by the court. At the same time, offenders are required to take the needs and interests of victims into consideration.⁷⁷ PMS therefore has the dual responsibility of dealing with victims *and* offenders; however, Stern stated in interview that “while the Act does not require admission of guilt, PMS will not work with anyone who has not pleaded guilty”.

Cases are generally referred to PMS via the courts or a prosecutor, however, the police, stakeholders of the offence and employers may also refer cases.⁷⁸ In cases where the referral does not come from the prosecutor or the court, PMS is obliged to inform

⁶⁸ Pavel Stern, Radek Gajdos and Marek Tkac, ‘Czech Justice and Restorative Practice’. (EuForum 2004) <<http://www.euforumrj.org>> Accessed 26 June 2007.

⁶⁹ *supra* n. 57.

⁷⁰ *supra* n. 64.

⁷¹ *supra* n. 66.

⁷² *supra* n. 64; David Miers and Jolien Willemsens, *Mapping Restorative Justice: Developments in 25 European Countries* (EuForum 2004); *supra* n. 66; *supra* n. 61; UN, *Handbook on Restorative Justice Programmes* (United Nations 2006); *supra* n. 41.

⁷³ *supra* n. 51; Stern *supra* n. 41; Hansen *supra* n. 43.

⁷⁴ *supra* n. 51; Hansen *supra* n. 43; *supra* n. 60.

⁷⁵ Pavel Stern, *Recruitment, Selection and Training of Probation Staff*. Paper presented at a ‘Conference on Probation and Aftercare’, organized by the Council of Europe in co-operation with the Ministry of Justice of Turkey, Istanbul November 14 – 16 (2005b).

⁷⁶ During the pre-trial stage mediation services and restorative activities are provided and in the post-trial stage, probation supervision, community service, and parole supervision are delivered, see: Dita Asiedu, ‘Czech Probation and Mediation Service launches campaign to assist victims of crime’, (Talking Point 2005) <<http://www.radio.cz/en/article/68232>> Accessed 28 August 2007.

⁷⁷ *supra* n. 66; *supra* n. 61.

⁷⁸ PMS. *Methodology for the Czech Republic PMS Centre in Pre-Trial Proceedings and in Court Proceedings* (PMS 2006); PMS. *Methodological rules for PMS centers when providing mediation in criminal proceedings involving juvenile clients* (PMS 2008).

the state prosecutor and to request his approval prior to engaging with the stakeholders of the offence.⁷⁹ Once authorisation has been received, PMS staff contact both parties to invite them for an individual meeting that might be followed, if both parties agree, by either direct or indirect mediation.⁸⁰ In 2002, the number of alternative sanctions exceeded the number of custodial sentences for the first time in the history of the Czech Republic⁸¹ and by 2007 just over a third of all cases handled by PMS were dealt with through mediation.⁸² In February 2004, PMS sought to further integrate and embed restorative justice into the underlying ethos by establishing National Professional Methodological Standards for restorative practice.⁸³

PMS currently co-operates with NGOs in relation to the continued development of the accreditation system as well as the development of other probation and restorative programmes, particularly victim-offender conferencing.⁸⁴ However, because of their unsystematic funding arrangements, NGOs are only sporadically engaged.⁸⁵ As a result, mediation is currently practiced by the state only.⁸⁶

The second piece of 'restorative' legislation, The Law on Justice in Juvenile Matters, created a completely new regulation of the criminal responsibility of juveniles and emphasizes restorative solutions and their corresponding graded system of disposals. The age of criminal responsibility in the Czech Republic is 15 (although there are indications that this is due to be reduced to 14) and the police, as in others, are the gatekeepers into the system. As a civil law jurisdiction, their role is limited to investigating the circumstances of the offence, whether this proves the accused innocent or not and they may either abandon criminal prosecution or submit evidence to the prosecutor for consideration of the facts. The prosecutor may either dispense with prosecution with or without conditions, divert the case from the system or proceed with prosecution through the juvenile court.

Should sufficient evidence be available to take the case to trial, the court may divert the case to mediation; impose a range of measures upon the young person that may have an educational, protective or penal basis; or the court may decide to impose an alternative to imprisonment in which the sentence is carried out within the young person's community with or without probation. In considering what route to take, the Act states that it is necessary for the court to ensure that the disposal is proportionate to both the offence and the circumstances of the offender and that the views of the offender are taken into consideration. Furthermore, the Act stresses that all disposals are used for the restoration of broken relationships, the integration of the young person back into the community and the prevention of reoffending. In cases where imprisonment is considered necessary, this may not exceed two months unless exceptional circumstances exist whereby the court may impose a sentence of six months. Unfortunately, no formal evaluation of the system has been conducted to date and it is therefore impossible to discuss how the system actually works in practice.

⁷⁹ *supra* n. 61; *op cit.*

⁸⁰ All procedures are regulated by PMS national standards.

⁸¹ Pavel Stern, *From Pre-sentence Enquiry to Post-prison Supervision*. Paper presented at a 'Conference on Probation and Aftercare', organized by the Council of Europe in co-operation with the Ministry of Justice of Turkey, Istanbul November 14 – 16 (2005a); *supra* n. 41.

⁸² *supra* n. 47.

⁸³ *supra* n. 57; Pavel Stern *Supervision V. Social Assistance: Where to Strike the Right Balance*. Paper presented at a 'Conference on Probation and Aftercare', organized by the Council of Europe in co-operation with the Ministry of Justice of Turkey, Istanbul November 14 – 16 (2005d).

⁸⁴ *supra* n. 61.

⁸⁵ *supra* n. 61.

⁸⁶ Hansen *supra* n. 43.

This section has presented the process of restorative justice adoption and subsequent integration within the Czech Republic. The impact of external legal culture on restorative justice development within the context of Czech criminal justice reform may be viewed as follows: restorative justice as a philosophy and alternative system of sanctioning was introduced into criminal justice discourse through a process of policy transfer from the 'bottom-up'. As the previous discussion has explicitly illustrated, the deliberate decision by the social work students to actively seek out alternatives to the limited sanctions available at that time led to knowledge of restorative justice as both a philosophy and practice being imported from other jurisdictions.

The development of restorative justice from the 'top-down', or within an internal legal culture perspective, has emanated due to a concerted effort to move away from the harsh, punitive sentencing regime experienced under authoritarian rule and a desire to return to earlier Western democratic traditions. The appeal of restorative justice to provide a more democratic justice system for both adults and juveniles was stimulated by external developments and the lobbying of scholars and academics. While mediation had been a possible outcome for criminal cases for a number of years, it was not really accepted by legal practitioners until the promulgation of both the Probation and Mediation Act and the Law on Justice in Juvenile Matters. These Acts have resulted in the mainstreaming of mediation for cases involving both adults and juveniles, without limitations on the gravity of the offence. The next part of this paper seeks to further discuss the impact that legal culture and history had on the character and prevalence of restorative justice within the Czech Republic.

DISCUSSION

Despite a convergence of responses to crime around the world, particularly in relation to restorative justice, localities remain distinct and different. This can be explained by the fact that punishment is a complex phenomenon that is likely to be affected and influenced by a wide range of societal factors, including that which is often referred to as the 'cultural'⁸⁷. Shapland⁸⁸ argues that culture plays an important role in determining the ways in which the state and citizens view justice, both in terms of what it is and what the state's role should be. Accordingly, these views have an impact on reactions to innovation, localisation and lay people and may hold some insights into the distinctions in the application of restorative justice around the globe.

The rather limited literature which links both restorative justice and legal culture⁸⁹ seems to suggest that the civil law tradition is somewhat antithetical to the restorative justice project. This is due to the fact that restorative justice is primarily party-centered and empirically driven which jars with the normatively driven tradition of civil law. However, given that the Czechs have passed quite significant progressive restorative justice legislation, even in relation to its common law counterparts, it could be argued that this assertion is not an entirely convincing assertion in relation to this particular case.

While the impact of Socialism was the destruction of civil society and a severe distrust of state institutions, particularly within the criminal justice system, the informalist and non-individualistic strains in Socialist legal culture are attributes shared with restorative

⁸⁷ Michael Cavadino, and James Dignan, *Penal Systems: A Comparative Approach* (2006, Sage).

⁸⁸ Joanna Shapland, 'Restorative Justice and States' Uneasy Relationship with their Publics', in Adam Crawford, (Ed.), *International and Comparative Criminal Justice and Urban Governance* (2011, Cambridge University Press).

⁸⁹ See Adam Crawford, 'Contrasts in Victim/Offender Mediation and Appeals to Community in France and England', in David Nelken, (Ed.), *Contrasts in Criminal Justice* (2000, Ashgate); *op cit*.

justice philosophy. Indeed, both seek to regulate conduct that transgresses social norms and values by influencing the attitudes of the particular offender and the relationships that individual has in a way that will engineer an internal moral discourse.

Marx, like many restorative theorists, rejected the monopoly of the state in responding to perceived transgressions against the law, viewed the law as alienating and a mechanism through which to enforce the views of the powerful. Although the practice of informalism under the Communist state was particularly brutal, Markovits does argue that Socialist governments were able to imprint on their citizens the image of the familial state, thus increasing receptiveness for informality and alternative sentencing methods that are directed at maintaining and restoring relationships.⁹⁰

However, the negative experience of informalism and the educative, moralising aims of law under the Socialist regime (characterised by ambiguity and punitiveness) has created a great deal of scepticism and suspicion around any programme underpinned by such notions. The use of law against those who transgressed the norms and values of the Communist system in this manner is thus in stark contrast to the 'reintegrative' nature (moralising control) of restorative justice and more similar to the stigmatising nature (coercive control) of adversarial systems of the West.⁹¹ It could be argued that the impact of Soviet legal culture on restorative justice development and integration within this jurisdiction has limited practice to that of victim-offender mediation by formal institutions due to the suspicion attached to any informal processes. One of the disadvantages of this outcome is that the state continues to monopolise the response to offending thereby maintaining a centralised legal system characteristic of the previous regime.⁹²

Willemsens and Walgrave (2007) point out that many Europeans have great difficulty with the term 'community' and the state is often seen as a safeguard against abuses of power by the most powerful (ironic given that the state was responsible for such abuses under Communism). Consequently, the strong support for restorative justice by the state within the Czech Republic has arguably provided a perception of stability and the fact that it was been developed within a legal framework helped to create a perception of legitimacy for it as a mechanism to deal with offending behaviour.

The mainstreaming of restorative justice in a transitional context therefore has some undeniable benefits. In this case, mediation has become an integral part of the formal criminal justice system in less than decade with more than a third of all criminal cases being dealt with through this disposal by 2007. The prominence of mediation as a disposal used by the courts is testament to the support that it has received from both practitioners and policy-makers alike following the implementation of a legal framework, highlighting the importance of legalism in the new democratic order. Restorative justice within this context is perceived to be a mechanism through which to increase democratic participation in conflict resolution and also a means through which to make the system more transparent and therefore legitimate for citizens.

Despite the positive developments that have been recounted here, there are a number of debilitating factors for restorative justice within the Czech context. Firstly, a lack of resources and infrastructure connected to the implementation of alternative sanctions and measures⁹³ has limited the amount of training and recruitment that can take place

⁹⁰ Inga Markovits, 'Law and Glasnost: Some Thoughts about the Future of Judicial Review under Socialism' (1989) 23 *Law and Society Review* 399.

⁹¹ See John Braithwaite, *Crime, Shame and Reintegration* (1989, Cambridge University Press).

⁹² *supra* n. 61.

⁹³ Clear et al *supra* n. 45; Stern *supra* n. 43; Hansen *supra* n. 43; Jolien Willemsens and Lode Walgrave, 'Europe', in Gerry Johnstone and Daniel van Ness, (Ed.), *Handbook of Restorative Justice* (2007, Willan).

within PMS. While there appears to be good co-operation between PMS and NGOs, the lack of adequate funding for these organisations makes innovation and consistent service provision a real problem (Fellegi 2005) thus reducing the potential for mediation to increase in terms of referrals.

Secondly, while restorative justice has been incorporated into Czech law, thereby making restorative processes a mandatory consideration⁹⁴ this has not meant that problems in the criminal justice process do not arise. Interviews conducted with PMS staff indicated that judges refer cases without an evaluation of whether the case is suitable for mediation and probation which can create problems for success rates and thus the credibility of the process. Ouřednicková (2000) argues that the new democratic dispensation has seemingly created this problem as they conducted no preparatory work on the implications of the new policy nor did they consult with the general public or criminal justice practitioners who were responsible for implementing the policy.

Therefore, while there have been significant strides within the Czech Republic to integrate restorative justice into the response to offending behaviour, the legacy of Communism is such that the strength of the economy and infrastructure is weaker than that of more advanced liberal democracies within the EU. This reality has stunted the growth of restorative justice to include more 'bottom-up' programmes and to become much more entrenched in the system. Nevertheless, interviews with staff at PMS have indicated that they are looking for external funding to facilitate growth in this area.

CONCLUSION

Law has always been tied up with specific social, economic and political conditions and the states particular legal culture. However, Kalvodova argues that legal cultures influence each other and often blend together. The Czech Republic was unique among other post-Socialist states in that it had a history of existing democratic traditions. Western law was seen as "guarantor of political freedom", "the bearer of the rule of law and human rights" and steps were therefore taken to embrace this model.

This paper has argued that the adoption of restorative justice in particular has occurred for two reasons. The first was to expand the disposals available to deal with offenders. The small policy communities that are characteristic of transitional settings can be seen to have aided this process with Válková being able to push the issue onto the national policy agenda. It has been argued that this was potentially aided by a second impetus – the international restorative justice experiment and the political desire for the Czech Republic to become part of the EU. The support for restorative justice within this context is evidenced by the existence of a number of documents relating to its integration in the response to offending. While these documents only came into existence following experimentation within the Czech Republic, the general move in this direction in Western Europe at the time undoubtedly influenced such practice within the Czech context.

However, the use (or abuse) of informalism during the Communist years meant that society is largely underdeveloped (Thee 1991), limiting the adoption and implementation of restorative justice to that of victim-offender mediation. Furthermore, the process of moving towards a criminal justice system based on due process led to scepticism about any informal justice mechanisms and extra-judicial proceedings due to the fact that they had been misused under the Communist regime. Such scepticism of

⁹⁴ *supra* n. 42; UN *supra* n. 72.

informal justice practices could have led to a rejection of restorative justice; however, the Communist regime enjoyed a centralised system of government with no public involvement.

This paper has demonstrated that while restorative justice was initially pushed onto the criminal justice agenda from the 'bottom-up', the formal sector now has sole purchase over restorative justice as a response to offending behaviour within the Czech Republic. Karstedt (2002: 114) argues that 'policies and practices cannot become embedded without, in some way, appealing to or complementing existing practices and the institutional pattern as well as the legal system that allows for or restricts their implementation'. Thus the extent to which restorative justice has featured in each jurisdiction has been determined by existing institutional arrangements and the Czech Republic which has continued with its centralised traditions.

RESTORATIVE JUSTICE AS SOCIAL JUSTICE

*BELINDA HOPKINS**

This paper grew out of a keynote speech called ‘Acting “restoratively” and being “restorative” – what do we mean?- the ‘DNA’ of restorative justice and restorative approaches in schools and other institutions and organisations’ delivered at the European Forum for Restorative Justice Conference in Barcelona June 2006. Since then the ideas have developed further and formed the basis of a talk given at the Nottingham Conference in 2011.

INTRODUCTION

THE ‘JADENESS’ OF JADE

There was once a man who wanted to know more about jade. Through a friend he heard there was an expert on the subject living in the next village. The young man went to visit this person, an old man with a quiet, restrained manner. It was agreed that the older man would give ten lessons on the subject and a fee was agreed.

On the day of the first lesson the young man was shown into a room which was light and airy. He was invited to sit down and the older man gave him a piece of jade and left the room. The young man held the piece of jade in his hand, turning it around and wondering when the lesson would begin. After half an hour the older man returned and said that the lesson was over and showed him to the door.

The next week the young man returned for the second lesson and exactly the same thing happened. Indeed the same thing happened for several weeks and the young man was feeling increasingly frustrated and beginning to suspect he was being cheated.

Then one day he met the friend who had recommended the teacher. The friend asked how the lessons were going and the young man explained what had been happening week after week.

“And do you know” he burst out angrily “last week he had the cheek to give me a fake piece of jade instead.”

The young man in the story had gradually come to understand, experientially, the ‘jadeness’ of jade. The question of how people come to understand and appreciate what acting ‘restoratively’ actually means, is fascinating and it is also interesting what is meant by describing a process or indeed an institution as ‘restorative’. What does it mean, for example, to be a restorative school, a restorative prison, a restorative youth offending service or indeed a restorative work place? Using an analogy from science, what would the DNA (Deoxyribonucleic acid) of ‘restorative justice’ look like? In recent months the Restorative Justice Council¹, the national membership organisation for all those practising in the restorative justice field, has established a working party to develop a ‘Quality Mark’ for restorative institutions and services, and so these questions have become even more pertinent.

This paper takes the educational setting as an example, drawing on this writer’s professional and academic work in this field, but at the end it raises wider questions

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¹ <http://www.restorativejustice.org.uk/>.

about what it means to be restorative at a personal, a workplace, an organisational, a district and even a society level. It argues that by using the principles and practices implicit in the restorative justice philosophy we have a set of tools for ensuring greater social justice in every aspect of our lives.

Values, Skills and Processes

It can be helpful, in defining and explaining the concept of 'restorative justice' to differentiate between the key values and principles, the skills that are underpinned by these values and principles, and the various restorative processes that incorporate these skills.² Restorative practitioners must always ensure their actions are grounded in restorative values and principles or else risk diluting their practice.³

In order to engage people in exploring what they believe to be the essential values and principles of restorative justice it is useful to consider what might drive a restorative practitioner. In many cases this is a belief in the power of relationships and social capital, combined with a commitment to build, nurture and, when necessary, repair these relationships in the community.⁴ Morrison⁵ points to research that indicates how fundamental the need to belong is. She also emphasises the important role that connectedness has on the ability of human beings to self-regulate in order to preserve their own health and well-being, and by extension that of others. These insights help to explain the importance of seeking to repair these inter-social bonds within a community when they are ruptured following conflict or harmful behaviours. 'Community' in this context this could mean the community of the workplace, the local school, the residential home, the neighbourhood, the borough or district, or even on a more national and international plain.

Accepting the underlying commitment to relationships and connectedness as an important inspiration behind restorative work it is pertinent to enquire what values and principles underpin such a commitment. In some informal research some years ago this author conducted on behalf of what was then the Restorative Justice Consortium (now Council) amongst restorative practitioners and theorists the following values were found to be key: empowerment, honesty, respect, engagement, voluntarism, healing, restoration, personal accountability, inclusiveness, collaboration, and problem-solving.⁶ The skills needed to make, maintain and repair relationships include: emotional articulacy; empathy; open-mindedness; active non-judgemental listening and conflict-management skills.⁷ The processes include any interaction that has as its intention to build, nurture or repair relationships, including inter-personal conflict resolution, mediation, group problem-solving and formal restorative conferencing.⁸

Purists would state that the word 'restorative' should only be applied to processes that happen when harm has occurred and when there is something to repair or restore. However there is a flawed logic in arguing that restorative values, principles, skills and

² B. Hopkins *Just Schools* (.2004, Jessica Kingsley Publishers).

B. Hopkins *The Restorative Classroom* (.2011, Optimus Publishing).

³ Zehr, H *The Little Book of Restorative Justice* (. 2002, GoodBooks).

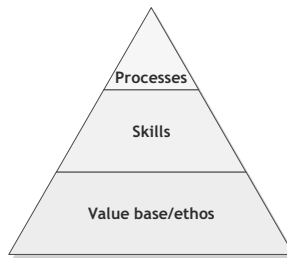
⁴ This view was reiterated by Garry Shewan, Assistant Chief Constable for Greater Manchester Police, in his plenary speech at a conference on restorative practice in Hull in November 2011.

⁵ B.Morrison 'Restorative Justice in Schools' in E. Elliott and R.M. Gordon (eds.), *New Directions in Restorative Justice, Issues, Practice, Evaluation*, (2005, Willan).

⁶ http://www.restorativejustice.org.uk/resource/rjc_principles_of_restorative_practice_in_a_schools_setting_2005/.

⁷ D.Quill and J. Wynne *Victim and Offender Mediation Handbook* (1993, Save the Children/West Midlands Probation Service).

⁸ The debates about what constitutes a truly restorative process continue to occupy the literature. See for example: G. Johnstone and D.W. Van Ness 'The Meaning of Restorative Justice' in G. Johnstone and D.W.Van Ness *Handbook of Restorative Justice* (2007, Willan).



processes should only be used in an organisation or an institution once harm has happened, and that they are not relevant at other times. It is clear that much damage and conflict can be avoided in the first place if the adjective ‘restorative’ can be usefully applied to a set of proactive values and skills as well, those that create the fundamental ethos of the organisation/institution. After all, what opportunity is created by a restorative meeting if not a chance for people to become fully accountable, develop compassion and empathy for others, and share a responsibility for finding ways forward? How much better would our communities be if these skills were being developed and used long before anything went wrong? This is certainly the argument in school contexts – that preventative strategies would help young people avoid more serious conflict if they grew up in a ‘restorative milieu, to coin a phrase used by McCold’.⁹

A Restorative Individual

This argument leads to a discussion then of what an organisation or institution might look like if restorative values, principles, skills and processes were used systematically by everyone in that community on a regular basis. Clearly this situation can only be achieved if people are committed to this on an individual basis, so it is useful to think about what a ‘restorative mindset’ might be like - one might even add ‘a heart set’, since a restorative mindset draws on heart-felt beliefs.

Taking the example of a school teacher. What would be her priorities once she has adopted a restorative mind and heart set? Wachtel and McCold have developed what is now known as their Fundamental Hypothesis, which is that people work best when worked *with*, being treated with respect and given opportunities for co-operation and collaboration, rather than having things imposed on them (being done *TO*) or being spoon-fed (having things done *FOR* them).¹⁰ A restorative teacher subscribing to this view would strive to empower her students to take responsibility for their own behaviour and for their learning. Being responsible for one’s own behaviour requires an ability to be accountable and to feel empathy and compassion for the impact of one’s actions on others. In order to develop these values and aptitudes in young people the restorative teacher must model a certain sort of behaviour in her day to day dealings with them. She finds that genuine curiosity, rather than preconceptions, judgements or bias, informs the way she interacts with her students – encouraging them to think for themselves using Socratic questioning techniques.¹¹

⁹ P. McCold. ‘Evaluation of a Restorative Milieu: CSF Buxmont School/Day Treatment Programs 1999–2001. Evaluation Outcome Technical Report.’ (2002). www.iirp/edu/pdf/erm.pdf; B.Morrison ‘Restorative Justice in Schools’ in E. Elliott and R.M. Gordon (eds.), *New Directions in Restorative Justice, Issues, Practice, Evaluation* (2005, Willan); N. Riestenberg *Circle in the Square* (2012, Living Justice Press).

¹⁰ T. Wachtel and P. McCold ‘Restorative Justice in Everyday Life’ in H. Strang and J. Braithwaite (eds), *Restorative Justice and Civil Society* (2001, Cambridge University Press).

¹¹ Many of the ideas in the section on the restorative teacher come from B. Hopkins *Just Schools* (2004, Jessica Kingsley Publishers); B. Hopkins *The Restorative Classroom* (2011, Optimus Publishing).

Thus in the event of a conflict or problem in the classroom, or observing one in a corridor or playground (school yard), the restorative teacher would ensure that she *asks* rather than *tells*. She enquires of those involved what they believe to have happened, what their thoughts were during the incident, the feelings arising from those thoughts, who they think has been affected, and what they believe needs to happen to address these needs and put things right. Informed by such writers as Rosenberg¹² and Kohn¹³ she might ponder on what unmet needs were being met by the incident and how these could be met in a more positive ways. Faced with any given situation in a school the restorative teacher does not rush to take sides or make assumptions. Her curiosity encourages those involved to become accountable for what has happened but also to feel empathy for others, and it also empowers them to take responsibility for putting things right. She knows that punitive, disapproving responses alienate people, breed resentment and sour relationships, both between herself and those concerned, and between those in conflict. She also knows that if all sides feel fairly heard and given a chance to put things right for themselves they usually feel better about themselves afterwards, something that rarely happens when people are punished.¹⁴

Depending on the nature of the situation the restoratively trained teacher has a number of options with regards using her skills. She can simply have a one-to-one conversation with a young person and find that this is enough to move a situation on without further repercussions. If the incident has caused distress or harm to another person then she has the option, following one-to-one conversations with both parties, to invite both to engage in a restorative meeting (Face to face meetings are often described as mediation sessions). If the incident is more serious then she has the option of involving supporters for the young people, often this would be the parents or key adults who may well have their own story to tell and are grateful for the opportunity to be involved.

A restorative teacher also used her skills in the day to day management of her class and in the way she develops a sense of community within each class. Working *with* her students she invites them to identify what they need to work at their best and this becomes the class agreement. If people are unable to stick to their agreement the restorative teacher may well either use one of the restorative meetings described above or else invite the whole class to sit in a circle and review the problem together. In this way young people learn that their actions impact on others and become accustomed to taking the initiative if amends need to be made. The restorative teacher's students understand that class rules are not abstract constructions created to make their lives difficult but have grown out of a genuine dialogue about human needs which they themselves share. They come to recognise that failing to meet others' needs can cause distress or harm and that this wrongdoing is first and foremost a violation of people rather than of rules. This important lesson for life is the lesson that Zehr¹⁵ pointed out was a key restorative idea, contrasting it with conventional criminal justice thinking, which focuses on crime as rule-breaking.

In fact Circles become the restorative teacher's 'stock in trade' not only as a reactive strategy, but also as a proactive tool for building community, a sense of belonging and connectedness, empathy, self-confidence and the ability to both find common ground

¹² M.B. Rosenberg *Non-Violent Communication* (1999, PuddleDancer Press).

¹³ A. Kohn *Beyond Discipline – from compliance to community* (1996, Association for Curriculum Development).

¹⁴ A. H. Macfarlane and V.Margrain 'He Tapuwae o Mua : Footsetps towards Responsive Engagement with Challenging Behaviour' in V.Margrain and A. H. Macfarlane (eds) *Responsive Pedagogy. Engaging restoratively with challenging behaviour* (2011, NZCER Press).

¹⁵ H. Zehr *Changing Lenses* (1990, Herald Press).

and value diversity of viewpoints and opinions. She knows that a sense of belonging and connectedness is crucial for well being and can protect young people from the feelings of rejection and alienation which so often lead to anti-social behaviour and delinquency.¹⁶ In the UK many schools now use Circle Time regularly with their classes in order to do this.

The restorative teacher is mindful that her own example speaks loudly to her students and knows that she must be open to ways in which the restorative mindset can inform her own interpersonal relationships at home, socially and at work. The conflict management skills she uses with her students and teaches them to use for themselves must inform the way she deals with discipline issues and conflicts not just in her classroom but with colleagues, friends and family, so that they become second nature.

Restorative Pedagogy

The restorative mindset inevitably impacts on pedagogy. A restorative teacher who works *with* her students ensures that how she teaches simultaneously models her own restorative values but also develops restorative values, aptitudes and skills in her students. Such an approach need not, and indeed must not, be confined to citizenship, civic studies or PHSE (personal, social and health education) lessons. It is an approach to teaching and learning that needs to be consistently applied across the curriculum.¹⁷

How might a restorative pedagogy differ from traditional approaches to teaching and learning? In fact current research about what constitutes best practice confirms what a restorative teacher would be inclined to do anyway.¹⁸ Students respond best to lessons where they are involved in making decisions for themselves about what they learn and how they learn.¹⁹ They appreciate their own preferred learning style being taken into consideration whilst acknowledging they may also benefit from other approaches. The key is good communication – an ongoing dialogue between teacher and student so that both give each other feedback on what is and isn't working.

The Circle framework provides an example of how a lesson might be structured. Once gathered and sat in a circle, students are encouraged to reflect on the previous lesson, their thoughts and feelings, what they learnt, what questions they still have unanswered and what they need to move on and progress their learning this time. Pair and group discussion could start these ideas flowing and then a structured circle 'go-round' could allow for sharing on this. The main part of the lesson could involve students taking responsibility for finding answers to their questions, either through private study with appropriate resources, talking with other students or small group work with the teacher herself or an assistant. The final part of the lesson could be conducted back in the circle with every student sharing what they had found out and what they intended to do as their homework task to deepen their understanding. In this way students learn from each other and the teacher gets ideas from the students about how she can tailor her teaching to meet their learning needs.

Such a structure might not be appropriate for every lesson but it is clear that the familiar 'restorative framework' with the key questions about perspectives, thoughts, feelings, needs and ideas for ways forward can be woven into most lesson formats.

¹⁶ C. A. McNeely, J. M. Nonnemaker, et al. 'Promoting School Connectedness: Evidence from the National Longitudinal Study of Adolescent Health.' (2002) *Journal of School Health* 72(4): 138–146.

¹⁷ B. Hopkins *Just Schools* (2004, Jessica Kingsley Publishers).

B. Hopkins *The Restorative Classroom* (2011, Optimus Publishing).

¹⁸ J.D. Bransford, Brown, A.L. and R.R. Cocking (eds.) *How People Learn: Brain Mind, Experience and School* (2000, National Research Council).

¹⁹ Kohn, A *Beyond Discipline – from compliance to community* (1996, Association for Supervision and Curriculum Development).

Teachers can inject a spirit of curiosity, awe and wonder into their lessons by bringing these qualities to the lessons themselves and being prepared to be amazed as they will undoubtedly continue to learn themselves.

The lesson format itself builds in opportunities for developing restorative skills – pair and group work encourage discussion and the sharing of ideas, perspectives and opinions. It takes skill to remain in open dialogue with one person, let alone a group, and so young people need training in how to be curious, open minded and inquisitive – without falling into the trap of trying to ‘win’ a debate or put others views down by derision or simply by ignoring them. Preliminary activities early in the school year may need to focus on the ‘process’ of pair and group discussion before students can be given the task and be trusted to have a constructive inclusive debate left on their own. The more used to circle process a group becomes the better they will be able to conduct these discussions in their own small groups.

Taught in this way young people learn social skills alongside their academic skills and absorb the key values of collaboration, respect for others, consideration and non-violent communication. They are learning how to create a ‘culture of care’.²⁰ A restorative pedagogy is one that implicitly teaches social justice, and the teacher models social justice in her daily interactions.

Working in a Restorative Team

The restorative teacher’s work is going to be made much easier if she is working within a restorative faculty or department, and a restorative year group, which itself is working within a restorative school. Her Head of Department/Faculty and her Year Head will themselves be informed by restorative principles in the way they run their department/faculty or year group. They regularly meets with their team in a circle so that everyone can share their experiences, their thoughts and feelings about how things are going and what is needed to improve things. The department/faculty leader and Year Head know that their role is to create a strong sense of team amongst their colleagues, with commitment to mutual respect and support, whilst also empowering them to take initiatives for themselves. They cultivate a climate of positivity, where everyone openly values their colleagues’ contributions whilst being able to address minor conflicts honestly and restoratively before they escalate and sour relations. Their role as leader means that they model this behaviour themselves in their informal dealings with colleagues, students and their parents, but they may also offer more formal restorative processes if informal interactions are not enough. Trained in the full range of restorative processes they may be the one more likely to offer a restorative process if one of their colleagues is having particular problems with an individual student. This might be simply a face to face meeting or it may involve parents.

Probably the most important role of the Team Leader (department/faculty or year group) is their role as a model of restorative skills and an enabler, so that their team are encouraged and supported in their own use of restorative approaches to teaching and managing behaviour. Without this consistency there will be confusion and bewilderment on the part of students, staff and parents.

Restorative Leadership

If this is true of middle managers how much more true must it be for the senior management team and the Head herself? Their leadership style needs to be informed

²⁰ T. Glynn, T. Cavanagh, A.H. Macfarlane and S. Macfarlane ‘Listening to Culture’ in V. Margrain and A. H. Macfarlane (eds) *Responsive Pedagogy. Engaging restoratively with challenging behaviour* (2011, NZCER Press).
N. Noddings *The Challenge to Care in Schools* (1992, Teachers College Press).

by the restorative mindset and heart set such that every policy or decision taken can be measured against restorative values and principles and any action taken has restorative language and process at its heart. That is not to say that painful decisions and actions are never taken, but a restorative leader would be working at all times *with* people as much as possible to minimise resentment and breakdown of relationships and communication. Restorative processes can be adapted for all sorts of meetings, from internal discipline procedures to multi-agency review meetings to discuss a young person's future.²¹

Certain key policies will be written with restorative principles in mind – the traditional 'behaviour management policy', conventionally based on behaviourist notions of rewards and sanctions, will be re-written as a 'relationship management policy' (a phrase coined by Marg Thorsborne, a restorative trainer from Queensland, Australia). This sets out guidelines that apply to everyone in the school and as such is likely to have been developed in consultation with all members of the school community. Policies regarding how to address bullying will also be informed by restorative principles and will apply equally to student-student bullying, staff-student (and vice-versa) bullying, staff-staff and parent-staff (and vice-versa) bullying. Restorative processes can be very effective in all these situations and indeed provide ways forward where traditional approaches do not, and indeed also sadly ignore many of the feelings and needs of those close to the key parties.

The restorative leadership team will be actively empowering students, teaching staff, administrative, catering and domestic staff and parents to become more involved in the well-running of the school. Amongst students there will be opportunities for involvement using restorative and relational skills including being peer mentors or mediators (the former act as a non-judgmental listening ear, the latter facilitate mediation sessions in the event of conflict); school councillors; peer supporters for those needing extra support with learning; social and sports secretaries organising events and fixtures; and charity representatives. The list is endless once students are recognised as leaders in their own right and given the opportunity to take responsibility for the well running of their school.

Amongst the adult groups mentioned the role of the senior management team is to empower and support a structure of distributed leadership, encouraging initiatives, making time for relationship building amongst key groups and ensuring that restorative and relational training is readily available. Whereas initially a school may rely on external training to build its capacity, it will ultimately be looking to develop its own in-house training team and a restorative steering group who will manage to gradual implementation and sustainability of the whole school approach. It is generally agreed that the journey to a fully restorative school could take up to five years and various restorative educationalists offer excellent advice on how to manage this journey.²²

²¹ Even the most deep-seated problems, one that inevitably spills out into the community and involving long-standing issues in a young person's family, can be addressed using a process called Family Group Conferencing. This is a model where after careful preparation the extended family and friends of a young person identified as having chronic challenges is empowered to find ways forward for themselves.

²² B. Hopkins *Just Schools* (2004, Jessica Kingsley Publishers); P. Blood 'The Australian Context – Restorative Practices as a Platform for Cultural Change in Schools.' Paper presented at the *XIV World Congress of Criminology: Preventing Crime & Promoting Justice: Voices for Change* Philadelphia, Pennsylvania, USA (2005); P. Blood and M. Thorsborne 'The Challenge of Culture Change - Embedding Restorative Practices in Schools.' *6th International Conference on Conferencing, Circles, and Other Practices*, Sydney, Australia (2005); B. Morrison 'Building Safe and Healthy School Communities: Restorative Justice and Responsive Regulation. Building a Global Alliance for Restorative Practices and Family Empowerment, Part 3', *The IIRP's Sixth International Conference on Conferencing, Circles and other Restorative Practices*, Penrith, New South Wales, Australia (2005).

*Restorative Communities*²³

Restorative schools are able to function more successfully if they are working in partnership with the other schools in their authority and if the authority has taken a decision to integrate restorative principles and practices throughout its services and management structure. This would mean that the multi-agency support a school draws on – including behaviour support, education welfare, social services, the local mental health team, the youth offending team and the police – would all be informed by restorative principles and practices. Furthermore the conflicts and problems that spill over from the community into school such as neighbourhood conflicts and family feuds could be dealt with in partnership with teams from restorative housing associations, environmental health and the local police. Restorative justice can serve as an overarching philosophy and approach within which all can function. In this way a young person, wherever he or she may be referred, will be dealt with restoratively. Furthermore should they young person find themselves in residential care or in a Pupil Referral Unit these two would also be running along restorative lines.

A pragmatic reason for a whole authority taking on this approach is so that the community at large gradually understand and benefit from a restorative approach. The International Institute of Restorative Practices refers to Restorative Practices as a Family Empowerment Model since families have a voice in issues that concern them in a way that is unique. One of the main fears for schools embarking on a restorative initiative is addressing what they perceive as the parents' need for justice to be done in the event of wrongdoing. In fact experience suggests that every parent wants their own child do be dealt with fairly; it is the 'other' children they want severely punished!

Involvement in restorative processes does in fact bring parents round – they feel heard and acknowledged often for the first time and they can see the effects of restoring relationships in terms of a safer and happier school. Ormesby School in Middlesborough, for example, has found that parents are increasingly enthusiastic and supportive of the restorative approach precisely because of their involvement in meetings involving their children.²⁴ In the short term however it will help pioneering schools if their new initiative is part of a district-wide one, rather than experiencing the very understandable fear that they may lose their vital student numbers if rumours get out that they are trying something wacky whereby students 'get away' with wrongdoing. Furthermore district-wide initiatives are likely to be able to access the resources required to put in place effective evaluation and monitoring tools so that evidence can be gathered over time to assess the value of the initiative in terms of performance indicators such as reductions in exclusions, neighbourhood conflicts, re-offending etc

If the aspiration for a restorative authority or district sounds far-fetched and over idealistic then one need look no further than certain authorities where this aspiration is already within reach. In the UK cities like Hull and Cardiff are stating publicly that they are aspiring to become restorative cities. Counties like Norfolk and Oxfordshire are making similar commitments for the whole County.

Restorative Organisations and Institutions

This quest to become 'restorative' at a community level begs the question about what this means for individual services, workplaces, businesses, institutions and

²³ In the UK every school works within a specific Local Authority, an administrative unit that comprises the local government and the services required by the local community. Elsewhere the word 'Authority' might best be described as the local 'District'.

²⁴ Private conversation with Deputy Head teacher Mandy Thompson from Ormsby School, who has been overseeing the implementation of restorative approaches in the school since 2007.

organisations. The example of the school gives an indication of the layers to which a restorative philosophy can influence behaviour.

Day to day conversations and meetings can become infused with some key ideas: attention to, and respect for every individual's opinion, so that respectful dialogue rather than competitive point-scoring becomes the norm and no one person's view is necessarily considered more important than another's; attention to what lies beneath people's words – a willingness to show, and expect to be shown, empathy and understanding, patience and tolerance; personal responsibility for the impact people's choices have on everyone else with whom they work; attention to the needs of everyone in an office or team to be able to give of their best and finally, a willingness to address any harm that may arise in day to day interactions and a commitment to putting it right promptly, before it escalates.

In any workplace this kind of day to day practice must be modelled by middle and senior managers who would also ensure that a structure is in place to support this ethos. The school example can be adapted for offices, teams, reception areas and indeed anywhere where people met and interact. Meetings can occasionally use the circle format to ensure all voices are heard. Every workplace can offer personal training in conflict management but also build into grievance and disciplinary procedures the requirement to try mediation at the earliest opportunity. These kind of informal restorative practices are also excellent for creating the social capital that can help to guard against workplace bullying and prejudice-based incidents. However in addition to this preventative practice all workplaces can also commit to addressing any such bullying or prejudice based incident using restorative measures.

From the individual to the whole

This paper has considered what a restorative individual might be thinking and how they might be acting, and then looked at how a restorative line manager, and a restorative senior management team, might be acting. It has suggested that a single institution, such as a school, will find it easier to be restorative if it is working within an authority or district-wide initiative, not simply in the education field but across the authority in all its services. This would be a pragmatic suggestion from the school's point of view, although there is clearly a case to be made for the potential of restorative principles and processes in each of these services in their own right, and the paper has begun to explore what this might look like.

Many individual services and agencies are exploring and using restorative approaches, certainly in the UK. Local government housing and environmental health officers have long had recourse to neighbourhood mediation schemes. Youth offending teams, probation officers and police officers in many areas are using restorative practices with clients. However youth justice services are beginning to consider what it means to become fully restorative in mind-set and language in day to day exchanges, when writing reports, when addressing anti-social and harmful behaviours by young people who visit their base, to name a few examples. This has meant encouraging a review of every interaction staff have with their client group, families and their own colleagues to see how all of these encounters could be informed and transformed by the restorative mindset and restorative language.²⁵

The paper has suggested that restorative justice means so much more than simply engaging in restorative approaches with client groups. Its starting point was asking what it means to act 'restoratively' and indeed *be* 'restorative', as a person and as an

²⁵ This systemic approach is something my own organisation Transforming Conflict has been exploring with services and in care settings, as well as schools, for several years: B. Hopkins *Just Care* (2009, Jessica Kingsley).

organisation or institution. It has suggested that acting restoratively starts at the individual level and that not only do individuals benefit from working within a restorative organisation but that the organisation is a better place for being staffed by restorative individuals. The paper would also like to encourage others to consider what their own environment might be like were everyone in that environment to adopt a restorative mind and heart set.

A Typology of Restorativeness

A typology is offered here which could be applied an individual level, a workplace/team level and an organisational/district level to stimulate debate. It would be for each individual in specific working environments to fill out the detail on what this typology might look like, inspired perhaps on the thoughts about teachers, school managers and schools. A Working Party convened by the Restorative Justice Council is beginning by considering whether there are in fact common and generic elements to being a restorative institution or service, or whether in fact each environment would need its own descriptors. Perhaps there will be some factors in common and some unique ones.

A scale from -1 to 4 is suggested by this author to describe an essentially similar situation. Level -1 describes an individual, workplace or organisation that has heard of restorative justice and restorative approaches and has rejected them, for whatever reason. (This need not be taken as a definitive position, it could simply be initial hostility or suspicion based on fear of change or loss of power). Level 0 is simply that – the individual, workplace or organisation has had zero exposure to restorative ideas and so is ignorant of them. Level 1 would be an individual, workplace or organisation with an interest in learning more about restorative approaches. Level 2 would be an

Levels

4	BEING	Personal and professional life informed by restorative principles (proactive)
3	DOING	Using restorative approaches only when an incident occurs (reactive)
2	ENCOURAGING OTHERS	Aware of restorative approaches – makes referrals to others but not personally involved
1	INTERESTED	Aware of restorative justice/approaches and open to their potential
0	IGNORANT	Unaware of restorative justice/approaches
-1	RESISTANT	Rejects restorative justice/approaches – for ideological or practical reasons

individual, workplace or organisation that knows about restorative justice and approaches and supports others to use the skills and processes, but does not take the time to learn about them or use them personally or internally. Level 3 would be an individual, workplace or organisation using restorative skills and processes regularly as and when the need arises - reactively. Level 4 would be an individual, workplace or organisation infused with restorative values, like a traditional British seaside stick of rock, which has the name of its place of origin miraculously written right through the middle of it, wherever it is snapped open. Restorative Justice has become a philosophy, a way to *be*, and not just something to *do*.

CONCLUSION

This paper has explored what it means *to act* restoratively and *to be* restorative, using the example of a school as a starting point. The 'restorative typology' poses an implicit invitation to any individual, workplace or organisation to review their own 'restorativeness'. Many restorative justice practitioners are very skilled at running restorative procedures for clients but how good are we at turning the mirror onto ourselves, and walking the walk as well as the talk? What does being restorative mean for us as individuals at whatever level we work within an organisation?

Trainers, consultants and researchers in the field of restorative justice must take an interest in what support people need once they have been introduced to restorative justice. Training in the basic restorative skills and processes is not enough, it is only the beginning. If the training is good quality, and not rushed or superficial, something extraordinary will have happened to a person who has now become a fledgling restorative practitioner. They may well see the world through what Zehr (1990) has described as a different lens. They may well find that they become more acutely aware of how they interact with others at home, socially and at work. Indeed if those around them are not similarly enthused life can actually be quite challenging. Trainers, project managers and line managers within organisations themselves have a significant responsibility to support people post – training and helping them begin the task of transforming not only their own practice but the environment in which they work and live, hence the inspiration for this paper. What is meant by a restorative workplace, a restorative community, a restorative world? Ghandi once said: "To believe in something and not to live it is dishonest".

The quest for social justice goes beyond the internal culture of workplaces, organisations and institutions and many would point to injustice at a higher societal level as well. Has restorative justice a part to play in addressing these wider social inequities? Writers like John Braithwaite, Sullivan and Tift would argue that they can.²⁶ However the place to start in addressing social justice is with oneself, and then one's own family, friends, work colleagues, clients and service users. To ignore these crucial 'home bases' in the quest to address injustice on the wider stage would be hypocritical. Furthermore the very same skills used to communicate and to address conflicts with family, friends, colleagues and clients are often those needed at local and national government and the world stage. Non-violent communication, conflict resolution and mediation are sadly needed on the world stage.

²⁶ J. Braithwaite and H. Strang, (eds), *Restorative Justice and Civil Society* (2001, Cambridge University Press); D. Sullivan and L. Tift *Restorative Justice - Healing the Foundations of our Everyday Lives* (2001, Willow Tree Press); J. Braithwaite *Restorative Justice and Responsive Regulation* (2002, Oxford University Press); V. Braithwaite 'A framework for tailoring a Responsible Citizenship Programme' in B. Morrison (ed), *From Bully to Responsible Citizenship* (2003, Australian Institute of Criminology).

The philosophy, values, principles, skills and structures of restorative justice are part of what is needed to promote social justice in the world, not only in the field of criminal justice but in every aspect of daily life.

LEGISLATION AND COMMENT

THE IMPACT OF THE *AMERICA INVENTS ACT* ON THE UNITED KINGDOM: 'FIRST TO FILE' RULES

INTRODUCTION

On 16 September 2011 the President of the United States, Barack Obama, signed into law the America Invents Act, the most significant piece of federal intellectual property legislation to be passed in that country since 1952. The America Invents Act (AIA) is based on six years of preparatory work by the US Congress, the Administration and various stakeholders culminating with the reform of one of the oldest and most successful patent systems in the world. The legislation was introduced by Senator Patrick Leahy on 25 January 2011 and has received overwhelming support ever since. The strategic reforms contained in the AIA will shape the future of American intellectual property law in the decades to come. This legislation means that the US has finally given way to international pressure to abandon its traditional 'first to invent' system which is deeply rooted in its Constitution, in favour of the 'first to file' arrangements of every other country which subscribes to the Paris Convention, including the UK, for whom this is an important change. The changes will apply to patent applications filed in the US on or after 16 March 2013.

A positive impact of the new approach finally being adopted by the US, is the elimination of discrimination against foreign patent applicants who file US patents where concurrent research is being carried out abroad. This is because complex interference proceedings will no longer be necessary.

COMMENTARY ON THE US MOVE TO A 'FIRST TO FILE' PATENT LAW SYSTEM

As innovation needs to be protected beyond the boundaries of the UK, it is important for UK patent applicants to have an awareness of the patent law frameworks of key foreign trade markets such as the USA. Indeed, the USA is Britain's largest single export market, taking £33.3 billion of UK goods in 2010 (14.3% of the UK's exports) and is also the leading overseas destination for British investment. The UK is the sixth biggest exporter to the USA, after Canada, Mexico, China, Japan and Germany.¹ Central to understanding the US patent law framework is the knowledge that patent protection is deeply rooted in the US Constitution adopted in 1787, which is the supreme law in the US. In relation to patents, article 1, section 8 of the US

¹ UK Trade Info (2012), "Summary of Import and Export Trade with EU and Non-EU Countries Annual 2003–2011", HM Revenue & Customs: <https://www.uktradeinfo.com/index.cfm> accessed 22 March 2012.

Constitution states, “The Congress shall have power...To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.” Substituting ‘inventor’ with ‘filer’ was not what was originally contemplated when the US Constitution was drafted in 1787 and why the shift is of great significance for the US. As the UK’s patent rights are not rooted in a constitution, it never had such a constraint.

Until now with the advent of the AIA, the US patent system was based on this unique ‘first to invent’ doctrine, namely that the inventor who first conceives an invention and then diligently reduces it to practice by filing a patent application (or actual reduction to practice) is held to be the first inventor and is thus entitled to patent protection for a term of twenty years. However, almost every other country in the world has a patent system based on the ‘first to file’ doctrine whereby the patent is granted to the inventor who is the first to file a patent application, regardless of the actual date of the invention the subject of the application.

The existence of two parallel systems created uncertainty for inventors and investors around the world. Accordingly, in recent decades, the goal of global patent harmonization negotiations focussed on achieving two uniform substantive legal requirements: (1) ‘first to file’ and (2) a 12 month grace period. This commentary and analysis will focus on the former. Briefly however, in relation to the latter, under the existing US system an inventor who discloses his or her invention to a third party without entering into a confidentiality agreement, or publishes details of the invention, risks losing the right to patent as the disclosure amounts to prior art. In other words, the inventor has no grace period during which time he or she is allowed to disclose or publish the invention without it forming part of the prior art taken into account when the United States Patent and Trademark Office (USPTO) determines novelty. Under the AIA, the new 12 month grace period will give inventors a critical period during which they can disclose, publish and enter into negotiations to commercially evaluate their invention without forfeiting the right to file a patent. Prior art will then be evaluated from the patent filing date and will include all art that exists before the filing date, except for disclosures made by the inventor within the one year period of filing the patent application. In any event, the US provisional application system will continue to exist, so that inventors who wish to preserve their right to patent can do so by filing the provisional application for a nominal fee and then converting it to a full US patent application within 12 months.

Now we will turn to the question why the shift away from the traditional US ‘first to invent’ system is such an important development for the UK and other countries, particularly those in the Europe and Asia. Albert Tramposh, Director of International and Governmental Affairs at the USPTO states that the new Act “represents the optimal harmonized patent system that international negotiations have aimed for over the last 25 years”.² A primary benefit flowing from America’s transition to the ‘first to file’ system is that it will provide the uniformity and transparency that banks, venture capitalists, and other investors need to convince them to invest in new businesses while establishing the stability that companies need to bring new products to globalized markets. Section 3(p) of the AIA recognises the importance of the transition to a ‘first to file’ system as follows:

It is the sense of the Congress that converting the United States patent system from ‘first to invent’ to a system of ‘first inventor to file’ will improve the United States patent system and promote harmonization of the United States patent

² Tramposh, A. “The Global Impact of the America Invents Act” WIPO Magazine December 2011 pp6-7.

system with the patent systems commonly used in nearly all other countries throughout the world with whom the United States conducts trade and thereby promote greater international uniformity and certainty in the procedures used for securing the exclusive rights of inventors to their discoveries.

However, is the traditional US ‘first to invent’ system of registration such a bad thing? It takes into account the problem of simultaneous invention which is not unthinkable when patentable inventions are made to meet market demands. A vital advantage of a ‘first to invent’ system is that it rewards the first inventor, not the winner of the race to the USPTO. A ‘first to invent’ system safeguards organisations with limited resources available to prepare patent applications by ensuring that protection could be secured if an earlier date of invention could be proved, in priority to a competitor who conceived the same invention at a later date, but who had the resources to prepare and file their application earlier in time.

In the US ‘first to invent’ system, when two (or more) patent applications apparently claiming the same invention have been filed, the USPTO declares an ‘Interference’. All parties must then provide evidence as to the date they conceived the invention and details of their efforts to reduce the invention to practice. This may include laboratory notebooks, internal test reports and other relevant documents. At first glance, this is not problematic.

Nevertheless, according to William Kingston in his article *Is the United States Right about ‘First to Invent’?*³ there are two reasons why the US has come under pressure in recent years to change to a ‘first to file’ system. Firstly, ‘first to invent’ discriminates against applicants from abroad due to the nature of the evidence that may be used during US interference proceedings. Secondly even if the foreign party wins the interference proceedings, its application will be considerably delayed and result in additional expenses. Discrimination existed because during interference proceedings, the USPTO only recognised evidence that related either to (1) invention and reduction to practice within the US; or (2) ‘introduction’ of an invention from abroad into the US and its reduction to practice there. For example, consider an interference between a UK firm and a US firm, in which the UK firm was actually the first to make the invention and there is no question that neither firm derived the invention from the other. The US firm would likely be granted the patent if the only evidence the UK firm could adduce for its earlier invention, was the date, and reduction to practice related to what had happened in the UK.

Compared with the US traditional ‘first to invent’ system, the ‘first to file’ system is less likely to result in multiple sources of development of an invention that require expensive adjudication. A practical advantage of the ‘first to file’ system is that it is very simple. Whoever has the earliest filing date will be entitled to the patent, assuming all other legal requirements are met.

In conclusion, with the discrimination against foreign patent applicants such as the UK now resolved, the UK will be in a stronger position when contemplating filing US patents where concurrent research is being carried out, as long as it does so expeditiously. For the reasons outlined above, the US shift to a ‘first to file’ system is very welcome in the UK and should make it more efficient and effective for the UK to protect its innovations in the United States.

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³ Kingston, W. “*Is the United States Right about ‘First to Invent’?*” [1992] 7 EIPR 223.

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THE COURT OF JUSTICE OF THE EUROPEAN UNION RULES THAT NON-DUTCH RESIDENTS SHOULD GET A PROPER CUP OF COFFEE, BUT NO POT!

M.M. Josemans and the Burgemeester of Maastricht v Rechtbank Maastricht, Reference for a preliminary ruling from the Raad van State (Netherlands) Case C-137/09 (J.N.Cunha Rodrigues, A.Arabdjiev, A.Rosas (Rapporteur), A.O.Caoimh and P.Lindh, Judges. Advocate-General: Y Bot.)

INTRODUCTION

For non-Dutch nationals visiting the Netherlands, it has been customary in the past 30 years to pay a visit to, or at least observe, the famous Dutch “coffee shops” which are often decorated in flamboyant psychedelic colours and bear memorable names such as “Funky Monkey” or “Mellow Yellow.” The coffee shops are, of course, less famous for their beverages than for selling soft drugs such as cannabis, either on its own or in products such as “cookies” or “rainbow cakes.”

Although the number of these establishments has dropped significantly during the last 16 years, there are still nearly 700 such coffee shops in the Netherlands with over half of these in the main cities of Amsterdam, Rotterdam and The Hague. The “Easy Going” cafe in Maastricht is such an establishment, and one to which the Court of Justice of the European Union (CJEU) recently gave its attention.¹

To understand the role of the CJEU in this case, its ruling and consequent implications, a further explanation of relevant Dutch administrative organisation and law is required.

LEGAL AND ADMINISTRATIVE BACKGROUND

Contrary to popular belief, the selling of all narcotics is illegal in the Netherlands.² The *Opiumwet* 1976 is the main legal provision on drugs in the Netherlands and regulates the production, distribution and use of “psychoactive” substances. The revision in 1976 came about after the Working Group on Narcotic Drugs 1972 (the *Baan* Committee), published a report which proposed a “risk scale” of specific substances, based on the overall potential for harm. This report was addressed in the 1976 revision of the Act and since then there has been a distinction made between “soft drugs” e.g. cannabis and its derivatives, and “hard drugs” namely heroin and cocaine.

A key theme of the original policy was to help overcome risks that both individuals and society as a whole faced as a result of drug use. Consequently, for the last 30 years, there has been a policy of “turning a blind eye” to the sale of soft drugs, via a policy of “non-enforcement” in specific circumstances. Although the possession of cannabis up to the amount of 30 grams is potentially punishable by up to one month’s imprisonment and/or a fine of 2,250 Euros, small quantities of cannabis products for personal use are exempt from punishment.

The Opium Act is assisted by the Opium Directive which states that the prosecution of possession of up to 5 g of cannabis on a person has the lowest priority for judicial action. Consequently sales of such quantities of cannabis from cafés to customers has

¹ Case C-137/09. Although a pre-Lisbon Treaty case, the current Article numbers have been used for clarity.

² *Opiumwet* 1976 (Opium Act, of 1919, amended in 1928 and 1976) Art. 3C; Opium Act Directive.

not generally been investigated provided the establishment adheres to the *AHOJ-G criteria*.³ A breach of one of the *AHOJ-G* rules can lead to prosecution, and should another breach occur, the café is likely to be closed down.

In addition to the national laws, each municipality is able to devise its own policies to regulate the establishments. The majority of Dutch municipalities have a zero policy, i.e. no such establishments have been allowed at all. In municipalities that *do* allow these cafés, the majority will have policies to ensure cafés are not established near to schools or, if appropriate, to national borders.

Therefore, although cannabis remains a controlled substance and its sale and use is illegal, in certain circumstances the practice is tolerated. However with an increase in drugs tourism, several hundred visitors flocking across the Dutch-German, and Dutch-Belgium borders on a regular basis, coupled with a general increase in drugs related crimes, it is not hard to see why “coffee-shops” have become increasingly prosecuted, in an attempt to eliminate them. Prosecutions are often bought on the grounds that a café has breached the “G” criteria owning more than 500 g of cannabis at one time, the bulk amounts accumulating as an owner tried to balance supply and demand with the [then] increasing number of tourists.

In 2004, the then ruling Dutch Conservative coalition, led by Jan Peter Balkenende, proposed to reduce the number of establishments and to ban sales of cannabis to international tourists, particularly in border towns. Consequently, a number of municipalities tightened the local laws. For example, in an effort to stop drugs tourism from Belgium, the authorities in the border towns of Bergen op Zoom and Roosendaal have now closed all their coffee shops.

Maastricht, which sits close to the Dutch-German border, is one of the cities suffering most from drug-related crime. At the time of the hearing, the 14 coffee shops in the municipality attracted around 10 000 visitors each day with an estimated 70% of these tourists. This equates to more than 3 million drugs tourists per year.⁴ In addition, according to police officials, the majority of crime in Maastricht is drug-related, and the number of drug-related murders each year is increasing.⁵ In this potential greenhouse of crime, efforts were made to prune as much drug-related activity as possible.

THE FACTS

Mr Josemans obtained a licence to establish the “Easy Going” coffee shop in 1994, subject to compliance with the conditions laid down in the General Maastricht Municipal Regulations the *Algemene plaatselijke verordening Maastricht* (“the APV”). As well as ‘soft drugs’ Mr Josemans also sold non-alcoholic beverages and food. Until 2006, the “Easy Going” coffee shop was able to open its doors to both Dutch and non-Dutch residents. However, in an anti-drugs move, the *Gemeenteraad*,⁶ led by the *Burgemeester van Maastricht*,⁷ ordered a change in the APV. By a decision of 20th

³ In 1991 the Ministry of Justice introduced five rules, the *AHOJ-G* criteria, to assist coffee-shop regulation, currently:-

A :“affichering”- no advertising for the sales of soft drugs

H :“harddrugs”- no hard drugs on premises, either for sale or for use.

O :“overlast”- no public nuisance(i.e. no loud music, no groups of people outside the cafe)

J :“jeugdigen”- no juveniles i.e. customers under 18%G :“grote hoeveelheden”- no big quantities: no more sold than 5 g per person per day, maximum of 500 g stock at any one time in a coffee-shop.

⁴ See Advocate General Bot’s opinion for the case released 15th July 2010, paragraph 58.

⁵ DW Staff, (29.10.2008), “Dutch Municipalities Plan New Campaign Against Drug Tourists.” www.dw-world.de/dw/article/0,,3749750,00.html

⁶ Municipal Council.

⁷ Hereafter *Burgemeester* (Mayor).

December 2005, a residency clause was added to the existing APV which came into effect on 13th January 2006. Article 2.3.1.3e(1) of the 2006 APV stipulated that the proprietor of a drug-selling coffee shop was forbidden to admit non-Dutch residents.⁸ Subsequent checks carried out by the police on the 16th February and 8th May 2006, found that in contravention of the new Article, Mr Josemans had allowed non-Dutch residents into his cafe. As a result, his establishment was temporarily closed by the *Burgemeester* on the 7th September 2006.⁹

In an attempt to challenge the closure, Mr Josemans lodged an objection. This objection was dismissed by the *Burgemeester* by a decision of 28th March 2007. Mr Josemans then brought an action before the *Rechtbank Maastricht* (Maastricht Court) against both decisions. By a judgment of 1st April 2008, the *Rechtbank* annulled the previous March decision and revoked the decision of 7th September 2006.

According to the *Rechtbank*, the prohibition as set out in the APV against admitting non-Dutch residents to coffee-shops constituted indirect discrimination on grounds of nationality, which is contrary to Article 1 of the Netherlands Constitution, and it ruled in the appellants favour. However *this* Court found that there was no infringement of EU law, as previous case law had decided that trading in narcotic drugs was not covered by (then) EC Treaty.¹⁰

This verdict was appealed by both parties to the *Raad van State* (Council of State, Netherlands). The *Burgemeester* disputed the interpretation of the Netherlands Constitution by the lower court and Mr Josemans sought clarification as to whether such local restrictions were a breach of European Union (EU) law on the freedom to provide services under Article 56 Treaty of the Functioning of the Union (TFEU).¹¹ In April 2009, the *Raad van State* decided to stay the proceedings and seek a preliminary ruling from the CJEU.¹²

The *Raad van State* formulated four questions:-

1. Does a regulation, such as that [which was] at issue in the main proceedings, concerning the access of non-residents to coffee shops, fall wholly or partly within the scope of the [TFEU], with particular reference to the free movement of goods and/or services, or of the prohibition of discrimination laid down in Article [18 TFEU] in conjunction with Article [21 TFEU]?

2. In so far as the provisions of the [TFEU] concern the free movement of goods and/or services are applicable, does a prohibition of the admission of non-residents to coffee shops form a suitable and proportionate means of reducing drug tourism and the public nuisance which accompanies it?

3. [Was] the prohibition of discrimination against citizens on grounds of nationality, as laid down in Article [18 TFEU] in conjunction with Article [21 TFEU], applicable to the rules on the access of non-residents to coffee shops if and in so far as the provisions of the [TFEU] concerning the free movement of goods and services [were] not applicable?

4. If so, [was] the resulting indirect distinction between residents and non residents justified, and [was] the prohibition of the admission of non residents to coffee shops a

⁸ Under Article 2.3.1.1(d) APV, 'residents' means persons who have their actual place of residence in the Netherlands.

⁹ Article 2.3.1.5a(f) of the APV 2006, allowed the Burgemeester to close an establishment if the proprietor acts contrary to Article 2.3.1.3e(1).

¹⁰ Case 289/86 *Vereniging Happy Family Rustenburgerstraat* [1988] ECR 3655 and Case C-158/98 *Coffeeshop 'Siberië'* [1999] ECR I-3971.

¹¹ Formerly Article 49EC.

¹² Under Article 267 TFEU, a court or tribunal of a Member State has the right to formulate questions regarding EU law, to send to the Court of Justice for an interpretation. The purpose of this mechanism is to ensure uniformity of the application of the Treaties and the supporting secondary legislation.

suitable and proportionate means of reducing drug tourism and the public nuisance which accompanied it?’

ADVOCATE GENERAL BOT’S OPINION

The CJEU was presented with facts and legal arguments on the 29th April 2010. Before the final judgment was handed down, the CJEU considered an independent ‘opinion’ presented to them by Advocate General Yves Bot.¹³

The Advocate General considered the background to this case and noted that under Article 3(1) TEU, “the Union’s aim is to promote peace, its values and the well-being of its peoples”.¹⁴ He further noted that Article 3(2) TEU provides that “the Union shall offer its citizens an area of freedom... in which the free movement of persons is ensured in conjunction with appropriate measures with respect to . . . the prevention and combating of crime.”¹⁵ He also highlighted section 71 of the *Schengen Implementing Convention*,¹⁶ which stipulates that “the Contracting Parties undertake . . ., all necessary measures to prevent and punish the illicit trafficking in narcotic drugs and psychotropic substances.”¹⁷

The Advocate General suggested the following answers:¹⁸

(1) A measure adopted by a local authority as part of its general police regulations which restricts access to coffee shops only to Netherlands residents does not fall within the scope of freedom to provide services under Article 56 TFEU.

(2) Article 4 TEU, Article 72 TFEU and Article 71(5) of the *Schengen Implementing Convention* do not preclude a measure adopted by a local authority which restricts access to coffee shops only to Netherlands residents, in the fulfilment of its duty to contribute to the maintenance of European public order. In short, the Advocate General supported the lawfulness of the Maastricht APV. This was a bitter blow to M. Josemans and fellow coffee shop owners. They prepared for the worst when the CJEU announced its verdict, some six months later.

THE JUDGMENT

It is not always easy to understand the train of logic that accompanies the judgments that emerge from the CJEU, as the Court produces only one unanimous verdict -any dissensions being omitted. However, the judgment in this case is relatively straightforward to follow.

Before considering the legal provisions in the Netherlands itself,¹⁹ the CJEU noted that the EU is a party to the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances.²⁰ The CJEU further considered legal

¹³ In opinions the Advocate General will arrive at an advisory decision as to the verdict of the case. (The Court often passes judgment in complete contrast to such opinions! See for example Jacob’s Opinion in the infamous Case C-50/00 *UPA v Council*).

¹⁴ *Op cit n 4*, para 18.

¹⁵ *Ibid*, para 19.

¹⁶ The *Schengen Agreement*, was signed in 1985 between five member states, which created the *Schengen* area along with the Convention implementing the Schengen Agreement create a ‘borderless area.’ This became part of the EU system in 1997.

¹⁷ *Op citn 13*, at para 28.

¹⁸ *Ibid*, para 125.

¹⁹ See *Case C-137/09* paras 12–22.

²⁰ Concluded in Vienna on 20 December 1988 (*United Nations Treaty Series*, Vol. 1582, No 1–27627).

measures adopted by the EU to inhibit drug culture growth, in particular by preventing drug trafficking, and in general by clamping down on consumption.²¹ The CJEU stated that closing Dutch Coffee-shops to tourists would potentially assist the battle in combating the expansion of the drugs trade.

The CJEU considered that the “Easy Going” was an establishment to which the *AHOJ-G* criteria applied, whilst noting that it was clear that this establishment also sold non-alcoholic beverages. In this regard it stated that: “it is necessary to assess... first, the marketing of cannabis in coffee-shops and, secondly, the question of whether the sale of non-alcoholic beverages and food in such establishments may have an effect on the answer to be given to the national court”²²

Having consulted the relevant legislation, and its previous jurisprudence,²³ the CJEU considered that although the Netherlands operates a policy of tolerance to “soft drugs,” nevertheless the activity was still *prima facie*, illegal. Therefore illegal substances would not be allowed to benefit from unlimited protection granted by the laws structuring Free Movement of Goods, particularly Art 35 TFEU, or Free Movement of Services (Art 56 TFEU). In terms of the principle of indiscriminate to non-Dutch nationals,²⁴ this was also not deemed to be applicable in regards to selling drugs. However, the CJEU decided that the selling of drugs was to be compared and contrasted with the selling of non-alcoholic beverages, an area to which a number of arguments were submitted by various parties.

The *Burgemeester van Maastricht* and the Netherlands, Belgian, and French Governments submitted that the marketing of non-alcoholic beverages and food should not have any bearing on the outcome of this case, as the purchase of such products was of secondary importance to trading in coffee-shops. Unsurprisingly, Mr Josemans argued to the contrary. He was supported by the German Government and the Commission. The Commission identified the fact that visitors to these cafés who sought to buy non-alcoholic drinks were unlikely to be interested in exporting them to their native country, an issue of Art 35 TFEU, therefore the issue in this case should centre on Art 56 TFEU, the freedom to provide services. The CJEU agreed. Having paid full attention to the Advocate General’s opinion and considered its own jurisprudence,²⁵ the CJEU decided that:-

the answer to the first question is that, [...], a coffee-shop proprietor may not rely on Articles [18 TFEU] , [21TFEU], [35 TFEU] or [56 TFEU] to object to municipal rules such as those at issue in the main proceedings[. . .]. As regards the marketing of non-alcoholic beverages and food in those establishments, Article [56 TFEU] et seq. may be relied on by such a proprietor.²⁶

Having answered the first question, the CJEU then considered the second question which was asked in case any of the fundamental freedoms was deemed to have applied to this case. Having decided that the municipal rules might restrict the freedom to provide services, the court then considered if these rules could be justified. The CJEU

²¹ *Op cit* n 18 para4, The Court noted Recital 1 in the preamble to Council Framework Decision 2004/757/JHA of 25 October 2004, which lays down minimum penalties for drug trafficking.

²² *Ibid*, para 34.

²³ The Court noted Case 221/81 *Wolf* [1982] ECR 3681; Case 240/81 *Einberger* [1982] ECR 3699; Case 294/82 *Einberger* [1984] ECR 1177; Case 269/86 *Mol* [1988] ECR 3627, and *Vereniging Happy Family Rustenburgerstraat*).

²⁴ Arts 18 TFEU; 21 TFEU.

²⁵ Case C-275/92 *Schindler* [1994] ECR I-1039, para 22; Case C-71/02 *Karner* [2004] ECR I-3025, para 46; Case C-36/02 *Omega* [2004] ECR I-9609, para 26; Case C-452/04 *Fidium Finanz* [2006] ECR I-9521, para 34; and Case C-233/09 *Dijkman and Dijkman-Laveleije* [2010] ECR I-0000, paragraph 33).

²⁶ *Op cit* n 18 para 54.

assessed that the restriction is “justified by the objective of combating drug tourism and the accompanying public nuisance.”²⁷

In summary, therefore, the CJEU indicated that the APV does not undermine EU law in restricting sales of drugs to non-Dutch residents. Although this is a restriction in the freedom to provide services under Article 56 TFEU, the actions are proportionate to the justifiable aims, i.e. reducing drug tourism and the resulting crime. *However*, to stop a non-Dutch resident from entering a coffee shop and buying *coffee* would be a breach of Article 56 TFEU.

COMMENTARY

It may be questioned why M. Josemans was so eager to offer non-Dutch citizens a cup of coffee in the “Easy Going.” One suspects that although he received some revenue this way, it is unlikely to be a significant amount. It has been estimated that the sale of non-alcoholic beverages would amount to a figure between 2.5% and 7.1% of the turnover his coffee shop.²⁸ However, in reality, if M. Josemans could prove that his visitors to the coffee-shops were there purely to have a cup of coffee, and that such visits were allowed by virtue of Art 56 TFEU, the freedom to provide services, then M. Josemans could rely on Art 56 TFEU, as a defence to claims that he had broken municipal law in allowing such non-Dutch citizens into his establishment. This ruling might have helped him recover his licence, but subsequent region rules are likely to make it difficult to trade at all.

Since the judgment was announced, the authorities in Maastricht tightened up admissions to cafés, with only Dutch, Belgium and German *residents* being allowed entry to such places. Of even more significance, the Dutch government has moved rapidly by introducing new polices whereby such coffee shops will be considered private clubs with a maximum of 2,000 members limited to Dutch residents who are older than 18 and carry a so-called ‘weed pass’. Since 1st January 2012, non-Dutch residents have been banned from entering cafés in the Southern provinces of Limburg, North-Brabant and Zeeland, with measures due to come into force in the rest of the country, including Amsterdam, in January 2013.

From an outsider’s point of view, reducing access to drugs may be thought a good idea, but inevitably a number of individuals will object. For example, it is possible that imposing such a ban will do the *general* local economy a great deal of harm. Maastricht alone sees 10,000 visitors a day, mostly from Belgium, Germany, and France, who will buy a variety of goods, not just drugs. It is possible that there will be general decrease in trade in border regions in the Netherlands, and ultimately the Government may experience a reduction in income and tax revenues, not to mention a rise in unemployment.

Additionally the question should be asked, “will this help stamp out drug related crime?” It has been suggested that these measures are unlikely to do so. In fact they could exacerbate the whole situation. A number of individuals are concerned that ‘soft’ drugs will become part of the black-market and everything that entails. In all reality this judgment is unlikely to change this, as there is evidence that more relaxed laws actually reduce rather than increase drug related problems. When Portugal relaxed its drug rules in 2001, there was initially a general outcry that Portugal would be a

²⁷ *Ibid* para 84. Having decided questions 1 and 2 as they did, the Court then stated that there was no need to answers questions 3 and 4.

²⁸ *Ibid* para 46.

“general dumping ground for junkies.” This has not materialised. On the contrary, since the new drugs laws came into force in 2002, drug usage in Portugal appears to have been reduced and consequently along with it, drug-related infections and deaths.²⁹

Perhaps the true significance of this case will be seen, not so much as stamping out drugs tourism, but purely in changing the destination for ‘chilling out’. In this regard, it is interesting to note that the Czech Republic relaxed their rules on drugs possession in 2010, the justification, given by the Czech Government for “decriminalising” certain aspects, was to promote law enforcement. Whether these more liberal laws will address the difficulties faced in the Czech Republic, or make them worse, is to be seen. What is more likely to happen is that German “day-trippers” abandon Maastricht and head East, to sample the “coffee-shops” in Prague.³⁰

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²⁹ Maia Szalavitz, (2009) “Drugs in Portugal: Did Decriminalisation Work?” Time www.time.com/time/health/article/0,8599,1893946,00.html

³⁰ Benjamin Cunningham (2009) ‘New drug guidelines are Europe’s most liberal Czech rules on narcotics possession designed to aid law enforcement.’ The Prague Post. www.praguepost.com/.../3194-new-drug-guidelines-are-europes-most-liberal.html

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CAGING THE GREEN-EYED MONSTER – RESTRICTIONS ON THE USE OF SEXUAL INFIDELITY AS A DEFENCE TO MURDER

Regina v Clinton; Regina v Parker; Regina v Evans [2012] EWCA Crim 2
(Lord Judge, LCJ, Henriques and Gloster DBE, LLJ)

INTRODUCTION

The circumstances in which an individual can claim a “loss of control” so as to mitigate their culpability when charged with an offence of murder have long been controversial. The partial defence of provocation had caused the development of a mass of contradictory case law. Parliament has tried to introduce some certainty through the introduction of the defence of “loss of control” as expressed in sections 54 and 55 of the Coroners and Justice Act 2009. This has replaced the defence of provocation for offences committed after 4 October 2010. Under the new legislation:

Where a person (“D”) kills or is party to the killing of another (“V”), D is not to be convicted of murder if –

- (a) D’s acts and omissions in doing or being a party to the killing resulted from D’s loss of self control,
- (b) The loss of control had a qualifying trigger, and
- (c) A person of D’s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in a similar way to D.¹

In a recent judgement, the Court of Appeal has given its first interpretation of some of the more difficult provisions of this act. This was a conjoined appeal and in two cases (*Parker* and *Evans*) the appeal was focused on the adequacy of the judge’s directions to the jury in cases where the judge had permitted the defence to be put before the jury. The appeals in these cases were rejected. However, in the case of *Clinton* the Court of Appeal was required to give a more detailed consideration of the circumstances in which this defence could be relied upon.

THE FACTS

The appellant had lived with the deceased (his wife) for 16 years. They had married in 2001 and had two children of school age. Two weeks prior to her death Mrs Clinton had left the family home by way of a trial separation. There was evidence that during this period the appellant had been researching ways to commit suicide. He had also stolen Mrs Clinton’s car in what appeared to be an attempt to make her reconcile with him. The appellant had begun to suspect that Mrs Clinton had been having an affair. On the morning of the 15th of November he discovered Facebook entries and explicit images which confirmed these suspicions. As a result of this the appellant took Codeine and drunk a quantity of Brandy. Mrs Clinton returned to the family home at 14:00 and was confronted by the appellant. His case was, that on being presented with evidence, she described, in graphic terms, acts of intercourse with five different men. He also stated that she had taunted him about his desire to kill himself, stating amongst other things “you haven’t got the fucking bollocks”. At this point he grabbed a piece of

¹ Coroners and Justice Act 2009 section 54.

wood which he used to batter her to death. Photographs of her naked corpse were sent via text to the man with who she had been having an affair. The appellant then attempted to hang himself. Alerted by the texts the police were able to enter the property and resuscitate him.

The trial judge considered this defence in the light of section 55 of the Coroners and Justice Act 2009 which states: “In determining whether a loss of control had a qualifying trigger; . . . The fact that a thing done or said constituted sexual infidelity is to be disregarded.”² The trial judge ruled that not only would the appellant not be able to rely on the infidelity as a qualifying trigger, she would have to direct the jury to ignore the appellant’s evidence regarding the comments allegedly made by Mrs Clinton that she had had sex with five other men. As a result of this the only evidence the jury could consider in determining whether there was a qualifying trigger was Mrs Clinton’s taunt that he would not have the willpower to commit suicide and a comment that he could not have contact with his children. The trial judge concluded that these events, of themselves, were not of an extremely grave character or would cause the defendant to have a justifiable sense of being seriously wrong.³ On this basis she concluded that there was insufficient evidence to conclude that the appellant had discharged his evidential burden and therefore the defence could not be put before the jury. The appellant also advanced a defence of diminished responsibility but this was rejected by the jury and the defendant was convicted.

THE COURT OF APPEAL DECISION

In a detailed judgement, the Lord Chief Justice reviewed some of the difficulties faced by the courts in trying to define this exclusion. The judgment began by acknowledging that the legislation was framed in this way to reflect the notion of individual autonomy and the fact that no one party to a relationship could dictate the behaviour of the other.⁴ However, the Court of Appeal noted that the experience of the courts was that the factors present in the breakdown of a relationship brought with them a potential for irrational fury, far removed from any notion of rights that one party believes they have over another.

A number of arguments were advanced by counsel to highlight how anomalous decisions could arise from the application of the rule. The example was cited of a case in which a stalker who had never been in a relationship with the deceased murdered her on discovering her having intercourse.⁵ On one interpretation of the law he would be able to avail himself of this defence whilst an individual who discovered their spouse in a similar situation would not. The Court of Appeal indicated such cases would have to be resolved as and when they arose.⁶ In their judgment the legislation was clearly expressed and when the only qualifying trigger was “sexual infidelity” a defendant could not avail themselves of this defence.⁷

However this was not the end of the matter as the Lord Chief Justice recognised that a defendant who had a qualifying gateway under section 55 still had to satisfy the requirements of section 54 (1)(c) by establishing that a person of their sex and age in

² Coroners and Justice Act 2009 section 55(6)(c).

³ As required by Coroners and Justice Act 2009 section 55 (4).

⁴ *Regina v Clinton* [2012] EWCA Crim 2 at paragraph 16.

⁵ *Regina v Stingel* [1990] 171 CLR 312.

⁶ *Regina v Clinton* [2012] EWCA Crim 2 at paragraph 20.

⁷ *op cit*, at paragraph 35.

all the circumstances might have acted in the same way. It was observed that Parliament had not sought to prevent the jury assessing the impact of sexual infidelity at this stage (indeed section 54(3) states that the reference to circumstances is a reference to “all” of the defendant’s circumstances). Therefore to prevent a jury taking into account evidence of sexual infidelity when considering the existence of a qualifying gateway but then to allow them to take account of it when considering this component of the defence “is, to put it neutrally, counter intuitive”.⁸

The conclusion reached by the Court of Appeal was where the only potential trigger for loss of control is sexual infidelity then there is a prohibition on placing this defence before a jury. Where it is one of a number potential triggers the jury is entitled to consider these other potential triggers in the light of the evidence of all of the defendant’s circumstances, including infidelity.

Accordingly the Court of Appeal ruled that the trial judge had misdirected herself in concluding that the jury should ignore the evidence of the infidelity. In their judgment the totality of the matters relied upon by the appellant set against the background of the sexual infidelity were of sufficient weight to be left to the jury to assess. The appeal was allowed.

COMMENTARY

This case highlights the difficulties that are prevalent in trying to assess the level of criminality which arises when an individual is acting in an irrational state. However, what is clear is that Parliament intended that an individual who acts out of a sense of spite or vengeance on discovering an act of infidelity will not be able to attempt to justify their behaviour by way of a defence. Nevertheless, what the Court of Appeal has demonstrated is a recognition that there may well be other factors which trigger such behaviour and when these other triggers exist the jury can take into account the sexual infidelity in assessing all the circumstances that were operating on an individual’s mind at the time.

This will not be the last time this defence will be considered by the Court of Appeal. There are still many areas in which further definition is needed (in particular the use of the phrase “sexual infidelity”). Is it correct that the obsessive stalker who murders their quarry will have a defence when the faithful spouse will not? What of the defendant who learns that their spouse has been in a loving but chaste relationship with another person? Do they have a defence, when a defence would not be available to a person who discovers their spouse has been having sex? Who defines whether or not there is a relationship to which the victim owes “fidelity” and in establishing this do we further undermine the notion of autonomy which is at the heart of this legislation? Any attempt to legislate for the most irrational of human behaviours is going to be rife with opportunities for injustice. It is hoped that as this defence is analysed further by the courts a canon of case law is produced which is fair and consistent and avoids presenting the “disappointing spectacle” that resulted from the contradictory approach taken in cases that arose under the repealed defence of provocation.⁹

HELEN EDWARDS* AND JEREMY ROBSON**

⁸ *op cit*, at paragraph 32.

⁹ D. Ormerod, *Smith & Hogan’s Criminal Law* 13th edition, (Oxford, OUP, 2011), at 506.

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MEDIATION AND THE JUDICIARY: NEGOTIATION IS NOT ENOUGH!

PGF II SA v OMFS Company and Bank of Scotland PLC
[2012] EWHC 83 (TCC) (Mr Recorder Furst QC)

INTRODUCTION

As well as attracting increasing academic attention, mediation remains a topic of considerable importance for civil practitioners. The recent decision in *PGF II SA v OMFS Company and Bank of Scotland* is important to both groups. To academics it confirms the judiciary's essentially consistent policy of strongly encouraging mediation in suitable cases; to practitioners it is a firm reminder of the risks involved in not seriously contemplating mediation even when Part 36 offers and other forms of settlement are in use. Since the Woolf Reforms there has been increasing emphasis on active, some would say pro-active, case management by the judiciary. A major tool in their armoury has been the cost sanction regime under section 44 including the wide discretion given to judges in assessing the conduct of the parties under 44.3(5). It is through the use of these provisions, that allow for costs to be apportioned against either party according to how they have conducted themselves as a whole during litigation, that has been central to the judicial encouragement of mediation. There has been a well-documented series of cases that has clearly emphasised the danger of parties failing to consider mediation as an appropriate method of dispute resolution.¹ This case continues and develops this theme and indeed clarifies that even a reasonable Part 36 offer is not sufficient to protect the client from cost implications.

THE FACTS

The facts of the case are relatively straightforward. The defendants were tenants of the claimant, with leases expiring in 2009. At some point a licence had been granted to the tenants allowing them to make alterations to the ventilation and air conditioning system. The licence was subject to a reinstatement clause. In August 2008 notice was served on the tenants requiring them to reinstate the system in accordance with the terms of the licence, and in January 2009 on the expiry of the lease the landlord served a schedule of dilapidations. The Scott Schedule clearly differentiated between the alleged breach of the requirement to reinstate under the licence and the wants of repair under the repairing covenant in the lease. However, at some later date the original schedule had been altered, placing the requirement to reinstate the air conditioning system into that part of the schedule that dealt with wants of repair. Proceedings were eventually commenced in October 2010. The claimant's Particulars of Claim cited various breaches of the repairing covenants, but no specific mention was made of the terms of the licence and no breach of the duty to reinstate was explicitly alleged. The claim in total was for a little over one million pounds. In January 2011 the defendants filed their defence, the main thrust of which being that certain work carried out by the landlord had not been necessitated by the alleged breach.

In April 2011, the defendant's made a Part 36 offer in the sum of £700,000 in full and final settlement of the landlord's claim. On the same day the landlord as claimant

¹ For example, *Dunnett v Railtrack PLC* [2002] EWCA Civ 302, [2002] 2 All E.R. 850; *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576, [2004] 4 All E.R. 920.

also made a Part 36 offer but also wrote to the defendant under a separate letter suggesting mediation. The defendant ignored the letter and a subsequent offer to mediate made in July 2011 was also ignored. On 10 January 2012, the day before the hearing was scheduled to commence in court, the claimant accepted the defendant's Part 36 offer of £700,000. The letter of acceptance demanded that the defendants pay all the costs incurred by the claimant on the standard basis up to the 2 May 2011 (being within the 21 day relevant period after the Part 36 offer had been made) and in addition all their costs incurred after the expiry of the relevant period. The claimant put forward two arguments for claiming costs after the expiry of the relevant period:

- (1) that the defendant had introduced new 'information' and raised a new argument in January 2012 that had the claimant known about beforehand would have been material to their case, and
- (2) that the defendant had unreasonably declined or refused to mediate.

The general legal rule is that where a Part 36 offer is accepted within the relevant period the claimant is entitled to costs on the standard basis up to the date of acceptance. If, as in this case, the Part 36 offer is accepted after expiry of the relevant period the parties must agree the liability for costs. If they cannot agree the court will decide and usually, unless the court considers there to be "exceptional circumstances" and orders otherwise, the claimant will be entitled to the costs of the proceedings on the standard basis up to the date on which the relevant period expired, as before, but from thereon, the offeree will be liable for the offeror's costs on the standard basis from the date of expiry of the relevant period to the date of acceptance. In this case the offeree was the claimant landlord, the offeror the defendant tenant. The issue here was whether or not the judge considered this to be a case of "exceptional circumstances" allowing him to deviate from the norm and award costs to the claimant. In any case in making his or her decision the judge must take into consideration:

- (1) the terms of the Part 36 offer;
- (2) the stage in proceedings when the offer was made;
- (3) the information available to the parties at the time the offer was made and whether or not that information was likely to be material to the making of the offer, and
- (4) the conduct of the parties, in particular relating to the giving and receiving of material information that might have had a bearing on the offer.

The judge in this matter decided that the claimant was entitled to costs during the "relevant period" but was not convinced on the facts that this was an "exceptional case" and so no award for costs was made for the period after expiry of the "relevant period". Had that been an end to the matter the defendants could have made a claim for their own costs incurred after the relevant period had expired. However, the judge took into account the defendants' conduct in relation to the offer to mediate and decided that their failure to respond to two distinct offers had been unreasonable. The defendants maintained (*inter alia*) that because a previous attempt at mediation in an earlier dispute had been unsuccessful their refusal by silence was reasonable. However, adopting the principles of *Lumb v Hampsey*,² as well as *Halsey*, the judge disagreed. That all the facts were not present at the time was not considered an insurmountable obstacle to progress being made at mediation and some weight was also attached to the fact that the defendants did not raise at the time their concerns regarding the efficacy

² [2011] EWHC 2808 (QB).

of mediation which they later sought to rely upon. The defendants were not therefore entitled to costs despite the ultimate reasonableness of their Part 36 offer.

COMMENTARY

This case is a consistent and logical development of the principles of Woolf that emerge from the overriding objective.³ It confirms the established line of *Halsey* and clarifies that attempts at negotiation though a Part 36 offer are insufficient to satisfy the demand that alternative dispute resolution be seriously considered. Additionally, it also demonstrates that the judiciary, most of whom spent the majority of their time in practice before the introduction of the Civil Procedure Rules, are increasingly aware of the potential of mediation. Mr Recorder Furst QC in his judgment stated “In any event the skill of a mediator lies in drawing out seemingly intractable positions.”⁴ This highlights the increasing regard for the value of the actual process of mediation and the belief that it can, in many cases, be effective. Whilst the value of mediation has long been noted with regard to family matters because of its ability to preserve on-going relationships it has not received as much attention in relation to land law including landlord and tenant.⁵ However, in very many areas of civil law there remains a need to preserve long-term relationships. Commercial tenancies, for example, often last for decades and neighbours often live in close proximity for a lifetime. In another recent case *Jackson LJ* noted the utility of mediation with regard to a particular type of property dispute namely one concerning warring neighbours:

This case concerns a dispute between neighbours, which should have been capable of sensible resolution without recourse to the courts. During the course of his submissions in the Court of Appeal Mr Pearce for the claimants observed that this may not be an “all or nothing” case. A moderate degree of carpeting in flat 8 might (a) reduce the noise penetrating into flat 6 and (b) still enable the occupants of flat 8 to enjoy their new wooden floor. This is precisely the sort of outcome which a skilled mediator could achieve, but which the court will not impose.

Of course there are many cases where a strict determination of rights and liabilities is what the parties require. The courts stand ready to deliver such a service to litigants and must do so as expeditiously and economically as practicable. But before embarking upon full blooded adversarial litigation parties should first explore the possibility of settlement. In neighbour disputes of the kind now before the court (and of which I have seen many similar examples) if negotiation fails, mediation is the obvious and constructive way forward.⁶

However, it must be noted that this still stops short of compelling mediation and *Jackson LJ* himself has stated elsewhere “In spite of the considerable benefits which mediation brings in appropriate cases, I do not believe that parties should ever be compelled to mediate.”⁷ Just as the courts have been clear in encouraging mediation they have also been consistent in rejecting any attempt at enforcing mediation on unwilling parties. This is in sharp contrast to other jurisdictions including other

³ Civil Procedure Rules, 1.1.

⁴ At paragraph 25.

⁵ B. Ezzel, “Inside the minds of America’s family law courts: The psychology of mediation versus litigation in domestic disputes”, (2001) 25 *Law and Psychology Review* (Spring) 119–143.

⁶ *Faidi v Elliott Corp* [2012] EWCA Civ 287 at paras 34 and 35.

⁷ L.J. Jackson, *Review of Civil Costs – Final Report* (London, TSO, 2010) p 361.

common law systems. Australia and parts of the USA, for example, have mandatory schemes have been in operation for some time.⁸ The thinking of the judiciary here is not without criticism. It is obvious that one cannot, and should not, force a settlement on a participant whilst in mediation. To do so would breach the essential voluntariness of the process and this must include the voluntariness of the actual final agreement itself. This serves to distinguish it from adjudicative methods of dispute resolution where both the process and the outcome can be compelled on unwilling parties. It is, however, quite a separate matter to insist that a party engage in the actual process. This distinction has been noted by many commentators.⁹ There seems to be nothing here that breaches the rules of natural justice. Parties to litigation are often told to go away and attempt to negotiate a settlement. Mediation is no different in that regard. However, many members of the senior judiciary have expressed concerns that a system of compulsory mediation might be a breach of Article 6 rights with regard to a fair trial.¹⁰ Nevertheless, European jurists have not tended to consider mandatory schemes problematic. For example, Advocate General Kokott in *Rosalba Alassini and others v Telecom Italia Spa* argued that:

mandatory dispute resolution procedure without which judicial proceedings may not be brought does not constitute a disproportionate infringement upon the right to effective judicial protection. [These provisions] constitute a minor infringement upon the right to enforcement by the courts that is outweighed by the opportunity to end the dispute quickly and inexpensively.¹¹

Will *PGF II SA* then actually change lawyers' practices in the way desired by Woolf and his judicial disciples? Or will it mean that lawyers whose clients do not wish to mediate must instead go through the pretence of contemplating mediation? Will it be sufficient to produce some evidence that the option was discussed with their client and that their reticence was documented, and explained and communicated to the other side contemporaneously? Clearly, their reasons will be subjected to scrutiny and must be, *prima facie*, reasonable. However, to realise the aspirations of mediation advocates, more than this carefully measured approach is needed in order to overcome a wider resistance to mediation amongst parts of the legal profession. The tactical use of mediation by lawyers to further the interests of their clients, for example, has been noted in a number of studies.¹² Further, the reticence of some lawyers to engage in mediation has also been noted.¹³ Therefore, whilst there has been a continuous line offered by the judiciary on the validity of mediation as a method of dispute resolution it is clear that this has not fully had the desired effect amongst practitioners. This is because the real change required from the legal profession is a cultural one. There is still a sense that "real" law involves litigation and this is fostered by the significant emphasis placed on litigation as opposed to alternative dispute resolution in professional training courses. Whilst then the judiciary have used a stick of costs they have

⁸ P. Brooker & S. Wilkinson, (eds) *Mediation in the Construction Industry: An International Review* (Abingdon, Spon Press, 2010).

⁹ For example, B. Wolski, "Voluntariness and Consensuality: Defining Characteristics of Mediation?" (1996-7) *15 Australian Bar Review* 213.

¹⁰ European Convention on Human Rights 1950.

¹¹ C-317/08-C320/08 [2010] para 45.

¹² P. Brooker & A. Lavers, "Mediation Outcomes: Lawyers' Experience with Commercial and Construction Mediation in the United Kingdom" (2005) 5 *Pepperdine Dispute Resolution Law Journal* 2, 161-213. P. Brooker, "An investigation of evaluative and facilitative approaches to construction mediation" (2007) 25 *Structural Survey* 3/4, 220-238.

¹³ For example, J. Sidoli del Ceno, "An investigation into lawyer attitudes towards the use of mediation in commercial property disputes in England and Wales" (2011) 3 *International Journal of Law in the Built Environment* 2, 182-198.

not yet given a carrot. The positive comments about the potential use of mediation in this case and others might be that carrot.

CONCLUSION

If there were any doubt that civil practitioners and their clients must seriously consider mediation and provide reasons for rejecting it at the actual time that they refused to mediate then that has been dispelled by this judgment. The line of judicial thought, or perhaps judicial policy, begun by Woolf has again been confirmed here. This case also clarifies that a Part 36 Offer – even a reasonable and timely one - cannot alone save a party from negative cost implications. *PGF II SA* may in time become as well-known as *Halsey* but the future growth of mediation depends as much on a sea-change in attitudes amongst practitioners as it does on the spectre of cost sanctions.

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BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

Walled States, Waning Sovereignty by WENDY BROWN

New York, Zone Books (distributed by The MIT Press), 2010, 168 pp., 10 illustration
\$25.95, £19.95 cloth, ISBN 978-1-935408-08-6.

The future of independent and equal state sovereignties is in doubt, or so Wendy Brown argues in her monograph concerning the recent explosion in state-built border walls for keeping people either 'in' or 'out', and to differentiate between 'us' and 'them'. The author of this slim volume utilises the material, physical and psychological characteristics of walls to highlight a renewal of concern regarding the seeming imperviousness of global capital and other transnational forces to individual sovereign state power. The growing imbalance in strength between the global and the local forms in the author's view the central danger to longstanding frameworks of international relations and power-politics. Professor Brown argues in particular that, while walls may project an image of impregnability, the huge pressures being placed on traditional sovereign frameworks of governance by globalised forces have only strengthened the opposing contexts of virtual power over physical power, of open sourcing over material appropriation, of de-territorialised tentacle of control over fixed territorial limits, and so on. Accordingly, border walls can only *project* an image of statehood, soothe a growing sense of state powerlessness, and bolster national xenophobia against the 'outside other'.

How do walls function as effective communicators? Professor Brown points to three central paradoxes of what walls represent and make visual: the power to open or block, to universalise or to exclude/stratify, and to allow virtual networking or to impose physical barriers to networking. After these binary themes are introduced, she develops two further ideas: first, that state sovereignties are today battling a larger 'sovereignty' of globalisation, in the sense of 'a higher power' or the 'power to decide', as advocated by such theorists as Carl Schmitt; secondly, that states utilise the visual symbolism of walling to project an underlying theological dimension of state power, by helping to produce sovereign awe ('God is on our side'). She develops this latter idea in particular to illustrate her premise that the more walls are built, the more 'real' state power diminishes. In turn, as walls are of dubious efficacy when faced with human inventiveness, wall-building states rely on their walls to project a more intense sense of state power, while in actuality, walls can serve only as visual coda, in the sense of the theatrical *projection* of a bounded, secure nation when nothing could be further from the case.

For example, some walls foster a bunker mentality among those living inside them, while others securitise a way of life. Notable examples of walls today are detailed throughout the book, and include post-apartheid South Africa, which has built a complex internal maze of walls and checkpoints, and maintains a controversial electrified security barrier on its Zimbabwe border; Saudi Arabia, which has a ten-foot-high concrete post structure along its border with Yemen (soon to be followed

by a similar wall at the Iraq border); and India, which has walled-out Pakistan, Bangladesh, and Burma, and has walled-in Kashmir, as well as mining, and placing barbed concertina wire along the Indo-Kashmir border. The building of walls, such as the 'Security Wall' in Israel to contain West Bank and Gazan 'terrorists', or that between the southern U.S. and Mexico, to prevent illegal migration, further illustrates the challenges and insecurities felt by the numerous states whose sovereignty is placed under severe challenge, particularly during the last half century, by the growing transnational flows of capital, people, technology, ideas, violence, and politico-religious loyalties. The importance of international institutions of economic governance such as the IMF and WTO, and in the last quarter century the ever-broader assertions of international law and individual rights, further illustrate a failing Westphalian world order of territorial sovereign states.

Professor Brown's interpretation may at first appear over-stated, but the warning in her message is clear. Even though states are likely to retain their significance as important actors on the global stage and as symbols of national identification, walls have always been with us, whether those placed around medieval castles, or around the wealthy in society who live in gated communities, while high-end business traffic enjoys its separate lounges and segregated passageways. It may well be human nature to exclude, just as it can be argued that power excludes by necessity in order to survive, but the sheer ubiquity of the new walls is conditioning many societies to see walls anew as legitimate. However, in order to depict the new walls as the carriers of a special iconography - one expressive of a purely modern predicament in state power - a different interpretation of the purpose of walls is needed, for even as the 'walls' of Cold War Europe came down, the building of the new generation of containment walls had already begun. It is at this point that Professor Brown can argue that one crucial difference exists between 'old' and 'new' walls - a difference which is located in the identification of the group intended to be excluded: rather than serve as a means of defence against attack by third states, the new walls are utilised to resist the openness and transparency demanded by a new class of global, non-state transnational actor the movement of which corrupts the territorially-bounded reach of political dictate and legitimacy, and limits the rule of local law.

Globalisation, in short, has had dissolving effects on national economies and demographics, a phenomenon attributable to the preference of neo-liberal globalists to relocate production to lower-cost regions which the masses of (stateless) peoples then seek out to find work. Likewise, the supply of cheap (frequently illegal) labour of many kinds, be it for industry, crime, trafficking, etc., is positively demanded by insatiable globalised forces. Accordingly, walls may appear to contribute to state political, economic, and regulatory self-protection by guarding against certain types of human dispersion, but the more fundamental market forces of supply and demand are operating in the opposite direction, and the author is certainly convincing in her thesis that barrier walls are effective only as *trompes-l'oeil*, to convey exclusion and protection, when they can secure neither. A central premise, that globalised forces are facilitating new fusions of state and non-state violence as they leach away from territorial nation-states their sovereign powers, allows Professor Brown to provide her insights into the corresponding erosions of what she terms 'inner-core state sovereignty'. Even when walls are used in combination with the many checkpoints, viruses, security apparatuses, etc., dispersed throughout networks of homes, vehicles, schools, and airports, the countervailing lures of globalised capital and/or alternative political-economic-religious linkages are just too potent a force for individual states to withstand.

This leaves only the sheer physicality of walls to provide good propaganda for those who advocate them, e.g., when fortifying stereotypes, conditioning and shaping national and citizen subjectivities, generating fears of dilution in national identity, and producing legally differentiated classes of people for territorial entry and abode ('regular' citizen, resident alien, visas, etc.). The monograph is structured in four chapters. Chapter One introduces the author's central proposition, and more controversially argues that the new walls must be conceived of as a singular historical phenomenon. Chapter Two, entitled 'Sovereignty and Enclosure', ranges across the topics of sovereignty and enclosure in modern political theory, the meaning of *nomos* as expressing 'the production of (political) order through spatial orientation', and engages with modern theorists on sovereignty including Locke, Bodin, Schmitt, Agambon and Negri, in order to broach such issues as the meaning of sovereignty, the rise of theological politics, and the impact of capital on bordered enclosure. Chapter Three, 'States and Subjects', and Chapter Four, 'Desiring Walls', more directly address the dangers posed to states and their citizen-subjects in a global world order characterised by an increasingly corrupted and diminishing sovereign power. Chapter Three specifically addresses different examples of U.S. walls, although those of other states are also highlighted, while Chapter Four dabbles in psychoanalytic theory, as the author attempts to get to the heart of the human desire for walls in the first place by means of an exploration of the structure of different 'fantasies' theorised by the Freuds (Sigmund and Anna). Accordingly, Chapter Four is somewhat less successful in its purpose, due no doubt to its more speculative content.

Given the overall theme, it hardly comes as a surprise that Professor Brown muses in passing on whether the psychic, social and political impacts of the Berlin Wall for example were indeed so very different on those kept within and without it, as the twenty-first century walling advocates protecting free societies would have us believe today. The author has worked in the Political Science Department of the University of California, Berkeley, since 1999, where she is currently the Heller Professor of Political Science. Her areas of research expertise are extensive, and range from the history of political theory to nineteenth and twentieth century Continental theory, critical theory, and cultural theory. Further, Professor Brown's focus on such themes as power formation, political identity, citizenship, and political subjectivity, is informed by her insights into the works of Marx, Nietzsche, Weber, Freud, the Frankfurt School, Foucault, and contemporary Continental philosophers, and her published work has been translated into more than 15 languages. In conclusion, *Walled States, Waning Sovereignty* makes a valuable contribution to the literature on political theory concerning the developing relationship between the forces of sovereignty and those of a larger global and transnational world.

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The Owlets of Minerva were hatched by The Owl of Minerva. The latter is a series of essays on aspects of human rights in the context of criminal procedure and criminal law. It is extremely learned and draws eclectically on a range of theorists more often found on the philosopher's or sociologist's bookshelf than the lawyer's. As Jonathan Doak commented in his review¹ it reflects the author's academic, rather than his judicial, experience and interests. What we have in the Owlets is the judicial opinion of Judge Zupančič to compare and contrast to the academic view of Professor Zupančič (to adopt the apposition of Judge Sajó in his Preface).

The Owlets principally consists of extracts from 49 decisions of the European Court of Human Rights. The basis for selection is that each has a separate opinion of Judge Zupančič. This may be sole or joint, concurring, dissenting or mixed. In two of the cases Judge Zupančič sat ex officio as the Slovenian judge, but the others represent the relatively chance allocation of cases through the ordinary procedure of the Court. Each extract provides enough of the factual and legal background, and of the main judgment of the Court, to place the opinion in context. The organisation is by ECHR Article, so some of the cases cover issues significantly outside the purview of the Owl.

The author in his Foreword and Judge Sajó in the Preface do discuss some of the leading themes which preoccupy both the Judge and the Professor, including issues of relevance, proof, distinguishing law and fact and the nature of (judicial) truth. However, the reader is then left to navigate the cases with little general commentary and explication, although there are a number of substantive footnotes expanding on and elucidating specific words and phrases in the opinion. This means that, particularly where it is not possible to cross-refer to the Owl, the reader gets little help in understanding the train of Judge Zupančič's thought.

Given that a large proportion of the opinions are joint, it would be helpful to know how far they actually and precisely reflect Judge Zupančič's reasoning, and whether he wrote the opinion. It is also questionable how illuminating concurring opinions which merely differ on points of detail are. That said, there are many important and substantial dissents, which do repay further study, e.g. *Giuliano & Gaggio v Italy*², *Jalloh v Germany*³, *Rehbock v Slovenia*⁴. There is really a missed opportunity; as Judge Zupančič is sufficient of a professor to annotate his opinions, he could have provided a wider context by providing more of a commentary.

The format seems oddly old-fashioned. In pre-digital times it would have been convenient to publish the collected oeuvre of a judge as a catalogue raisonné, which is what this collection most resembles, but today, with all judgments of the Court freely available in electronic form, it would have made sense to publish the substance of the Owlets as an electronic appendix to the Owl, thus allowing much greater access to the materials of the cases, and scope for more developed analysis and cross-referencing to the Owl. As it stands, it is a slightly underpowered insight into the judicial hemisphere of Zupančič's thinking to set against the much more developed and focussed product of the professorial hemisphere in the Owl. Many judges in a variety of jurisdictions have made very significant extra-judicial contributions to legal debate, and Judge Zupančič is a worthy addition to the list, even without a fully developed account of the

¹ (2010) 19 (2) Nott LJ, 51 at 53.

² 24.3.11 23458/02

³ ECHR 2006-IX 54810/00

⁴ ECHR 2000-XII 29462/95

judicial side. After all, most judges are content to allow their judicial utterances to speak for themselves, and do not revisit them at all.

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Housing Disadvantaged People? Insiders and Outsiders in French Social Housing

by JANE BALL, London, Routledge, 2012, xiv+341 pp,

Paperback, £34.99, 978-0-415-55445-9

“... it is the mark of a trained mind never to expect more precision in the treatment of any subject than the nature of that subject permits ...” Aristotle, *Nicomachean Ethics* 1094b - 25

Housing Disadvantaged People? is an attempt to carry out a comparative legal study and a political institutional study and to gain insight through the application of economic theory organised around its subject matter – the allocation of social housing in France and its success or failure in providing housing for disadvantaged people. The book is one product of research activity by the author over more than a decade, and it provides a warning, an exemplar, and a valuable addition to our understanding of French legal culture and social housing administration.

The book warns against an easy assumption of the feasibility of comparative legal studies of a delimited and confined area of activity. The early chapters of the book are a reiterated attempt to explain how French law and legal culture is different for an English audience. To understand housing allocation (who obtains access to social housing) the author feels it is necessary to understand *inter alia*: what French social housing is (it is not, and never has been, predominantly local authority built and managed); what French rights are (the right to housing, but also its relation to the right to property); how French law divides the legal universe into private and public spheres of jurisdictional competence; the French local government structure; and even the French history of revolutionary struggle and negotiated constitutional compromise. The problem is that legal texts and administrative processes make sense only within their legal and cultural context. The temptation is to ignore the messy contextual embeddedness of foreign law and administration, and to simply use terms as if the reader understood the shifting nuances of meaning and significance. That would be tidy, but it would also invite misunderstanding. Dr Ball resists this temptation, but falls prey to a consequential hazard, the impossibility of deciding how many ways the French material could be misread.

In *Word and Object* W.V.O. Quine argued that radical linguistic translation is impossible.¹ Even the most apparently unambiguous words and actions (pointing at a rabbit hopping past and saying “Gavagai”) is radically indeterminate. Is “Gavagai” a noun or a verb or an adjective? Quine viewed language as a matter of logical analysis untranslatable (not that one could not learn another language and understand it, but that the process rested in conventions of language use that were incapable of being reduced to any pre-linguistic foundation of point and say). This type of indeterminacy haunts comparative legal research. Applicants have a right to housing, but it is a French right and does not carry an assumption of any correlative duty; the right is enforceable in the public law courts as a right, but it is in conflict with other rights of higher status which may mean it is not enforceable in case of a conflict. The most basic legal concepts are suspended in a web of interpretative particularity - it is the problem that led Legrand to declare legal transplantation a simple impossibility as that which is transplanted to the donee system cannot be that which exists in the donor system, as the meaning of the transplanted words and practices is determined by their position in the respective legal systems.² It is this indeterminacy that renders unanswerable the question: how many ways to misinterpret the French sources can a common lawyer find?

¹ (1960) Cambridge, Mass, MIT Press.

² Pierre Legrand *What “Legal Transplants”?* in Nelken & Feest, *Adapting Legal Cultures* (2001)Oxford, Hart Publishing.

Dr. Ball wrestles with this intractable problem, but never quite solves it. In part she uses her experience of the misunderstanding of French lawyers of common law, and of common lawyers of French law, to guide her account; and she has been talking to people about these issues formally and informally for several years. However, it remains an unsatisfactory treatment, too involved for a clean and simple read, but too cursory to resolve matters. The honesty and explicitness of this attempt generates a powerful and valuable warning for those embarking on research with a comparative angle, demarcation of the subject area is impossible to fully justify rationally, and will always remain to some extent arbitrary, and it is all the more important to be clear about how one goes about it because it is arbitrary. Perhaps, a solution in this case would have been to structure the explanations of French law and institutions around a narrative of an application for social housing - inclusion would have been granted to explanations necessary for an understanding of the narrative, and anything not required for this purpose would have been excluded. However, this was not attempted, and indeed may not have been practicable. There is no account of the application process from the standpoint of an applicant, and this is a weakness of the book.

The book is an exemplar of careful and fair minded interpretation and criticism of the French system based upon qualitative research. The heart of the book is chapters seven through nine. These in turn are founded on interviews with French decision makers, and French housing activists, all of whom were involved in the practical administration of housing allocation, and textual study of the French laws and administration. This material is then interpreted using a distinction taken from labour economics of “insider” and “outsider” status. Dr Ball clearly learnt from her interviews a lot about the system she was studying. Her approach, one of grounded research, allowed her to be led in her thinking about the allocation process by her interviewees, rather than imposing her preconceptions upon them. One important illustration of this was the impact of family breakdown upon the housing stock. French social landlords tended to support existing tenants in such circumstances, and provide housing for the departing spouse whilst leaving the other spouse in occupation of the original home, a practice that, given levels of housing stock, was a very significant element of all housing allocations (up to 40%). The issue was identified in an early interview and subsequently incorporated in later interviews. It was no doubt a feature of the system that pulled the author towards an insider/outsider analysis; as the generous treatment of existing tenants denied opportunities to non-tenants in these circumstances.

The book, and again especially chapters seven to nine, is a valuable addition to our understanding of how the French allocation system works; and how and why it is unresponsive to the housing needs of disadvantaged applicants for social housing. In short the French system of housing allocation is too complex and opaque, and it allows applications to be “diverted”, and thereby fail, at the instance of too many decision makers, some of whom may be motivated by partial considerations. There are very significant *de facto* discretions built into the system, through the existence of several conflicting allocation principles or policies, of which housing the disadvantaged is only one. The system tends to favour not the disadvantaged (mostly outsiders) but the stable established tenant (insiders) and people with ties to the locality (insiders in a different sense of the word). As practiced it is a system marred by institutional racism, in which express devotion to equality allows myriad demands and processes that impact disadvantageously upon non-European immigrant communities. This is despite significant personal good will, and rejection of any overt racist views, amongst decision makers. The concern of social landlords with financial prudence (reliable rent flows), the welfare of existing tenants, the opinion of powerful local political actors, and

central Government incentives for improvement of existing housing stock and new construction, all drive these negative features of the system.

Conflicting legal and administrative principles and policies introduce significant discretion into the allocation of social housing. The policy favouring reconstruction of old housing, in combination with the policy of encouraging socially mixed estates, tends to discriminate in practice against disadvantaged applicants. Older and cheaper housing stock featuring larger family homes is replaced by newer more expensive and higher quality smaller units. As the allocation process diverts applicants who in the opinion of the decision makers cannot afford the rent, or who need larger accommodation than is available, one result of reconstruction of the housing stock is to exclude significant groups of the disadvantaged (large and relatively poor families, disproportionate numbers of whom are also of non-European origin). The demand for a social mix also militates against putting poor people in cheap estates (as such areas are already full of poor people). Hence, the effective driver is towards the gentrification of deprived estates (housing relatively prosperous applicants if they can be tempted) and the refusal of applications from the poor and disadvantaged, who are already preponderant in the cheaper and more dilapidated estates. As they cannot afford the newer and more expensive housing units they are not allocated housing elsewhere, but find their applications rejected or placed on interminable waiting lists. The counter-acting possibility, the building of cheap accommodation in more prosperous estates, is unrealised; as it is unpopular with local politicians and existing tenants of higher class areas. Therefore, the net effect of the policy for encouraging a social mix is to deprive some poor applicants of social housing. The type of homogenous, or “unmixed”, estates that are particularly objectionable to decision makers are those where there is a preponderance of non-European immigrant communities.

The book contains a wealth of information about the allocation process, the legal structure, legal developments at the European level, and policy consideration. However, the standpoint of the applicant is not really developed. The French official statistical data makes it peculiarly difficult to identify the practice and effects of institutional racism, and the utilisation of qualitative interviews to identify such problems is impressive. The economic theory is used for the analytical insight it gives, and the definition of “insider” is a little too varied for optimal clarity. A consideration of what “disadvantage” means in the context of the right to housing and allocation, in theory and practice, would have been useful. Earlier work had failed to identify the strong effects of local divergence in allocation practice due to restricted research parameters. In this respect *Housing Disadvantaged People?* has changed the parameters for future research irreversibly. The book will be indispensable for anyone wanting to think seriously about social housing in a European context, and of real benefit to any researcher who embarks upon comparative studies in law and administration. As Aristotle warned us we must take the inherent limits of our subject matter into account when framing our research questions, and attempt the feasible, or risk the dissipation of our energies and the generation of confusion. This book is an impressive account of a researcher who managed through time and perseverance to tame her subject despite its unruly nature. Her readers are the beneficiaries of that considerable effort.

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