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EDITORIAL

Our first issue of 2007 covers much topical ground. There is a strong emphasis on constitutional matters and human rights in the two full-length articles: Steve Foster explores current developments in prisoners’ rights; Andrew Mackie considers the legitimacy of “reverse onus” clauses. In Case and Comment we have contributions on European sales law and the employment rights of agency workers. The books under review deal with the diverse topics of UK company law and, to close, freedom of expression, our third contribution touching on civil liberties and human rights. All that remains for me to do is to thank our contributors and my hard working production team of Jane Ching, Tom Lewis, Carole Vaughan and Kay Wheat for bringing this edition to fruition.

ADRIAN WALTERS
ARTICLES

AUTOMATIC FORFEITURE OF FUNDAMENTAL RIGHTS: PRISONERS, FREEDOM OF EXPRESSION AND THE RIGHT TO VOTE

STEVE FOSTER*

INTRODUCTION

Despite regular judicial statements to the contrary, there is a strong public perception that prisoners forego their rights on incarceration and that the taking away of such rights is a necessary and justified punishment for their crimes. This perception can also be reflected in judicial decisions when prison regulations and practices are under challenge. This article looks at the protection of the prisoner’s democratic rights to free speech and the right to vote, both under the European Convention on Human Rights and in domestic law. It will examine whether prisoners do, or should, enjoy such rights, and will explore the advantages of upholding those rights as well as any possible justifications for curtailing them; in particular whether there is indeed greater justification for restricting the democratic rights of prisoners on the basis of their status as prisoners. Although it will be conceded that such rights are qualified, and that there may be greater justifications for more stringent control of prisoners’ democratic rights, the article argues that there is nothing in the status of the prisoner or the fact of incarceration to justify either their exclusion or any interference that is not related to the legitimate aims laid down in article 10 of the European Convention.

In 1980 Lord Wilberforce stated that a prisoner retains all basic civil rights save those taken away expressly or by necessary implication.¹ This theory has been the basis of many successful cases brought by prisoners who claimed that their right of access to the courts had been interfered with by prison regulations and administrative discretion.² In addition, both the European Court of Human Rights and the domestic courts have begun to adopt a robust approach to challenging prison conditions that

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² See in particular R v Secretary of State for the Home Department, ex p Anderson [1984] 1 All ER 920, R v Secretary of State for the Home Department, ex p Leech (No2) [1993] 4 All ER 539 and, more recently, R v Secretary of State for the Home Department, ex parte Daly [2001] UKHL 26; [2002] 1 WLR 1622.
infringe article 3 of the European Convention on Human Rights, of protecting the prisoner's right to life, and of safeguarding against arbitrary detention and recall to prison.

However, the domestic courts have shown more deference with respect to the protection of the prisoner's "democratic" rights. These rights, including the right to private and family life, freedom of expression and the right to vote, are hedged in by restrictions that are contained either expressly or, in the case of the right to marry and the right to vote, inherently within the Convention. Notwithstanding this, with regard to prisoners' rights in general, the European Court of Human Rights has held that the rights laid out in the Convention are owed to prisoners and that such rights are not generally excluded from enjoyment by prisoners by implication. Thus in Golder v United Kingdom the Court rejected the United Kingdom government's argument that article 8 contained implied limitations, thereby excluding the application of those rights to persons detained in prison. The Court felt that the submission conflicted with the explicit text of article 8(2), which left no room for the concept of implied limitations. Consequently, although the European Court has recognised that the prison authorities should be given a wide margin of appreciation in placing restrictions on prisoners' correspondence and other contacts, there is no ground for arguing that prisoners should lose their Convention rights under article 8 or 10 by reason of incarceration. Therefore, in Golder, whilst the European Court noted that the necessity for interference with a convicted prisoner's right to respect for his or her correspondence must be appreciated, having regard to the ordinary and reasonable requirements of imprisonment and that "prevention of disorder and crime," for example, may justify wider measures of interference in the case of such a prisoner than that of a person at liberty, the Court still found a clear violation of the prisoner's right of correspondence in that case.

Despite the Court's clear stance on this issue, there are a number of English authorities that appear to accept that prisoners may lose their rights as a necessary part of incarceration. This position may simply reflect the European Court's acceptance that the Convention would offer prison authorities a generous margin of appreciation in balancing prisoners' rights with the administration of prisons when such authorities

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7 This article will not examine the protection of these rights in detail, but reference will be made to cases relating to the enjoyment of such rights to illustrate the courts' approach to the protection of the prisoner's democratic rights.

8 (1979–80) 1 EHR 524.

9 Ibid., at para 44. The European Court went on to consider whether the restrictions on the prisoner's correspondence satisfied the tests laid out in art 8(2) and held that they were not necessary in a democratic society; judgment of the Court, para 45.

10 See Golder v United Kingdom, note 8, and Boyle and Rice v United Kingdom (1988) 10 ECHR 425. See also Messina v Italy (No 2), [2000] ECHR 440.

11 Golder v United Kingdom, note 8 at para 45.

are pursuing one of a number of legitimate aims recognised within the Convention. However, the cases may also be viewed as allowing prisoners' fundamental rights, including the rights to freedom of expression and the right to vote, to be compromised on grounds beyond those contained in those listed legitimate aims. This, it is submitted, permits the authorities and the courts to circumvent the requirements of necessity and proportionality so firmly established in the European Court's jurisprudence and instead to relegate the prisoner's right to a mere privilege, capable of violation on illegitimate and insubstantial grounds. This position may indeed be countenanced by the European Court's recent decision in Dickson v United Kingdom, where it accepted that it was permissible for the prison authorities to take notice of public confidence in the penal system and to interfere with the prisoner's rights as part of the sentence:

... whilst reiterating that there is no place under the Convention system... for automatic forfeiture of rights of prisoners based purely on what might offend public opinion, the Court nevertheless accepts that the maintaining of public confidence in the penal system has a legitimate role to play in the development of penal policy within prisons.

THE PRISONER'S RIGHT TO FREEDOM OF EXPRESSION UNDER ARTICLE 10 OF THE EUROPEAN CONVENTION

Article 10 of the European Convention on Human Rights provides that everyone has the right of freedom of expression, subject to the restrictions laid out in article 10(2), which permits interference provided it is prescribed by law and necessary in a democratic society for achieving one of the legitimate aims listed therein. The majority of cases concerning prisoners' expression have been dealt with under article 8 of the Convention, although there is authority for the argument that a prisoner enjoys a prima facie right of freedom of expression under article 10. Firstly, although on some occasions the Court has considered it unnecessary to deal separately with an alleged violation of article 10, in many of those cases it has accepted that article 8 also

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13 In Boyle and Rice v United Kingdom, supra, note 10 the Court stated that: "When assessing the obligations imposed on the Contracting States by art 8 in relation to prison visits, regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion which the national authorities must be allowed in regulating a prisoner's contact with his family." (At paragraph 74). This deference is also evident in the domestic courts with respect to the prisoner's right to correspondence. For example, in R (Taylor) v Governor of HM Prison Risley [2004] EWHC 2654 the High Court held that the need to control a drugs problem within the prison justified a policy whereby prisoners were only entitled to have up to 20 numbers to call and that such numbers had to be authorised by the prison governor. Further, in R (Szudak) v HM Prison Full Sutton and another [2004] EWCA Civ 1426 the Court of Appeal held that monitoring by a prison medical officer of the prisoners' medical correspondence with an outside practitioner was not a disproportionate interference with that prisoner's art 8 rights.


15 Ibid, at para 33. Accordingly, the Court found that it was permissible for the Secretary of State to have regard to factors such as public opinion in deciding not to grant a prisoner and his wife access to artificial insemination facilities.

16 The legitimate aims are national security; territorial integrity or public safety; the prevention of disorder or crime; the protection of health or morals; the protection of the rights and reputation of others; the prevention of disclosure of information received in confidence and the maintenance of the authority and impartiality of the judiciary. The authorities will commonly rely on public safety or the protection of the rights of others, or more generally, on the prevention of disorder or crime, attempting to justify restrictions with the prisoner's correspondence and speech on the basis of good order and discipline within the prison.

17 Guaranteeing, inter alia, the right to correspondence. For example in Goldner v United Kingdom, note 8, the Court was dealing with alleged violations of arts 6 and 8 only, and in Boyle and Rice v United Kingdom, note 9, the Court was dealing with alleged violations of arts 8 and 13. However, in Silver v United Kingdom (1983) 5 EHRR 347 the European Court, confirming the opinion of the Commission, held that it was unnecessary to pursue a further examination of the issue of freedom of expression, that right being guaranteed already via the right to correspondence contained in art 8: (1983) 5 EHRR 347, at paras 106–7. See also M S v Austria (Application No 22048/93); Herzegovina v Austria (1992) 15 EHRR 437; Schonenberger and Durmaz v Switzerland (1989) 11 EHRR 202 and Grace v UK (Application No 11323/85).
protects the right to freedom of expression. Thus, in *Silver v United Kingdom*, both the European Commission and the European Court considered that in the context of correspondence, the right to freedom of expression was guaranteed by article 8 of the Convention. Accordingly, although the Convention’s protection of prisoners’ correspondence has been more intensive when the prisoner’s right to legally privileged correspondence has been at issue, cases such as *Silver* illustrate that a prisoner enjoys a general right to correspondence and free speech under the Convention. Notably in this respect, the European Commission has held that rules which require a form of prior authorisation for prisoners’ correspondence and which assume that the prisoner loses his right to correspond with whomever he or she wishes, run counter to the fundamental principle that a prisoner retains the right to correspond with the outside world save to the extent that restrictions on the right are indeed necessary within the meaning of article 8.

Secondly, there have been cases where the Court or Commission has specifically addressed and adjudicated on a prisoner’s right to freedom of expression under article 10. Accordingly, in *Herczegfalvy v Austria*, the European Court held that a violation of article 10 led from the Court’s previous finding that there had been a violation of article 8. Accordingly, a prisoner enjoys a right to freedom of expression, either in conjunction with, or independently of, his or her right under article 8. For example, in *T v United Kingdom*, the European Commission held that the prisoner had had his right to freedom of expression interfered with when the prison authorities, *inter alia*, placed a blanket ban on his disseminating his private writings outside prison. The Commission found that the ban, which had been applied to the applicant’s academic writings, was unduly wide and also found that the prison authorities had unjustifiably denied the applicant access to written materials.

Although in these cases the Commission displayed considerable deference, offering a wide area of discretion to the authorities and thus accepting that the administration of the prison regime warranted restrictions that would be regarded as inadmissible outside it, such latitude is not necessarily inconsistent with the principles laid down by the European Court in *Golder*, provided it is accepted that the prisoner does indeed enjoy the (qualified) right to freedom of expression and that such right can only be disturbed on legitimate and necessary grounds. This position has been endorsed by the European Commission’s admissibility decision in *Bamber v United Kingdom*, where a prisoner had been disciplined for breaking prison rules on contacting the media. Although the application was declared inadmissible because the interference was seen as a reasonable and necessary method of exercising effective control over communications with the media by the telephone, the Commission accepted that the applicant had the right of freedom of expression under article 10 and that it had been interfered with. In that

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18 Note 17, above.
20 *MS v Austria* (Application No. 22048/93), at paras 31–32.
22 49 DR 5.
23 For example, in *McFeeley and others v United Kingdom*, 20 DR 44, the Commission held that it was permissible to restrict the prisoner’s access to writing materials when there was evidence that the materials themselves were being used for an improper purpose. Further, in *Lowe v United Kingdom*, 59 DR 244, it held that the withholding from the prisoner of a single issue of a magazine was justified on grounds of the prevention of disorder or crime.
26 The Commission found that the new rule was introduced for the legitimate aims of preventing disorder and for the protection of morals and/or the rights of others.
case, therefore, the Commission held that where the state imposes restrictions on an individual's access to a particular method of communication which, but for the restriction, he or she would have enjoyed, such a restriction may constitute an interference with the individual's right of freedom of expression. Accordingly, although the applicant had other methods of communication with the media open to him, the restriction on his right to communicate with them by telephone amounted to an interference with his right of freedom of expression.

The case confirms that a prisoner does enjoy the right of freedom of expression under article 10, and further evidence is provided by the European Court's decision in Yankov v Bulgaria, where it considered whether a sanction of seven days' solitary confinement as punishment for writing defamatory comments about the state and the judiciary was in violation of article 10(2) of the Convention. The Court held that by punishing the applicant for having included moderately offensive remarks (the prison wardens were referred to as "well-fed idlers") in a private manuscript critical of the justice system that had not been circulated among other detainees, the prison authorities had not struck a fair balance between freedom of expression and the protection of the authority and reputation of state officials and had accordingly exceeded their margin of appreciation. Although in this case the Court's intervention was no doubt affected by the prisoner being subjected to punishment in the form of loss of liberty, the case illustrates the Court's willingness to subject restrictions on prisoners' free speech to close scrutiny. Also, there is no mention in the judgment of any implied restrictions on such rights based on the prisoner's incarceration or the public good in restricting prisoners' free expression on matters of public interest. Further, the European Commission in Bamber was not prepared to accept a restriction on the prisoner's right solely on the basis that such correspondence and communications might cause distress to the victims, requiring instead justification on the basis of the legitimate concern for good order and discipline in prisons.

The case law thus appears to confirm that any restriction on a prisoner's freedom of expression must relate to real issues of good order and discipline in prisons, however liberally that concept is interpreted, and not to concerns of public confidence and objection raised by the mere fact that the speaker is a prisoner. Thus, it would appear to be valid to restrict a prisoner's access to materials of a violent and sexual nature on the grounds of maintaining good order and discipline in prisons, even though a person outside prison would not be so restricted. This is because the prison regime, together with, perhaps, the prisoner's criminal record and recent behaviour, justify the maintenance of good order in that prison. One would also expect the courts, including the European Court, to offer a generous margin of discretion to the prison authorities when balancing prison order with the enjoyment of those rights, and, as we have seen, this is not inconsistent with the jurisprudence of the Convention. In contrast, however, some domestic decisions, considered below, appear to accept that imprisonment warrants automatic forfeiture of such rights, without the need to justify any violation within article 10 and its qualifying terms. Applying that approach, it would be justifiable to restrict the prisoner's access to material, not because such a restriction

27 (2005) 40 EHRR 36.

28 At para 133.

29 The European Court has recognized that reasons of public offence and outrage might justify a restriction on free speech in the context of obscenity or indecency laws; Muller v Austria (1992) 13 EHRR 212; although the European Court would be expected to look more closely at a regulation which prohibited free speech on the basis that it caused offence or upset to a number of individuals.
would assist the prison regime, the rights of others or the prevention of crime, but rather because it reflects the fact that the person is a prisoner and, as such, should not enjoy that right.\textsuperscript{30}

**THE PRISONER’S RIGHT TO FREE SPEECH AT COMMON LAW: THE DECISION IN *EX PARTE O’BRIEN AND SIMMS***

Although the domestic courts had clearly articulated the prisoner’s right to legal correspondence with lawyers in the context of the right of access to the courts,\textsuperscript{31} they had never considered whether a prisoner retained the right to freedom of expression. This opportunity arose when prisoners challenged a prison policy imposing a blanket ban on journalists visiting prisoners unless they signed an undertaking to the effect that they would not publish anything said at interview.\textsuperscript{32} In *R v Secretary of State for the Home Department, ex parte O’Brien and Simms*\textsuperscript{33} Home Office policy was declared unlawful,\textsuperscript{34} but the case did not establish that a prisoner had a general right of free speech in domestic law, and left open the question whether prisoners lose their right of free speech as a necessary incident of imprisonment.\textsuperscript{35}

In *O’Brien and Simms* two prisoners serving life sentences for murder claimed that they had been victims of a miscarriage of justice. They wished to conduct oral interviews with two journalists who had taken an interest in their cases, but the prison authorities refused them permission, relying on the policy. In the High Court,\textsuperscript{36} Latham J accepted that the prisoners enjoyed a right of freedom of expression under article 10 of the European Convention and that the blanket prohibition could not be justified as a minimal interference with that right. Although Latham J was prepared to find that Rule 33 of the Prison Rules was *intra vires* the Prison Act 1952, he held that the restriction in question constituted an interference with the prisoners’ freedom of expression and thus could only be upheld if it were necessary to achieve the objectives of the legislation. However, on appeal it was held that the restrictions were both lawful and rational.\textsuperscript{37} Applying the *Wednesbury* test,\textsuperscript{38} the Court of Appeal held that the regulations were not irrational, disproportionate or otherwise unjustifiable.\textsuperscript{39} More significantly, the Court of Appeal appeared to reject the idea that the prisoners’ freedom of expression was engaged; Judge LJ noting that the case was not concerned with a prisoner’s fundamental right of free speech, but rather with the relationship

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\textsuperscript{30} Thus in *Bamber*, note 24 above, although it may be acceptable to restrict a prisoner’s access to the media if that would cause undue distress to the victim or families, it would not be valid to restrict such access purely because it would cause individual or public concern that a prisoner should be allowed such a facility.

\textsuperscript{31} See the cases cited in notes 1 and 2 above.

\textsuperscript{32} The then Rule 33 of the Prison Rules 1964 and paras 37 and 37A of Prison Service Standing Order 5A.


\textsuperscript{34} In *R (A) v Secretary of State for the Home Department* [2003] EWHC 2846 (Admin), it was held that article 10 of the European Convention was not broken by requirements for the monitoring of journalists’ interviews with asylum seekers detained under the Anti-Terrorism, Crime and Security Act 2001, s 21.

\textsuperscript{35} Although in either case interferences with freedom of expression would need to be scrutinised by the courts in the light of art 10 of the European Convention and the doctrines of legitimacy and proportionality, the level of scrutiny, and the courts willingness to interfere with policies and decisions, will be greatly influenced by which approach is taken. See in particular Elias J in *R (on the application of Hirst) v Secretary of State for the Home Department* [2002] EWHC 602; [2002] 1 WLR 2929, considered below.


\textsuperscript{37} [1998] 2 All ER 491. The Court of Appeal accepted as reasons for the maintenance of the regulation: that staff ratios did not permit the supervision of the conversations so as to ensure the acceptability of their content and the potential impact of an article based on a live interview on feelings of the victim: [1998] 2 All ER 491, at 496, j-497, d.

\textsuperscript{38} *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223, per Lord Greene, at 230.

\textsuperscript{39} [1998] 2 All ER 491, per Kennedy LJ at 501, f and Judge LJ at 510, j-511, a. Chadwick LJ gave a concurring judgment.
between the journalist and those responsible for the secure administration of prisons.\footnote{Ibid, at 510, G–H.} In addition, Kennedy LJ felt that the prisoner had no right to communicate orally with the media, since a sentence of imprisonment meant that he or she could no longer speak to those outside prison.\footnote{Ibid, at 501, C–D.}

On appeal, the House of Lords held that a blanket ban on interviews between prisoners and journalists was unlawful in that such a policy could deprive a prisoner of his or her fundamental and basic right to seek justice: in other words, the right to seek through oral interviews to persuade a journalist to investigate the safety of a conviction and to publicise his or her findings in an effort to gain access to justice for the prisoner. Significantly, although Lord Steyn pointed out that the starting point of the claim was the right of freedom of expression, which in a democracy is a primary right and without which an effective rule of law is not possible,\footnote{[1999] 3 All ER 400, Lord Steyn at 407, f.} he stressed that the prisoners’ claims were not based on the right to free speech in general, but were limited to a very specific context. This was the right of the prisoners to seek justice \textit{via} the oral interviews with the journalists. After quoting article 10, his Lordship then considered the value of free speech in particular contexts:

\begin{quote}
Not all types of speech have an equal value. For example no prisoner could ever be permitted to have interviews with a journalist to publish pornographic material or to give vent to so-called hate speech. Given the purpose of a sentence of imprisonment, a prisoner can also not claim to join in a debate on the economy or on political issues by way of interviews with journalists. In this respect the prisoner’s right to free speech is outweighed by deprivation of liberty by the sentence of a court, and the need for discipline and control in prisons . . .\footnote{[1999] 3 All ER 400 at 408, g–h. In this respect, his Lordship’s general views reflect those of Kennedy and Judge LJ in the Court of Appeal: notes 37–39 above.}
\end{quote}

However, the free speech at stake in the present case was said to be qualitatively of a different order. The prisoners wished to challenge the safety of their convictions and it was not easy to conceive of a more important function which free speech might fulfill.\footnote{Ibid, at 408, h.}

The decision in \textit{O’Brien and Simms} is, therefore, clearly restricted to the facts of that case and their Lordships did not accept that a prisoner had a fundamental right to free speech.\footnote{See L Lazarus, “Conceptions of Liberty” (2006) 69 MLR 738, at 756.} In addition, their Lordships stressed that any right to freedom of expression was subject to rigid control by the prison authorities. For example, Lord Hobhouse accepted that the right to communicate with professional journalists needed to be controlled and regulated as a necessary part of running a penal institution.\footnote{\textit{Ibid} at 418, f–g. As a consequence, in the High Court, Latham J had concluded that Rule 33 of the Prison Rules 1964 was lawful in covering the effect of inmate’s activities on the interests of other persons. Latham J relied on the decision in \textit{R v Secretary of State for the Home Department, ex p Bamber}, n. 25 above, which upheld the legality of restrictions imposed on prisoners contacting the media by telephone.} His Lordship then confirmed that the case law of the European Convention\footnote{Most notably \textit{Silver v United Kingdom} (1983) 5 EHRR 347 and \textit{Campbell v United Kingdom} (1993) 15 EHRR 137.} accepted that some measure of control was permissible, provided it did not go beyond what was reasonably necessary.\footnote{[1999] 3 All ER 400, at 420, c–e, referring in particular to \textit{Campbell v United Kingdom} (1992) 15 EHRR 137. His Lordship also relied on \textit{R v Secretary of State for the Home Department, ex p Leech} [1993] 4 All ER 539, and the Canadian case of \textit{Solosky v R} (1979) 105 DLR (3d) 745, which advocated basically the same test.} His Lordship also found himself in general agreement with the
decision of the Court of Appeal in the present case, and particularly the judgment of Judge LJ who held that the need to control such visits ought to be vested in and exercised by the prison governor.49

It is suggested that the position taken by the Court of Appeal and Lord Steyn in the House of Lords is flawed and inconsistent with the right to freedom of expression under the Convention, condoning as it does the natural interference with prisoners’ rights simply because of the prisoner’s status. On the other hand, the general approach taken by their Lordships in that case, although deferential, does not necessarily depart from the Convention jurisprudence provided the level of review now accommodates the principles of necessity and proportionality as required by the case law of the Convention and the incorporation of the Convention via the Human Rights Act 1998.50 On the other hand, to say that a prisoner has no right to distribute pornography or hate speech is superfluous: no-one, including the prisoner, has the right to do that if it is contrary to the law, and the fact that a prisoner would (probably justifiably) not be allowed to access or disseminate such information even if it was not contrary to the general law does not invalidate the principle that the prisoner enjoys a basic right to freedom of expression. The error is then compounded by the denial of the prisoner’s right to take part in political or economic debate. Such interference does not appear to serve any aim other than penalising the prisoner for his incarceration. Further, it pays little regard to the interests of both the public and the press in allowing prisoners to exercise their right to free speech.51

Neither is my rejection of Lord Steyn’s approach and insistence on an alternative simply academic. The extent to which prisoners enjoy freedom of expression depends primarily on the views of the domestic courts concerning whether the prisoner was intended to retain this right when imprisoned. Thus in O’Brien and Simms, Latham J did not seem to question that the prisoner retained his right of free speech whilst in prison, thus requiring the authorities to show a pressing need for any interference. The Court of Appeal, on the other hand, was clearly of the opinion that the prisoner lost such a right on incarceration. The difference of approach was, of course, crucial to the determination of the dispute. Whilst Latham J subjected the regulations to a strict test of necessity and concluded that there was no pressing need for distinguishing between oral and written communications with journalists, the Court of Appeal, applying the bare Wednesbury test and showing due deference to administrative discretion, was not satisfied that the prison authorities had acted irrationally. Although the House of Lords restored the prisoner’s right to talk to journalists, it is clear from the opinion of their Lordships that the prisoner should not enjoy a general right of freedom of expression.

The approach adopted by Lord Steyn in O’Brien and Simms also pays only indirect regard to wider aspects of freedom of expression, including the rights of the journalists to investigate these fundamental issues and for the public to receive such information. On the facts of the case these matters are accommodated because the court accepts that there is a vital interest in exposing a possible miscarriage of justice, thus engaging the prisoner’s right to free speech via their right of access to justice. However, there is no

49 Ibid 423, g-j, citing Judge LJ in R v Secretary of State for the Home Department, ex p O’Brien and Simms [1998] 2 All ER 491, at 510. Such decisions would still be subject to challenge on the grounds of irrationality, with the courts requiring greater justification for any interference with basic rights: see R v Ministry of Defence, ex p Smith [1996] 1 All ER 257, but the level or review would be severely diluted in such a case.

50 See Lord Steyn in R (Daly) v Home Secretary, note 2, where he distinguishes Wednesbury unreasonableness from proportionality.

51 This aspect of the prisoner’s right to free speech was accepted by the High Court in Hirst, note 35, and is considered below.
wider acceptance of the public interest in prisoners enjoying the right to freedom of expression, or of the more general democratic values in allowing prisoners, as individuals, to enjoy the right of free speech. Indeed it would be interesting to guess the court's approach had the case been brought by the journalists affected by the regulation rather than the prisoners. Presumably in such a case their Lordships would have recognised the journalists' right to freedom of expression, even though it would have conflicted with the prison authorities' attempts to regulate the speech of prisoners, and would have subjected that rule to the most rigorous review, beginning with the assumption that any interference was a prima facie breach of that right. Whilst accepting that the prison regulations impose a greater restriction on prisoners because they, unlike journalists, are subject to those rules; it is submitted that the wider issues of press freedom should not be ignored by the courts in assessing whether either article 10 is engaged, or the necessity and proportionality of the restriction under review.

Following the implementation of the Human Rights Act, the courts must establish whether any interference with the prisoner's freedom of expression is lawful and necessary in accordance with the tests laid down by the European Court. However, if the views of Lord Steyn and the Court of Appeal in Simms are accepted, the standard of review will be diluted to an unacceptable level, in all likelihood one consistent with Wednesbury unreasonableness. Accordingly, it will be relatively simple for the authorities to justify any violation on the prisoner's right to freedom of expression, provided the authorities have acted for some rational purpose and have not precluded the possibility of waiving the rule in cases that raise more fundamental issues, such as was present in O'Brien and Simms. This would reflect Professor Barendt's view that a review of the domestic case law reveals the fact that prisoners do not, even now, have the right to freedom of expression, aside from limited exceptions.

THE HUMAN RIGHTS ACT 1998 AND THE PRISONER'S RIGHT OF FREEDOM OF EXPRESSION

The passing of the Human Rights Act 1998 requires the domestic courts to apply the Convention rights given direct effect by section 1 of the Act. This includes the courts' duty to follow the relevant case law of the European Court and Commission, and their power to apply principles of necessity and proportionality when questioning legislative and administrative acts that impinge on the human rights of prisoners. I will now examine a small number of cases in which restrictions with the prisoner's right to free speech has been challenged under the Human Rights Act 1998. Specifically, the cases examine and apply the dicta of Lord Steyn in Simms, which seek to establish that

52 As in R v Home Secretary, ex parte Brind [1991] I AC 696.
53 See Broadmoor Hospital Authority v R [1999] 2 WLR 1006; see S Foster, “Do Prisoners have the Right to Free Speech?” note 32, at 401-3.
54 Note that Rules 34 and 35 of the Prison Rules 1999, which deal with prisoners' communications, have been amended to ensure that certain actions in relation to prisoners' communications are only carried out to the extent that they are necessary to achieve a legitimate aim and are proportionate.
55 E Barendt, Freedom of Speech (2nd ed, 2005, Oxford University Press), at page 505. The author does not refer to the High Court decision in Hirsi, considered below.
56 The effect of this "incorporation" was explained by Lord Steyn in O'Brien and Simms, note 33, at 412J-413B, including the courts' interpretative powers under s 3 of the Act and its powers to declare legislation incompatible with the Convention.
57 R (Daly) v Secretary for the Home Department, note 2.
prisoners do not, in fact, enjoy the fundamental right of freedom of expression, such right being taken away by necessary implication. Although, the effect of the dicta has been modified by the decision in Hirst (discussed below), their rationale has been adopted in other cases, rendering the status and extent of the prisoner's right to freedom of expression insecure.

Access to the media – the decision in Hirst
In R (Hirst) v Secretary of State for the Home Department, a prisoner and an active campaigner on prisoners’ rights had conducted a number of interviews with radio stations over the telephone on matters concerning prison life, contrary to paragraph 6.10 of paragraph 4 of Prison Service Order 4400. He had applied for permission to contact the media by telephone on matters of legitimate public interest relating to prisons and prisoners, but the request was refused on the grounds that the claimant could exercise his right of free speech by writing to the media, rather than speaking to them on the telephone. The prisoner claimed that this constituted an undue interference with his freedom of expression and that without direct two-way contact with the media, serving prisoners would frequently be denied the right to participate in discussions about matters of legitimate concern to all prisoners.

Elias J considered the significance of the claimant being able to communicate orally with the media by telephone rather than simply communicating by writing, in particular the claim of one journalist that prisoners who sent letters on controversial issues would, because of the perishable nature of news items, be excluded from the bulk of news and current affairs coverage on radio and television. This, according to his Lordship, sat unhappily with the submission of the Secretary of State that written correspondence still enabled a prisoner to make a contribution to debates of this kind. His Lordship stressed that any interference with the right to freedom of expression had to comply with the doctrine of proportionality and that the question whether the restrictions imposed on the prisoner’s liberty to make telephone calls to the media were unjustified had to be answered by applying the principle of proportionality, albeit against the backcloth of the prison environment.

In his Lordship's view, either the restriction was an inherent part of the sentence itself; or it was the result of the fact that rules had to be made for the good order and discipline of the prisons together with related objectives. The onus was on the party seeking to interfere with article 10 to show that the interference was designed to meet a legitimate objective, that the means adopted were rationally connected to that objective, and that the Convention right was not impaired more than is necessary to achieve that objective. His Lordship then considered the consequences of adopting

60 John Hirst was at the time the General Secretary of the Association of Prisoners. Elias J stated that the claimant should not be given more advantageous treatment simply because of his position, but equally should not be discriminated against because of that fact (para 85 of the court transcript).
61 This provides that prisoners must not make calls to the media if it is intended, or likely, that the call will be used for publication or broadcast. The paragraph declares that a prisoner may make a written application to do so, but that permission will only be granted in exceptional circumstances and that prisoners should normally communicate with the media in writing. The paragraph then states that before an interview by phone can be allowed, the governor must be satisfied that the call would be for a legitimate purpose, for example, bringing to light a miscarriage of justice, which could not be satisfied in a written communication or visit.
63 Ibid, at 2939, F (para 29), citing the House of Lords' decision in R v Secretary of State for the Home Department, ex parte Daly, note 2.
64 Ibid, at 2940, B-E (para 31).
65 Ibid, at 2940, F-G (para 32).
66 Ibid, at 2941, C (para 33), citing de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Land and Housing [1999] 1 AC 69.
either of the following alternatives: a) if it were determined that the appropriate sentence required the denial of the right to exercise free speech in particular contexts, then the issue would not be whether the restriction of freedom of speech as part of the penalty was the minimum required to achieve the particular objective; rather whether even if it was the minimum compatible with achieving the desired and legitimate objective, it nevertheless impacted disproportionately on the Convention right. Alternatively, b) where the state had deliberately chosen to deprive prisoners of their rights as part of their punishment, the courts would not readily interfere with that decision, particularly where it reflected the democratic will, although they might still do so where the denial of the right was disproportionate to the penal objective and whether this was so would depend on the significance of the particular right interfered with.

His Lordship accepted that some restrictions had to be placed on the prisoner: for example, a prisoner could not attend any public meetings or debates outside prison. This was a necessary consequence of the prisoner being locked up; such loss of liberty consequentially impacting on the enjoyment of his or her Convention rights. On the other hand he referred to a number of cases where the courts had upheld the freedom of speech of prisoners where it was directed at securing another important right of the citizen, such as access to the courts. Consequently, although some restrictions on freedom of expression are an inherent part of the sentence itself, others did not fall into that category. Referring to the passage in Lord Steyn’s speech in Simms, Elias J was not clear whether his Lordship in that case was taking the view that such restrictions were the automatic result of the sentence of imprisonment alone, an element of the sentence itself, or whether they occurred because rules are inevitably required to limit that right in the interests of the proper discipline and good order of the prison population. However, his Lordship accepted that that passage had in subsequent cases been accepted as suggesting that in certain cases the denial of a prisoner’s free speech was justified by necessary implication.

Despite accepting this view, Elias J did not consider that the rules restricting access to the telephone for dealing with the media came within Lord Steyn’s *dicta*. In his Lordship’s opinion, access to the media for the purpose of making known concerns about matters affecting the rights or interests of prisoners as a group neither fell into that category nor constituted part of the sentence of imprisonment itself. His Lordship justified this conclusion on a number of grounds, all of which are central to the rejection of implied restriction on prisoners’ free speech. First, a democratic society will not prevent prisoners from expressing their own views directly to the media about grievances or concerns they have about issues affecting them, there being a public interest that the voice of prisoners is heard about such matters and the public will be better informed about the consequences of government policies if they are able to hear

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70 *Ibid*, at 2944, B–F (paras 43 to 45), citing *Raymond v Honey*, note 1, and *R v Secretary of State for the Home Department, ex parte Leech*, note 2.
71 *Ibid*, at 2945, H-2946,G (para 50) His Lordship thus referred to Lord Phillips MR in *R v Home Secretary, ex parte Mellor*, note 12, at 550 A, where, after considering the speeches of their Lordships in *Simms* as a whole, he accepted that they recognized that a degree of restriction of the right of expression was a justifiable element in imprisonment, not merely in order to accommodate the orderly running of a prison, but as part of the penal objective of deprivation of liberty. In that case the Court of Appeal held that denial of a prisoner’s right to found a family by artificially insemiinating his wife, as was the denial of conjugal visits, was part of the deprivation of liberty which imprisonment was designed to achieve.
from those directly affected. Secondly, if it is perfectly appropriate for prisoners to write to the media about these matters, it was difficult to see why one form of communication and not the other would be denied to the prisoner because it is deemed to be part and parcel of the sentence of imprisonment itself. Thirdly, that had not been the basis on which the policy had been supported by the prison authorities, nor was it the basis on which the government had successfully defended the policy in the case of Bamber v United Kingdom before the European Commission of Human Rights.

His Lordship then considered the justification of the policy in the light of the reasons put forward by the Secretary of State: firstly, that hearing the prisoner’s voice on the radio would cause distress to the victims of the crime, which in turn would undermine public confidence in the criminal justice system; secondly, that it would not be possible to exercise effective control over communications directly to the media by telephone; thirdly, that there were significant practical problems involved in relaxing the rule, requiring a prison governor to make a speedy decision whether or not in any particular case the communication should be permitted; fourthly, that the discretionary nature of any such policy would lead to complaints from prisoners refused the right to use these facilities and finally, that it would still be possible for prisoners to communicate with the media in writing and through groups who act on behalf of their interests. His Lordship accepted that there were good reasons to limit direct telephone contact with the media and that such conduct imposed greater burdens on prison staff. Further, his Lordship accepted that the risks of irresponsibility by prisoners, the media or both could not be excluded. The authorities would be justified in asking the prisoner to provide a reasonable explanation why written correspondence would not be satisfactory and to ask the journalist the same question. In this respect, therefore, the prison authorities were justified in allowing exercise of the right only in exceptional circumstances. Nevertheless, his Lordship held that those reasons did not justify what was, in effect, a blanket ban on media interviews in matters of this kind. In his view, the concern about the distress of victims had been exaggerated, as, too, had the administrative problems involved in finding an officer to monitor and consider the calls.

In his Lordship’s view, the strongest justification for the policy was that there might be insufficient opportunity to monitor and control what was ultimately published, so that the facility would be open to abuse by both the prisoner and the journalist. However, in the former case, his Lordship noted that if a prisoner wished to communicate information contrary to the rules, he or she could do so in correspondence with very little risk of its being detected and intercepted. Although there was a risk of an unintended ill-considered remark infringing the contents requirement, so as to justify preventing interviews going out live, any such remarks could, in his Lordship’s view, be ignored by the journalist. Moreover, his Lordship noted that if journalists have also agreed not to breach the contents rule, there should be little

73 Ibid, at 2947, C (para 53).
74 Ibid, at 2947, D (para 54).
76 In this respect the justification related to the prevention of damage to the health or morals of others, and the protection of the rights and reputations of third party victims.
77 It was submitted that it was not possible to vet oral communications, and specifically that once the words have been spoken, their publication was within the control of the journalists and out with that of the authorities.
78 It was also argued that it would then be necessary to set up the facilities to monitor the call and to assess whether anything untoward had been said to which the prison authorities could raise objection.
79 [2002] I WLR 2929, at 2952-C-D.
80 Ibid, at 2952, H-2953, A (para 79).
likelihood of this being a significant problem. In his opinion, it was not justifiable to base a policy of this kind on mistrust of the press. Thus, although the authorities were entitled to satisfy themselves as to a journalis’s credentials, it ought to be assumed that if the press has agreed to abide by certain rules, it will keep to them.\(^{82}\) Although his Lordship accepted that this was a potentially difficult area, he felt that most problems could be resolved, particularly if the journalists were willing to make assurances as to the contents requirement. Accordingly, his Lordship held that the policy, which in all circumstances denied the applicant the right to contact the media by telephone whenever his or her purpose was to comment on matters of legitimate public interest relating to prisons and prisoners, was unlawful.

The decision in *Hirst* recognises the increased importance of freedom of expression and freedom of the press, stressing the need to show an overriding justification for any interference with such a right.\(^{83}\) It also reveals the courts’ willingness to give added protection to speech that does serve the public interest, noting that the discussions between the prisoner and the media concerned matters of great interest not only to the prisoner him- or herself, but also to other prisoners and the public at large. In this sense, therefore, the decision accommodates the possibility of a challenge being brought by the journalists rather than the prisoners. In such a case, the journalists would expect the courts to adopt the approach taken by the European Court of Human Rights and thus require the most pressing evidence to justify any interference with the right of the media to disseminate information to the public.\(^{84}\) Most significantly, the decision modifies the view that prisoners lose their general right of freedom of expression on incarceration, Elias J rejecting the notion that the restrictions placed on a prisoner’s right to contact the media on matters relating to prisons and prisoners were part and parcel of the sentence itself. Instead, the prisoner, in this case at least, retains the fundamental right to freedom of expression, placing the onus on the Home Secretary and the prison authorities to justify any restrictions by reference to proportionate measures that pursue the legitimate aim of maintaining security and order in prisons.

However, the decision in *Hirst* does not question the validity of Lord Steyn’s statement that in some respects a prisoner’s right to free speech is affected by and outweighed by his or her deprivation of liberty. Instead, his Lordship in *Hirst* managed to distinguish the case of a prisoner contacting the media to discuss prison conditions or aspects of penal justice from that of the prisoner taking part in a debate on the economy or political issues,\(^{85}\) thus avoiding any conflict with Lord Steyn’s comments, which, it is suggested, are inconsistent with Convention case law and general prisoners’ rights theory. Thus, although, as Elias J points out, a prisoner is by the fact of imprisonment denied some opportunities of exercising freedom of expression – for example, the right to attend meetings – there appears to be no logical reason why a prisoner cannot, subject to reasonable restrictions imposed for legitimate purposes, take part in political or other debate. Again, this is not inconsistent with the judicial caution in the area of prison discretion. The European Court of Human Rights has made it

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\(^{82}\) *Ibid*, at 2953, B (para 80). His Lordship noted that in the *Simms* case that it was not suggested that the information about alleged miscarriages of justice should be denied to the media on the grounds that the press could not be trusted to use the information obtained for use within that field. With respect to the decision in *Rambler*, his Lordship accepted that the decision provides some support for the Secretary’s case, but noted that in that case it had been suggested that the safeguards now proposed by the prisoner to protect prison authority’s concerns might be adopted (at para 83).


\(^{84}\) See, for example, *Sunday Times v United Kingdom* (1979) 2 EHRR 245; *Lingens v Austria* (1986) 8 EHRR 407 and *Jersild v Denmark* (1994) 9 EHRR 1.

\(^{85}\) This approach ensures the protection of “public interest” speech, even in the prison context, but it does not establish the general principle that all prisoners’ speech engages article 10 of the European Convention, and that any interference with such a right has to be justified within paragraph 2 of that article.
clear that prison authorities would be allowed a wide margin of appreciation in placing restrictions on the Convention rights of prisoners and the court in the present case confirmed that in normal circumstances the domestic courts would be unwilling to interfere with the details of a lawful policy. Despite this deference, the decision in Hirst appears to accept that interferences with freedom of expression will be subjected to intense scrutiny, at least when that expression concerns matters of genuine and public interest, requiring strong justification for the proper enforcement of policies in an area where the courts normally prepared to defer to the administration.

The decision in Nilsen

The decision of Elias J in Hirst does not challenge Lord Steyn’s dicta so as to question the principle of implied restrictions on the prisoner’s right to free speech. As a consequence, that rationale has been employed in subsequent cases to question the prisoner’s right to freedom of expression and to justify the extension of the grounds for interfering with such a right. Thus, the recent decision of the Court of Appeal in R (Nilsen) v Secretary of State for the Home Department and another followed the dicta and accepted that the prison governor and the Home Secretary could take into account the views and sensibilities of the public and the prisoner’s victims in placing restrictions on freedom of expression. In particular, the Court of Appeal accepted that restrictions on prisoners’ speech do not have to be related to matters of good order and discipline within the prison gates and that the effect of the speech outside prison could be taken into account.

In November 1983 Denis Nilsen was sentenced to six life sentences for the murders of six young men and in 1992 he began to write an autobiography giving an account of his life before the murders, the murders themselves, his life in prison and his views on the criminal justice system. In 1996 he handed a copy of the manuscript to his solicitors, who, in March 2001, sought to return it to him. In October 2002 he was informed that it would be withheld by the prison authorities on the basis that its publication would contravene paragraph 34(9)(c) of Standing Order 5B, the governor having concluded that it was intended for publication and that it did not represent a serious discussion about legitimate matters. The claimant argued that the Standing Order was ultra vires the Prison Act 1952 and contrary to article 10. Specifically, it was argued that the authorities had no power to control matters outside the prison gates or, in the alternative, that the interference was disproportionate.

In the High Court, Maurice Kay J rejected the argument that the Home Secretary’s powers were confined to good order and discipline within the prison. In his Lordship’s view, the Home Secretary could concern himself with consequential effects outside prison and it followed that he could restrict a prisoner’s freedom of speech in pursuit of legitimate aims such as the prevention of disorder or crime, the protection of morals and the protection of the rights of others. Further, his Lordship held that, taking into

86 See Boyle and Rice v United Kingdom, note 10.
87 In the present case, therefore, the court stressed the fact that the prisoner wanted to talk to the media on matters of legitimate public interest, and that the present policy failed to accommodate such cases, thus applying the rationale of the House of Lords’ decisions in Simms and in Daly, note 2 above, where blanket policies admitting of no real exception in deserving cases were declared invalid.
89 This provides that “General correspondence may not contain material which is intended for publication . . . (or if which sent would be likely to be published) if it . . . (c) is about the inmate’s crime or past offences or those of others, except where it consists of serious representations about conviction or sentence or forms part of serious comment about crime, the process of justice or the penal system . . .”
account permissible considerations ranging from the punitive consequences of imprisonment to the impact on others of its publication, the Home Secretary could not be said to have acted disproportionately. On appeal, Lord Phillips MR noted that the Prison Act 1952, section 47 spoke, not only of regulation and management of prisons, but also of control of prisoners. In his Lordship’s view, one legitimate aspect of a sentence of imprisonment was to subject the prisoner’s freedom of expression outside the prison to appropriate control. Criminals who were deprived of their liberty by imprisonment were deprived of enjoyment of their possessions and of communication with the outside world, save insofar as the prison authorities permitted. His Lordship noted that both the House of Lords in *R v Home Secretary, ex parte Simms* and the Court of Appeal in *R (Mellor) v Home Secretary* had accepted that a degree of restriction of the rights of prisoners was a justifiable element in imprisonment, not merely to accommodate the orderly running of the prison but as part of the penal objective of deprivation of liberty. Consequently, in considering what restrictions could properly be placed on prisoners as natural incidents of imprisonment, regard could be had to the expectations of right-thinking members of the democracy whose laws had deprived them of their liberty. In the present case the prison governor had referred to the likely outrage and distress that would be caused by the publication of the typescript and although there was ample authority for the view that freedom of expression included the right to publish outrageous material, the outrage in this case did not relate to the subject matter, but whether the prisoner should be permitted to publish it from his cell.\(^1\)

His Lordship also distinguished the present case from the decision of the House of Lords in *O’Brien and Simms*. There, the court was concerned with a blanket ban, whereas the present case was concerned with a tightly drawn restriction on a prisoner writing about his crimes, which was subject to an exception covering serious representations about conviction or sentence or part of serious comment about crime or the criminal and penal system. His Lordship did not believe that any penal system could readily contemplate a regime in which a rapist or a murderer would be permitted to publish an article glorying in the pleasure that his or her crime had caused him. The wording of the regulation drew the line appropriately between what was and what was not acceptable conduct by a prisoner and fell within the Home Secretary’s powers conferred by the Act.\(^2\) His Lordship also rejected the argument that loss of liberty alone was sufficient to satisfy the legitimate aim of preventing crime and punishing offenders. In his Lordship’s view, the recent decision of the European Court in *Hirst v United Kingdom*, considered below, did not support that contention. That case related to a blanket and thus disproportionate ban; it did not establish that it was disproportionate for imprisonment to carry with it some restriction on freedom of expression nor for those restrictions to have regard to the effect of the exercise of that freedom in the world outside prison.\(^3\)

The decision in *Nilsen* accepted that some restrictions on prisoners’ free speech can be lawfully imposed on the ground that the claimant is a prisoner. As a consequence, the court’s review of the legality and acceptability of the restriction was weakened and the prison authorities were given a wider area of discretion to achieve the legitimate aims of maintaining prison discipline and order. Again, that this allowed the authorities to impose restrictions on prisoners’ speech that would generally fail to satisfy the tests of necessity and proportionality if applied to non-prisoners is not per se inconsistent

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\(^{1}\)[2005] 1 WLR 1028 at 1038, B (para 27).

\(^{2}\) *Ibid* at 1038, F (para 29).

\(^{3}\) *Ibid* at 1040, D (para 35).
with the case law under the Convention.\textsuperscript{94} However, the argument in favour of automatic forfeiture runs contrary to the judgment of the European Court in \textit{Golden v United Kingdom} and it may have been thought that the basis on which the prisoner’s right to freedom of expression was restricted needed to be adjusted once the European Court had ruled on the related question whether a prisoner should have the right to vote in \textit{Hirst v United Kingdom (No 2)}, a decision which questioned the validity of the principle that the prisoner lost this right for penal reasons and as a necessary consequence of imprisonment. In \textit{Nilsen}, the Court of Appeal distinguished \textit{Hirst (No 2)} on the ground that, in that case, the Court was concerned with a blanket policy and stressed that the European Court accepted that penal objectives could amount to justification for restricting prisoners’ rights.\textsuperscript{95} By doing so, the Court could then accommodate the argument that the prison authorities could impose restrictions on the prisoner’s fundamental rights to reflect penal considerations.\textsuperscript{96}

If, as it appears to, the decision in \textit{Nilsen} accepted that incarceration is a legitimate reason \textit{in itself} for restricting rights, then it is inconsistent with the jurisprudence of the European Convention. Applying that jurisprudence it would have been open to the Court of Appeal to decide that the good order and discipline of the prison system (including, indirectly, the treatment and rehabilitation of that prisoner) would be best served by denying the prisoner the right to publish his manuscript, even though such a restriction could not legitimately be imposed on individuals in the outside world, including journalists.\textsuperscript{97} Equally, it would have been appropriate for the prison authorities to guard against the publication causing gross offence to the victims or the general public, provided that the restriction could be seen to serve the legitimate aim of preventing crime or disorder, and, in such a case, given the need to maintain prison security and good order and discipline, such speech not being illegal or otherwise subject to legal control outside the prison context.\textsuperscript{98} However, to justify the restriction on the basis that authorising publication would undermine public confidence in the penal system and would thus be inconsistent with the original sentence imposed on the prisoner effectively undermines the safeguards of legality and proportionality provided by the Convention and its case law. Such a theory has not been accepted with respect to correspondence, especially legal correspondence, either by the European or domestic courts\textsuperscript{99} and, although legally privileged correspondence may warrant enhanced

\textsuperscript{94} See, for example, \textit{Morton v Governor of HMP Long Lartin} [2003] EWCA Civ 644, where it was held that the refusal to allow the prisoner access to pornographic magazines was not in violation of his right to freedom of expression; the Court of Appeal stressing that each prison had the power to execute its own policy in accordance with the requirements of good order and discipline.

\textsuperscript{95} As we shall see, the European Court in \textit{Hirst} did not regard the government’s reason for disenfranchisement as falling outside the list of legitimate aims that would justify an individual losing his or her right to vote, and instead decided the case on grounds of proportionality, failing to see that blanket disenfranchisement, including the disenfranchisement of life sentence prisoners who had served their tariff periods, was necessary in a democratic society.

\textsuperscript{96} Lazarus describes the decision in \textit{Nilsen} as “dangerous” as it “endorses an indivisible view of liberty whereby Convention rights may be restricted as an inherent part of the imposition of a custodial sanction – a concept which by the court’s admissions, is subject to shifting political notions of what imprisonment should include”. She also asserts that under that conception “there is no legal anchor whereby rights restrictions within imprisonment may be assessed”. (L. Lazarus, “Conceptions of Liberty Deprivation” (2006) 69 MLR 738, at 759).

\textsuperscript{97} A book had already been published detailing the crimes of the prisoner: B Masters, \textit{Killing for Company} (1994, Dell Publishers).

\textsuperscript{98} Thus, it should not be necessary for the prison authorities to prove that the publication would constitute a criminal offence or an actionable civil wrong, although if the authorities could prove such this should make it \textit{easier} to justify the restriction.

\textsuperscript{99} That is not to say that the right to such correspondence is absolute and cannot be limited in any circumstances. In \textit{Campbell v United Kingdom} (1993) 15 EHRR 137 it was accepted that such a right could be monitored to ensure prison security. Further, in \textit{R v Home Secretary, ex parte Leech}, note 2, the Court of Appeal accepted that the right may be interfered with if there were self evident and pressing grounds. Non-legal correspondence is of course subject to legal and necessary restrictions, but not beyond the aims listed in article 8(2): \textit{Golden v United Kingdom}, note 8, and \textit{Silver v United Kingdom}, note 18.
protection, there is no reason to accept that speech outside that context should be subject to implied restrictions related to the prisoner's crime and incarceration. In addition, even if this general ground for restricting rights were to be accepted by the domestic and European Courts, such a ground needs to be much more clearly articulated and there needs to be close legal scrutiny and policing of its scope and impact in individual cases. Failure to regulate such a wide concept would lead to executive officials gaining arbitrary punitive powers that are best established by parliament and monitored by an independent judiciary.  

PRISONERS AND THE RIGHT TO VOTE

Whether convicted prisoners have the right to vote lies at the heart of the question of whether prisoners retain their basic human rights upon incarceration or whether imprisonment inevitably deprives them of such claims. Although there are a number of specific reasons to support the prisoner's right to vote, I will focus on the assumption that prisoners retain their basic rights and that, as with the enjoyment of other democratic rights, the right to vote should not be lost on incarceration. Thus, the liberal view would be that the prisoner retains his or her citizenship and democratic rights and that such a right should only be limited for reasons that would be regarded as permissible within the terms of the Convention, such as the prevention of disorder, crime or the protection of the rights of others. Such restrictions, therefore, would need to be clearly tied to such aims and the authorities would need to show that any particular interference was proportionate to them. On the other hand, if the courts accept that disenfranchisement is an automatic result of imprisonment, then such a right becomes relegated to a mere privilege and any justification for its violation will not need to be articulated within the terms of the Convention and its case law. As we shall see, the latter approach was adopted by the domestic courts and, although effectively overruled by the European Court, the latter Court appeared to recognise that the national authorities might be justified in disenfranchising prisoners as part of their sentence and in pursuit of general penal policy.

The decision in Pearson, Martinez and Hirst
The compatibility of prisoner disenfranchisement under the Representation of the People Act 1983, section 3(1) with the article 3 of the First Protocol of the European Convention was unsuccessfully challenged in R v Secretary of State for the Home Department, ex p Pearson and Martinez; Hirst v Attorney-General. Relying on both the case law of the European Court and Commission and other jurisdictions, the High

100 The European Court has already challenged a number of executive sentencing powers: see the cases cited in note 5, above. More specifically the domestic courts have ruled against the exercise of arbitrary sentencing powers by the executive on behalf of public opinion and concern: R v Home Secretary, ex parte Venable and Thompson [1997] 3 All ER 97.


102 As amended by the Representation of the People Act 2000.

Court held that contracting states could make the right to vote subject to conditions, provided they did not destroy the very essence of the right, are imposed in pursuit of a legitimate aim, and are not disproportionate.\textsuperscript{104}

In particular, Kennedy LJ pointed to the fact that the Canadian courts had identified that the disenfranchisement of prisoners served a legitimate aim. Referring to the judgment of Linden JA in Sauvé v Canada (No 2)\textsuperscript{105} his Lordship noted that a number of objectives had been identified:

I would leave to philosophers the determination of the true nature of the disenfranchisement. It may be argued that this legislation does different things – it imposes a civil consequence, it fixes a civil disability, it imposes a criminal penalty, it furthers a civic goal, it promotes an electoral goal, or it is part of the sentencing process … There are elements of all these ideas and ideals at work here.\textsuperscript{106}

Noting that a judge is able to make a number of orders against a convicted person which do not affect his or her liberty, but which nonetheless may make serious inroads on other rights, his Lordship felt there was no reason why parliament should not, if so minded, in its dual role as legislator in relation to sentencing and as guardian of its institutions, order that certain consequences should follow upon conviction or incarceration without contravening the philosophy expounded in Raymond v Honey. In his Lordship’s view there were clearly elements of punishment and electoral law to consider. Parliament had taken the view that convicted prisoners had forfeited their right to have a say in the way the country was being governed whilst they remained in custody. Whilst accepting that the case law of the Convention required any interference with the right in article 3 to be proportionate, his Lordship felt that the courts should defer to the wishes of the legislature.\textsuperscript{107}

By embracing the argument relating to the inherent punishment of the prisoner, the decision in Pearson accepts that a prisoner automatically forgoes his or her right to vote on incarceration. Further, although the case was not directly concerned with article 10, its rationale could be applied to deny a prisoner the right to free speech, particularly where such speech related to the prisoner’s right to take part in political debate. Indeed, there is evidence from the cases of Hirst and Nilsen that such an approach is considered legitimate in justifying interferences with freedom of expression. It is submitted that this rationale is flawed for two reasons: firstly, it is inconsistent with the retention of basic rights unless such interference is justifiable within the terms of the Convention; secondly, assuming the criterion of penal sanction and public confidence in that system is a valid one, such aims should be clearly articulated and set and maintained by responsible and appropriate personnel so as to ensure certainty and reasonableness.

\textsuperscript{104} \textit{Ibid.}, at para 52. The High Court considered the decision of the European Court in Mathieu-Mahin and Clerfayt v Belgium (1988) 10 EHRR 1 and the Commission’s decisions in \textit{H v The Netherlands} [1983] 33 DR 42; \textit{X v Netherlands} [1974] 1 DR 87 and \textit{Holland v Ireland} [1998] 93A DR 15 The Court also referred to the decision of the United States Supreme Court in \textit{Richardson v Ramirez} [1974] 418 US 24.

\textsuperscript{105} [2002] 2 FC 117. The decision was overturned by the Supreme Court, whose decision affected the judgment of the European Court in \textit{Hirst}, considered below. In Sauvé (No 2) [2002] 3 SCR 519 the Supreme Court of Canada held that the disenfranchisement via the Canadian Elections Act 1985, s 51(e) of all prisoners serving sentences of two years or more was both arbitrary and unconstitutional. In the Supreme Court’s view the arguments of enhancing civic responsibility and enhancing the general purposes of the criminal sanction by providing an additional remedy were both vague and symbolic, making the justification analysis difficult. In the minority’s opinion, however, the objectives of disenfranchisement were both pressing and substantial. Although the promotion of civic responsibility might be abstract or symbolic, such purposes can be valid and must not be discarded for that reason alone. Further, it was a valid objective for parliament to develop appropriate sanctions and punishments for serious crime.

\textsuperscript{106} \textit{Ibid.}, at para. 99.

\textsuperscript{107} \textit{Pearson and Martinez}, note 100, at para 54.
The decision of the European Court of Human Rights in Hirst v United Kingdom (No 2)

Following the defeat in the domestic courts, one of the prisoners made an application under the European Convention claiming a violation of article 3 of the First Protocol, in conjunction with article 14, and of article 10. 108 In particular, the applicant argued that the domestic ban failed to pursue any legitimate aim under the Convention, by reference to the decision of the Supreme Court of Canada in Suávë v Attorney General of Canada (No 2), 109 a case postdating Pearson and Martinez, which decided that the automatic disenfranchisement of prisoners serving sentences of two years or more was unconstitutional. The European Court noted that in the present case the loss of the right to vote played no overt role in the sentencing process in the United Kingdom and that the Canadian Supreme Court had found that the imposition of a blanket punishment on all prisoners, regardless of their crime or individual circumstances, failed to establish a rational link between the punishment and the offender. 110 Further, with respect to civil responsibility and upholding the rule of law, it found that there was no clear and logical link between the loss of the vote and the imposition of a prison sentence, where no bar applies to a person guilty of crimes which may be equally anti-social or “uncitizen-like” but whose crime is not met by such consequence. 111 However, although expressing doubts as to the validity of either aim put forward by the government, it noted that the varying political and penal philosophies and policies that may be invoked in this context precluded the Court from ruling that these aims could not be regarded as legitimate, even on the abstract or symbolic plane. 112 Accordingly, it left open the question as to legitimacy, considering that it was, in any case, unnecessary to deal with that issue in the present application, given its decision on proportionality.

As to the issue of proportionality, the Court noted that the actual effect on the individual prisoner’s right to vote depended, somewhat arbitrarily, on the period during which he or she happened to serve the sentence. In addition, a further anomaly arose in the case of those who had served that part of the sentence relating to punishment and who continued to be detained only on grounds of a continuing danger to society. 113 In the Court’s view, insofar as a disqualification from voting is to be seen as part of a prisoner’s punishment, there was no logical justification for it to continue in the present case. The Court did not accept the government’s submission that such prisoners should be denied a vote while they remained in detention only because of the danger they presented, especially as it had never been explained how this argument fell under the aims advanced by the government. 114

Although the Court accepted that this was an area in which a wide margin of appreciation should be granted to the national legislature both in determining whether restrictions on prisoners’ right to vote could still be justified in modern times and, if so, how a fair balance was to be struck, 115 it observed that that there was no evidence that the United Kingdom parliament had ever sought to weigh the competing interests

109 Note 105, above.
110 Hirst (No 2), at para 45.
111 Ibid, at para 46.
112 Ibid, at para 47.
113 Ibid, at para 49.
114 Ibid.
115 Ibid, at para 51: “In particular, it should be for the legislature to decide whether any restriction on the right to vote should be tailored to particular offences, or offences of a particular gravity or whether, for instance, the sentencing court should be left with an overriding discretion to deprive a convicted person of his right to vote.”
or to assess the proportionality of the ban as it affected convicted prisoners. Consequently, the Court could not accept that an absolute bar on voting by any serving prisoner in any circumstances fell within an acceptable margin of appreciation. By a majority of 12 votes to five the Grand Chamber of the European Court upheld the decision of the European Court of Human Rights. The Grand Chamber stressed that the right in question was crucial to the foundations of a meaningful democracy and that the right to vote was a right and not a privilege. Further, it noted that there was no question that prisoners forfeited their Convention rights merely because of their status as prisoners. Nor was there any place under the Convention for automatic disenfranchisement based purely on what might offend public opinion. Although article 3 of the First Protocol did not exclude the imposition of restrictions on individuals who, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations, the principle of proportionality required a discernible and sufficient link between the sanction and the conduct and the circumstances of the individual concerned.

With respect to whether the domestic law served a legitimate aim, the Grand Chamber accepted that the domestic provision might be regarded as pursuing the aims pleaded by the government, viz that it was aimed at preventing crime, enhancing civic responsibility and respect for the rule of law and conferring a punishment in addition to the sentence. Although there were doubts as to the efficacy of achieving these aims through a bar on voting, the Grand Chamber found no reason to exclude these aims as untenable or as per se incompatible with the right guaranteed by article 3. However, the Grand Chamber noted that the domestic provisions affected approximately 48,000 prisoners and that they applied in a blanket fashion to the full range of offences which warranted imprisonment. The criminal courts made no reference to disenfranchisement during sentencing and it was not apparent that there was any direct link between the facts of any individual case and the removal of the right to vote. Further, it was noted that any issue of justification appeared to be regarded as a matter for the legislature, thus excluding the courts from any assessment of the proportionality of the measure.

Although the European Court does not reject the idea that a prisoner may lose his or her right to vote as part of the sentence of imprisonment, it states that incarceration in itself is not a logical and permissible justification for violating fundamental rights. Further, by insisting on a cogent link between the individual sentence and disenfranchisement, the Court is imposing a substantive safeguard against such restrictions by insisting that there is sufficient reason for disenfranchisement. Moreover, this substantive protection is bolstered by procedural safeguards, stressing that such decisions must be made by a responsible and accountable legislative body and reviewed by an independent judiciary to ensure that principles of legitimacy and necessity are followed.

Prisoner disenfranchisement does not appear to be justified by the application of the accepted Convention grounds for restricting rights. Thus, it could not really be argued that it is necessary for public safety or, directly, for the prevention of disorder or crime. Though granting the vote to prisoners would cause some administrative inconvenience and, possibly, pose some problems to internal prison order, such concerns could hardly

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117 At para 59 of the Court’s judgment.
118 Ibid, at para 69.
120 Ibid, at para 74.
121 Ibid, at para 77. In addition, there had been no substantive debate by the legislature on the continued justification of the policy in the light of modern day penal policy and of current human rights standards.
justify the taking away of a person's fundamental right to vote. Equally, there are weaknesses in the argument that the ban is necessary to protect the rights of others. Although the disenfranchisement of persons who have acted against society's interests could enhance public confidence in the electoral system, the more likely explanation for the ban is that it reflects a convenient and arbitrary decision to further punish a person who has been deprived of their liberty by the legal system.

The decision in Hirst (No 2) does not accept the argument that it is only legitimate to restrain prisoners' democratic rights on the grounds that the prisoner has been deprived of his or her liberty. Rather, it accepts, at least in principle, that the right to vote may be lost as part of an individual sentence, and that the notion of prevention of crime and disorder is wide enough to accommodate relevant penal arguments for, in that case, disenfranchising prisoners. Thus, the decision in Hirst (No 2) – and the decision of the Supreme Court in Suárez (No 2) – fell short of formally rejecting those broad reasons as constitutionally invalid. However, its insistence that such grounds are clearly articulated by the legislature and effectively reviewed by the judiciary ensures against arbitrary and unreasoned interference and the Grand Chamber has indicated that there should be some judicial oversight of the necessity and proportionality of these measures. Thus, although parliament must be given the initial duty to frame appropriate and compatible legislation, any such rules should provide for an area of judicial discretion. This could be accommodated by allowing the trial judge to impose disenfranchisement (complete or partial) at the trial, taking into account the nature of the offence and thus including the sanction as part of the sentence. This method would ensure some objectivity, consistency and independence and could be complemented by executive or legislative guidance given to judges based on the type and seriousness of the offence. It should also distinguish between logical and related reasons for interference and those based on the naked argument that prisoners forgo rights on incarceration.122 Further, both decisions stress the fundamental importance of the right to vote and the constitutional utility of prisoners participating in the democratic process, noting that the denial of prisoners' rights can have a deleterious effect on democracy as a whole.

CONCLUSIONS

It is conceded that the prison regime involves the restriction (as opposed to the loss) of a number of prisoners' rights beyond the loss of liberty. In addition to restricting the prisoner's general liberty and freedom of movement, the prison regime will impinge on the right to privacy and private life, contact with family and friends, with whom the prisoner can correspond (including the content of such correspondence) and with whom he or she can associate. All these restrictions are a necessary and incidental part of maintaining the regime and, provided the restrictions are prescribed by law and constitute a necessary and proportionate measure to ensure prison discipline or the prevention of crime, they are not in violation of the prisoners' human rights. Also, it

122 Thus, parliament should ensure that there is some correlation between the offender and offence on the one hand, and the sanction of disenfranchisement on the other. This will require parliament, and, most likely, the courts, appraising the seriousness of the offence and its relevance to possible disenfranchisement. On 14 December 2006, the Secretary of State for Constitutional Affairs and Lord Chancellor, Lord Falconer of Thoroton, published the first of two consultation papers in this area: Voting Rights of Convicted Prisoners Detained within the United Kingdom – the UK's response to the Grand Chamber judgment in Hirst v United Kingdom. The document is available at http://www.dca.gov.uk/consult/voting-rights/cp2906.pdf. The document sets out the options for reform, but does not accommodate the possibility of total disenfranchisement of prisoners. However, the government invites views on total disenfranchisement, despite conceding that that option is not consistent with the Grand Chamber's decision.
is accepted that those restrictions will go further than those imposed on individuals or groups outside that regime and that a wide and generous margin of appreciation will be afforded to the prison authorities in this respect. This should not, however, detract from the fact that prisoners enjoy the *prima facie* rights of private and family life, correspondence and speech and the right to vote. This is clearly established by Convention case law and any interference with those rights has to be justified within the established principles of legality and proportionality, subject, of course, to a margin of discretion to accommodate the nature and effectiveness of the regime.

The loss of the prisoner's right to freedom of expression and, perhaps, the right to vote, may also be justified by the existence and maintenance of the regime. To allow prisoners to exercise their right to free speech would, in many cases, jeopardize good order and discipline; including hampering the rehabilitation of the individual prisoner – or impinge on the rights of others. Again, those restrictions may be stricter than those operating in the outside world. For example, it *may* be justifiable to restrict a prisoner's access to pornographic material on the basis of good order and discipline in prisons despite the fact that the prisoner would have unrestricted and legal access to such material outside prison.\(^{123}\) However, regulations intended to restrict speech in such circumstances should be tied to a legitimate aim and one that is within the province of the relevant prison authorities: *viz*, the prevention of crime and disorder (either prison order or order outside prison) or the protection of the rights of others *via the management of prisons and prisoners.* To restrict such rights on the basis simply that the individual is a prisoner and that such status automatically justifies restriction, conflicts with the Convention jurisprudence and relegates the prisoner's right to a mere privilege, thus affecting the judicial recognition and protection of such rights from arbitrary and unreasonable interference.\(^{124}\)

Although the European Court and, to a large extent, the domestic courts, appear to accept the notion that prisoners retain their human rights on incarceration, this traditional stance is now under threat from cases that accept that it is justifiable to take into account the prisoner's status and the public's confidence in the penal system, in regulating what rights prisoners are allowed to enjoy. In domestic law, there are *dicta* in cases such as *Simms* and *Nilsen* that allow automatic forfeiture of rights on incarceration. Equally, the recent decision of the European Court in *Dickson* appeared to allow the prison authorities to consider both the prisoner's crime and public opinion on punishment in regulating the enjoyment of the prisoner's fundamental rights. This permits the authorities to accommodate public (and executive) disapproval of the prisoner's enjoyment of his or her human rights and, unless checked by the principles underlying the Convention and its rights and by necessary judicial supervision, will undermine both the presumption of rights' enjoyment and effective monitoring of any restriction.

It is submitted that there is no justifiable reason for the assumption that a prisoner forgoes his or her right to freedom of expression, or indeed his or her right to vote, on imprisonment. Indeed, as highlighted in cases such as *Hirst (No 2)* and *R (Hirst) v Home Secretary*, there can be great democratic value in facilitating prisoners' free speech. The justification for such an assumption appears to be based mainly on public

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\(^{123}\) See *Morton v Governor of HMP Long Lartin* [2003] EWCA Civ, note 94 above.

\(^{124}\) At the time of writing this article the Home Secretary is considering introducing legislation to prohibit convicted criminals from publishing their memoirs for profit: "Reid aims to rewrite law on memory of convicts", *The Times*, 28 October 2006. Such measures would have to be tied to the legitimate aims of either "the prevention of disorder and crime", or the "protection of the rights of others" which are listed in article 10(2) of the European Convention. It is submitted that such measures would in practice be difficult to apply to particular cases, and that they would unduly interfere with both press freedom and the public right to know.
(and judicial) objection to the prisoner exercising rights which, according to that view, are the birthright only of persons outside prison. The *dicta* in *Simms*, and the domestic decision in *Pearson and Martinez* attempt to legitimize this assumption, and the decision of the High Court in *Hirst*, whilst going some way to attack it, makes it clear that the courts are willing to accept its validity in certain cases. Further, the decision of the European Court in *Dickson*, unless modified on appeal to the Grand Chamber, will permit the authorities an unacceptable level of discretion in deciding which rights can be enjoyed by prisoners. Such a position, it is submitted, will undermine the rule of law, the principles of legality and necessity, and the ideals of the democratic right to freedom of expression.

\[\text{125 See Panick, "Why the European Court was wrong to deny FedEx sex", *The Times*, 2 May 2006, Law 5.}\]
STATUTORY OFFENCES AND THE BURDEN OF PROOF

*ANDREW MACKIE*

There is at present an extensive debate surrounding the operation and scope of reverse onus clauses as they apply to statutory offences. This is in recognition of the increasing use by parliament, when drafting criminal offences, of separating the constituent elements of a crime from defensive issues. Unlike at common law, where, for all except insanity, such distinction has no impact on the prosecution’s burden of proof, defence-saving provisions of a statutory nature must be proved by the defendant, on a balance of probabilities. So placed, the use of these so-called affirmative defences has the potential to violate the presumption of innocence, that most hallowed principle of the criminal law. Before the coming into force of the Human Rights Act 1998, which enshrines into domestic law the European Convention for the Protection of Human Rights and Fundamental Freedoms, such a debate “could scarcely have arisen”.¹ Although English courts have only recently begun to grapple with these issues, growth in the number of cases reaching the higher courts has been phenomenal, arguably outstripping cases concerned with all other Convention rights. Despite their controversial status, this article does not, as others have, call for their abolition. Attractive as such a proposition might seem, it is not only indefensible but may inadvertently serve to undermine the status of the presumption of innocence. Strikingly, their proliferation, and subsequent extensive analysis, is not unique to English law; other common law jurisdictions have in the past faced identical trends, America in the 1970s, and Canada in the 1980s. Although the presence of constitutional documents in these countries is an undoubted factor influencing any comparison, the issue confronting our courts remains identical: to what extent should they have the ability to review the adequacy of criminal statutes?

ELEMENTS AND DEFENCES

The starting point on any discussion of the presumption of innocence is Viscount Sankey’s famous pronouncement in Woolmington v Director of Public Prosecutions:

> Throughout the web of the English criminal law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity² and subject also to any statutory exception.³

The clear implication in Viscount Sankey’s speech is that the ambit of criminal conduct and, with it, the resulting constituent elements of an offence, are a matter solely for parliament. There is nothing novel in this approach; it is a feature endorsed throughout the common law world. As the US Supreme Court stated in McMillan v Pennsylvania: the “legislature’s definition of the elements of [an] offence is usually dispositive”⁴. It is also a view widely supported in the literature.⁵ Such an approach,

¹ Sheldrake v Director of Public Prosecutions [2004] UKHL 43, [2005] 1 AC 264, at [7].
² For details of this unique defence see T Jones, “Insanity, Automatism and the Burden of Proof on the Accused” (1995) 111 LQR 475.
⁴ 477 US 79, 85, 106 SCt 2411, 2415 (1986). The Canadian Supreme Court has echoed similar sentiments; see, for example, Martineau: “Parliament ... decides what a crime is to be, and has the power to define the elements of a crime” [1990] 2 SCR 633, at [8].
where the content of the criminal law is governed solely by the legislature, follows what Tadros and Tierney refer to as the “classical theory”.6 According to this theory, the prosecution is charged with proving only the definitional elements of an offence as set out in the statute; the burden resting on the defendant, on a balance of probabilities, to prove any affirmative defences.

The classic approach is illustrated by two famous American decisions in the mid-1970s. These two cases were predicated on the decision in In Re Winship, where the Supreme Court constitutionalised the reasonable doubt rule:

Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.7

In Mullaney v Wilbur,8 the United States Supreme Court struck down a Maine statute which placed the burden of proving “heat of passion” on the defendant. The state had argued that the absence of heat of passion in sudden provocation was not a fact necessary to constitute the crime of homicide in Maine. It sought to distinguish Winship on the ground that due process should be limited merely to establishing guilt or innocence, and given the state had already proved the defendant’s guilt, all that remained was the degree of punishment. Speaking for a unanimous court, Powell J rejected such an approach. Winship, he argued, “is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability”.9 Maine’s statute, having distinguished between those who kill in the heat of passion from those who did not, could not, then, remove the absence of this factor from the ingredients of the offence given that those who kill in such circumstances are less “blameworthy” and subject to substantially less severe penalties.

However, two years later in Patterson v New York,10 the US Supreme Court refused to strike down a New York statute which placed the burden of proving “extreme emotional disturbance” on the defendant. A majority distinguished Mullaney on the ground that there were material differences between Maine’s and New York’s statutes. In New York murder was defined by statute as death, intent to kill and causation; no other facts were either express or implied in order to constitute the offence. A separate clause went on to provide an affirmative defence of acting under the influence of extreme emotional disturbance, which, if proved by a preponderance of the evidence, would reduce the crime to manslaughter. Maine, however, had defined homicide as the unlawful killing “of a human being with malice aforethought, either express or implied”. Malice aforethought, as the statute indicated, could be implied from the absence of provocation. Therefore, although both statutes placed the defence of proving provocation on a defendant, the method by which they had sought to achieve this goal was different: in Maine the presence or absence of provocation was an essential element of the offence of murder, whilst in New York it was cast as a defensive issue.

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9 Ibid, at 697–698 and 1889.
Mullaney, the majority argued, did not stand for the principle that the prosecution must prove any fact which affects the degree of blameworthiness or the severity of the punishment. Instead, it was limited to a holding that a “State must prove every ingredient of an offence beyond a reasonable doubt, and that it may not shift the burden of proof to the defendant by presuming that ingredient upon proof of the other elements of the offence”.  

In a famous and scathing dissent, Powell J argued the majority’s judgment had effectively drained Winship of any substance, and consequently rendered the presumption of innocence nugatory. He reasoned:

The test the [majority] today establishes allows a legislature to shift, virtually at will, the burden of persuasion with respect to any factor in a criminal case, so long as it is careful not to mention the non-existence of that factor in the statutory language that defines the crime. The sole requirement is that any references to the factor be confined to those sections that provide for an affirmative defense.  

Distinguishing the states’ statutes in such a formalistic manner could only have been achieved by “closing [their] eyes” to the constitutional values which Winship had sought to uphold, with the resulting effect that a significant check on possible abuses within the criminal law had been relegated to an “exercise in arid formalities”. He concluded: “[w]hat Winship and Mullaney had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship”.  

Although it is difficult to argue that the distinction between constituent elements and defences was arbitrary under section 125.20 and 125.25 of New York’s Penal Code, what is abundantly clear, however, is, it is very difficult to see any material differences between Maine’s and New York’s statutes other than the fact that the defence of “extreme emotional disturbance” is wider in scope than the common law’s “heat of passion”. Both had provided for the defence of provocation to a charge of murder, and both had placed the burden of proof on a defendant. It is very hard not to agree with the words of Powell J when he stated: “[t]he [majority] manages to run a constitutional boundary line through the barely visible space that separates Maine’s law from New York’s”.  

Although provocation is a common law defence in England, and consequently Woolmington is the controlling case with regards to the burden of proof, what Mullaney and Patterson highlight is the effect of providing a legislature with unfettered discretion regarding the definitional elements of an offence. As Finkelstein cogently argues: “[i]s not] something peculiar at work . . . when the extent of a [factual] guarantee that ought to limit the reach of the criminal sanction is determined by the legislation establishing the sanction itself?” Arguably, this is the position English law has now reached following a series of cases culminating in Sheldrake v Director of Public Prosecutions and Attorney General’s Reference (No 4 of 2002).  

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11 Ibid, at 215 and 2229.
13 Ibid, at 224 and 2334.
14 The reason being that New York, except for where the burden of proof lay, had drafted its defence of Extreme Emotional Disturbance using the exact wording of the Model Penal Code.
15 Op cit, at 221 and 2332.
16 Although, of course, modified by the Homicide Act 1957, s3.
18 [2004] UKHL 43, [2005] 1 AC 264. These cases were ultimately decided on a conjoined appeal. Unless the text makes it clear otherwise, they are collectively referred to as Sheldrake.
The Leading English Authorities

In Shelvoke, the House of Lords was asked to rule on the compatibility with article 6(2) of two distinct reverse onus clauses. In Shelvoke, the Road Traffic Act 1988, section 5(2) provided a defendant with a defence to a charge under section 5(1)(b) of that Act – being in charge of a motor vehicle in a public place whilst the proportion of alcohol in one’s breath, blood or urine exceeded the prescribed limit – if he or she could prove the circumstances were such that there was no likelihood of him or her setting the vehicle in motion. In Attorney General’s Reference (No 4 of 2002), the Terrorism Act 2000, section 11(2) provided for a defence to a charge under section 11(1) of that Act – being, or professing to be, a member of a proscribed organisation – if a defendant could prove that the organisation was not proscribed on the last (or only) occasion on which he or she became, or began professing to be, a member, and he or she had not taken part in the activities of the organisation at any time whilst it was proscribed. Reversing the decisions of both the Divisional Court and Court of Appeal respectively, the House of Lords, unanimously, upheld the validity of section 5(2); and, by a majority of three to two, read down section 11(2) (pursuant to the interpretative obligation imposed upon them by the Human Rights Act 1998, section 3), so as to impose only an evidential burden of proof.

Although differing conclusions were reached on the broader issue of compatibility with article 6(2), Lord Bingham, who delivered the leading speech, applied identical reasoning to determine the true construction of the two statutory provisions. The significance of this cannot be underestimated, for as I will attempt to explain, such reasoning seemingly places him in conflict not only with previous House of Lords’ rulings but also a significant body of lower courts’ decisions.

In Shelvoke, Lord Bingham fortified his conclusion that the ingredients of the offence were contained solely in section 5(1)(b), by examining the history of the offence creating provision. The early drink-driving legislation (namely the Licensing Act 1872 and the Road Traffic Act 1930) made no reference to the likelihood of driving; the subsequent introduction of such a defence from 1956 onwards, operating as it did in favour of a defendant, meant “there could . . . be no ground of complaint if the offence of being unfit when in charge of a motor vehicle, as laid down in 1930, had remained unaltered”. Equally, in Attorney General’s Reference (No 4 of 2002), a pivotal factor leading him to conclude that the Terrorism Act 2000, section 11(2) was not a constituent element of the offence was to be found within section 118(1) of that Act. Section 118(5) listed a number of other sections which were to be interpreted as imposing only an evidential burden on the accused; crucially, however, section 11(2) was not one of them. In the light of this, he concluded: “the effect of [section 11(2)] is not . . . to make participation in the activities of the organisation while proscribed an ingredient of the offence . . . section 11(2) adds no ingredient to section 11(1)”.

Lord Bingham’s analysis of these two statutory provisions follows the classical theory. For him the elements of an offence are a matter solely for parliament and parliament had defined the constituent elements of the two offences as: “being in charge of a motor vehicle whilst over the prescribed limit”, and “belonging or

19 Ibid, at para [40]. Although, at para [41], he states: “It may not be very profitable to debate whether s5(2) infringes the presumption of innocence. It may be assumed that it does”; other parts of his speech seem to indicate that such an approach was as a fall-back only. In particular, when discussing the constituent elements of s11(2), he stated: “I have concluded above (para 40) that the likelihood of driving is not an ingredient of the section 5(1)(b) offence, despite the defence provided in section 5(2). By parity of reasoning, section 11(2) adds no ingredient to section 11(1)”, at para [49]. In addition, he specifically refused the unanimous view of the Divisional Court that a likelihood of setting the vehicle in motion was part of the gravamen of the offence. This analysis, he argued, “is in my opinion too simple and only partly correct”, at para [40].

20 Ibid, at para [49].
professing to belong to a proscribed organisation”. Consequently, the defence-saving provisions, encapsulated in sections 5(2) and 11(2) respectively, in no way affected or infected the substantive provisions. On such an account, one can immediately see a striking similarity with Patterson: parliament is charged with making appropriate policy choices and defining the resultant constituent elements of an offence. However, just as in Patterson, it is open to the charge that it leads to arbitrary decisions regarding whether the presumption of innocence is infringed.

In R v Lambert, the defendant was charged with possession of a controlled drug with intent to supply, contrary to the Misuse of Drugs Act 1971, section 5(3). Pursuant to section 28(2), it was a defence if the accused proved he neither knew of nor suspected nor had reason to suspect that what he was carrying was a controlled drug. In relation to the article 6(2) issue, two questions were placed before their Lordships: firstly, was section 28(2) a constituent element of the section 5(3) offence; and secondly, whether it was compatible with the presumption of innocence. With regards to the first question, applying ordinary methods of statutory interpretation (which includes the statute’s historical setting), it is clear that there are only two elements to the section 5(3) offence: a “physical element” (custody or control of a package or container), and a “mental element” (knowledge of possession of the package or container). On proof of these two elements, it would be legitimate for the trier of fact to draw an inference regarding knowledge of the contents in the accused’s possession, unless he could prove, on a balance of probabilities, absence of such knowledge. Two of their Lordships (arguably) limited their inquiry to one of statutory interpretation, concluding that section 28(2) was not dealing with the essential ingredients of the offence. However, Lord Steyn approached the issue from a different angle. In a “classic” speech, he argued:

The distinction between constituent elements of the crime and defensive issues will sometimes be unprincipled and arbitrary. After all, it is sometimes simply a matter of which drafting technique is adopted: a true constituent element can be removed from the definition of the crime and cast as a defensive issue whereas any definition of an offence can be reformulated so as to include all possible defences within it. It is necessary to concentrate not on technicalities and niceties of language but rather on matters of substance.

Lord Steyn’s reasoning echoes that of Williams, who, in a ground-breaking article, argued that legislative draftsmen often

do not follow strict and publicly proclaimed principles in the wording of the offence . . . Sometimes they separate the statement of a rule from a statement of what are thought of as exceptions to it, but sometimes combine what might have been stated as exceptions into

21 His rigid application to the classical theory belies other parts of his judgment, however. This is particularly so when he refutes the assumption, advocated by Lord Woolf in Attorney General’s Reference (No 1 of 2004), that parliament would not have made an exception without good cause; ibid, at para [31].
23 The speeches of their Lordships evince a difference of opinion regarding the scope of question one. I incline to prefer the approach of Lords Steyn and Hutton, to that of Lords Hope and Clyde. When discussing the ambit of a statutory provision, the former argued, it was important to consider whether it made an inroad into art 6(2). If so, question two then asked whether the provision was justified and proportionate. The latter, however, reserved their discussion of art 6(2) to the second question.
25 Lord Hope, at paras [60–71], and Lord Clyde, at paras [120–128]. See also note 38 below.
26 Sheldrake v Director of Public Prosecutions [2003] EWHC 273, [2004] QB 487, DC at [27] per Clarke LJ.
the sentence stating the rule . . . When they use the former style of drafting (rule + exception), they do not say why, but the obvious explanation is that it is a mere matter of presentation.  

Consequently, he concluded, “there is no assurance that the order of words represents a considered legislative judgment as to the burden of proof”.  

Clearly, similar reasoning must have been at the forefront of Powell J’s thinking in Patterson. Indeed, even the majority recognised that to leave the legislature with a free hand to reallocate burdens of proof simply by labelling as defensive issues factors which would traditionally be viewed as constituent elements of a crime, was eminently possible on their account; that is why they were quick to add the following proviso: “But there are obviously constitutional limits beyond which the States may not go in this regard”.  

Convention jurisprudence examining the scope of article 6(2) can, at best, be described as flaccid. In the leading decision of Salabiaku v France, the European Court of Human Rights stated: “in principle . . . Contracting States remain free to apply the criminal law to an act where it is not carried out in the normal exercise of one of the rights protected under the Convention and, accordingly, to define the constituent elements of the resulting offence”. Nothing here seems to limit a legislature’s ability to define the constituent elements of an offence as it sees fit.  

Although Strasbourg has had very little to say on the ability of national legislatures to define the constituent elements of an offence, this is not the same in comparable common law jurisdictions. In Canada, the Supreme Court has considered reverse onus clauses on many occasions. In the years immediately following the passing of the Charter of Fundamental Rights and Freedoms, there was disagreement amongst the judges on the crucial issue of just when section 11(d) of that charter was engaged. In Oakes, Dickson CJC stated:  

[A provision which requires an accused to disprove on a balance of probabilities the existence of a presumed fact which is an important element of the offence in question violates the presumption of innocence in s.11(d). If an accused bears the burden of disproving on a balance of probabilities an essential element of an offence, it would be possible for a conviction to occur despite the existence of a reasonable doubt.  

In Holmes, however, a difference of opinion emerged. McIntyre J considered that a provision which placed the burden of proof on a defendant to prove an excuse did not infringe section 11(d); whereas Dickson CJC moved away from the position he had taken in Oakes:  

32 Although the reverse onus provision must still satisfy the test of proportionality, as discussed below.
33 In English law there is some ambiguity regarding the status of these decisions. Although both Lambert and Johnstone cite Canadian decisions when discussing the ambit of art 6(2), in Sheldrake Lord Bingham stated: “Some caution is . . . called for in considering different enactments decided under different constitutional arrangements . . . the United Kingdom courts must take their lead from Strasbourg.” [2004] UKHL 43, [2005] I AC 264, at [33].
Any burden on an accused which has the effect of dictating a conviction despite the presence of reasonable doubt, whether that burden relates to proof of an essential element of the offence or some element extraneous to the offence but nonetheless essential to verdict, contravenes section 11(d) of the Charter. 36

Like Mullaney and Patterson, which preceded them, what these cases demonstrate is the difference of opinion that exists as to the exact scope of the reasonable doubt rule. Is the prosecution charged with only proving all essential elements, leaving defences for the defendant to prove? Or, regardless of the drafting technique employed, is it incumbent on the prosecution to prove all elements and disprove all defences essential to the verdict? These tensions are vividly illustrated by the difference of opinions expressed by their Lordships in Lambert. Applying ordinary canons of statutory interpretation, four of their Lordships 37 concluded that knowledge of the contents was not a constituent element of possession with intent to supply. When they came to determine whether the reverse onus clause made inroads into the presumption of innocence, however, each of them considered “somewhat different questions”. 38 Little wonder this confusing set of commands has resulted in the lower courts being set adrift.

At the forefront of this confusion was the judgment of an enlarged Court of Appeal in Attorney General’s Reference (No 1 of 2004). 39 Giving the judgment of the court, Lord Woolf CJ was very critical of Lord Steyn’s reasoning in Lambert. He referred to the fact that Lord Steyn’s judgment had received no support from other members of the court and instead preferred the dissenting judgment of Lord Hutton. However, as highlighted above, Lord Hutton had agreed with Lord Steyn on the first certified question and had argued that, under Convention jurisprudence, knowledge of what was in the container was part of the gravamen of the offence and, prima facie, had to be disproved by the prosecution.

Providing general guidance for magistrates and trial judges, Lord Woolf stated: “[t]he common law (the golden thread) and the language of article 6(2) have the same effect. Both permit legal reverse burdens of proof or presumptions in the appropriate circumstances”. 40 This is undoubtedly true, but surely the rationale is different, for otherwise, as Powell J admirably demonstrated in Patterson, evasion of the presumption of innocence can be achieved by creative statutory drafting. Avoidance of this conclusion, can, in the words of Dickson CJ in Whyte, be achieved if, instead, one determines the final effect a provision has on the presumption of innocence: “[i]f an accused is required to prove some fact on the balance of probabilities to avoid

36 Ibid, at para [40]. Emphasis added. A view endorsed by the Supreme Court in a number of later cases, most notably Whyte (1988) 51 DLR (4th) 481 (as to which see note 41 below), and Downey (1992) 90 DLR (4th) 449.
37 The exception being Lord Steyn, who ignored conventional methods of interpretation.
38 Sheldrake [2003] EWHC 273, [2004] QB 487 (DC) at [25], per Clarke LJ. It is difficult to elicit the reasoning of Lord Hope and Lord Clyde, for although (arguably) they seek to ascertain whether s28(2) made an inroad into art 6(2) (see paras [88-89] and [153-156] respectively), they do so in the context of the second certified question – which, to my mind, was directed at the separate issue of proportionality, and, it is submitted, does not become an issue until it has been determined a provision derogates from art 6(2). In this respect, see also note 23 above, and text accompanying note 46 below. Lord Steyn’s views are set out in text accompanying note 27 above. Strikingly, although dissenting with regards to the outcome, Lord Hutton agreed with Lord Steyn concerning the first certified question. He was not content to limit himself to conventional methods of interpretation; prima facie, he argued, s28(2) made inroads into the presumption of innocence. Presumably, therefore, he must have viewed s28(2) as part of the gravamen of the offence, at para [185]. Lord Slynn’s judgment is ambiguous on this point. Although arguing the prosecution must bear the persuasive burden as “it ensures that the defendant does not have the legal onus of proving the matters referred to in section 28(2) which whether they are regarded as part of the offence or as a riposte to the offence prima facie established are of crucial importance”, this was, however, stated in relation to the second certified question; and on that point he deemed it unnecessary to come to a conclusion. It was enough that the legislation could be read down as imposing only an evidential burden, at para [17]. Emphasis added.
40 Ibid, at para [52].
conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused".  

Lord Woolf cited the decision of the House of Lords in Johnstone. He argued that it was the leading decision and expressly preferred it to that of Lambert. After analysing the speeches of Lord Steyn (in Lambert) and Lord Nicholls (in Johnstone), he concluded: “it does appear there is a significant difference in emphasis between their approaches”. However, on a closer analysis of the two speeches, one can see a great deal of similarity; the differences pertaining only to the separate issue of proportionality, which, in turn, can be explained by the differing nature of the statutory provisions. Johnstone concerned the reverse onus clause provided for by the Trade Marks Act 1994, section 92(5). Citing Whyte, Lord Nicholls concluded that the provision was part of the gravamen of the offence and prima facie had to be disproved by the prosecution. Like Lord Steyn, therefore, Lord Nicholls, was not content to limit his inquiry to purely conventional methods of statutory interpretation.

In Sheldrake, the House of Lords rejected the guidance provided in Attorney General’s Reference (No 1 of 2004), save to the extent it was in accordance with the views expressed in their Lordships’ judgment. Although the rejection of this guidance is to be welcomed, it is debatable whether Lord Bingham’s analysis differs substantially from Lord Woolf’s. Examining the differing opinions expressed in Lambert, he concluded that a majority of their Lordships had held that knowledge of the contents of the duffle bag was not an ingredient of the offence. But the “majority” he was speaking of in that context had limited themselves to purely ordinary principles of construction without reference to the Convention. As demonstrated, the focal point must instead be determining whether the reverse onus clause read with the elements of the offence make inroads into article 6(2) and, in that context, (although, as highlighted above, the reasoning of their Lordships is far from clear) it can categorically be stated that both Lord Steyn and Lord Hutton viewed the Misuse of Drugs Act 1971, section 28(2) as doing just that.

Turning his attention to Johnstone, Lord Bingham recognised that the offending provision prima facie derogated from the presumption of innocence. However, when he came to analyse the reverse onus clause under consideration in Sheldrake, he reverted to a purely common law interpretation. Rejecting the unanimous view of the Divisional Court, he concluded, on the grounds discussed above, that an intention to set the vehicle in motion was not a constituent element of the offence of being in charge of it. Using conventional methods of statutory interpretation, one cannot doubt such a conclusion. But, as explained above, if the presumption of innocence is to exist as a meaningful device, one’s analysis cannot stop there. If the offending provision, whether characterised as a constituent element or a defence, allows for a conviction notwithstanding a reasonable doubt as to the guilt of an accused, the presumption of innocence is engaged. Viewed in this light, section 5(2) does indeed make inroads into the presumption of innocence, for it operates as a presumption against an accused who will be presumed to have intended to set the vehicle in motion unless he or she can prove, on a preponderance of the evidence, the contrary.

43 Ibid, at para [47].
By limiting his examination to conventional methods of statutory interpretation it is open to debate whether Lord Bingham’s conclusion in *Attorney General’s Reference (No 4 of 2002)* is sustainable. His reasoning that the Terrorism Act 2000, section 11(2) was not a constituent element of the section 11(1) offence did not prevent him, however, from viewing it as violating the presumption of innocence, because it was a disproportionate response to the threat of terrorism. But if the ambit of the offence is contained solely in subsection (1), subsection (2) adding no ingredient, then the presumption of innocence is not engaged and, if it is not engaged, issues pertaining to proportionality surely do not arise.\(^{46}\)

The above account has placed heavy reliance on Dickson CJ’s reasoning in *Whyte* as a means of determining whether a statutory provision makes inroads into article 6(2). It is only by seeking to ascertain the gravamen of the offence – by reading defensive issues in conjunction with constituent elements – that one can determine whether it derogates from the presumption of innocence. Lord Bingham’s failure in *Sheildrake* to see beyond conventional methods of interpretation, it is submitted, places him in conflict with a significant body of authority. However, this critique of Lord Bingham should by no means be viewed as decisive, for adoption of a more expansive interpretation may, admittedly, be misplaced. Although the Canadian Supreme Court has, on the whole,\(^{47}\) endorsed Dickson CJ’s view, readily accepting that a provision, whether characterised as an essential element or excuse, *prima facie* violates section 11(d) of the Charter, it has nevertheless gone on to rule in all cases, other than *Oakes* and *Laba*,\(^{48}\) that the offending provisions were justified and proportionate pursuant to section 1 of the Charter. However, acceptance of Dickson CJ’s reasoning as a means of interpreting article 6(2) does lead to one inescapable conclusion: a reverse onus clause will always engage the presumption of innocence. As such it merely acts as a precursor to the bigger, and more problematic, issue of determining when the use of reverse onus clauses should be viewed as legitimate.

**The Sentencing Factor Cases**

In recent times the presumption of innocence has come under threat in the United States of America through the practice of state legislatures recasting the elements of a crime not in the traditional method of an “affirmative defence” (as we saw in *Mullanev* and *Patterson*), but, instead, as a “sentencing factor”. Although, as I shall explain, these cases have mostly centred on the Sixth Amendment’s jury trial guarantee, rather than the due process clause of the Fourteenth Amendment, there are “deep conceptual similarities”\(^{49}\) in terms of their influence on the reasonable doubt rule.

Within the dictates laid down by a statute, a trial judge has always had a wide discretion when selecting an appropriate sentence. Sentences can be increased (or

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\(^{46}\) The Court of Appeal had not limited themselves to ordinary canons of construction, they also deemed it necessary to read ss(1) together with ss(2) in order to determine whether it made inroads into art 6(2), [2003] EWCA Crim 762, [2003] 3 WLR 1153, at [12]. Although (on grounds I would not agree with) concluding it did not (at para [38]), as a fall-back argument they stated: “If we are wrong as to the nature of the offence and accordingly the effect of art 6(2) [the provision is justified and proportionate]”, at para [41]. Indeed, there is a significant body of authority from the lower courts to the effect that the true nature of a statutory offence can only be ascertained by reading it in conjunction with defensive provisions: *S v London Borough of Havering* [2002] EWCA Crim 2558, [2003] 1 Cr App R 35 (CA), at [32], applying identical (and again what I would deem flawed) reasoning as above. *Sheildrake* [2003] EWHC 273, [2004] QB 487, (DC) at [25]; *Matthews* [2003] EWCA Crim 813, [2004] QB 690, (CA) at [15].

\(^{47}\) In *Schwartz* (1988) 55 DLR (4th) 1, Dickson CJ’s reasoning was not employed by a majority of the court.

\(^{48}\) (1994) 120 DLR (4th) 175. Although not involving reverse onus clauses, the Supreme Court in *Vaillancourt* (1987) 47 DLR (4th) 399 and *Martinenu* (1990) 2 SCR 633 declared the felony-murder rule incompatible with s11(d) of the Charter, and incapable of being saved by s1.

Statutory offences and the burden of proof

decreased) to reflect the particular case at hand. In the United States, however, following the passing by Congress of the Sentencing Reform Act 1984, state legislatures began to limit judicial discretion in selecting a penalty within the range available. For example, in McMillan v Pennsylvania,\textsuperscript{50} the Supreme Court had to decide whether Pennsylvania's Mandatory Minimum Sentencing Act (1982) complied with the due process clause of the Fourteenth Amendment. This Act provided that anyone convicted of certain enumerated felonies was subject to a mandatory minimum of five years' imprisonment if the sentencing judge, on a preponderance of the evidence, finds that the defendant "visibly possessed a firearm" during the commission of an offence. The Act explicitly characterised such possession as a sentencing factor which only came into play following conviction for one of the enumerated felonies rather than as an element of the offence. The defendants argued that under the due process clause, as interpreted in Winship and Mullaney, the visible possession finding was really an element of the offences for which they were being punished and, accordingly, the burden of proving that fact, beyond a reasonable doubt, was on the prosecution. Dismissing these arguments, the court noted that the Act did not allow a judge to pass a sentence beyond the prescribed statutory maximum, nor did it create a separate offence calling for a separate penalty. As Rehnquist J aptly put it: "the statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offence".\textsuperscript{51}

However, in a series of cases the Supreme Court was faced with a novel approach to the legislative regulation of sentencing. Amidst a growing concern about the proliferation of drug crime and its close association with firearms offences, it became the practice of many state legislatures not only to limit judicial discretion, but also to increase the range of sentences possible for the underlying crime.

In Apprendi v New Jersey,\textsuperscript{52} the defendant fired several shots into the home of an African-American family and made a statement (which he later retracted) that he did not want the family in his neighbourhood because of their race. He was charged with the offence of possession of an unlawful firearm; an offence which carried a maximum custodial sentence of ten years. A separate statute, described as a "hate crime" law, provided for an extended custodial sentence if the trial judge found, on a preponderance of the evidence, that the "defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, colour, gender, handicap, religion, sexual orientation or ethnicity". The maximum custodial for such an offence was 20 years. After the defendant pleaded guilty to the possession charges, a hearing was held to determine his motive for committing the offence at which the trial judge concluded the evidence supported a finding of racial bias and sentenced him to 12 years' imprisonment. On appeal it was argued, inter alia, that the principles enunciated in Winship had been violated. In a landmark ruling,\textsuperscript{53} the Supreme Court invalidated New Jersey's statute, holding: "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt".\textsuperscript{54} The central argument of the state that the biased purpose requirement should be characterised not as an "element" of a distinct hate crime but as a traditional "sentencing factor" of

\textsuperscript{50} 477 US 79, 106 S.Ct 2411 (1986).
\textsuperscript{51} Ibid, at 88 and 2417.
\textsuperscript{53} In her dissenting judgment O'Connor J remarked that the decision would be viewed "as a watershed change in constitutional law" ibid, at 524 and 2380.
\textsuperscript{54} Ibid, at 490 and 2362–63. Emphasis added.
motive, was rejected by the Supreme Court. They argued that it did not matter whether the required finding was characterised as one of intent or one of motive, for "labels do not afford an acceptable answer".\textsuperscript{55} Instead, the relevant inquiry in determining whether such a finding was an essential element of an offence was "one not of form, but of effect". Following a defendant's conviction for the second degree offence of unlawful possession, New Jersey's statutory code authorised a judge to pass a punishment which was equivalent to crimes of the first degree. Given, as highlighted above, \textit{Winship} was concerned as much with the category of substantive offence as with guilt or innocence in the abstract, New Jersey's practice could not stand.

\textit{Apprendi} involved a state statute. In \textit{Blakely v Washington},\textsuperscript{56} the Supreme Court again struck down a state statute. However, the court recognised there was no distinction of constitutional significance between Washington's determinate sentencing scheme and the federal sentencing guidelines.\textsuperscript{57} This has led to the tantalising question whether the guidelines had survived \textit{Apprendi} and \textit{Blakely}. In \textit{Booker v United States},\textsuperscript{58} the US Supreme Court answered in the negative.

In \textit{Booker}, the defendant was convicted of possessing 92.5 grams of crack cocaine. The guidelines authorised a sentence ranging from 210–262 months in prison. The judge then went on to hold a sentencing hearing and concluded, on a preponderance of the evidence, that the defendant had possessed an additional 566 grams of crack. Because these findings mandated a sentence between 360 months and life, the judge gave the defendant a 30-year sentence; nearly ten years more than the sentence he could have imposed based on the facts proved to the jury beyond a reasonable doubt. The court described \textit{Booker} as a "run-of-the-mill drug case" which did not present any facts inadequately dealt with by the Sentencing Commission. Consequently, the steep rise in sentence could only have been supported by additional fact-finding after the jury's verdict. This, the court concluded, was a clear violation of the Sixth Amendment's jury trial guarantee. In order, therefore, to preserve the Sixth Amendment "in a meaningful way", the court struck down the mandatory part of the guidelines. Such a decision, they concluded, was "not motivated by Sixth Amendment formalism but by the need to preserve Sixth Amendment substance".\textsuperscript{59}

The concepts of formalism and substance have been a recurring theme throughout the above analysis. Whatever the common law country of origin, the case law leads inexorably to one conclusion: the rejection of the formal approach or classical theory. It is worth reminding ourselves what the US Supreme Court said in \textit{Apprendi}: "labels do not afford an acceptable answer"; for if they did, the presumption of innocence would certainly be a hollow concept, its ambit lying solely at the hands of legislative discretion and "subject to defeat by a single stroke of the drafter's pen".\textsuperscript{60}

\textsuperscript{55} \textit{Ibid}, at 494 and 2365.
\textsuperscript{56} 542 US 296, 124 S.Ct 2531 (2004).
\textsuperscript{58} \textit{Ibid}, at 237 and 752.
\textsuperscript{59} J C Jeffries and P B Stephan, "Defenses, Presumptions, and Burden of Proof in the Criminal Law" (1979) 88 \textit{Yale Law Journal} 1325, 1333.
PROCEDURAL ACCOUNTS OF THE PRESUMPTION OF INNOCENCE

The analysis so far has led to the rejection of a purely formal approach towards distinguishing elements from defences. Central to such a conclusion is the recognition that parliamentary draftsmen, when defining the constituent elements of an offence, do not always factor in the significance of the burden of proof when distinguishing elements from defences. More often than not, such distinction rests on merely stylistic considerations. This conclusion, however, is equally necessitated even if the legislature makes a deliberate choice characterising a particular fact as a defence, as otherwise the presumption of innocence will have very little effect.  

The issues raised above form part of a larger problem, one indeed which has ramifications outside of the scope of the reasonable doubt rule: do exceptions exist independently of the rules they qualify? And, if so, on what basis? From my discussion of the formal approach we can now see why the answers to these questions are of vital importance, for the legitimacy of reverse onus clauses rests on the assumption that exceptions, at least in some circumstances, are more than purely linguistic constructs.

In the Model of Rules I, Dworkin famously pronounced: “[r]ules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision”.  

An accurate statement of the rule, he argues, would take into account all exceptions, and any which did not “would be incomplete”. Although, when dealing with a large number of exceptions, “it would be too clumsy to repeat” them each time the rule is cited, there is, however, no reason in theory why all exceptions could not be added on, “and the more that are, the more accurate is the statement of the rule.”

Dworkin’s model of a legal system was developed to counter the theory of positivism, and, in particular, Hart’s conception of it. Positivism “is a model of and for a system of legal rules”; but, Dworkin continues, not all legal rights and obligations are rules, some operate as “principles” which he defines as standards to be observed if they promote “justice, fairness or some other dimension of morality”. Principles are distinct from rules in two respects. Firstly, they do not “purport to set out conditions that make [their] application necessary”; unlike rules, therefore, a principle can be valid and still fail to be dispositive. Secondly, “principles have a dimension that rules do not – the dimension of weight or importance”. In Dworkin’s theory of a legal system, therefore, whether one speaks in terms of a rule or a principle, there is no room for an exception. Given such an account, one can immediately see a similarity with Williams, who, on grounds explained above, argued that “rationally regarded, an exception merely states the limits of an offence”.

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61 As the debates which led to the passing of the Clean Neighbourhoods and Environment Act 2005 and the London Olympic Games and Paralympic Games Act 2006 demonstrate.
64 Ibid, at 25.
65 Ibid, at 22. He provides two examples: firstly, a person should not be allowed to profit from his or her own fraud; and secondly, courts will not lend themselves to the enforcement of a bargain where one party has unjustly taken advantage of the economic necessities of another.
66 The reason being: “[w]e do not treat counter-instances as exceptions . . . because we could not hope to capture these counter-instances simply by a more extended statement of the principle. They are not, even in theory, subject to enumeration. [Although attempting such a list] might sharpen our sense of the principle’s weight . . . it would not make for a more accurate or complete statement of the principle” ibid, at 25–26.
However, to deny the existence of an exception would, in the context of reverse onus clauses, lead to a significant broadening of the reasonable doubt rule; indeed, one without limits. The prosecution's burden of proving every fact constituting the crime would have to be interpreted as a requirement to prove all elements and to disprove all affirmative defences. Although, as Williams admirably demonstrated, there can be no doubting that stylistic matters often do dictate which "facts" are characterised as elements and which as defences, this does not, however, justify such an extensive alteration to the reasonable doubt rule.

Dworkin's interest in the concept of "legal principles" can partly be explained by his rejection of a litmus test for distinguishing "the law of a community" from "other social standards". Responding to this theory, Raz argues that Dworkin provides no cogent reasons for abandoning an attempt to formulate the limits of law. At the heart of Raz's argument is the concept of the individuation of laws: "[e]very theory about the logical types of laws presupposes a doctrine of the individuation of laws, and . . . it can be attacked or defended only by attacking or defending its underlying doctrine of individuation". When discussing the status of legal principles, he continues, it is very important to be constantly aware of such a concept; in so doing "we will soon realise" that many of the principles Dworkin mentions are in fact "merely a brief allusion to a number of rules". Although rules and principles generally do not concern us here, the possibility of conflict between them certainly does. Raz argues that it is not possible to devise principles of individuation which would guarantee that every rule would include all its limitative and exceptive provisions and, therefore, contrary to Dworkin, concludes that legal rules can conflict. In order to illustrate his argument, he provides an example taken from the criminal law. The law includes a rule prohibiting assault but is qualified by various other laws, eg assault is permitted in self-defence, under duress and when the victim consents. Now, he argues, if we accept the view that such a rule was not valid unless it enumerated all such qualifications, we would have to include these and every other qualifying condition, in every law. The consequences of accepting this view of the individuation of laws would be fewer laws, but those which remain would be enormously complex and repetitive.

Instead we should adopt a doctrine of individuation which keeps laws to a manageable size, avoids repetition, minimises the need to refer to a great variety of statutes and cases as the sources of a single law, and does not deviate unnecessarily from the (admittedly hazy) common sense notion of a law. Such a doctrine of individuation will result in a greater number of laws which interact with one another, modifying and qualifying each other.

The principles of individuation which attempt to avoid conflicts amongst legal rules, as demonstrated, inevitably lead to an exception always being subsumed within the rule. Conversely, if one accepts Raz's argument, which attempts to carve "laws" into smaller units, an exception will always stand outside the rule it qualifies. Neither argument, however, reflects the courts' approach. The stature of an exception as an independent construct to the rule it qualifies, exists, within the context of reverse burdens, solely to facilitate the legislature's choice on the burden of proof. If we wish to establish the legitimacy of reverse burdens, we must look elsewhere for the answer to our problem.

69 J Raz, "Legal Principles and the Limits of Law" (1972) 81 Yale Law Journal 823, 824.
70 Ibid, at 827.
71 Ibid, at 828.
72 Ibid, at 832. Emphasis added.
Our task, therefore, is the development of an intermediary argument which enables us to determine the true character of a qualifying condition, either as one standing outside the rule it qualifies, or one which should be viewed as part of the rule. Then we will be in a position to map such a theory onto the specific problem of offences and defences. It is only defences that are true defences, in the sense that they exist independently of the offences they qualify, where the legislature could permissibly reverse the burden of proof; all other defence provisions – ones which should be viewed as part of the offence creating provision – would not permit alterations to the burden of proof. The search for such a principle, however, is preceded by two issues. Firstly, what interests does the reasonable doubt rule seek to protect? Secondly, does the rule seek to provide only procedural guarantees, or is it capable of encroaching into the substantive criminal law?

In State v Coetzee, the South African Constitutional Court articulated three fundamental values that the reasonable doubt rule seeks to protect. Firstly, prevention of unjustified loss of liberty; secondly, avoidance of unwarranted stigmatisation; and thirdly, maintenance of public confidence in the criminal law.\(^{73}\) To what extent do these values enable us to delineate the ambit of the reasonable doubt rule? Underwood, a prominent theorist, sees them as crucial. She argues that a primary function of the rule is to “put a thumb on the defendant’s side of the scales of justice” by directing a fact-finder to acquit even when the evidence somewhat favours guilt rather than innocence. Such a mechanism is needed, she argues, to compensate for a systematic flaw which may lead a trier of fact to favour the prosecution evidence, rather than to weigh it objectively.\(^{74}\) There are alternative ways of viewing the presumption of innocence. In Winship the Supreme Court linked due process to “procedural fairness”.\(^{75}\) As Dennis points out, this equates the presumption to “process”, whilst Underwood focuses more on “outcome”.\(^{76}\) The effect these different approaches have on the scope of the reasonable doubt rule, then, is negligible. Once the validity of reverse onus clauses is tied to a set of values, this in effect constitutionalises them: engagement of the presumption of innocence resting solely on ascertaining when those values are at stake. Underwood provides a good example. Noting the significance that Winship and Mullaney place on these values, she argues that the prosecution should bear the burden of proof on any issue impacting on “culpability”. Therefore, if a legislature defines a particular offence as being constituted of elements A, B and X (where X is characterised as a defence), the prosecution must prove the non-existence of X, because the legislature has articulated it as a basis for the imposition of the criminal sanction.\(^{77}\)

Viewing the presumption of innocence as a procedural device, its engagement relying upon a set of external values, is, however, problematic. Concepts such as culpability, blameworthiness and stigmatisation are not easily quantifiable. It therefore becomes difficult to measure the exact weight that should be given to a “fact” prescribed within the definition of a statutory offence in order to determine whether, regardless of legislative pronouncement, it should be viewed as an essential element. Logically,
therefore, all facts characterised as defences must invoke these values, for why else would the legislature provide for them as a means of evading the imposition of the criminal sanction? Underwood's argument, like Dworkin's, tends to lead to the invalidation of all reverse onus clauses.

In search of a principle which dictates when it is, and when it is not, legitimate for a legislature to reverse the burden of proof, a proceduralist is faced with a serious obstacle: the legislature's supremacy in defining the ambit of a criminal offence. In his seminal account on the criminal law, Hart states: "[w]hat sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?" 78 There is much force in this argument. Consider a statutory scheme which makes it a criminal offence to be in charge of a motor vehicle whilst the proportion of alcohol in one's breath, blood or urine is over the prescribed limit. Compare this hypothetical statute with that under consideration in Sheldrake. There the offence was defined in exactly the same way, but the defendant was given an opportunity to exonerate himself by proving that he had no intention of setting the vehicle in motion. If the essence of the reasonable doubt rule is, as many have argued, the protection of unjustified loss of liberty and associated stigmatisation, then if it can be shown that the first hypothetical statute is valid, it must follow that the second is too as it is an amelioration of the first. If the reasonable doubt rule is viewed as a procedural device divorced from the substantive criminal law, then it would be very difficult to argue that the statute in the first example was not valid. Parliament, being sovereign, can define an offence in any way it seems fit; consequently, if it is under no obligation to provide for a given defence, then surely it has the power to provide for one but place the burden on a defendant to prove it? The logic of this argument, commonly referred to as the greater-includes-the-lesser, is very compelling. It formed a salient part of the prosecution's submission in Sheldrake, and was subsequently adopted by both Lord Bingham and Lord Rodger in their speeches. 79 It was also a central tenet of the majority's judgment in Patterson. 80

The inescapable logic of the greater-includes-the-lesser is vividly illustrated by considering its effect on the Maine statutory provision examined in Mullaney. Although the method by which the Patterson majority attempted to distinguish the Maine and New York statutes was not very convincing, it could not have escaped them that Mullaney provided no rational basis for determining the validity of reverse onus clauses; its wide-ranging approach seemingly squeezing them out of existence. This, however, sits uneasily with Powell J's pronouncement in Patterson that "Winship and Mullaney are no more than what they purport to be: decisions addressing the procedural requirements that States must meet to comply with due process. They are not outposts for policing the substantive boundaries of the criminal law". 81 As he himself acknowledged, such an approach could not prevent a legislature from circumventing the presumption of innocence by simply abolishing the distinction between murder and manslaughter and treating all unjustifiable homicide as murder.

Equally, the decision in Apprendi, that it was unconstitutional for a legislature to remove from the jury the assessment of facts that increased the prescribed range of

79 [2004] UKHL 43, [2005] 1 AC 264, at [40], per Lord Bingham; and [71], per Lord Rodger. See also Attorney General of Hong Kong v Lee Kwong-Kwai [1993] AC 951, (PC) at 975, per Lord Woolf; Attorney General's Reference (No 1 of 2004) [2004] EWCA Crim 1025, [2004] 1 WLR 2111, (CA) at [82], per Lord Woolf CJ.
80 "The Due Process Clause ... does not put New York to the choice of abandoning those defences or undertaking to disprove their existence in order to convict of a crime which otherwise is within its constitutional powers to sanction by substantial punishment", 432 US 197, 208, 97 SCt 2319, 2326 (1977).
81 Ibid, 228 and 2336.
penalties to which a defendant was exposed, such facts having to be established by proof beyond a reasonable doubt, is open to the same charge. Articulation of such a "bright-line" rule limiting the power of Congress and state legislatures to define criminal offences, could, in the words of O'Connor J, be viewed as "[resting] on a meaningless formalism that accords, at best, marginal protection for the constitutional rights that it seeks to effectuate". New Jersey, she argued, could cure its statutory scheme simply by redrafting its weapons possession statute in the following manner: on conviction, prescribe a custodial sentence ranging from five to 20 years, with a ceiling of ten years' imprisonment unless the judge finds, on a preponderance of the evidence, that the defendant's actions were motivated by a purpose to intimidate. Although the majority sought to counter this by arguing that "structural democratic constraints" exist to prevent state legislatures from effectively providing disproportionate sentences, their conclusion that such action "seems remote" has not been borne out, with evidence suggesting that state and federal statutes will, in fact, undertake post-Apprendi evasion.\textsuperscript{83}

Although Booker has been described as "Mullaney's revenge",\textsuperscript{84} it is submitted that the decision will probably have very little impact in relation to determinate sentencing schemes. As with Apprendi before it, legislatures will still have the ultimate say over the definitional elements of an offence. Consequently, as I have sought to demonstrate, without substantive controls, evasion of constitutional guarantees merely becomes an exercise in creative statutory drafting; and, in this respect Justice O'Connor was surely correct. In effect, the courts' insistence on "substance" rather than "formalism" is meaningless if the ambit of their review is limited to procedure.

One of the exponents of the procedural argument, Dennis, argues it is less controversial for the courts to limit their review to criminal procedure.\textsuperscript{85} There is no doubt an element of truth in this; however, the point I wish to make here is that any theory which views the presumption of innocence as a procedural device, divorced from the substantive criminal law, will always be defeated by the greater-includes-the-lesser approach. The fundamental values, identified above, which the presumption of innocence is seeking to protect, are fully accommodated by a statute which defines an offence as being composed of elements A and B, but goes on to provide a defence of X. The prosecution having proved A and B legitimises the imposition of the criminal sanction, with the associated stigma and loss of liberty which accompanies it. X is a superfluous requirement.

The Criminal Law Revision Committee argued something akin to the constitutionalisation of burdens of proof in their report in 1972; there they stated: "[w]e are strongly of the opinion that, both on principle and for the sake of clarity and convenience in practice, burdens on the defence should be evidential only".\textsuperscript{86} Several commentators have used this as a reason for justifying the abolition of reverse burdens.\textsuperscript{87} Such an approach, as intimated above, may have the opposite effect,
however, inadvertently undermining the presumption of innocence. An illustration will help to explain why. Let us say that parliament is debating passing a new law making it an offence to be in possession of a bladed article in a public place. Mindful of the number of people who might be carrying a bladed instrument for legitimate purposes, it wishes to exclude these people from the ambit of the offence. It is willing to do so, however, only if the persuasive burden regarding this fact is placed on the accused, for otherwise it perceives great difficulty in securing a conviction. If, as the CLRC advocates, all burdens on the accused are to be read as merely evidential, then parliament is forced into making a harsh choice: burdening the prosecution with disproving the defence beyond a reasonable doubt, or abolishing the defence altogether. Faced with such a choice, parliament will inevitably choose the latter, with the consequent effect of criminalising those who are carrying an article for a legitimate purpose.  

Acceptance of the validity of reverse onus clauses logically dictates that we must reject all procedural approaches to the presumption of innocence. This, undoubtedly, is an audacious statement, one which neither the House of Lords nor the US Supreme Court has ever accepted. The proliferation of reverse onus clauses, and the corresponding number of cases examining such provisions, undoubtedly mirrors what happened during the 1970s in the United States, following the decision in *Winship* — more recently, reborn under the guise of the “sentencing factor” — and, to a lesser extent, during the 1980s in Canada. But to avoid the inexorable logic of the greater-includes-the-lesser and to bring clarity to what otherwise might seem unprincipled decision-making, it may now be time for such a re-examination to take place.

**SUBSTANTIVE APPROACH TO OFFENCE DEFINITION**

The arguments so far presented provide compelling support for the adoption of a substantive approach to offence definitions. In order to preserve the presumption of innocence as a meaningful device, courts must have the ability to review legislation in order to ensure the adequacy of its content. However, the adoption of such an account must not have the consequence of providing the judiciary with a green light to ride roughshod over the legislative supremacy of parliament. Any theory which did not have at its heart the maintenance of legislative flexibility in defining the content of criminal laws would be rejected out-of-hand. The question therefore becomes whether any substantive account is capable of marryng such discordant principles?

As highlighted above, the development of a theory of substantive offence definitions is inextricably linked to the wider issue of rules and exceptions. Recognition that exceptions are not merely the product of “linguistic fortuity”, 89 but are, in the words of Raz, capable of “interacting with one another, modifying and qualifying each other”, means we are now in a position to reject the notion, advocated by, amongst others, Williams, that to allow an exception is tantamount to changing the rule. Instead, using such an approach, a rule could be valid and still fail to be dispositive of the outcome, because another rule (or indeed principle) with which it was in conflict was deemed to have greater weight.

How then is one to ascertain the true status of a qualifying condition? It is logical to assume that a qualifying condition is only a true exception if the rule it qualifies

would dispose of the case absent that qualification. A qualification which lacks this attribute must be viewed as part of the rule, for surely there is no such thing as an exception which fails to dispose of the outcome of a case. In the context of our criminal law problem, take, for example, the rule making it an offence to be in possession of a controlled drug with intent to supply. Another rule, cast as a defensive issue, states that a person is not to be convicted of such an offence if he or she has no knowledge of the contents in his or her possession. We have here a conflict of rules. Sciencer of the contents would be a true exception, however, only if the statement of the offence was complete without the addition of this qualifying condition; for if knowledge of the contents was required in order to dispose of the case (in other words to secure a conviction), then the offence would be incomplete, and would have to be redrafted to include this provision as part of the definitional elements of the offence.

A theory of exceptions which ascribes to them a relative weight necessitates a determination of the background goal, purpose or justification behind a rule, for without an answer to that question it is not possible to ascertain whether a rule’s weight is greater than that of any other rule with which it conflicts and, correspondingly, whether it meets that aim sufficiently, absent any exceptions. At the heart of any substantive approach to an offence, therefore, will be the ascertainment of its underlying purpose. A criminal statute, it is submitted, will fail to meet its burden of justification if either of the following applies: it is not pursuing a legitimate aim because it has failed to identify a discrete harm; or, having identified a legitimate aim, the method adopted to combat the evil is deemed greater than necessary.

Ascertaining the purpose of an offence entails a multi-faceted inquiry. English courts, interpreting the Convention, have developed a two-stage test under the headings “justification” and “proportionality”.90 In R v Director of Public Prosecutions, ex parte Kebilene, Lord Hope, responding to counsel’s arguments, posed three questions for resolving the validity of reverse burdens:

(1) What does the prosecution have to prove in order to transfer the onus to the defence? (2) What is the burden on the accused – does it relate to something which is likely to be difficult for him to prove, or does it relate to something which is likely to be within his knowledge or ... to which he readily has access? (3) What is the nature of the threat faced by society which the provision is designed to combat?91

Question three is clearly aimed at the identification of a specific harm or evil. Although in most situations the goal will be easily identifiable, this will not necessarily always be the case. For example, in Sheldrake, marked differences of opinion were expressed by the judges regarding the goal of the Road Traffic Act 1988, section 5(1)(b). In the Divisional Court, Clarke LJ, agreeing with Taylor LJ’s interpretation in Director of Public Prosecutions v Watkins,92 stated: “[t]he offence is aimed at those who may try to drive the vehicle while still unfit through drink or, differently expressed, put themselves in a situation where there is a risk that they may drive a vehicle while still unfit”.93 Consequently, he concluded, the offence only intended to convict “those who have already formed or may yet form the intention to drive the vehicle, and may try

90 This follows from the leading decision of the European Court of Human Rights: Salabiaku v France (1988) 13 EHRR 379, at [28].
91 [2000] 2 AC 326, 386.
to drive it whilst still unfit".94 The Court of Appeal, in Attorney General’s Reference (No 1 of 2004), cast doubt on such an interpretation. Lord Woolf advocated a much wider background purpose:

Parliament could have intended that because of the risks to the public from a person driving under the influence, a person in charge was to be guilty of an offence on these facts alone, and this was the substance of the offence. However, there was to be an exception, if and only if it was one of the rare cases where a driver could prove there was no likelihood of his driving whilst still over the limit.95

When Sheldrake reached the House of Lords, Lord Bingham preferred Lord Woolf’s interpretation. Key to Lord Bingham’s reasoning, as highlighted above, was the historical context. The early drink-driving legislation having provided no defence, there could be no grounds for complaint if the legislation had remained unaltered. Lord Bingham’s analysis, exhibiting as it does the greater-includes-the-lesser, only goes to reinforce the rejection of a purely procedural approach to the presumption of innocence, one thought worth re-emphasising. The need for an offence to embody a specific harm or evil is paramount in order to legitimise the imposition of the criminal sanction; but to leave the scope of that harm and, with it, the boundary that separates the “guilty” from the “innocent”, to unconstrained legislative discretion would leave very little of the presumption of innocence, “save, perhaps, for its relic status as a doughty defender of rights in the most trivial of cases”.96

Equally troubling is Lord Bingham’s reliance on history. Why should the legislative history of an offence be of any importance in ascertaining its purpose? The subsequent introduction of an ameliorative provision could be for a whole host of reasons, but one that certainly springs to mind is recognition by the legislature that the offence, as originally cast, was not fulfilling its background purpose. Ironically, acceptance of Lord Bingham’s historical analysis would have lead to the upholding of the reverse onus clause under consideration in Lambert, given that the predecessor to the Misuse of Drugs Act 1971, section 5, had made no provision equivalent to section 28.97

Referring back to Lord Hope’s three questions formulated in Kebilene, question one in effect asks has the prosecution proved enough to legitimise the imposition of the criminal sanction and is, in effect, identical to question three. Question two is a different matter. Commonly referred to as the “peculiar knowledge rule”, it attempts to assess the relative ease or difficulty associated with requiring a defendant to prove exculpatory facts; those facts deemed to be within a defendant’s sphere of knowledge justifying a reverse onus clause. This rule is, therefore, related to the rationality requirement, balancing as it does the prosecution’s burden with that of the defence’s. The question for us, however, is what weight should be given to it within a theory of substantive offence definitions? The answer is partly supplied by examining the influence it has had in deciding cases, an influence that can only be described as breathtaking.98 Indeed, it is not merely the regularity of its use which is worrying, but

94 Ibid, at para [57].
97 Ashton-Rickards [1978] 1 WLR 37, (CA) at 43.
also the prominence the judges seem to be giving to it, almost to the point that if an issue is deemed to be within the exclusive domain of the defendant, reversal of the burden of proof follows inexorably. No more is this evident than in Sheldrake.

During the course of his speech, Lord Bingham formulated the following test for assessing the validity of a reverse onus clause by reference to a range of factors:

Relevant to any judgment on reasonableness or proportionality will be the opportunity given to the defendant to rebut the presumption, maintenance of the rights of the defence, flexibility in application of the presumption, retention by the court of a power to assess the evidence, the importance of what is at stake and the difficulty which a prosecutor may face in the absence of a presumption.\(^99\)

Decisive to the disposal of the case, however, was the final factor. Likelihood of an intention to set the vehicle in motion was a "matter so closely conditioned"\(^100\) by the defendant's own knowledge and state of mind as to make it much more appropriate for him to prove, than for the prosecution to disprove. In the earlier decision of Johnstone,\(^101\) Lord Nicholls took a much more balanced approach to the issue. Identifying six key factors pertaining to the particular legislation under consideration, he upheld the reverse onus clause; but, critically, did not view the ease of proof as dispositive. However, it must be said that Lord Nicholls' more balanced approach is very much a minority view.

As far back as 1943, the US Supreme Court cast doubt on the peculiar knowledge rule. In \textit{Tot v United States} Roberts J stated:

\[\text{[the fact that the defendant has the better means of information, standing alone, [cannot] justify the creation of a presumption. In every criminal case the defendant has at least an equal familiarity with the facts and in most a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. But the argument proves too much. If it were sound, the legislature might validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.}\] \(^102\)

The force of this argument is very compelling. There would be nothing left of the reasonable doubt rule if a defendant was required to prove facts in respect of which he or she had best access to the evidence; a defendant will always be in a better position than the prosecution to prove issues relating to his or her behaviour and state of mind. Even more concerning, though, is the assumption upon which the rule is based namely that a defendant's exculpatory testimony will necessarily be believed. But is this a fair assumption to make? Clearly, in Sheldrake's case, the magistrates were unconvinced by his evidence that he had arranged alternative transport and the House of Lords did not cast doubt on this conclusion. Indeed, it has to be questioned whether it is any easier for a defendant to introduce, on the one hand, credible exculpatory evidence to prove he or she had no intention of setting a vehicle in motion\(^103\) and, on the other, proving he or she had not taken part in the activities of a proscribed terrorist organisation at any time while it was proscribed. But this difference was viewed as critical in disposing of the conjoined appeals. In this context, it is interesting to note

\(^{99}\) \textit{Ibid}, at para [21].

\(^{100}\) \textit{Ibid}, at para [41]. See also Lord Carswell, at para [84].


\(^{102}\) 319 US 463, 469, 63 SCt 1241, 1245-46 (1943).

\(^{103}\) Particularly when one considers that Sheldrake's blood-alcohol content indicated he would not be under the prescribed limit for 36 hours, and it was a cold winter's night. Given these circumstances, it is submitted, a fact-finder would be very slow to acquit regardless of a defendant's testimony.
the view of the Court of Appeal in *Duncan*: a fact-finder should place more weight on incriminating parts of a statement (otherwise why say them?) compared to excuses. It is submitted that the credibility problem explains why very little weight should be given to the peculiar knowledge rule. That is not to say it can never have any relevance, but, at the very least, it must be one amongst many reasons. If, therefore, it is the sole, or effectively the sole, reason being advanced, then the statutory definition of the offence will not have met its burden of justification and the reverse onus clause will be invalid.

Other than the peculiar knowledge rule, many other factors have been identified by both courts and commentators in the assessment of the validity of a reverse onus clause. However, as with the peculiar knowledge rule, it must be doubted if any of these factors can be useful in ascertaining whether an offending statutory provision has met its burden of justification. The central problem lies not so much with their efficacy, but in the way that they are deployed: the judges effectively trading them off against each other. Such trade-offs, it is submitted, are highly counter-productive for it becomes difficult to elicit any general principles for use in future cases. These problems are starkly illustrated by an analysis of the courts’ approach to strict liability offences.

In *Davies*, a sub-contractor employed by the defendant was crushed to death by a reversing vehicle. The employer was charged with failing to discharge his duty of ensuring, so far as was reasonably practicable, that employees were not exposed to risks to their health and safety, contrary to the Health and Safety at Work Act 1974, sections 3(1) and 33(1). Section 40 of the Act placed the burden of proof with regard to the “reasonably practicable” provision on the defendant. The Court of Appeal, after citing extensively from the leading Canadian case of *Wholesale Travel Group*, upheld the reverse onus clause on two principal grounds. Firstly, the legislation was regulatory rather than prescriptive in nature; and secondly, there was no risk of imprisonment following a conviction, a fine being the only option. The distinction between “truly criminal” and “quasi-criminal” (or regulatory) offences has been admirably discussed in the literature and will not be further discussed here. Suffice it to say that the cases provide no coherent guidelines for assessing the validity of reverse onus clauses.

Equally troublesome is the related issue of the type of punishment. The court’s heavy reliance on the absence of a custodial punishment in *Davies* had no impact in *Johnstone* where the maximum custodial sentence was ten years. In *S v London Borough of Havering* (a case, like *Johnstone*, concerning offences under the Trade Marks Act 1994, section 92), the court offset the severe custodial sentence by arguing that most convictions for the offence resulted only in a fine. This argument is unconvincing. In order for a statute to meet its burden of justification it must pursue a legitimate goal and do so in the least liberty-infringing way. Consequently, issues arising after conviction are not pertinent to the discussion. Indeed, to accept such an argument would just add another tier to an already over-burdensome list of guidelines.

The over-abundant number of guidelines for determining the proportionality of a reverse onus provision suggests that such provisions are not fit for their purpose. On the other hand, acceptance of a substantive theory of offence definition calls for a litmus test for determining the adequacy of a criminal statute. I have already provided the outline of such a theory: a criminal statute stands in need of justification, a burden it will only pass if it overcomes the background presumption against the use of the criminal sanction. It is now incumbent on me to test the practicality of such a theory. A series of illustrations drawn from the statutory provisions discussed above will help to explain how we can convert this theory into a tangible scheme of offence definitions. We shall start with Sheldrake.

Does exempting an intention to set a vehicle in motion from the prohibition of being in charge whilst under the influence of alcohol identify a sufficient harm, one which overcomes the presumption against the use of the criminal sanction? Clearly the provision is pursuing a legitimate aim, but does it do so in the least liberty-infringing way? We can only answer this question by ascertaining the background goal or purpose of the Road Traffic Act 1988, section 5(1)(b). This, however, as the discussion above demonstrated, is not an easy task. If we characterise the goal, as Lord Bingham and Lord Woolf did, on the basis of reducing the risk of harm to others from people who get behind a steering wheel drunk, then the provision would be complete absent the qualifying condition, because the relevant harm would be fulfilled regardless of any intention to set the vehicle in motion. There is a problem, however, with characterising the background purpose in such a wide manner. It would not be very difficult to find some harm or evil behind every statutory provision, and thus we would be driven to the same conclusion as provided for by the classical theory. This is particularly apt in the context of strict liability offences, as we shall see below.

If we therefore agree with the Divisional Court’s narrower interpretation of the purposes of the provision, does this alter our conclusion? That will depend on whether parliament could have adopted a less liberty-infringing alternative, whilst still fulfilling the purpose of the prohibition. It is at this point that one can see the benefit of adopting a substantive theory of offence definitions: the presumption of innocence would need no external value for it to be engaged; hence, unlike all procedural approaches, it would not be trumped by the greater-includes-the-lesser approach. Parliament could neither impose the burden of proof on a defendant, nor remove it from the ambit of the Act altogether, and with it return the offence definition to the position before 1956, unless the offence was deemed complete, absent an intention to set the vehicle in motion. The only options left open, given an under-specified statute would, therefore, either be to add the qualifying provision to the definitional elements of the offence, or – which amounts to effectively the same thing – read down the legislation as imposing an evidential burden on the accused to bring forward credible evidence to explain why he was behind the steering wheel of a car and over the prescribed limit.

Although it is not completely beyond argument, it is submitted that section 5(1)(b) does meet its burden of justification. A person who is in charge of a motor vehicle whilst over the prescribed limit is causing no harm to him- or herself or to anybody else. But one only has to look at the facts of Mr Sheldrake’s case – he would not have been fit to drive for up to 36 hours – to realise that it is a person’s intention which is the key. The chances that a person will drive, or attempt to drive whilst still over the prescribed limit increase with the passage of time, for it is only natural for a person to wish to get home, a feat particularly pertinent on a cold winter’s night. The risk to the public is a real and substantial one. Does the regulatory nature of the legislation
have any bearing on the outcome? I think it does, but not in the way one traditionally approaches this issue, namely to consider the amount of moral obloquy a conviction attracts, together with the length of any custodial sentence. The granting of a driving licence, coupled with the associated benefits it bestows, places people on notice that they are entering a regulated sphere of activity. Those who get behind the steering wheel of a car know that they are under a continuing duty of care to the public at large. Voluntary acceptance of these regulatory controls is at the heart of the drink-driving legislation. It is not unfair, therefore, to place the burden of proof on a person who, through his or her own actions, has created a risk, to demonstrate that the circumstances which brought about that risk are, in his or her case, not present.

Let us turn to examine the provision under consideration in Lambert. The Misuse of Drugs Act 1971, section 5(3) provided for an offence of possession of a controlled substance with intent to supply. In drafting this provision so as to exclude knowledge of the contents from the definitional elements of the offence (and instead casting it as a defensive issue), parliament’s clear intention was to lighten the prosecution’s burden. As Lord Steyn explained, this was in recognition that “sophisticated drug smugglers, dealers and couriers typically secrete drugs in some container, thereby enabling the person in possession of the container to say that he was unaware of the contents”\(^\text{109}\).

As already identified, this provision will only meet its burden of justification if it is complete absent the \textit{scintex}\(^\text{109}\) element. One’s intuition, particularly when told that a conviction can attract life imprisonment, might well be to suppose that parliament had over-stepped the mark by allowing conviction absent \textit{scintex} of the contents. In the light of what has preceded, however, it is submitted that this should not necessarily clinch the argument. If we define the harm that the prohibition is attempting to address as the “discouragement of trading in drugs, a grave social evil” we would, as the Court of Appeal did, uphold the validity of the reverse onus clause, for the norm that justifies the offence would be fulfilled regardless of the presence of the \textit{scintex} element. On the other hand, if we construe the purpose as limited to “intent to supply”, a different result transpires: the statute would indeed give the impression of having been tailored to permit the \textit{scintex} finding to be a tail which wags the dog of the substantive offence.

Matters become a little bit more difficult in the strict liability arena. One of the largest areas of controversy surrounds the licensing cases. A typical example is \textit{R (on the Application of Grundy) v Halton Division Magistrates’ Court}.\(^\text{110}\) The combined effect of the Forestry Act 1967, sections 9 and 17 made it an offence, subject to a number of exceptions, to fell trees without a licence. The defendants argued that in order to make the statute Convention-compliant, the ingredients of the offence should be read so as to include knowledge that a licence was required. Dismissing this interpretation, the court invoked, as it does in all such cases, the peculiar knowledge rule, concluding that the prosecution’s burden was limited to proving the felling of trees. However, the arguments against the peculiar knowledge rule are as powerful here as they are outside the licensing arena, a conclusion reinforced in the majority of cases as the sole reason justifying a reverse burden.

Dennis, providing an alternative to the problematic peculiar knowledge rule, argues that reversal in the burden of proof in licensing scenarios can be justified on practical grounds. If a defendant has a licence to do what otherwise would be a prohibited act, then he or she cannot be seen to complain if he or she is required to produce it to prove his or her innocence.\(^\text{111}\) However, matters are more complicated than one might


\(^{111}\) \textit{Op cit}, at 919.
have originally envisaged. Let us hypothesise that the defendants in Grundy did have a licence but mistakenly believed that it had expired. The result will depend on how one characterises the licensing provision. If it is viewed as an essential element of the offence, an acquittal will result, for the defendants do indeed possess a valid licence; whereas, if it is viewed as a defence, there will be a conviction, since although they possess a licence, they believe it to be invalid. On the other hand, felling trees is not a harm of sufficient magnitude to overcome the background presumption against the use of the criminal sanction; therefore, it is necessary to include the absence of a licence as an element of the offence. The same principle can be used as a means of questioning a whole host of licensing provisions. The purpose behind the offence of driving without a licence is to protect other road users and pedestrians from inexperienced drivers; absence of a licence encapsulates the essence of the offence and no conviction can be justified without it.

At this point one might interpose the question: “why should the voluntary nature of the activity not play as critical a role in the licensing cases as it does in the context of other regulatory legislation, such as drink-driving?” Although, in the licensing cases, defendants have a clear commercial interest in obtaining a licence, the answer is supplied by remembering a statute will not meet its burden of justification unless it has identified a legitimate harm. Although, in the context of Grundy, the protection of our arboreal heritage is extremely important, as the discussion above demonstrates, the efficacy of a measure bears a close relationship to how discretely the harm is defined: on its own, felling trees does not identify a discrete harm.

In the regulatory context, let us consider the example provided by Pharmaceutical Society of Great Britain v Storkswain. In this case the defendants were convicted of retailing certain medications without a doctor’s prescription, contrary to the Medicines Act 1968, sections 58(2) and 67(2). The House of Lords upheld their convictions despite their lack of knowledge that the “prescriptions” were invalid. Fault, their Lordships reasoned, was not a requisite element of the offence. Regardless whether fault is deemed absent from the offence, or is, in the context of reverse burdens, cast as a defensive issue, the resulting legislation meets its burden of justification. We can readily identify the harm of this measure as “preventing the distribution and use of restricted medicinal drugs”. So defined, the offence is complete absent fault because parliament has the power to punish the selling of restricted medicinal drugs per se. “Culpability” is supplied solely by the defendant’s choice to engage in the voluntary act covered by the statute for commercial gain; he or she can have no grounds of complaint, therefore, if he or she fails to exercise absolute care to ensure only those legally prescribed the drug are sold it.

Adoption of a substantive theory of offence definitions, one that provides courts with the power to scrutinise legislation in order to ensure the adequacy of its content, ironically respects legislative supremacy over the definitional elements of an offence. Other than the licensing cases, the discussion above mirrors the courts’ conclusions regarding strict liability and reverse onus clauses. Courts are, in effect, going where they have gone before.

114 Acceptance of the view provided for here, however, does necessitate no distinction being made between strict liability offences and reverse burdens of proof. In Sweet v Parsley Lord Reid had viewed the provision of a defence as preferable to strict liability.
In Sweet v Parsley\textsuperscript{115} the defendant was convicted of being involved in the management of premises used for the purposes of smoking cannabis resin, contrary to the Dangerous Drugs Act 1965, section 5. The House of Lords quashed her conviction, for she had no knowledge such activity was taking place. The court's conclusion is equally necessitated under the theory of offence definitions. As in Storkwain, the defendant had voluntarily engaged in an act for commercial gain. However, here, what the prosecution had proved was wholly inadequate to legitimise the imposition of the criminal sanction. Absent knowledge from the definitional elements, the offence was quite simply incomplete; it had failed to recognise a discreet harm.\textsuperscript{116}

By way of a final example, consider the reverse onus clause discussed in Attorney General's Reference (No.4 of 2002).\textsuperscript{117} Employing the theory of substantive offence definitions would lead one to conclude that the Terrorism Act 2000, section 11(1) has failed to meet its burden of justification. The measure, read on its own, is incomplete, the prosecution having not proved enough to justify the imposition of the criminal sanction. This conclusion follows from the "extraordinary breadth" of the provision,\textsuperscript{118} the background purpose which it seeks to promote bearing no rational relationship to the furtherance of that end.

CONCLUSION

This article has called for a re-examination of the way in which we view the presumption of innocence. Using the inescapable logic of the greater-includes-the-lesser, it has argued against the traditional methods, which, by and large, the courts have adopted, namely a) determining whether a provision makes inroads to or derogates from article 6(2) and b) ascertaining, using a multiplicity of factors, whether such inroads are justified and proportionate. If we were, instead, to follow Dickson CJC's reasoning in Whyte, the first question would become superfluous: a reverse onus clause would then always engage the presumption of innocence. As to the second question, the myriad of factors itself creates a level of confusion. Our inquiry, it has been argued, should, instead, concentrate on determining the background goal or purpose of a statutory provision. Only a provision which overcomes the background presumption against the use of the criminal sanction would be deemed a "complete" offence. Any other interpretation leads to arbitrary justice. In this respect, the latest pronouncement of the House of Lords in Sheldrake is extremely worrying. Regardless of the wider debate around procedure versus substance, the decision is open to the charge that it fails to elicit any general principles for determining the validity of reverse onus clauses. Blameworthiness and ease of proof, which were deemed essential criteria in justifying the different conclusions in the conjoined appeals, are unsatisfactory, as, indeed, was the historical analysis. Subsequent decisions indicate that there is still some way to go before rationality is brought to this troublesome area of criminal procedure. In Navabi\textsuperscript{119} the Court of Appeal upheld the reverse onus clause in the Asylum and

\textsuperscript{115} [1970] AC 132.
\textsuperscript{116} Similar conclusions are necessitated by B (A Minor) v Director of Public Prosecutions [2000] 2 AC 428, and K [2001] UKHL 41, [2002] 1 AC 462. The upshot of the (strict liability) provisions in these cases was the potential to convict wholly innocent conduct: the measures were in effect drafted too widely to enable them to meet their burden of justification.
\textsuperscript{118} Ibid, at para [47].
Immigration Act 2004, section 2.\footnote{120} As in \textit{Sheldrake}, the principal basis for the decision was the peculiar knowledge rule\footnote{121} notwithstanding the court’s recognition “that a defendant may be traumatised and unable to produce documents or witnesses to support his factual claims”. For an appellate court simply to brush off these problems by entrusting juries “to make allowances for [such] difficulties” is quite extraordinary.

Parliament’s appetite for reverse burdens seems set to continue, several acts of parliament having created new offences with reverse onus clauses. For example, the London Olympic Games and Paralympic Games Act 2006, section 19, provides the Secretary of State with powers to make regulations about advertising in the vicinity of London Olympic events. Pursuant to section 21(1), a person commits an offence if he or she breaches these regulations, unless he or she proves contravention occurred: (a) without his or her knowledge, or (b) despite his or her taking all reasonable steps to prevent it from occurring or (where he or she became aware of it after its commencement) from continuing.\footnote{122} No doubt these and many other reverse onus clauses will be tested by the courts in due course. All that can be hoped is that, if given another chance, the House of Lords makes a better job of it than it did in \textit{Sheldrake}.

\footnote{120} This provided for the offence of failing to possess an immigration document during an asylum interview which satisfactorily established identity and nationality, unless the defendant could provide a reasonable excuse for such failure.

\footnote{121} “All of the relevant information is in the possession of the defendant”\textit{, op cit.}, at para [29]. See also \textit{Makuria} [2006] EWCA Crim 175, [2006] 1 WLR 2755, where the Court of Appeal (except for proof of refugee status) upheld the reverse onus clause provided for by the Immigration and Asylum Act 1999, s 31(1). The sole reason provided was the peculiar knowledge rule, at para [36].

\footnote{122} See also Clean Neighbourhoods and Environment Act 2005, which introduces a number of reverse onus clauses: s3, (exposing vehicles for sale on a road); s4 (repairing vehicles on a road); s33 (modifying the Town and Country Planning Act 1990, s 224: the explanatory notes accompanying the Act justify such modification on the grounds of easing the prosecution’s burden); s99 (amending the Environmental Protection Act 1990, schedule 4).
TROUBLE WITH THE OVEN – NEW GERMAN SALES LAW BEFORE THE ECJ

DECISION TO REQUEST A PRELIMINARY RULING, BGH, VIII ZR 200/05 (16 AUGUST 2006)

The German Federal Supreme Court (BGH) has decided to refer a question to the ECJ,¹ which has been hotly debated ever since the Schuldrechtsreform (reform of the law of obligations)² was passed. It relates to the legal consequences of the delivery of substitute goods under ss 439 para 4, 346 to 348 of the German Civil Code (BGB) and their compatibility with the Consumer Sales Directive.³

THE FACTS

The facts of the main proceedings may be summarised as follows.⁴ In 2002 a consumer ordered an oven from a mail order catalogue. The appliance that was delivered to the consumer appeared to be in good working order. However, about a year and a half later, the consumer noticed that the enamel coating inside the oven was coming off. She therefore asked for a replacement, which was promptly supplied. At that moment the trouble really started, because the seller presented her with a bill. Having used the oven for 18 months, the consumer was asked to pay a Nutzungserschädigung. This is a payment to the seller to account for the fact that the buyer has had the use of the goods prior to the defect appearing and prior to receiving a brand new replacement. It is a form of compensation to the seller for use by the buyer. A lengthy exchange of letters ensued. In the end, the consumer paid the bill and assigned any claims against the seller to a consumers' association. The association subsequently sued the seller arguing that he was not entitled to any compensation for use.

² Gesetz zur Modernisierung des Schuldrechts vom 26 November 2001, BGBl I S 3138.
⁴ For details, please see LG Nürnberg-Fürth, NJW 2005, 2558; OLG Nürnberg, NJW 2005, 3000.
THE LAW

According to the rules on unjustified enrichment\(^5\), the consumers' association can demand a refund provided that the seller was not entitled to compensation for use. However, the legal consequences of the delivery of substitute goods are set out in the *Schuldrechtsreform*, 439 para 4 BGB which refers to the provisions on termination of contract. Section 439, para 4 BGB reads: "If the seller delivers a thing free from defects for the purpose of supplementary performance, he may demand the return of the defective thing in accordance with ss 346 to 348.\(^6\)" Accordingly, under s 346 BGB, the seller may demand that (i) the defective goods and (ii) any benefits related to these goods be returned, or else compensation for value be provided. Given that it is impossible to return benefits derived from having used the goods, the buyer must provide compensation for use.\(^8\)

The legislator's decision to impose this obligation on the buyer was criticised even before the *Schuldrechtsreform* came into force.\(^9\) Indeed, there are several reasons for criticising s 439, para 4 BGB and its consequences. Under s 446 BGB, benefits accrue to the buyer from the time of delivery. It is therefore difficult to understand why the buyer is obliged to compensate the seller when the latter provides a replacement. In the explanatory remarks to the bill of *Schuldrechtsreform* it is argued that the buyer should not benefit from defective performance by receiving substitute goods and retaining previously derived benefits. However, this reasoning is not very persuasive because it is out of line with s 446 BGB, which allocates any benefits to the buyer. Besides, the duty to replace is a consequence of the seller's failure to perform his contractual obligations in the first place. This point also supports the view that the buyer should be entitled to keep any benefits.

Most importantly, even though s 439, para 4 BGB refers to the provisions on termination of the contract (ss 346 to 348 BGB), the legal consequences of termination and supplementary performance are different. If the buyer terminates the contract, both parties are obliged to return any performance and benefits derived from such performance (s 346, para 1 BGB).\(^11\) If, however, the buyer demands supplementary performance, the contract is kept on foot. Thus the seller can keep the purchase price and any interest accrued. In other words, whereas the buyer is obliged to provide compensation for use, the seller need not return any benefits.\(^12\) This illustrates that, as regards the consequences of supplementary performance, the scales are tilted in favour of the seller.

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\(^5\) Section 812, para 1 BGB reads: "A person who obtains something by performance by another person or in another way at the expense of this person without legal cause is bound to give it up to him. The same obligation exists if the legal cause later lapses or if the result does not occur which the performance had been aimed at to produce according to the content of the legal transaction." Translation: Dannemann, German Law Archive, available at http://www.iuscomp.org/gla/statutes/BGBest.htm.


\(^7\) Section 346, para 1 BGB embodies the general rule, under which: "If one party to a contract has reserved a right to terminate the contract or if he has a statutory right of termination, then, if termination occurs, any performance received is to be returned, as are benefits derived from such performance." Translation: Thomas/Dannemann, German Law Archive, available at http://www.iuscomp.org/gla/statutes/BGB.htm.

\(^8\) Under s 346, para 2 BGB: "The obligor must pay compensation for value rather than effect a return, where

1. the return or surrender is excluded because of the nature of what has been acquired, [. . .]." Translation: Thomas/Dannemann, German Law Archive, available at http://www.iuscomp.org/gla/statutes/BGB.htm.


\(^10\) BT-Drucks. 14/6040, 232-233.

\(^11\) See above, note 7.

\(^12\) OLG Nürnberg, NJW 2005, 3000, 3001.
Bearing this in mind it is hardly surprising that both the regional and higher regional courts of Nuremberg struggled to come up with reasons why the seller was not entitled to compensation for use. In essence, they ruled that s 439, para 4 BGB does not refer to the obligation to return any benefits (or provide compensation), but only the duty to return any performance, i.e. the defective goods. Unfortunately, this line of reasoning is inconsistent with the unambiguous wording of the statute ("any performance received is to be returned, as are benefits derived from such performance") as well as the legislative intent expressed in the explanatory remarks to the bill. This view was shared by the BGH, which in its decision dated 16 August 2006 pointed out that it seems impossible to find a solution without disregarding the wording and the legislative intent. As mentioned earlier, s 439, para 4 BGB was included in the bill, because the drafter thought that the buyer should not receive substitute goods and retain any previously derived benefits.

CONFORMITY WITH THE CONSUMER SALES DIRECTIVE

The BGH decided to request a preliminary ruling from the ECJ. This is because, in agreement with several commentators, the BGH seriously doubted whether ss 439, para 4, 346 to 348 BGB conform to the relevant provisions of the Consumer Sales Directive. According to art 3 paras 2 to 4 of the Directive, in case of defective performance the consumer may demand that the seller deliver substitute goods free of charge. If, however, national law requires the buyer to provide compensation for use, it appears questionable whether the replacement is effected "free of charge".

To this the drafter of the Schuldrechtsreform would probably reply that the Directive itself allows for an obligation to compensate the seller, because pursuant to recital (15) member states can provide that "any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods". From the wording it can be inferred, though, that this statement only relates to the consumer's right to rescind the contract. Recital (15) does not address the consequences of the delivery of substitute goods. Accordingly, there is no counterpart to ss 439, para 4, 346 to 348 BGB in the Sale and Supply of Goods to Consumers Regulations 2002. Under s 48C (3) it is permissible to take account of the buyer's usage but only if he or she rescinds the contract. Although not particularly persuasive, this conclusion may still be correct.

In order to get to the root of the matter, it is necessary to take into account how the Directive defines the term "free of charge". According to art 3, para 4 these terms

15 BGH, Beschluss vom 16 August 2006, VIII ZR 200/05, Rn 15.
16 See above, note 10.
18 BGH, Beschluss vom 16 August 2006, VIII ZR 200/05, Rn 15–24 (with further references).
20 BT-Drucks. 14/6040, 232–233; a similar view is shared by Tonner, Crellwitz and Echtermeyer in Micklitz, Pfeiffer and Tonner (eds), Schuldrechtsmodernisierung und Verbraucherschutz (Nomos, 2001), 293, 324; Jakobs in Dauner-Lieb, Konzen and Schmidt (eds), Das neue Schuldrecht in der Praxis (Heymann, 2003), 371, 393.
21 This view is shared by Hoffmann, "Verbrauchsgüterkaufrichtlinie und Schuldrechtsmodernisierungsgesetz", (2001) ZRP 347, 349. Recital 15 reads: "Whereas Member States may provide that any reimbursement to the consumer may be reduced to take account of the use the consumer has had of the goods since they were delivered to him; whereas the detailed arrangements whereby rescission of the contract is effected may be laid down in national law."
CONCLUSION AND OUTLOOK

The outcome of the proceedings before the ECJ is yet to be seen. In this writer’s view, it is arguable that the Court will find that art 3, paras 2 to 4 of the Directive do not prevent member states from making arrangements under which the seller is entitled to compensation for use. Having said that, it is equally conceivable that the ECJ will dismiss the request for a preliminary ruling as inadmissible. After all in its decision dated 16 August 2006, the BGH admits that the unambiguous wording and legislative intent do not really leave room for an alternative interpretation. Therefore, even if the ECJ took the view that the obligation to compensate for use is incompatible with the Directive, the BGH would be unable to restrict the scope of s 439, para 4 BGB. Given that Community law does not require member state courts to disregard national interpretative methods in order to achieve the results sought by a directive, a substantive ruling of the ECJ should have no impact on the main proceedings.

Irrespective of the final outcome, the decision to request a preliminary ruling and the preceding judgments clearly show that ss 439, para 4, 346 to 348 BGB are provisions of questionable value. The legislature would be well advised to consider reform and correct this, and other, mistakes that were made during the course of the implementation of the Consumer Sales Directive. To take one further example: under German sales law the buyer cannot rescind the contract unless he or she stipulates a period of time in which the goods must be replaced (ss 441, 437 no 2, 323 BGB). This does not conform to the Directive, which merely refers to the seller not having provided the remedy within a reasonable time (art 3, para 5). Put in a different way, the Directive expects the consumer to wait for the passing of a reasonable time whereas German law also requires him or her to stipulate a period of time. Recent case law indicates that buyers are not necessarily familiar with that obligation. It is therefore suggested that it may only be a matter of time before another question relating to the new German sales law will be referred to the ECJ.

DR ANETTE GÄRTNER*

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22 BT-Drucks 14/6040, 233. This view is shared by Huber in Huber and Faust (eds), Schuldrechtsmodernisierung. Einführung in das neue Recht (Beck, 2002), Rn 13/56; Zerres, "Recht auf Nacherfüllung im englischen und deutschen Recht", (2003) R1W 746, 755.


24 BGH, Beschluss vom 16 August 2006, VIII ZR 200/05, Rn 15.

25 Pfeiffer and others v Deutsches Rotes Kreuz, Joined Cases C-397/01 to C-404/01, [2004] ECR 1-8835, at paras 114–119; for details, see Gärtner, Die Umsetzung der Verbrauchsgüterkauftrichtlinie in Deutschland und Großbritannien (Peter Lang, 2006), 32–33 (with further references).

26 Gärtner, Die Umsetzung der Verbrauchsgüterkauftrichtlinie in Deutschland und Großbritannien (Peter Lang, 2006), 100–102.


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BEYOND THE CONTRACTUAL VEIL: AGENCY WORKERS, EMPLOYEE STATUS AND COMMERCIAL REALITY

James v Greenwich London Borough Council, [2007] IRLR 168
Employment Appeal Tribunal
(Elias J (President), A Gallico, D Jenkins)

In James v Greenwich Council, Mrs James was supplied by an employment agency to provide support work for Greenwich Council's Asylum Team. She had no express contract with the Council but contended that an implied contract of employment had arisen. Whilst the Employment Appeal Tribunal upheld the employment tribunal’s initial decision that there was no implied contract of employment as no mutuality of obligation existed, the case is of greater significance due to the fact that Elias P went further and, obiter, gave guidance on when it is appropriate to imply a contract between worker and end-user.

The orthodox view of an employment relationship is that of a bilateral relationship between employer and employee. Whilst in the majority of cases this remains accurate, there are now a significant number of individuals within the UK whose working relationships do not accord with this position. Agency workers provide such an example.

The agency workers’ relationship is defined by Antell\(^1\) as having two distinctive features:

(a) there is a contract between the worker and the agency, and a contract between the agency and the client, but there is no contract between the worker and the client; and,

(b) to the extent that any control is exercised over the work being carried out by the worker, such control will be exercised by the client and not by the agency.

The peculiarity of this relationship, coupled with the fact that the courts have traditionally applied relatively stringent tests for determining employee status, has left agency workers in a legal lacuna with regard to employee status. This was explicitly recognised by Elias P in the Employment Appeal Tribunal in the James case:

If there were no agency relationship regulating the position of these parties then the implication of a contract between the worker and the end user would be inevitable. Work is being carried out for payment received, but the agency relationship alters matters in a fundamental way. There is no longer a simple wage-work bargain between worker and end user.\(^2\)

DELIMITING EMPLOYEE STATUS

Certain key statutory employment protection rights apply only to "employees".\(^3\) Examples include the right not to be unfairly dismissed,\(^4\) the right to a minimum period

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2. [2006] UKEAT 0006_06_1812 (EAT) at para 55.
3. However, notable exceptions which do not require employee status include the National Minimum Wage Regulations 1999, SI 1999/584; the Working Time Regulations, SI 1998/1833 and SI 1999/3372 and all anti-discrimination legislation.
of notice upon termination of the contract\(^5\) and the right to a redundancy payment.\(^6\) There are a variety of statutory definitions of employee. However, for those statutory rights cited above, the relevant definition is to be found in the Employment Rights Act 1996, section 230(1). This provides that an employee is an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment. Faced with such an indistinct definition the courts have developed a number of tests in order to determine employee status.\(^7\) The modern test for determining employee status was formulated in *Ready-Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance*.\(^8\) There Mackenna J identified three conditions that must be satisfied if a contract of employment is to enter into existence:

(i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.\(^9\)

The final condition of Mackenna J's formulation requires little attention: it is patently obvious. In essence, it enables courts and tribunals to examine a number of factors surrounding any relationship in order to determine whether they might indicate employee status.\(^10\) His remaining conditions do, however, merit further analysis.

Mackenna J's first condition is frequently referred to as the existence of mutuality of obligations. It recognises that a contract of employment is, like any contract, subject to the existence of valid consideration. In his opinion, "there must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind" and that "[t]he servant must be obliged to provide his own work and skill".\(^11\) This, it is submitted, may be viewed as a broad approach to the idea of mutuality of obligation. Subsequent cases however significantly altered the focus of Mackenna J's first condition. The later case of *O'Kelly v Trushouse Forte plc*\(^12\) shifted the emphasis of the first condition from being solely concerned with the existence of consideration to that of whether there was a continuing obligation upon an employer to supply an individual with work and if so, whether that individual was obliged to accept it. Indeed, as Freedland recognises, the idea of mutuality of obligation from that point on was:

concretised into the requirement that, in order for a pattern of, or set of arrangements for, working, employing, and remunerating to constitute a contract of employment with a continuing existence, there must exist continuous commitments, firm enough to be regarded as contractual in character, to present or future working on the part of the worker, and to present or future employing and remunerating on the part of the employing entity.\(^13\)


\(^7\) For example, the control test in *Yewens v Noukes* (1880) 6 QBD 530; the integration test in *Stevenson Jordan and Harrison Ltd v MacDonald and Evans* [1952] 1 TLR 101 and the economic reality test in *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173.

\(^8\) [1968] 2 QB 497.

\(^9\) *Ibid* at p 516.

\(^10\) Courts and tribunals may for example enquire as to the tax status of the individual; who arranges a replacement if the individual cannot attend work; who provides the equipment and who bears the financial risk associated with the relationship. This is not an exhaustive list.

\(^11\) *Op cit* at p 516.

\(^12\) [1983] 1 All ER 456.

Consequently, to establish employee status, an agency worker must not only establish that, in consideration of a wage, they provided their work and skill in the performance of some service for a master; but also that, in consideration of future unascertained wages, there was an expectation to provide future work for the performance of future services for their master. This approach was later confirmed by the House of Lords in *Carmichael v National Power*[^14] where it was held that tour guides who worked on a “casual as required basis” lacked the requisite mutuality of obligations.[^15] The significance of this is that the focus of Mackenna J’s first condition is altered from being concerned not solely with the existence of present consideration within the worker/employer relationship to also being concerned with the existence of continued and ongoing consideration within the relationship. This more restrictive, narrow approach to the idea of mutuality of obligation substantially raised the bar for agency workers wishing to establish employee status.

Mackenna J’s second condition centred upon the existence of control within the relationship. In his opinion:

> Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant.[^16]

The scope of this second requirement was left unaltered by later decided cases. Instead, later cases conveniently passed over Mackenna J’s assertion that: “[a]n obligation to do work subject to the other party’s control is a necessary, though not always a sufficient, condition of a contract of service”[^17] and elevated the existence of control to being a necessary pre-condition for any contract of employment. This was most clearly illustrated in the Court of Appeal decision of *Montgomery v Johnson Underwood Ltd.*[^18] In that instance Buckley J stated:

> For my part, I regard the quoted passage from Ready Mixed Concrete as still the best guide and as containing the irreducible minimum by way of legal requirement for a contract of employment to exist. It permits tribunals appropriate latitude in considering the nature and extent of “mutual obligations” in respect of the work in question and the “control” an employer has over the individual. It does not permit those concepts to be dispensed with altogether. As several recent cases have illustrated, it directs tribunals to consider the whole picture to see whether a contract of employment emerges. It is though important that “mutual obligation” and “control” to a sufficient extent are first identified before looking at the whole.[^19]

It is apparent that the effect of this decision was to elevate significantly the status of both the control and mutuality of obligations elements of Mackenna J’s test. They are the irreducible minimum legal requirements of employee status and it follows that both must be present before any worker is afforded the cloak of employee status and the myriad of accompanying statutory rights.

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[^15]: See also *Clark v Oxfordshire Health Authority* [1998] IRLR 125 where the Court of Appeal held that there was no contract of employment in the case of a nurse who had been engaged by only one authority over a period of three years (with only 14 weeks off). The lack of mutuality was held to be fatal.

[^16]: Op cit at p 516.

[^17]: Op cit at p 516.


DIFFICULTIES POSED BY AGENCY WORKERS

Due to the tripartite nature of the relationship, agency workers may wish to establish that they are an employee of either the agency itself or the agency’s client, the end user. However, the adjustments to Mackenna J’s formulation discussed above present significant difficulties for agency workers wishing to establish employee status with either of these parties.

As between the worker and the agency, there is no mutuality of obligations. The agency’s primary purpose is to identify possible employment opportunities for the worker. It has no obligation to provide that individual with any work, and even when the worker is utilised by an end user, there is no obligation on the agency to ensure that the end user furnishes the provision of future work. Even when one analyses the relationship utilising a broad approach to mutuality of obligations, as advanced above, difficulties still remain. The worker receives remuneration for the provision of his work or skill from the agency, but such work or skill is instead directly furnished to the end user. There is no bilateral exchange of promises.

The control element of the test is also problematic. Buckley J stated in Montgomery:

I am not prepared to say that an assignment provided and paid for by an agency could never, as a matter of law, give rise to “sufficient control”. That is a matter which would call for a practical approach to and consideration of the arrangement between the parties and how they operated it.  

Aside from the unusual situation when agencies become directly involved in the disciplining or dismissal of individual employees, it is difficult to envisage how the arrangement could give rise to sufficient control. Consequently, there is no contract of employment between the worker and the agency. As between the worker and the end user, the control element of the test is undoubtedly satisfied. Conventionally the worker will provide their work or skill directly to the end user at its premises. During such period, the client will receive and invariably obey reasonable lawful orders.

Difficulties are presented when one analyses the relationship utilising the broad approach of mutuality of obligation which is concerned solely with the mutual exchange of promises: the provision of work or skill in exchange for a wage. Here, the worker furnishes his work or skill to the agency but his remuneration is received via the medium of the agency. Again, there is no bilateral exchange of promises. Although the control element of the test is satisfied, mutuality of obligations is not and, following Montgomery, the irreducible minimum legal requirement needed to establish employee status is not satisfied. Consequently, if one applies the ratio of Montgomery too strictly, the result may be that the agency worker is neither an employee of the agency nor the end user.

LIFTING THE CONTRACTUAL VEIL

The traditional view of an agency worker is of an individual who provides their services to an end user for a period of days or months. The reality is much different. The constitution of the United Kingdom’s workforce has altered significantly in the last 15 years. Working patterns and practices have altered and atypical workers, of which agency workers are a prime example, can no longer be regarded as unusual. Agency

20 Op cit at para 41.
workers form a significant proportion of the United Kingdom’s workforce and examples of agency workers working for the same end user for a period of years are not uncommon.21

From a purely legal perspective, the courts have begun to recognise that, within an agency relationship, any express contractual documentation will invariably be issued between, on the one hand, the worker and the agency and, on the other, the end user and the agency. Mummery LJ noted in Franks v Reuters Ltd that difficulties arose in relation to:

the third limb of the tripartite work arrangements. It is hardly documented at all. It must be considered against the background of the other relationships which are documented, but the very lack of documentation of the work relations ... highlights the importance of considering all the evidence relevant to the possible formation of an oral or implied contract of service.22

Courts have, therefore, started to examine the contractual relationship between agency parties in its entirety. Examining the relationship as a whole enables courts to lift this contractual veil and consider the possibility of an implied contractual relationship between the worker and the agency. Indeed, this is an entirely legitimate approach as the Employment Rights Act 1996, section 230(1) states that a “‘contract of employment’ means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing”. This recent judicial development therefore accords with statute which makes it explicitly clear that a contract of employment may be implied.

In the later Court of Appeal decision in Brook Street Bureau (UK) Ltd v Dacas, Mummery LJ built upon the foundation he had laid in the Franks case and held that in future, courts and tribunals must examine the agency relationship in its entirety to consider the reality of the legal relationship between the parties. Indeed, he explicitly stated that:

In determining the true nature of the relationship (if any) between each of the respective parties, it is necessary to consider the total situation occupied by the parties. The totality of the triangular arrangements may lead to the necessary inference of a contract between such parties, when they have not actually entered into an express contract, either written or oral, with one another.23

The Court of Appeal again revisited this area in Cable & Wireless Plc v Muscat24 and affirmed the principle that an agency worker could be an employee of an end-user via the medium of an implied contract of employment. However, a contract of employment will not be implied between the end-user and client in all circumstances. This was an issue which received particular attention and Smith LJ who, in delivering the leading judgment, noted the following passage from Bingham LJ’s judgment in The Aramis:25

As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case – and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given case unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create

21 See for example Montgomery v Johnson Underwood Ltd [2001] IRLR 269, where Mrs Montgomery worked for the end user for two-and-a-half years and Dacas v Brook Street Bureau (UK) Ltd [2004] IRLR 358, where Mrs Dacas worked for the end user for six years.
24 [2006] EWCA Civ 220.
enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations to exist.\(^{26}\)

It is trite law that a contract may be implied due to the conduct of the parties. Indeed, in *Modahl v British Athletic Federation Ltd (No 2)* Latham LJ noted:

Where there is an express agreement on essentials of sufficient certainty to be enforceable, an intention to create legal relations may commonly be assumed: Chitty, para. 2–146. It is otherwise, when the case is that a contract should be implied from the parties' conduct: Chitty, para. 2–147. It is then for the party asserting a contract to show the necessity for implying it: see *The Aramis* [1989] 1 Lloyd's Rep 213, *Blackpool and Fylde Aero Club Ltd. v. Blackpool B.C.* [1990] 1 WLR 1195, *The Hannah Blumenthal* [1983] AC 854 and *The Gudermes* [1993] 1 Lloyd's Rep 311.\(^{27}\)

Nevertheless, the emerging body of case law concerning the employee status of agency workers has been subject to substantial criticism by a number of commentators. Reynold\(^{28}\) notes that if a contract is to be implied between the parties the *Aramis* test must be satisfied. In *Aramis*, Bingham LJ pointed out that:

it would be contrary to principle to countenance the implication of a contract from conduct if the conduct relied on is more consistent with an intention to contract than with an intention not to contract . . . Put another way, I think it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract.\(^{29}\)

Reynold argues that in light of this and other case law, a contract of employment can only be inferred from the conduct of the parties when such an inference is "a necessary one"\(^{30}\) (emphasis in original). He also finds it difficult to see how, in either *Dacas* or *Franks*, the *Aramis* test could have been satisfied, as "the conduct of, and relationship between the parties was wholly consistent with the express contractual arrangements respectively entered by the parties with the agency."\(^{31}\) Reynold's approach is open to criticism on a number of grounds. First, the *Aramis* was concerned with implication of a contract within the sphere of shipping. Its focus was not employment and consequently, it was not concerned with the implication of a contract of employment. Contracts of employment are arguably *sui generis* and it does not follow that once a contract has been implied between the worker and the end user that it will fulfil the criteria required for a contract of employment. This is a matter to which I shall return later.

Second, his emphasis on the express contractual documentation fails to take account of the practical realities of the situation. This obsession with express contractual documentation can also be evidenced in *James* where, as part of his guidance, Elias P commented:

When the arrangements are genuine and when implemented accurately represented the actual relationship between the parties – as is likely to be the case where there was no pre-existing contract between worker and end user – then we suspect that it will be a rare case where there will be evidence entitling the Tribunal to imply a contract between the worker and the end user. If any such a contract is to be inferred, there must subsequent

\(^{26}\) Op cit at p 224.
\(^{27}\) [2001] EWCA Civ 1447 at para 102.
\(^{30}\) Op cit at p 323.
\(^{31}\) (2006) 35(3) ILJ 320 at 322.
to the relationship commencing be some words or conduct which entitle the Tribunal to
decline that the agency arrangements no longer dictate or adequately reflect how the
work is actually being performed, and that the reality of the relationship is only consistent
with the implication of the contract. It will be necessary to show that the worker is
working not pursuant to the agency arrangements but because of mutual obligations
binding worker and end user which are incompatible with those arrangements.32

The difficulty with this approach is that contractual documents are invariably drafted
by the agency or their client, thus perpetuating further the inequality of power within
any agency relationship and taking no account of the realities of the relationship
between the parties. In practice, the duration of an agency worker relationship is highly
variable. Most agency working is temporary in nature and will last with one end user
for a number of days or weeks before the worker is transferred to another end user.
Of more concern are those agency workers who work for an end user for months or
even years prior to being dismissed. In this instance, the inference of a contract is
arguably necessary. Once an established relationship between the end user and worker
has been created, many individuals would regard themselves as party to stable
employment relationships, yet may be denied access to statutory employment rights. In
addition, as there is no contractual employment relationship the duty of mutual trust
and confidence does not come into operation. This raises the possibility that agency
workers may be treated less favourably33 than comparable permanent employees and
left without a remedy. An unfair dismissal claim will not be available since they are not
an "employee" and, in the absence of the implied term of mutual trust and confidence,
a wrongful dismissal claim will founder. This is despite the fact that an agency worker
may be undertaking exactly the same role and fulfilling the same contractual duties as
a comparable "permanent" employee of the end user. End users and agencies clearly
do not wish their workers to be employees. It is more economical and easier for
them to dispense with the services of a worker. Therefore, any express contractual
documentation issued will simply not reflect the true reality of the relationship between
the parties. Indeed, as Megaw LJ noted in *Ferguson v John Dawson & Partners
(Contractors) Ltd*:

> a declaration by the parties, even if it were incorporated in the contract, that the workman
was to be, or was to be deemed to be, self employed, an independent contractor, ought
to be wholly disregarded – not merely treated as not being conclusive – if the remainder
of the contractual terms, governing the realities of the relationship, showed the relationship
of employer and employee.34

At best the express contractual documentation is incomplete; at worst it may
arguably offend the Employment Rights Act 1996, section 203 by intentionally
restricting an individual’s ability to present a complaint of unfair dismissal.35

The inability of agency workers to acquire employee status also presents public
policy concerns. The common law doctrine of vicarious liability merely renders an
employer liable for the negligent actions of his employee. Therefore it follows that any
member of public, who suffers loss or injury as a result of the negligent act of an
agency worker, will be unable to avail themselves of the doctrine.

32 *Op cit* at para 58.

33 Provided such treatment does not amount to discrimination based on one of the prohibited grounds eg sex, race,
disability, etc.

34 [1976] 1 WLR 1213 at 1223.

35 S 203 provides that "(1) Any provision in an agreement (whether a contract of employment or not) is void in so far as
it purports – (a) to exclude or limit the operation of any provision of this Act, or (b) to preclude a person from bringing
any proceedings under this Act before an employment tribunal".
Further, following the House of Lords' decision in Majrowski v Guy's & St Thomas' NHS Trust, employees are now able to present claims against their employers for damages if they are subjected to a course of conduct amounting to harassment. However, Majrowski is only applicable to employees and, as such, it would again appear that agency workers may be subjected to harassment yet left without a remedy. From the foregoing, it will be appreciated that in order accurately to reflect the rights and obligations of the parties, the implication of a contract will be necessary. As Megaw LJ noted in the Ferguson case: it is not open to an agency or end user, “by their own whim, by the use of a verbal formula, unrelated to the reality of the relationship, [to] influence the decision on whom the responsibility for the safety of workmen, as imposed by statutory regulations, should rest”.  

As previously acknowledged, many agency relationships are transient in nature and it is questionable whether an implied contract should be hardened or refined into a contract of employment in such circumstances. Of more concern are workers like Mrs Dacas and Mrs Montgomery. These are individuals who, on the face of it, undertake the same contractual duties as employees of the end-user yet are denied their statutory employment protection rights due to the nuances of contract. However, at what point should a contract of employment be implied and with whom?

It is evident that a contract of employment should not be implied in all circumstances. The question when, if at all, an employment relationship should be implied is one of fact. It will clearly depend upon the particular circumstances of each individual case. In Franks Mummery LJ noted, “[d]ealings between parties over a period of years, as distinct from the weeks or months typical of temporary or casual work, are capable of generating an implied contractual relationship”.  

Provided that the relationship is not a sham, the end user appears the most logical party to be determined “employer” in an agency relationship. It is the end user who exercises day to day control over the worker, it is the end user who acquires the benefit of the worker’s labour and it is the end user who experiences a benefit or detriment from the exploitation of that labour. However, it should be noted that any implied contract of employment between the worker and end-user will still be subject to the irreducible minimum existence of both mutuality of obligation and control. As stated previously in the majority of cases, agency workers will provide their work or skill directly to the end user at its premises. During such period, the client will invariably obey any reasonable lawful orders which may receive. Wynn and Leighton note that cases such as Dacas and Muscat have focused on the day-to-day instructions provided by the client as evidence of control over the agency worker. They argue however that the ultimate test of control has been seen as the power to discipline and terminate the relationship and that this power is almost invariably retained by the agency under the express terms of the contract with the agency worker. Whilst there is arguably a hierarchy of control within any employment relationship, to suggest that the power is retained and exercised exclusively by the agency ignores the realities of the situation. Agencies will know little about the day-to-day intricacies of the worker / end

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36 [2006] UKHL 34.  
37 Provided such harassment is not based on one of the prohibited grounds eg sex, race, disability, etc.  
38 [1976] 1 WLR 1213 at 1223.  
39 Op cit at para 29. In James v Greenwich Council Elias P stated, “[t]ypically the mere passage of time does not justify any such implication to be made as a matter of necessity, and we respectfully disagree with Sedley LJ’s analysis in Dacas on this point”. It should however be noted that the Court of Appeal’s decision in Dacas, and indeed Franks, is still binding on tribunals.  
user relationship once the agency worker has been placed. It follows that they will be unable independently to exercise control. If they were independently to exercise control, such exercise could be in a capricious or arbitrary manner which would inevitably seriously damage the business relationship between the agency and end user. Instead invariably, they will exercise control on the basis of express instructions from the end user. It is only when one lifts this contractual veil, that the true reality of the situation can be appreciated. The control element of the test is therefore unproblematic. The final obstacle to employment status for the agency worker is establishing sufficient mutuality of obligation within their relationship with the end-user.

Once the contractual veil is lifted and the relationship between the parties is examined as a whole, it is apparent that dealings over a period of a year or more should be treated as contracts of employment. In *James*, Elias P. was opposed to such an idea, noting:

> Typically the mere passage of time does not justify any such implication to be made as a matter of necessity, and we respectfully disagree with Sedley LJ’s analysis in *Dacas* on this point. It will no doubt frequently be convenient for the agency to send the same worker to the end user, who in turn would prefer someone who has proved to be able and understands and has experience of the systems in operation. Many workers would also find it advantageous to work in the same environment regularly, at least if they have found it convivial. So the mere fact that the arrangements carry on for a long time may be wholly explicable by considerations of convenience for all parties; it is not necessary to imply a contract to explain the fact that the relationship has continued perhaps for a very extensive period of time.*41*

This approach fails to recognise that over a lengthy period, the expectations of both parties to the relationship inevitably alter. A pattern of work is established, skills are developed and both parties mutually benefit from the permanent nature of the relationship. As such Mummery LJ’s comments in *Franks* that: “[d]ealings between parties over a period of years, as distinct from the weeks or months typical of temporary or casual work, are capable of generating an implied contractual relationship” are preferable and clearly accord with that the approach taken by Stephenson LJ in *Neathermere (St Neots) Ltd v Taverna and Gardiner* who noted:

> I cannot see why well founded expectations of continuing homework should not be hardened or refined into enforceable contracts by regular giving and taking of work over periods of a year or more, and why outworkers should not thereby become employees under contracts of service like those doing similar work at the same rate in the factory.*42*

Although the focus of the *Neathermere* case was the implication of an employment contract within the context of home working, by analogy the same contractual principle applies to agency workers. Although such an approach will not assist transient agency workers; it offers welcome assistance to those more permanent agency workers.

Finally, some may raise the apparent non-existence of a bilateral exchange of promises between the end user and the agency worker. Wynn and Leighton*43* note that, to argue as Smith LJ did in *Muscat*, that arrangements for pay can be made directly or indirectly is to ignore the fact that the client is paying for a service, and is not paying wages at all. This approach was followed by Elias P in *James* who noted that

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*41* Op cit at para 59.


"... the money paid by the end user to the agency is not merely the payment of wages, but also includes the other elements, such as expenses and profit". Again, this ignores the realities of the situation. End users typically pay a figure to the agency which comprises two elements, first an administration charge and second, a much larger amount comprising the wages of the individual worker. To categorise the entire amount as a service charge further belies the realities of this relationship. Indeed, when one lifts the contractual veil and asks the question posed by Mummy LJ in Dacas, what is the end user paying for, if not for the work done by the worker under its direction and for its benefit?

In sum, the traditional perception that agency workers hold relatively temporary positions with their end users belies the true position of a significant number of disenfranchised workers. Traditionally unable to establish employment status, such workers have long been perceived as easy prey for unscrupulous employers wishing to avoid their statutory employment liabilities. The cases of Franks, Dacas and Muscat represent a welcome development in this area of the law. The approach of the courts will invariably not afford all agency workers with employee status nor open any floodgates. Indeed, it is argued that courts and tribunals will only entertain the possibility of an implied contract of employment once any period of work of a year or more has hardened into an enforceable contract of employment. When viewed in such a manner, it is apparent that the approach of the courts has been evolutionary rather than revolutionary and that perhaps Franks does not represent such an unexpected shift in the development of the common law after all. Elias P's guidance is therefore noteworthy as it places the Employment Appeals Tribunal in direct conflict with the Court of Appeal on this issue. It now remains to be seen whether future employment tribunals will utilise his guidance, or follow the earlier and still binding Court of Appeal decisions and bestow employee status on ever increasing numbers of agency workers.

PETER MCTIGUE*
BOOK REVIEWS

Book reviews and books for reviewing should be sent to the address given at the beginning of this issue

COMPANY LAW


This book is one of the standard student texts on company law, and its success in this field is reflected in its progression to its 23rd edition, in the face of considerable competition. It combines depth with impressive breadth of coverage and is generally clearly written, an asset for any textbook, but particularly so in the complex and detailed area of company law. The headings and subheadings in each chapter provide guidance to the reader through the wealth of detail, although they could be formatted to make them a little more obvious for those searching through the book for a particular reference.

The contents of the introduction are highly user-friendly, providing an overview of the corporate form and of its main competitors, and a review of sources of company law, including reference to other jurisdictions. It is perhaps not so user-friendly in its structure, with the overview of the corporate form being interspersed with the other sections and consequently lacking coherence. This is indicative of one of the difficulties faced by any company law text, that of the most appropriate way to organise the enormous amount of material which now forms the subject, and it is not a difficulty which this book entirely overcomes, as will be explained later. One other quibble: this introductory chapter preceded Chapter 1 and so all headings and subheadings within it are numbered from 0.1, which jarred somewhat with this reader.

The organisation of the material between chapters is not entirely predictable and clearer cross referencing at the start of, and throughout, each chapter would be helpful, for example, in relation to the placing of Registration into a separate chapter from those on the Memorandum of Association and the Articles of Association. However, the content of all three of those chapters is thorough, and study thereof would suitably equip a student to tackle assessments on these areas. Similar comments can be made about the need for cross references between the chapters on Shares, Offering Shares to the Public and Transfer of Shares, but again the relevant law is thoroughly explained and the authors must be commended for their clear treatment of the complex area of public share offers. A further separate chapter is devoted to Shareholders, but the discussion of various voting requirements and the way in which decisions are made within a company justifies making this a discrete chapter, as well as the fact that it is followed by the parallel explanations of the powers of directors in the chapter on Directors. The section on the rise of the large institutional shareholder is included in
the latter chapter, rather than the former. Directors' Duties receive a separate chapter, although in places the division between powers (dealt with in the chapter on Directors) and duties is rather artificial.

The chapter on Disclosure usefully draws together discussion of various methods of disclosure – Companies' House, the Gazette, business documents and places of business – and sets out clearly the detailed range of obligations in respect of each.

The chapter on Corporate Personality contains both the consequences of corporate personality and how they can be awarded. The inconsistencies of the case law in these areas are fully explored as well as the theories that have been put forward to explain them.

The chapter on Distributions and the Maintenance of Capital makes a good attempt to explain complex provisions at a level which is helpful to a student, although it could be improved by the use of examples in explaining the procedures.

The chapter on Accounts deals with its subject matter in considerable depth, but the material is organised coherently and it is easy to locate details of particular obligations. However, given the inevitable detail of the subject matter, the use of bullet point lists would make the requirements clearer.

Some of the explanations in the chapter on Borrowing, Credit and Security might leave students confused; as in the chapter on Distributions and the Maintenance of Capital, the use of examples might have been beneficial. It is not clear why Marketable Loans are in a separate chapter and the cross references could be clearer. Floating charges are explained coherently and in depth in the Borrowing chapter, but more explicit cross referencing between these sections and the chapter on Company Insolvency and Liquidation would have been helpful given the obvious relevance of the former to the latter.

The chapter on Market Abuse, which sets out the provisions on various forms of restricted behaviour, is rather dry. Given the dearth of case law on such new provisions, its detailed coverage of the main statutory provisions needs to be enlivened with more commentary, perhaps involving comparative references to other jurisdictions.

Corporate officers other than directors are dealt with in the same chapter as promoters. As the sections on promoters are entirely distinct, it would be feasible and helpful to include them at an earlier stage of the text, perhaps in the chapter on Registration, given that they are concerned with formation of the company. The explanation of the law concerning both corporate officers and promoters is, however, comprehensive.

The chapter on Remedies for Maladministration is wide ranging and covers all aspects of the action which may be taken. The material is well written and structured and is ideal for students trying to get to grips with Foss v Harbottle\(^1\) and its extensive ramifications.

The chapter on Dealings with a Company is something of a miscellany, covering with issues of authority but also of criminal liability and the human rights of a company. It is thus a most interesting chapter, albeit somewhat unhelpfully titled.

The chapter on Company Insolvency and Liquidation covers the full range of insolvency proceedings, and does so clearly and in some depth. A good range of case law is discussed, bringing the provisions and procedures to life. It would thus not be necessary for a company law student to consult a separate insolvency text.

\(^1\) (1843) 2 Hare 461.
The effects of what was, at the time of publication, the Companies Bill\(^2\) are dealt with in each chapter, although not in a consistent format, so that in some chapters the introduction summarises the changes, whereas in others there is a separate section later in the text and yet others incorporate commentary on the Bill in context. Either of the first two approaches means that the reader must beware of reading any other section without cross referring to the introduction or section on the Bill so be aware of whether and how the law may be due to change.

This edition of the book, like its predecessors, is rather thin on the facts of cases, which in places make the principles laid down therein more difficult to understand and apply. However, given that this book now runs to over 800 pages, this approach is understandable, if not necessarily commended. The current length may also explain the absence of reference to LLPs which, as corporate entities, are subject to many of the provisions discussed in this book. Despite these omissions, this remains an excellent text for students of company law: and, equally importantly, for tutors.

ELSPETH BERRY\(^*\)

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\(^2\) Now Companies Act 2006.

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It has been over 20 years since the publication of the first edition of Professor Barendt’s masterful study of comparative free speech law. In the two decades between the publication of the first and this second edition there have been changes of orogenic proportions in the legal landscape inhabited by the free speech right.

Most obviously perhaps, for United Kingdom lawyers anyway, has been the passage of the Human Rights Act 1998 (HRA) which incorporates the right to freedom of expression under article 10 of the European Convention on Human Rights (ECHR). Thus, for the first time, those within the UK who, hitherto, merely had the freedom of speech, as long as that speech was not restricted by statute or common law, are now able to claim a positive right to freedom of expression. In a similar vein the Canadian Charter of Rights and Freedoms 1982 was virtually brand new at the time of the first edition. Since then there have been a series of important decisions developing the jurisprudence on freedom of speech, emanating from the Canadian Supreme Court.

Further there has been a steady and increasing stream of cases coming before the courts in different jurisdictions dealing with issues that might never have arisen 20 or 30 years ago. Examples include hate speech; holocaust denial; issues concerning copyright and the growth of the cult of celebrity with the concomitant conflict between freedom of expression and privacy. Indeed privacy itself is now afforded greater legal protection in the UK due to the boost given to breach of confidence by the incorporation of article 8 ECHR.1

Another huge change impacting upon freedom of speech has been not a legal but a technological one: the inception and meteoric rise of the world wide web, the internet and email, making possible, for huge numbers of people, instantaneous global communication.

Given the complexity of these constitutional, legal, technological and cultural shifts, even to produce a work covering the law of free speech in England and Wales would be a major achievement. But this is a comparative work dealing in addition and in detail with the varying approaches to free speech in the United States, Germany, Canada and by the European Court and Commission of Human Rights at Strasbourg, as well as in, to a lesser extent, a range of other jurisdictions.

As a consequence of the changes outlined above the second edition of Freedom of Speech is a much longer book than its predecessor (the number of pages has expanded from 344 to 526) and there are several completely new chapters. However, the core approach of the book, which, to this reviewer’s mind is its greatest strength, has remained. This is the linking thread that begins with the question posed in Chapter I: “Why Protect Free Speech?” Expression rights are less obviously worthy of protection than some other human rights (life; freedom from torture; physical liberty). There are many important interests that will, in particular situations, come into conflict with freedom of speech (eg, privacy, reputation, dignity, freedom from being caused offence, upholding morals, national security, fair trial). Indeed it is only when there is a conflict with some such interest that the free speech right becomes important, for when speech is innocuous, when no other interests are challenged, there is no reason to restrict it. It is therefore essential to establish, at the outset, why free speech is valued at all. To this end Chapter I explains and analyses the classic arguments justifying the free speech

1 See eg, Campbell v MGN [2004] 2 AC 457.
right: that it is necessary for the pursuit of truth; for the attainment of individual self-fulfilment or autonomy; or that it is a *sine qua non* of representative democracy. The extent to which these underpinning philosophical justifications lie behind judicial approaches (either expressly or, more usually, implicitly) to the protection of expression rights is a thread linking the subsequent chapters and facilitating the comparative approach. As the balance of underlying justifications varies between jurisdictions so do the levels of protection afforded to different types of free speech interest (political, journalistic, artistic, pornographic, commercial). This approach was one of the great strengths of the first edition of *Freedom of Speech*: and it remains so; and, despite the tectonic shifts outlined above, the various justifications as to why we value freedom of speech remain.

There is, in such an ambitious and wide ranging work, the ever present risk of the reader getting lost in the complexities of the jurisprudence of unfamiliar jurisdictions (especially, for UK and European lawyers, the First Amendment case law of the USA). Re-grounding the discussion in the reasons why we value free speech in the first place provides the reader with a compass enabling navigation through the labyrinth. *Freedom of Speech* achieves this tremendously difficult task with lucidity, fluency and elegance.

After the introduction to the philosophical underpinnings in Chapter I the following three chapters go on to discuss issues of general importance: Chapter II, “Free Speech in Liberal Legal Systems”, introduces the approaches of the main jurisdictions under consideration; Chapter III, “The Scope of Freedom of Speech”, considers the interesting and important threshold question – what is speech? – a question the resolution of which has been particularly important in the USA given the apparently absolute protection afforded to “speech” by the First Amendment: when, for example, can forms of expressive conduct be considered speech? Chapter IV, “Prior Restraints”, examines the traditional hostility of the law to censoring expression before it has the chance to enter the “market place of ideas” (rather than letting the speaker take his or her chance with the civil or criminal law once he or she has spoken).

Having laid solid foundations the author goes on, in the remaining ten chapters, to analyse the whole range of free speech interests in the various jurisdictions under consideration. These chapters cover: political speech; libel and invasion of privacy; copyright and other property rights; meetings, protest and public order; free speech and the judicial process; pornography; commercial speech; freedom of speech and the media, freedom of speech and the internet; and freedom of speech in special contexts (which considers for example limitations on election expenditure, freedom of speech in employment and free speech in education and in prisons). Of these, the last four are completely new chapters.

Perhaps one of the most surprising and disappointing messages of the book, for the domestic reader at least, is that whilst free speech law in the UK “has in principle been transformed by the incorporation of the ECHR . . . [in fact it is doubtful whether the change has so far been much more than cosmetic]”.2 Analysis of approaches by the courts in such cases as *R v Shayler*3 (in which the Official Secrets Act 1989 was found to be compatible with article 10 despite the absence of any public interest defence) and *R (on the application of the ProLife Alliance) v BBC*4 (in which the BBC’s refusal, on the grounds of taste and decency, to broadcast a political party’s election broadcast depicting an abortion was found not to breach article 10) would seem to bear out this conclusion. The recent case of *R (on the application of Animal Defenders International*)

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2 At p 39.
in which the blanket ban imposed by the Communications Act 2003 on all advertisements in the broadcast media that could even loosely be described as "political" was held to be compatible with article 10, notwithstanding apparently clear Strasbourg jurisprudence indicating otherwise, would seem to be further confirmation of this timidity.

The new edition of Freedom of Speech comes at a critical point. At a time of heightened anxiety about security there is always the temptation on governments to impose restrictions on the expression of certain groups. Justifications for freedom of expression are all the more important at such times. Also, however, in recent years there has been an increased sensitivity by those who perceive that the liberal, secular, human rights culture appears to value freedom of speech above other rights and interests. Perhaps something of this can be discerned in the furore concerning the publication (and worldwide re-publication in the name of free speech) of Danish cartoons depicting the Prophet Mohammad, provoking outrage and violence in the Muslim world. It is at times like these that we need to think carefully about why exactly we value freedom of speech and the extent to which it should receive heightened protection. It may well be that it should; but it is surely not good enough to dispense with the philosophical underpinnings and simply assert: "it's freedom of speech – I will say it because I can say it". It is for this reason, as well as many others, that the second edition of Freedom of Speech is so timely and important. It deserves to be read by scholars, legal practitioners and all those interested in this important, complex and fascinating area.

TOM LEWIS*

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6 VgT Verein Gegen Tierfabriken v Switzerland (2002) 34 EHRR 10.
7 Other examples might include the controversy over the broadcasting by the BBC of the musical Jerry Springer: the Opera and the violent opposition to the staging to the play Beshii at the Birmingham Repertory Theatre.

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NOTTINGHAM LAW JOURNAL

VOL 16(1) 2007

NOTTINGHAM MATTERS

This section documents major developments and research projects within Nottingham Law School together with responses to public consultation exercises and other public contributions made by its staff.

This edition’s Nottingham Matters takes the form of the text of a lecture given by Neil Peck of the Nottingham Law Journal’s Advisory Board at Nottingham Law School on 7 March 2007.

THE SCHIAVO LITIGATION: A PERFECT AMERICAN STORM OF LAW, MEDICINE, RELIGION AND POLITICS

INTRODUCTION

Many thanks to Prof John Tingle, for inviting me, Prof Adrian Walters for the arrangements and to Nottingham Law School. I am very pleased to have been associated with Nottingham Law School since 1994 and am also very pleased to have this opportunity to be here with you today to talk about a fascinating episode in American legal history.

THIS PRESENTATION

The Schiavo Litigation

I am here to talk about the Schiavo litigation. Most of you will have heard at least something about this unusually protracted end-of-life litigation, which at its most basic level involved the question of whether there was an adequate factual and legal basis for removal of an artificial nutrition and hydration tube, called a Percutaneous Endoscopic Gastronomy or PEG tube, from Theresa ("Terri") Marie Schiavo, a 35 year old woman in a "persistent (ie, permanent) vegetative state."¹ (35 at the time of the original petition for removal by the husband, Michael Schiavo.)

This massive and intensive judicial scrutiny of a patient’s medical condition and intent was probably unprecedented in the annals of American jurisprudence.

What I want to do is to use the Schiavo litigation (1) to tell you something about the American legal system, (2) to tell you how a rather routine piece of end-of-life

¹ Florida law defines “persistent vegetative state” as “a permanent and irreversible condition of unconsciousness in which there is: (a) the absence of voluntary action or cognitive behavior of any kind; (b) an inability to communicate or interact purposefully with the environment”. Fla Stat §765.101(12) (2003).
litigation in a Florida state court became yet another battleground in America’s “Culture of Life Wars”, and (3) finally to show how the American legal system upheld critically important constitutional principles and showed itself at its best.

Mrs Schiavo’s condition, while tragic, was hardly unusual. She suffered cardiac arrest on February 25, 1990, and following that event had been in a persistent vegetative state, “robbed ... of ... all but the most instinctive of neurological functions”. Most of her cerebrum had disappeared and had been replaced by cerebral spinal fluid. As the Florida Supreme Court put it: this “is not simply a coma. [Ms Schiavo] is not asleep ... medicine cannot cure this condition”. The artificial nutrition and hydration which were administered to Mrs Schiavo served only to prolong her physical existence, not to cure or improve in any way her irreversible brain damage. At least since the decision in the Quinlan case in 1976, and probably before then as well, cases of this kind were routinely resolved informally by families and doctors collectively deciding to remove respirators and PEG tubes from patients in a persistent vegetative state.

It is appropriate to say a few words about the seminal Quinlan case. In 1975, 21 year old Karen Ann Quinlan stopped breathing for two 15-minute periods, and the lack of oxygen caused significant brain damage. Ultimately, Karen Ann went into a persistent vegetative state, dependent upon a respirator to breathe.

Initially the Quinlan family authorized the treating neurologist, Dr Morse, to do everything he could to keep Karen alive. After three months without improvement in Karen’s condition, Karen’s parents consulted with their parish priest who advised them that the Roman Catholic Church’s teachings would permit withdrawal of extraordinary medical treatment under these circumstances. Then the parents asked the hospital to remove the respirator and signed a document releasing the hospital, its staff and Dr Morse from any liability.

However, Dr Morse refused to withdraw the respirator, asserting that to do so would deviate from standard medical practice and would require him to make a “quality of life” determination. So Karen’s father went to court for judicial assistance.

In brief, the court of first instance denied Mr Quinlan’s application for relief. The court concluded, inter alia, that the decision whether to remove Karen from the respirator was a medical one which should be left to Karen’s doctors, that Karen’s parents should have no role in the decision making process, and that Karen’s own statements prior to her incapacity were not sufficiently probative to persuade the court that she would elect, if competent, to terminate the respirator.

The New Jersey Supreme Court, that state’s highest court, reversed. The Supreme Court found that Karen had a constitutional right to privacy which would permit her to remove the respirator and that the only way to protect that right, given Karen’s incompetency, was to cede the court’s parens patriae power to Karen’s father who was also by that time her legal guardian. The Supreme Court reassured doctors that withdrawal of life-sustaining treatment in aid of an individual’s privacy right was lawful, and could not, therefore, subject the doctor to criminal prosecution or liability.

And there matters had stood for 30 years by the time Schiavo came along.

What Made Schiavo Different?
What was it about Terri Schiavo’s medical condition, or her family situation, or the law, or the political and/or religious climate of the late 1990s/early 2000s that converted

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2 Schindler v Schiavo (In re Guardianship of Schiavo), 780 So 2d 176, 180 (Fl 2d DCA 2001).
3 Bush v Schiavo, 885 So 2d 321, 325 (Fla 2004).
what should have been a rather routine end-of-life decision making process by the patient's family and doctors into a ferocious seven year litigation? A litigation which involved seemingly endless hearings in both state and federal trial and appellate courts, numerous written decisions and ultimately state and federal legislation designed to overturn the decision to withdraw artificial nutrition and hydration from Terri Schiavo.

1. How could it have happened that on February 11, 2000, Judge George Greer of the Florida Circuit Court first ordered the PEG tube removed from Mrs Schiavo but that it was not finally removed until March 18, 2005?

2. How could it have happened that between Judge's Greer's initial order of February 11, 2000 and the final removal of the PEG tube on March 18, 2005, the tube was twice removed (April 24, 2001 and October 15, 2003) and twice reinserted (April 26, 2001 and October 21, 2003)?

The Explanation:

In this lecture I will try to provide some answers to these questions, or at least an explanation of the extraordinary combination of factors - a veritable "perfect [American] storm" of law, medicine, religion and politics - which produced these unique results.

SETTING THE SCENE

The US System

It is important I think to briefly describe the legal systems in which the Schiavo litigation thrived for almost seven years, especially as the litigation invoked the jurisdiction of both the state and federal court systems.

Federalism

The United States has a federal structure of government consisting of the national government and 50 states. The federal government is legally superior to the states, by virtue of the Supremacy Clause of the US Constitution, Art VI, par 2, which makes federal law the "supreme law of the land". However, the states have broad governmental authority within their own spheres.

This federal system contains a dual system of courts.

First and foremost there is the federal court system provided for in Article III of the US Constitution which includes the United States Supreme Court at the top of the pyramid, the various United States Circuit Courts of Appeal of which there are 11, plus the Federal Circuit which largely hears patent cases, and the US District Courts which are akin to the High Court in England. There are one or more Districts per state depending upon the size of the state, eg, NY has four districts, Southern, Eastern, Northern and Western, and my state of Colorado has just one.

Second, each state has its own court system based on its own constitution. The structures of the state court systems are generally similar to the federal court system with a Supreme Court at the top, whether called that or not. In New York and several other states they are called the Court of Appeals and in Delaware the Supreme Court was formerly called the Supreme Court of Errors. In most states there are intermediate courts of appeal, usually called Courts of Appeal, and trial courts of general jurisdiction at the bottom of the pecking order with a variety of names, some occasionally misleading, eg, in New York State the lowest ranking court is denominated the Supreme Court.
Sources of Law

At both the federal and state levels, the courts derive their decisions from three basic sources: constitutional law, legislation, and common law. Among these, constitutional law is supreme, legislation is the next most authoritative, and common law is authoritative only in the absence of constitutional or legislative provisions.5

"The relationship between federal law and state law can be summarized ... as follows: state law governs all legal relationships between private parties except where federal law has been enacted on a subject, in which event federal law is authoritative."6
In some areas, both federal and state law regulate different aspects of a relationship. For example, with respect to employment, federal law prescribes a minimum wage, but state law controls termination of the employment relationship.

The Schiavo litigation was brought originally by Terri’s husband Michael in Florida state court and was controlled by Florida state constitutional and statutory law (ie, legislatively enacted). So let's say a few words about that.

Florida Law

Here are the Florida Constitutional and statutory provisions which were the foundation for Michael Schiavo’s lawsuit and which Judge Greer relied upon in making his decision.

(a) It is a well-settled principle under Florida law that individuals have a right to control the fate of their own bodies and to refuse life-sustaining medical treatment. The right of refusal is grounded in the Florida Constitution’s explicit right of privacy. Under Article I, Section 23 of the Florida Constitution, “every natural person has the right to be let alone and free from governmental intrusion into the person’s private life”.

(b) Florida law also is clear that the right to refuse treatment covers all life-prolonging procedures including artificial nutrition and hydration.7

(c) Florida law permits a proxy decision-maker, including through a court adjudication, upon clear and convincing evidence of the patient’s wishes, to step in to articulate the desires of incapacitated patients whether those wishes have been expressed orally or in writing. Florida law explicitly recognizes the validity of oral advance directives.8

(d) In Florida, the statutory hierarchy of proxies grants decisional authority to the incapacitated patient’s spouse ahead of her parents.

(e) In Florida, before a proxy may exercise an incapacitated patient’s right to withdraw life-prolonging measures, the decision “must be supported by clear and convincing evidence that the decision would have been the one the patient would have chosen had the patient been competent”.9

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5 Hazard and Tarullo, American Civil Procedure (Yale University Press, 1993), p 37.
6 Ibid at 42.
7 Fla Sta Ch 765.101(10) (2004).
9 Fla Stat Ch 765.401(3) (2004).
THE MAIN LITIGATION

The Factual Background

During the first several years of her incapacity, Mrs Schiavo’s husband and parents were in agreement about her course of treatment. She received extensive testing and rehabilitation efforts and various therapies (eg, speech, occupational).

In 1993 there was a falling-out between them, apparently over the disposition of proceeds from the settlement of a malpractice case Michael Schiavo had brought against his wife’s doctors. Whatever the reason for this rupture in their relationship, things turned pretty nasty beginning with the parents’ (the Schindlers) effort to remove Michael Schiavo as his wife’s guardian. This suit was dismissed.

Years went by without any change in Mrs Schiavo’s condition. In mid-1996, CAT scans revealed that nearly all of Terri Schiavo’s cerebral cortex, the portion of the brain used for cognitive purposes, had been replaced by cerebral spinal fluid. According to the Florida Court of Appeal, “medicine cannot cure this condition. Unless, an act of God, a true miracle were to recreate her brain, Theresa [would] always remain in an unconscious, reflexive state, totally dependent upon others to feed her and care for her most private needs.”

The Next Big Event, and the one which precipitated this *Jarndyce v Jarndyce* of American end-of-life litigation, came in May 1998, when Michael Schiavo petitioned the Pinellas-Pasco County Circuit Court (ie, the Florida state court of general trial jurisdiction) to authorize the removal of his wife’s PEG tube. Terri Schiavo’s parents opposed the petition saying that their daughter would want to remain alive.

Trial began before Circuit Court Judge George Greer on January 24, 2000. On February 11, 2000 Judge Greer ruled that evidence of Theresa’s desire to avoid indefinite artificial life-sustaining treatment was legally sufficient to warrant the removal of life supportive measures. Accordingly, Judge Greer ordered the PEG tube removed. However, he stayed his order until 30 days beyond the final exhaustion of all appeals by the Schindlers.

From Judge Greer’s initial order of February 11, 2000 to remove the PEG tube, until the tube was finally removed for the last time on March 18, 2005, there were many court proceedings and hearings at all levels in the Florida state court system, and, at all levels in the federal court system. Nineteen judges in six different courts took part in the various Schiavo proceedings and there were at least 30 written decisions or judgments.

There were far too many proceedings, hearings and decisions for me to be able to review them with you in any detail here today. In any event, such a detailed review is not really essential to showing how a usually private, family end-of-life medical decision was hijacked by right wing religious and political interests for their own purposes and how the American legal system not only tolerated, but to some considerable degree, bent over backwards to accommodate this politicization of an end-of-life decision.

The Florida courts themselves seemed aware that they had been unusually tolerant of the Schindlers’ repeated and redundant efforts to overturn Judge Greer’s order. Thus, when the Schindlers, Theresa Schiavo’s parents, mounted their final assault on Judge Greer’s decision, the Florida Court of Appeal noted that Judge Greer’s decision

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10 *In Re Guardianship of Schiavo*, 780 So 2d, 176, 177 (Fla 2d DCA 2001).
has been subject to appeals and post-judgment scrutiny of all varieties, and it remains a valid judgment pursuant to the laws and constitution of this state. Not only has Mrs Schiavo's case been given due process, but few, if any, similar cases have ever been afforded this level of process.\footnote{In Re Guardianship of Schiavo, 2005 Fla App LEXIS 3574, March 16, 2005.}

Suffice it to say that through all of these trials, hearings and proceedings, the courts, and here I refer primarily to the Florida state courts, consistently found that Michael Schiavo had acted appropriately and attentively, that Terri Schiavo’s medical diagnosis of a persistent vegetative state was reliable, and that clear and convincing evidence supported her husband’s assertion that she would not want to live in that condition with no prospect for recovery.

Listen to the words of the Florida Court of Appeal in affirming Judge Greer’s second order of removal of the PEG tube:

But in the end, this case is not about the aspirations that loving parents have for their children. It is about Theresa Schiavo’s right to make her own decision, independent of her parents and independent of her husband. ... [T]he trial judge must make a decision that the clear and convincing evidence shows the ward would have made for herself. In the final analysis, the difficult question that faced the trial court was whether Theresa Marie Schindler Schiavo, not after a few weeks in a coma, but after ten years in a persistent vegetative state... with no hope of a medical cure... would choose to continue the constant nursing care and supporting tubes in hopes that a miracle would somehow recreate her missing brain tissue, or whether she would wish to permit a natural death process to take its course and for her family members and loved ones to be free to continue their lives. After due consideration, we conclude that the trial judge had clear and convincing evidence to answer the question as he did.\footnote{In Re Guardianship of Schiavo, 851 S 2d 182, 186-187 (Fl. Ct App 2003).}

**Politics and Religion**

Given this uninterrupted string of judicial holdings which authorized the removal of Theresa Schiavo’s PEG tube, what happened to transform this litigation and Mrs Schiavo’s situation into a national, indeed even international \textit{cause célèbre}? For the answer to that question we must consider American politics in the early 21st century and the influence of the so-called Religious Right on the Republican Party. Here are some political and cultural factors which came together and bore heavily on the Schiavo situation:

1. First of all, we had a family bitterly divided over whether Terri Schiavo should live or die. This division made all else possible. Had the family been united either way, either to continue treatment or to terminate it, there would have been nothing for politicians and Culture of Life Warriors to seize upon.

2. In recent years the country seemed to have become more “conservative”. In 2000, we elected a conservative president and thereafter many conservative candidates had been elected to local, state and federal offices. At the pertinent times in this litigation, both the Florida legislature and the US Congress were controlled by Republicans. The leaders of the US House of Representatives and the US Senate, Tom DeLay and Bill Frist, were card-carrying conservatives and Senator Frist was contemplating a campaign for president.
3. As the *Schiavo* case worked its way through the Florida courts time and time again, the White House was occupied by a “born again” Christian conservative Republican president whose Christian conservative/Republican brother was the governor of Florida.

4. The Religious Right had become critically important to the Republican Party. Indeed, many attribute President Bush’s two elections to his close to 100 per cent support from evangelical Christians and political, religious and ideological groups which are strongly right-to-life and anti-abortion in their views. These Culture of Life Warriors saw the *Schiavo* litigation as another battleground with their sworn enemy: the anti-life, liberal, anything goes, Democratic Party.

5. Litigation in America is extremely expensive. The Schindlers were only able to sustain their prolonged assault on Judge Greer’s decision by virtue of support from these Religious Right organizations and their lawyers. One commentator identified 14 groups and seven foundations with connections to the *Schiavo* case and the Schindlers’ 15 lawyers.  

   In addition, many organizations representing people with disabilities appeared *amici curiae* seeking to limit the powers of substitute decision-makers. These groups sought to raise the spectre that severely disabled persons with cognitive ability would be put to death by surrogate decision-makers using the patients’ poor quality of life as justification.

6. In the American adversarial system it is almost always possible to find so-called “experts”, medical and others, who are willing to appear and give evidence for almost any point of view. Here, several doctors were willing to state, contrary to the overwhelming evidence, and, in some instances without even examining her, that Mrs Schiavo was not in a persistent vegetative state but rather retained cognitive powers. This group even included Sen Bill Frist, the Republican Senate majority leader and a highly regarded transplant surgeon. This had the effect of making it look like Michael Schiavo, his supporters and the Florida courts were cold-bloodedly proposing to end a meaningful life.

*The Legislative Response*

Well, put all of these factors into your Cuisinart or blender and what do you get? First, you get “Terri’s Law”.

“*Terri’s Law*”

After the Florida Court of Appeal affirmed Judge Greer’s decision, and after the PEG tube was removed on October 15, 2003 (the second removal; the first was on April 24, 2001, with reinsertion on April 26, 2001), Florida Governor Jeb Bush convened a special session of the Florida legislature to consider a statutory response to Mrs Schiavo’s circumstances and other patients like her.

On October 21, 2003, the Florida legislature passed “Terri’s Law” which authorized the governor to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient if, as of October 15, 2003:

(a) That patient has made no written advance directive or instructions regarding terminating treatment and end-of-life decision making;

(b) The court has found that patient to be in a persistent vegetative state;

(c) That patient has had nutrition and hydration withheld; and

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(d) A member of that patient’s family has challenged the withholding of nutrition and hydration.

This statute realistically could only have applied to Terri Schiavo.
Immediately following the law’s enactment, Governor Bush intervened in the Schiavo matter and ordered a stay of the trial court’s order. Nutrition and hydration were restored to Mrs Schiavo.

Michael Schiavo then filed suit challenging “Terri’s Law” as unconstitutional both facially and as applied to Mrs Schiavo. On May 5, 2004 Pinellas County Circuit Judge W Douglas Baird found “Terri’s Law” unconstitutional for three reasons:

1. First, because facially it encroached upon the powers of the judiciary thus violating the separation of powers doctrine. Specifically, the Circuit Court found that Governor Bush effectively rescinded a duly entered final judgment to discontinue further life-prolonging medical procedures.

2. The separation of powers doctrine is a bedrock principle of both the US and Florida constitutions. Indeed, in the Florida constitution it is explicitly incorporated.

   In both instances, the doctrine prohibits any one of the three branches of government – executive, legislative, and judicial – from encroaching on the others, and from delegating its powers to the others; the three branches are supposed to function independently in a system of “checks and balances” so as to prevent any one branch from abusing its power;

3. Second, because as applied to Mrs Schiavo it was unconstitutional retroactive legislation since it sought to undo a specific court order in a particular case; legislation may not do that; the role of Congress and state legislatures is to make laws of general application, while the role of the judiciary is to apply those laws to specific cases; and

4. Third, because it delegated legislative power to the governor in that it gave him “unfettered discretion to control the nutrition and hydration, indeed the life or death, of a limited class of Florida citizens”.

5. Time does not permit an examination of the constitutional analysis, but I will draw to your attention one portion of Judge Baird’s decision. Sometimes we tend to denigrate our state court judges, as compared to our federal court judges, so we are heartened when we encounter a Judge Baird. Speaking of “Terri’s Law” Judge Baird said:

   This court must assume that this extraordinary legislation was enacted with the best intentions and prompted by sincere motives. However, as the highly respected constitutional lawyer and Senator, Daniel Webster (1782–1852), is widely credited with observing:
   “Good intentions will always be pleaded for every assumption of authority. It is hardly too strong to say that the Constitution was made to guard the people against the dangers of good intentions. There are men in all ages who mean to govern well, but they mean to govern. They promise to be good masters, but they mean to be masters”.

14 Schiavo v Bush, 2004 WL 980028 (Fla Cir Ct) at 3.
15 Ibid at 6.
THE END GAME

On September 23, 2004, the Supreme Court of Florida affirmed the findings of the lower court. The Supreme Court also found that "Terri's Law" violated the constitutional separation of powers doctrine and constituted an improper delegation of legislative power to the governor. The Supreme Court said:

... This case is about maintaining the integrity of a constitutional system of government with three independent and co-equal branches. ... Were "Terri's Law" to be declared constitutional, "[y]ested rights could be stripped away based on popular clamor".16

The United States Supreme Court denied review on January 24, 2005.

Thereafter, the parents initiated further proceedings of various kinds, including a motion for emergency stay. Judge Greer, having finally reached the limit of his tolerance for the seemingly endless efforts of the parents to prevent the inevitable, denied any further stay and ordered the PEG tube removed at 1:00 pm on Friday, March 18, 2005. The Florida Court of Appeal affirmed, and both the Florida and United States Supreme Court denied any further relief.

And so it seemed, at least briefly, that finally Terri Schiavo's life support system would be removed and she would be allowed to peacefully pass away.

But Terri Schiavo's parents and the Culture of Life Warriors had some ammunition left, and the Cuisinart produced another extraordinary result.

On March 21, 2005, Congress passed and President Bush dramatically signed – flying from Texas to Washington to do so – the Act for the Relief of the Parents of Theresa Marie Schiavo granting federal court jurisdiction over the Schiavo case and requiring de novo review. How did that happen? Simply put, most Democrats, fearful that the Republicans had a winning issue, and seriously misreading public opinion, raised no opposition to the legislation.

That same day, the parents sued for a preliminary injunction which would have required reinsertion of the PEG tube. The next day, March 22, the United States District Court for the Middle District of Florida denied any relief because the parents had not shown a substantial likelihood of success on the merits of their claim that there had been inadequate due process in the state courts. On March 23, the Eleventh Circuit Court of Appeals affirmed the District Court's decision. The United States Supreme Court refused review and Theresa Marie Schiavo died on March 31, 2005.

CONCLUSION

What lessons can be drawn or conclusions reached as a result of this tortured and protracted end-of-life litigation?

For one thing, the Schiavo case in all its permutations did represent a unique coming together of legal, medical, religious and political factors. While it is somewhat risky to say "never" in any context, and probably especially so when it comes to litigation in the United States, I think it can confidently be said that, notwithstanding the creativity of American lawyers, the flexibility of the American legal system, and the determination of the Culture of Life Warriors, we are unlikely to see anything like the Schiavo case again for a long time.

The American people simply did not like Congress and the Florida state legislature, and congressional and political leaders interfering in the work of the courts or in

16 Bush v Schiavo, 885 So 2d, 321, 337 (Fla 2004).
private family matters. The vast majority of Americans greatly deplored, and had little patience for, the mass hysteria and political manipulations that turned one woman’s tragic medical condition and death into an extraordinary public spectacle.

Those politicians who sought to overturn the court’s decisions came out losers and politicians and legislators are not likely to want to touch this kind of hot stove again for quite a while.

Although since Terri Schiavo’s death there have been efforts in several states to pass legislation which would require artificial nutrition and hydration in situations like Terri Schiavo’s, and at least one such bill passed (in Louisiana), the Culture of Life Warriors have largely moved on to other issues such as stem cell research, and gay marriage, and other patients in a persistent vegetative state have not become pawns in intra-familial battles over end-of-life decisions. And if they have, they have been below the radar screen. There certainly are ample opportunities for such battles as one author reports that there may be as many as 10,000 to 30,000 PVS patients in the United States.\(^{17}\)

We are back where we were, and, where we should be, when it comes to making these kinds of uniquely private, personal and agonizing decisions, namely in a purely private realm where family and physicians can make decisions about when to terminate life prolonging procedures if patients have indicated their wishes. If anything, \textit{Schiavo} only reinforced the essentially private nature of end-of-life decision making, and the constitutionality of state statutory procedures for effectuating end-of-life decisions.

At the end we can say that our courts did their job, that some politicians did not, that the Constitution prevailed, that Terri Schiavo’s wishes were honoured, and that perhaps the \textit{Schiavo} litigation will, at least for a while, act as a deterrent to others who would, for their own political or religious reasons, seek to thwart individual wishes and judicial decision making.

Thank you.

\textit{NEIL PECK}\(^{18}\)

\(^{17}\text{Eisenberg, Using Terri, 47–48 (Harper San Francisco, 2005).}\)

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EDITORIAL

Our second issue of 2007 is significant for me personally because it is my last as editor of the Nottingham Law Journal. After five years at the helm, the time has come to pass on the torch and I am succeeded by Tom Lewis who steps up to the editorship after many years of sterling service as our book reviews editor. I could not leave the Journal in any better hands.

Thanks to our contributors, I am bowing out in style. As ever, we offer you a number of high quality articles, notes and reviews covering a range of topical subject matter. I hope that you will enjoy reading it as much as we have enjoyed putting it together. All that remains is for me to express my warmest thanks to the members of our production team: Jane, Kay, Tom and Carole. The Journal is a labour of love sustained by their goodwill and effort. Long may it continue.

ADRIAN WALTERS
HUMAN RIGHTS ABROAD

PAUL ARNELL*

INTRODUCTION

The human rights obligations imposed by the Human Rights Act 1998 increasingly relate to territory, persons and events outwith the United Kingdom. Cognisance has recently been taken by courts within the United Kingdom of past or future alleged human rights violations arising beyond its borders in several cases in England\(^1\) and Scotland.\(^2\) One such case is pending before the House of Lords.\(^3\) Analysis of, and judgment upon, the extraterritorial application of United Kingdom human rights law necessarily involves several distinct areas of law including human rights, statutory interpretation and public international law. Human rights and in particular the Human Rights Act 1998 (HRA) and European Convention on Human Rights 1950 (Convention) are, of course, relevant because together they form the basis of the human rights obligations upon United Kingdom public authorities. Statutory interpretation is of concern \textit{inter alia} because of the general presumption against the extraterritorial application of law. Public international law is relevant because the application of law\(^4\) outside United Kingdom territory is governed by rules of state jurisdiction and may conflict with norms protecting the territorial integrity and sovereignty of other states.\(^5\)

* Department of Law, The Robert Gordon University, Aberdeen, Scotland. The author gratefully acknowledges the comments and suggestions made by the anonymous referees. Any inaccuracies are the author’s alone.


3 Permission to appeal the Court of Appeal 21 December 2005 decision has been granted to both the appellants and respondents in Al Skeini. The petitions of appeal were lodged in March 2006.

4 The term “application of law” is largely synonymous with the term “assumption of jurisdiction” but is preferred because of the particular relevance of the word “jurisdiction” for our purposes.

5 A contravention of conventional (as opposed to customary) public international law although generally relevant is not necessarily the concern of courts in the United Kingdom as this form of law is distinct from national law and courts in the United Kingdom have traditionally generally eschewed referring to it, for a somewhat striking example see Kaur v Lord Advocate, 1980 SC 319. It is clear however that courts in the United Kingdom are increasingly taking account of international law and the law of distinct jurisdictions, and not merely because of s 2(1) of the Human Rights Act 1998. Practise differs within the United Kingdom however, with courts in Scotland taking a somewhat more insular approach in certain circumstances than England and Wales, see P Arnell, “Malle Captus Bene Dementius in Scotland” [2004] JR 242.
This article firstly describes and analyses the germane law highlighting the relative weakness of the authorities in the area and the arguments weighing against the extraterritorial application of United Kingdom human rights law found within it. It then brings together the arguments in favour and against the present position and argues that the extraterritorial application of human rights law should be discouraged and restricted.

THE LAW – THE CONVENTIONAL CONTEXT

The immediate subject of this article is the extraterritorial application of the HRA. Discussion of the Convention, however, is also necessary because of the close relationship between it and the HRA, which will be discussed below. Here it is sufficient to note that the jurisprudence of the European Court of Human Rights (ECtHR) has influenced the development of United Kingdom law and that courts within the United Kingdom are now bound to take it into account by the HRA, section 2. A discussion of the territorial application of the Convention is, therefore, the first step in analysing the precise application of the HRA.

The Convention

The logical starting point in an examination of the Convention’s spatial application is the provision within it governing the nature of the obligation placed on state parties. Article 1 of the Convention provides: “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in section 1 of the Convention”. The question that arises is what is the definition of “jurisdiction”? Possible meanings include “territory”, “residence” and “control”. The drafting history of article 1 is illuminating. As discussed in a leading case in the area, Bankovic v Belgium et al, the provision in draft form referred to those residing within the territory of state parties, not to those within their jurisdiction. The travaux préparatoires contain the following:

The Assembly draft had extended the benefits of the Convention to “all persons residing within the territories of the signatory State”. It seemed to the Committee that the term “residing” might be considered too restrictive. It was felt that there were good grounds for extending the benefits of the Convention to all persons in the territories of the signatory States, even those who could not be considered as residing there in the legal sense of the word. The Committee therefore replaced the term “residing” by the words “within their jurisdiction” which are also contained in Article 2 of the Draft Covenant of the United Nations Commission.

Apart from one comment by a representative in the drafting process to the effect that the obligations arising under the Convention apply to all persons within the territory of state parties the travaux préparatoires fail to refer to the issue in any more depth. Therefore whilst “within their jurisdiction” is wider than residence one must turn to the case law of the European Commission and Court of Human Rights for greater clarity.

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6 See generally for the extraterritorial application of human rights F Coomansand, MT Kamminga (eds), Extraterritorial Application of Human Rights Treaties (Intersentia, 2004).
9 Bankovic, n7 above at paras 20 and 21.
10 Article 56 of the Convention also relates to the treaty’s spatial application in that it entitles a state party to declare that the Convention is to extend to a territory over which it is responsible. This provision was at issue in Quark, n1 above. Interestingly for our purposes it was held in Quark that sections 6 and 7 of the Human Rights Act 1998 do not extend to territories where such a declaration has been made.
ECHR Jurisprudence – Extradition and Expulsion Cases

Two types of case relating to the precise meaning of article 1 and the scope of the Convention more generally have arisen.\(^{11}\) The first more longstanding type occurs where an individual within the territory of a state party argues that his extradition or expulsion could lead to a violation of his human rights. These will be called extradition and expulsion cases, although they have also been termed “foreign cases”.\(^{12}\) The second type arises where it is argued that a state party to the Convention is directly responsible for human rights violations that have taken place outside its territory. These cases will be termed wholly extraterritorial in that both the alleged victim and situs of violation are outside the territory of the state at the relevant time. The leading E CtHR extradition and expulsion authority is *Soering v United Kingdom*.\(^ {13}\) Here it was held that Soering’s extradition from the United Kingdom to West Virginia in the United States of America would breach article 3 of the Convention in that he would be likely to spend a considerable time on death row. The judgment considered the question of jurisdiction because the possible future human rights violation would occur outside the United Kingdom and in a non-state party to the Convention. It is extraterritorial in the sense that judgment in it inevitably involved an “assessment of conditions in the requesting country”.\(^ {14}\) The state party is possibly complicit in a human rights violation in the sense that but for the extradition or expulsion it would not occur. The Court in *Soering* stated:

> It would hardly be compatible with the underlying values of the Convention ... were a contracting state knowingly to surrender a fugitive to another state where there were substantial grounds for believing that he would be in danger of being subjected to torture ... Extradition in such circumstances ... would plainly be contrary to the spirit and intendment of [article 3].\(^ {15}\)

There have been subsequent to the decision in *Soering* a number of further ECHR cases relating to extradition and expulsion.\(^ {16}\) These have considered and expanded upon the basic position in *Soering* and also have informed the two recent United Kingdom cases discussed below, *Ullah* and *Razgar*.\(^ {17}\)

ECHR Jurisprudence – Wholly Extraterritorial Cases

Within the jurisprudence of the E CtHR there are a number of instances of the second type of case: wholly extraterritorial cases. Overall this body of authority is less than

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\(^{11}\) Coomans and Kamminga suggest three types of extraterritorial application of human rights; where a state has effective control over an area, where a state exercises power and authority over persons by abducting or detaining them, and “perhaps in certain other extraterritorial situations such as extraterritorial killings not preceded by arrest”, in Coomans and Kamminga, op cit, at pp 3–4.

\(^{12}\) By Lord Bingham in *Ullah*, n1 above at para 9. Extradition and expulsion have not been differentiated in the case law of the E CtHR for the purposes of jurisdiction. This has been accepted by Lord Steyn in *Ullah*, at para 33.

\(^{13}\) (1989) 11 EHRR 439.

\(^{14}\) Ibid at para 91. Emphasis added. See also *Chahal v United Kingdom*, (1997) 23 EHRR 413. Article 3(2) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85, specifically mandates the consideration of circumstances in a foreign state where there are allegations that torture may result from an extradition or expulsion.

\(^{15}\) Ibid at para 89.


\(^{17}\) *Soering* was also considered recently in *The Queen on the Application of Rose Gentle and Others v The Prime Minister et al*, [2005] EWHC 3119, where in judicial review proceedings over the refusal to hold an inquiry of the circumstances that led to the invasion of Iraq, Collins J, refusing the application, held the rule in *Soering* arguably applied to both persons subject to extradition and military personnel. He stated “It is arguable that there is no difference in principle since Soering was, just as this case is, concerned with the actions of the state in compelling the subject in question to go overseas where he might suffer the relevant breach of his human rights”, at para 19.
clear and consistent and has engendered a not-insignificant body of academic criticism.\textsuperscript{18}

Whilst it is beyond the scope of this article to analyse this jurisprudence in depth, it is necessary to mention certain cases involving northern Cyprus and a leading (and controversial) authority where both the putative victim and violation were outside the territory of the state parties allegedly responsible. The cases and admissibility decisions concerning Cyprus contain the first clear statements by Convention organs on the extraterritorial application of the Convention. They arose following Turkey’s invasion of northern Cyprus in 1974 and \textit{inter alia} relate to the treatment of Greek Cypriots in the north of the island. In a series of admissibility decisions the Commission held that the actions of Turkish state agents in northern Cyprus did engage the responsibility of Turkey. In the \textit{Cyprus v Turkey} ruling in May 1975 the Commission held that state agents “... bring any other persons or property within the jurisdiction of that State, to the extent that they exercise authority over such persons or property”.\textsuperscript{19} In the first instance where the ECtHR itself was concerned with northern Cyprus, \textit{Loizidou v Turkey (Preliminary Objections)},\textsuperscript{20} three sets of circumstances were detailed whereby a case could fall within the jurisdiction of a state party even though it related to persons or events outside its territory. These were a pending extradition and expulsion; where acts of state agents produce effects outside that state and where a state’s forces or agents exercise effective control over an area outside its territory.\textsuperscript{21} It was held in \textit{Loizidou} that the acts of the northern Cypriot authorities could be attributed to Turkey in light of Turkey’s control over them and its military presence on the island. This jurisprudence has recently been said to support a second exception to the territorial nature of jurisdiction – in addition to the extraterritorial actions of state agents bringing a situation within a state’s jurisdiction – are acts where it has “effective control of an area” outside its own territory.\textsuperscript{22} It was against this arguably somewhat expansive approach to jurisdiction that the ECtHR decided \textit{Bankovic}.

\textit{Bankovic}, a decision of the Grand Chamber of the ECtHR, is a controversial decision that has engendered much debate and criticism. The disagreements surrounding the decision are demonstrated in the arguments advanced to the High Court in \textit{Al Skeini} where Rabinder Singh QC for the claimants argued that the case was “... just one among a long line of Strasbourg authorities” and Christopher Greenwood QC for the Secretary of State stated that it was a watershed and that “[e]ven if earlier cases were not doubted in their outcomes, they were subject to a fresh rationalisation, so that what at an earlier stage may have seemed a matter of broad principle, had to be re-evaluated as narrow exceptions”.\textsuperscript{23} Furthermore, Loukis Loucaides, Cypriot judge in the ECtHR, recently called the decision “... an example of bad law influenced by the considerations relating to the factual situation”.\textsuperscript{24} Conversely, Dominick McGoldrick termed \textit{Bankovic} a “... hard case which made good law ... consistent with the previous jurisprudence ... ”.\textsuperscript{25} It is submitted that this last view is the correct one.


\textsuperscript{19} \textit{Cyprus v Turkey}, (1982) 4 ECHR 482 at para 8.


\textsuperscript{21} \textit{Ibid} at para 62.

\textsuperscript{22} Argued by Rabinder Singh QC for the claimants in the High Court in \textit{Al Skeini}, n 1 above at para 110.

\textsuperscript{23} \textit{Ibid} at paras 114 and 115.

\textsuperscript{24} Loucaides, \textit{op cit} at p 393.

\textsuperscript{25} D McGoldrick, “Extraterritorial Application of the International Covenant on Civil and Political Rights” in Commons and Kamminga (eds), \textit{op cit}, at p 41.
Bankovic is in accord with the previous ECtHR jurisprudence and, more importantly for our present purposes, expressly in accord with general public international law.

In Bankovic the applicants were survivors and relatives of the deceased of a NATO-led bombing within the former Yugoslavia. They argued that their rights had been infringed and that they came within the jurisdiction of several state parties to the Convention. The Grand Chamber held, in essence, that the Convention’s application is normally limited to the territory of state parties but it is exceptionally applicable outwith that territory where a state

... through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises all or some of the public powers normally to be exercised by that Government.\textsuperscript{26}

Significantly the Court stated that it must “... take into account any relevant rules of international law when examining questions concerning its jurisdiction ... The Convention should be interpreted as far as possible in harmony with other principles of international law of which it forms a part”.\textsuperscript{27} The ECtHR then discussed extraterritorial jurisdiction generally and stated that whilst it is not excluded by international law the bases of jurisdiction are “... as a general rule defined and limited by the sovereign territorial rights of the other relevant states”.\textsuperscript{28} It continued

... a State may not actually exercise jurisdiction on the territory of another without the latter’s consent, invitation or acquiescence, unless the former is an occupying State in which case it can be found to exercise jurisdiction in that territory, at least in certain respects.\textsuperscript{29}

Following this emphasis upon extant rules of general international law, the ECtHR held that “jurisdiction” “... must be considered to reflect [the] ordinary and essentially territorial notion of jurisdiction, other bases of jurisdiction being exceptional and requiring special justification in the particular circumstances of each case”.\textsuperscript{30} It found confirmation of the essentially territorial notion of jurisdiction in the travaux préparatoires\textsuperscript{31}, as noted above. The ECtHR summarised its view in regard to the application of the Convention in Bankovic by stating that

... the Convention is a multi-lateral treaty operating ... in an essentially regional context and notably in the legal space (espace juridique) of the Contracting States ... The Convention was not designed to be applied throughout the world, even in respect of the conduct of Contracting States.\textsuperscript{32}

This final sentence explicitly encapsulates the restrictive essence of the case. The judgment relies and focuses upon basic and fundamental rules of public international law, especially the rule protecting the sovereignty and territorial integrity of states and provides strong support for a spatially restrictive interpretation of the Convention.

\textsuperscript{26} Bankovic, n 1 above at para 71.
\textsuperscript{27} Ibid at para 57.
\textsuperscript{28} Ibid at para 59.
\textsuperscript{29} Ibid at para 60.
\textsuperscript{31} Ibid. at para 63.
\textsuperscript{32} Ibid at para 80. Emphasis added.
Following *Bankovic* there have been a number of ECHR decisions that have examined the precise scope of Convention obligations. In essence, these cases have confirmed that there are two sets of circumstances that can give rise to the wholly extraterritorial application of the Convention: where a state’s forces or agents have a degree of control over a spatial area outside its territory and where they have a degree of personal authority over an alleged victim. These two circumstances have been termed “effective control of an area” and “state agent authority” respectively.\(^3\) A recent ECHR example is Issa v Turkey\(^4\) where both tests of personal authority and effective control of an area were applied in examining possible Turkish jurisdiction outside the territory of the Council of Europe, namely in Iraq. It held:

The Court does not exclude the possibility that, as a consequence of this military action, the respondent State could be considered to have exercised, temporarily, effective overall control of a particular portion of the territory of northern Iraq. Accordingly, if there is a sufficient factual basis for holding that, at the relevant time, the victims were within that specific area, it would follow logically that they were within the jurisdiction of Turkey (and not that of Iraq, which is not a Contracting State and clearly does not fall within the legal space (espace juridique) of the Contracting States (see the above-cited *Bankovic* decision, § 80).\(^5\)

On the facts, the ECHR held that the applicants had not proved that their relatives, allegedly killed by Turkish soldiers in northern Iraq, were under the personal authority of Turkish soldiers or that the territory in question was under the overall effective control of Turkey.\(^6\)

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THE LAW – THE HUMAN RIGHTS ACT 1998

The Convention and ECHR jurisprudence provide the context for the HRA’s application. The HRA’s purpose was to give “further effect to the Convention”.\(^7\) As seen, the meaning of “within their jurisdiction” in article 1 of the Convention according to the ECHR is relatively clear. The Convention applies to an act or person where a state party has effective extraterritorial control of the *situs* of the act, where the putative victim is under the personal extraterritorial authority of its agents and, perhaps more obviously, where a person is within its territory subject to extradition or expulsion to a state where a future human rights violation may occur. The question that arises is whether, and if so to what extent, this meaning affects the particular spatial application of the HRA. On the one hand, one might argue that since the HRA, section 2(1) obliges United Kingdom courts to take into account *inter alia* jurisprudence of the ECHR the application of the HRA would be governed by the rules found in the cases noted above. If this is the case, the HRA would apply in the manner just described. On the other hand the Convention is a multilateral treaty and not part of municipal United Kingdom law. The HRA itself is silent on the issue of its general extent, with article 1 not finding a place in the

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\(^3\) By the Court of Appeal in *Al Skeini*, n 1 above at para 50.

\(^4\) (2005) 41 EHRR 27. This case is also authority for the position that the Convention can apply outside the territory of state parties to the Convention, see R Wilde, "The “Legal Space” or “Espace Juridique” of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?" [2005] EHRL 115.

\(^5\) *Ibid* para 74.

\(^6\) Further relevant cases include *Öcalan v Turkey*, (2003) 37 EHRR 10 and *Iliascu v Moldova*, (2005) 40 EHRR 46.

\(^7\) The Long Title of the HRA *inter alia* provides that it is “An Act to give further effect to rights and freedoms guaranteed under the European Convention on Human Rights . . . .”
Act. Rules of statutory interpretation largely militate against its extraterritorial application. Together these factors suggest that the range of application of the Convention and the HRA are not co-extensive. However, in applying the HRA, courts in the United Kingdom have, to date, effectively adopted the ECtHR’s approach to jurisdiction. Prior to analysing the germane jurisprudence, it is useful to examine the precise relationship between the HRA and the Convention. This is relevant in part because it sheds light on whether courts in the United Kingdom were, and are, obliged to adopt the ECtHR’s approach as a matter of law, or instead, whether there was, and is, scope for divergence in the approaches taken to jurisdiction by United Kingdom courts and the ECtHR.

Academic and judicial debate both fail to provide clear and consistent guidance on the relationship between the Convention and the HRA. Academic debate is centred mostly upon whether the HRA “incorporated” the Convention or gave it “further effect”. “Incorporation” here tends to suggest a single set of jurisdictional rules governing both the HRA and the Convention. It implies the transplantation of the Convention (or parts of the Convention) and its attendant rules into United Kingdom municipal law. Given “further effect” on the other hand implies the possibility of distinct rules. This can be understood to mean that (certain) rights guaranteed under the Convention have been adopted and are now guaranteed by HRA and conditioned by the rules (or absence of rules) within the HRA itself. For example, Fenwick writes

The HRA does not “incorporate” the Convention rights into substantive domestic law, since it does not provide that they are to have the “force of law”, the usual form of words used when international treaties are incorporated into domestic law . . . the rights are in a sense incorporated into domestic law when asserted against public authorities or when the issue in question, which relates to a Convention right, falls within the scope of EC law.

Himsworth appears to agree in stating that the Human Rights Act 1998 does not “in a strong sense” incorporate the Convention and make it part of United Kingdom law. In contrast is this judicial dictum of Lord Scott, who stated

The ECHR is not part of domestic law except to the extent that it has become so under the 1998 Act. The 1998 Act did not entrench the articles of the ECHR so as to bar Parliament from subsequently enacting legislation inconsistent with those articles. Parliament can, if it wishes to do so, enact such legislation.

As this authority indicates, there is no uniformity of opinion on the question of the nature of the relationship between the HRA and the Convention. In order to discern the territorial reach of the HRA therefore other, more orthodox methods, are more useful.

A standard rule of statutory construction is the presumption that legislation applies only within the territory of the United Kingdom unless the particular statute specifies otherwise. Bennion writes “[u]nless the contrary intention appears, Parliament is taken

38 The several sections that refer to the HRA’s territorial application are discussed below. Lord Drummond Young states that the reason for the absence of article 1 “... is obvious; article 1 is the provision that renders the Convention binding on the High Contracting Parties, but it does not of itself confer any specific rights on persons who find themselves within the jurisdiction of any High Contracting Party. Thus it has no place in domestic law”, in Al Fayed, 2 above at para 5.
39 H Fenwick, Civil Liberties and Human Rights (Cavendish, 2002), at pgs 134–135, emphasis hers.
41 A (FC) and others (FC) v Secretary of State for the Home Department, [2004] UKHL 56, [2005] 2 AC 68 at para 144. Further judicial authority will be referred to below.
to intend an Act to extend to each territory of the United Kingdom but not to any territory outside the United Kingdom". 42 In R v West Yorkshire, ex p Smith, Donaldson LJ stated that "... every parliamentary draftsman writes on paper which bears the legend, albeit in invisible ink, 'this Act shall not have an extra-territorial effect, save to the extent that it expressly so provides'". 43 There is no express stipulation in the HRA that leads to the conclusion that the contrary applies. It does not contain general express provision on its spatial or personal application. Indeed the provision within it militates against any general extraterritorial application. There are two specific references to the scope of application of the HRA, section 22(6) which states that the Act extends to Northern Ireland and section 22(7) which provides "[s]ection 21(5), so far as it relates to any provision contained in the Army Act 1955, the Air Force Act 1955 or the Naval Discipline Act 1957, extends to any place to which that provision extends". Also relevant is section 11, which inter alia states that "(a) A person's reliance on a Convention right does not restrict – (a) any other right or freedom conferred on him by or under any law having effect in any part of the United Kingdom". 44 Following this specific provision and in the light of the rule of interpretation above, it is reasonable to conclude that the HRA applies on an intra-territorial basis only. However, courts in the United Kingdom have overcome the presumption in favour of the territorial application of the HRA.

There are four factors that led to United Kingdom courts adopting the same approach to jurisdiction as the ECtHR. Firstly, courts are bound to take into account the jurisprudence of the ECtHR and Commission in interpreting Convention rights. As was noted in Ullah by Lord Bingham "... the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law". 45 Secondly, the HRA, section 3(1) provides that "[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights". This includes the HRA itself. In Al Skeini, the Divisional Court could "... see no reason why section 3(1) should not apply to the Act itself and to the question of its scope". 46 Thirdly, there is the presumption that legislation giving effect to international treaty obligations will be compatible with those obligations. 47 Fourthly, there is the rule of statutory interpretation that provides that the object and purpose of an Act should be taken into account in determining its meaning. 48 Together these factors have led to the same set of rules governing the range of application of the HRA as the Convention. Lord Nicholls has recently stated:

42 F Bennion, Statutory Interpretation: A Code, 4th ed (Butterworths, 2002) at p 82. Of course this is just a presumption, and one that is increasingly explicitly overcome. There is, particularly in the area of the criminal law, increasing extraterritorial application of statutory provision. Prominent examples include s 134 of the Criminal Justice Act 1988 prescribing torture, offences relating to so-called "sex-tourism" under the Sexual Offences Act 2003 and a number of terrorist and bribery-related crimes under the Anti-terrorism, Crime and Security Act 2001.


44 Ss 11 and 22 were referred to by counsel for the Secretary of State in B and Others, n 1 above at para 69, as evidence against the application of the HRA to the facts in that case. It is discussed below.

45 N 1 above at para 20.

46 N 1 above at para 291.


48 Murray v Inland Revenue, 1918 SC (HL) 111. Indeed, there are "special considerations" in regard to the interpretation of statutes incorporating or giving effect to conventions within United Kingdom law, resulting in it being "absurd to interpret [conventions] differently from the courts of other countries which are also parties to the treaty or convention" and "... the court should adopt the European method of looking at the design and purpose of the legislation and interpreting the legislation to have the desired effect or in a manner less constrained by technical rules of English or Scottish law or by legal precedent but on broad principles of general application". D M Walker, The Scottish Legal System, 8th ed (W Green, 2001), at p 431, footnotes omitted.
... the territorial scope of the obligations and rights created by sections 6 and 7 of the Act was intended to be co-extensive with the territorial scope of the obligations of the United Kingdom and the rights of victims under the Convention. The Act was intended to provide a domestic remedy where a remedy would have been available in Strasbourg.\textsuperscript{49}

As will be seen in the analysis of recent United Kingdom jurisprudence below, the rules governing the particular application of the HRA are those developed by the ECtHR.

THE LAW – RECENT UNITED KINGDOM JURISPRUDENCE

Extradition and Expulsion Cases
A number of recent United Kingdom cases have considered the application of human rights law abroad. They have related to both extradition and expulsion and wholly extraterritorial situations. This recent jurisprudence is important for three reasons. Firstly, it establishes that the HRA does indeed apply abroad. Secondly, it highlights that the precise relationship between the HRA and the Convention remains unclear and that a more restrictive approach to jurisdiction under the HRA is not precluded. Thirdly, it is important because it contains several cogent reasons in favour of a narrower approach to jurisdiction than that taken by the ECtHR. In regard to extradition and expulsion cases the rule established in \textit{Soering} has recently been considered by the House of Lords in \textit{Ullah} and \textit{Razgar}, and by the Court of Session in \textit{Wright v Scottish Ministers}. The issue in all these cases was whether articles additional to article 3, prohibiting torture and inhuman and degrading treatment and punishment, could be invoked to prevent an extradition or expulsion. In \textit{Ullah}, article 9, which protects freedom of thought, conscience and religion, was considered.\textsuperscript{50} Lord Bingham firstly examined the possibility that any article other than article 3 could found the basis of an argument against extradition or expulsion. He accepted the importance of the right to life, stating ‘‘given the special importance attached to the right to life by modern human rights instruments it would perhaps be surprising if article 3 could be relied on and article 2 could not’’.\textsuperscript{51} Then, after referring to ECtHR case law, Lord Bingham accepted the possibility that articles 4, 5, 6 and 8 could apply in extradition and expulsion cases.\textsuperscript{52} As regards article 9, he concluded:

I find it hard to think that a person could successfully resist expulsion in reliance on article 9 without being entitled either to asylum on he ground of a well-founded fear of being persecuted for reasons of religion or personal opinion or to resist expulsion in reliance on article 3. But I would not rule out such a possibility in principle unless the Strasbourg court has clearly done so, and I am not sure it has.\textsuperscript{53}

A similar threshold rule as that used in cases based on article 3 was held to be applicable here. A ‘‘stringent test’’ should be adopted by courts that required the

\textsuperscript{49} Quark, n 1 above at para 34. Sedley LJ in the Court of Appeal stated in this regard ‘‘... I consider the Act to be not only presumptively but designly coextensive with the Convention ...’’, \textit{Al Skeini}, n 1 above at para 189.

\textsuperscript{50} Article 9 provides: ‘‘1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’’

\textsuperscript{51} \textit{Ullah}, n 1 above at para 15.

\textsuperscript{52} \textit{Ibid} at paras 16–18. The opinion of the Court on article 8 was split, with Lord Walker and Baroness Hale disagreeing with the view that it could be invoked in extradition and expulsion cases. This was the issue in \textit{Razgar}, discussed below.

\textsuperscript{53} \textit{Ibid} at para 21.
applicant to show strong grounds for believing that, if expelled, he or she faced a real risk of being subjected to a violation of the right in question. In the light of the facts, Lord Bingham held that the appellants fell far short of satisfying this test.

Importantly for our present purposes, in addition to accepting that an increased number of articles can find the basis of an argument against an extradition or expulsion, Lord Bingham discussed the relationship between ECtHR jurisprudence and United Kingdom courts. He stated:

In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court... From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law.

This statement confirms that it is possible for United Kingdom courts to eschew the jurisdictional approach taken by the ECtHR. Its case law is “not strictly binding”, it merely has to be “taken into account”. It will be argued below there are indeed strong reasons for diluting the effect of Strasbourg case law where it has been extraterritorially applied. Interestingly, Lord Carswell, agreeing with the majority, stated when considering exceptions to the primarily territorial nature of the Convention that:

One might indeed have preferred, if the matter was res integra, to see the exception expressed in terms of general humanitarian considerations, which could be applied flexibly throughout the states which are parties to the Convention, rather than being tied to specific articles of the Convention. The risk in defining it by reference to the latter is that courts of law will tend to fit expulsion cases into a Procrustean bed of legal categories.

This, it is submitted, is a wholly reasonable suggestion. A flexible humanitarian yet restrictive approach that takes into account a number of disparate factors is indeed preferable. Lord Carswell implied that relevant factors were state sovereignty and the interests protected by expelling or extraditing certain individuals, noting

It is to be hoped that the courts which have to apply the principles will be able to retain a substantial degree of flexibility in order to fulfil the humanitarian objectives of the Convention in such cases, while upholding the proper rights of states to decline to admit aliens.

He additionally highlighted the importance of not imposing alien standards of human rights protection on third states:

The primary focus of the Convention is territorial, but, as examination of the Strasbourg jurisprudence shows, it cannot now be said that persons seeking asylum in a member state of the Council of Europe are unable to invoke any of the provisions of the Convention when resisting an expulsion decision. I do regard it as important, however, that member states should not attempt to impose Convention standards on other countries by decisions which have the effect of requiring adherence to those standards in those countries’.

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54 Ibid at para 24. Lord Carswell states the law provides that the breach must be “flagrant”, which denotes the right being completely denied or nullified in the requesting state, at para 69.

55 Ibid at para 20, reference omitted.

56 Ibid at para 66.

57 Ibid.

58 Ibid at para 63. Emphasis added.
This point is significant and supports the arguments proffered below against the extraterritorial application of human rights law. *Ullah*, then, whilst authority for the HRA applying extraterritorially in extradition and expulsion cases also explicitly admits the possibility of divergent approaches between the HRA and the Convention and contains certain *dicta* in support of a more restrictive approach being applied to the HRA.

*Razgar*, like *Ullah*, follows the ECtHR’s approach while also containing *dicta* which can be used in support of a less expansive approach to jurisdiction. As noted, the issue in *Razgar* was whether article 8 could form the basis of an argument against extradition and expulsion in a case where the removal did not also violate article 3.60 The Court, by three to two, held that article 8 could be invoked on its own. Lord Bingham stated:

... the rights protected by article 8 can be engaged by the foreseeable consequences for health of removal from the United Kingdom pursuant to an immigration decision, even where such removal does not violate article 3, if the facts relied on by the applicant are sufficiently strong... an applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state.60

Following the decision on principle the Court held by a majority on the facts that it was not possible to hold as manifestly unfounded the argument that *Razgar’s* removal would infringe his article 8 rights.61 However, Lord Bingham stressed that:

... removal cannot be resisted merely on the ground that medical treatment or facilities are better or more accessible in the removing country than in that to which the applicant is to be removed... It would indeed frustrate the proper and necessary object of immigration control in the more advanced member states of the Council of Europe if illegal entrants requiring medical treatment could not, save in exceptional cases, be removed to the less developed countries of the world where comparable medical facilities were not available.62

Baroness Hale, dissenting, highlighted the fact that difficult decisions needed to be made in these circumstances:

... this is a field in which harsh decisions sometimes have to be made. People have to be returned to situations which we would find appalling. The United Kingdom is not required to keep people here who have no right to be here unless to expel them would be a breach of its international obligations. It does the cause of human rights no favours to stretch those obligations further than they can properly go.63

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60 *Razgar*, n 1 above at para 10.
61 Lord Walker dissented in part due to the “wide and imprecise” language used in interpreting article 8, at para 34. In analysing the situation in Germany, he stated “... neither the truism of human imperfection, nor the evidence (taken at its highest) of conditions in Germany, leads to the conclusion that the respondent’s treatment in Germany would probably be so much worse than his present condition as to amount to a flagrant infringement of his human rights — an infringement so serious as would... result in the rights in question being completely denied or nullified”, at para 37. Lord Walker’s dissent will be further mentioned below.
63 *Ibid* at para 65. Baroness Hale terms this type of case a “‘health case’” in that arguments against extradition or expulsion focus on the possible disparity in treatment available between the United Kingdom and the state to which the person is perhaps to be sent.
Although they disagreed in this case, both Lord Bingham and Baroness Hale strongly emphasised the fact that there are real and practical factors in support of a narrow approach to the extraterritorial application of human rights law in extradition and expulsion cases. These factors, including the policies behind immigration control and the coherence and defensibility of human rights themselves, lend support to a restrictive approach being taken to the HRA’s spatial applicability.

A Scottish case similar to Razgar is Wright v Scottish Ministers. Here Wright’s argument against extradition to Estonia on the basis of article 8 was dismissed. It was held that whilst his case was tenable in law it was not established in fact. The high threshold needed to establish such an argument was emphasised by the Court of Session, with passages in both Ullah and Razgar being cited with approval. Significantly the court, in discussion of the proportionality of the interference with Wright’s article 8 rights against the interests served by extradition, stressed the need to construe extradition treaties liberally: “... the court should not, unless constrained by the language used, interpret any extradition treaty in a way which would ‘hinder the working and narrow the operation of most salutary international arrangements’”. The court later discussed the purpose of extradition:

The object of extradition is to return a person who is properly accused or has been convicted of an extradition crime in a foreign country to face trial or to serve his sentence there... The extradition process is only available for return to friendly foreign states with whom this country has entered into either a multi or a bilateral treaty obligation involving mutually agreed and reciprocal commitments. Mr Perry, on behalf of the claimant, accepts that there is a strong public interest in our respecting such treaty obligations. Such international co-operation is all the more important in modern times, when cross-border problems are becoming ever more common, and the need to provide international solutions for them is ever clearer.

The court reached the following conclusion on the proportionality argument:

... we have not been persuaded that the mere possibility of prosecution of the reclamer in Scotland, presumably under sec 20 of the 1971 Act, can be seen as rendering the reclamer’s extradition, with the consequent interference with his Art 8 rights, as not “necessary in a democratic society... for the prevention of disorder or crime”, within the meaning of Art 8(2) of the European Convention on Human Rights.

The focus of the court upon the purpose and nature of extradition supports the arguments proffered below based on state sovereignty and territorial integrity. Indeed, all three of the recent cases discussed contain cogent arguments in favour of a limited approach to jurisdiction in extradition and expulsion cases. Admittedly they also provide authority for articles additional to article 3, namely articles 2, 4, 5, 6, 8, and 9 being able to found the basis of an argument against an extradition or expulsion. They also, however, stipulate a high and relatively difficult to establish threshold that must be overcome to argue a case successfully on the basis of one of these articles.
*Wholly Extraterritorial Cases*

Recent wholly extraterritorial cases considered by courts in England and Scotland, like extradition and expulsion cases, do three things: confirm that the HRA has been applied extraterritorially using the tests developed by the ECtHR; establish that this need not have been the case as a matter of law and provide reasons for the adoption of a narrower approach to jurisdiction. As noted above, the Convention has been held by the ECtHR to apply where both the alleged victim and violation are outwith the territory of the relevant state party and outwith the Council of Europe. This type of wholly extraterritorial application of human rights law has been adopted by United Kingdom courts. A leading case here is *Al Skeini*\(^{70}\) where the Court of Appeal held that the HRA applied to a prison in Iraq under United Kingdom control during the period between the cessation of combat operations and the assumption of power by the Iraqi interim government. It had been conceded by the Crown that the United Kingdom was exercising extraterritorial jurisdiction over the prison for the purposes of the Convention. The question for the Court of Appeal was whether the HRA itself applied.\(^{71}\) Brooke LJ stated that the HRA “... can be naturally interpreted as impliedly having extra-territorial effect in the very limited number of cases in which the state has exercised extra-territorial jurisdiction on [state agent authority] principles”.\(^{72}\) Specifically, the Court of Appeal overturned the High Court’s ruling that the failure to investigate the death of the applicant’s son in the prison sufficiently contravened article 2 of the Convention on the basis of new evidence of ongoing investigations. However, like the High Court, the Court of Appeal dismissed the claims of the five other applicants because it did not accept that the United Kingdom was exercising article 1 jurisdiction over the Iraqi territory outside the prison where they died. A distinction was drawn between the wider territory, where an “effective control of an area” test was applied and the prison, where a “state agent authority” test was held to be applicable.\(^{73}\)

Brooke LJ usefully discussed both ways in which a person or event could be brought with the jurisdiction of the United Kingdom under the Convention: state agent authority (abbreviated in the judgment as SAA) and effective control of an area (ECA).\(^{74}\) In holding that jurisdiction existed over events in the United Kingdom controlled prison, he stated “[i]n my judgment, Mr Mousa came within the control and authority of the UK from the time he was arrested at the hotel and thereby lost his freedom at the hands of British troops”.\(^{75}\) He continued, as regards SAA, he continued

It is essential, in my judgment, to set rules which are readily intelligible. If troops deliberately and effectively restrict someone’s liberty he is under their control. This did not happen in any of these five cases [in the general area of United Kingdom controlled southern Iraq].\(^{76}\)

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\(^{70}\) N 1 above.

\(^{71}\) As Sedley LJ stated “... the Crown accepts that such an establishment is analogous to a diplomatic legation: not an extension of British territory but a United Kingdom enclave within another state, and so within the *espace juridique* of the Convention”, *ibid* at para 185.

\(^{72}\) *Ibid* at para 147. The High Court, whose substantive decision in regard to the application of the Convention and Human Rights Act 1998 was upheld by the Court of Appeal, equated the prison with consular and diplomatic premises noting that they both had a “discrete quasi-territorial quality”, *ibid* at para 270.

\(^{73}\) A more recent and related case is that of *Al-Jeddah*, n 1 above, where the Court of Appeal held, following *Al Skeini*, that whilst the HRA and Convention could apply to persons detained by British forces in Iraq (as the claimant was) the operation of Security Council Resolution 1546, S/Res/1546 (2004), *inter alia* endorsing the formation of an interim Iraqi government, qualified the application of the law and therefore limited his human rights, at para 80. Al-Jeddah therefore could not rely on article 5(1).

\(^{74}\) Sedley LJ stated that the sole criterion is effective control: “[h]ere I would accept that while ECA and SAA have proved useful exegetic tools in analysing the decisions of the ECtHR, they do not represent discrete jurisprudential classes each of which attracts state liability. The single criterion is effective control”, *ibid* at para 191.

\(^{75}\) *Ibid* at para 109.

\(^{76}\) *Ibid* at para 111.
Brooke LJ then turned to ECA authority and considered whether the concept is distinct from “occupation” as defined by international humanitarian law. He concluded “... whatever may have been the position under the Hague Regulations, the question this court has to address is whether British troops were in effective control of Basrah City for ECA purposes”. 77 He then distinguished the situation in Iraq with those that had been examined in Strasbourg jurisprudence in northern Cyprus and the Russian-occupied part of Moldova. 78 He concluded “[i]n my judgment it is quite impossible to hold that the UK, although an occupying power for the purposes of the Hague Regulations and Geneva IV, was in effective control of Basrah City for the purposes of ECHR jurisprudence at the material time”. 79

Having held that, under the Convention, the prison – but not the wider area of southern Iraq – was within the jurisdiction of the United Kingdom, Brooke LJ examined the position under the HRA. He concluded that “... the HRA has extra-territorial effect in those cases where a public authority is found to have exercised extra-territorial jurisdiction on the application of SAA principles”. 80 Significantly, in coming to this conclusion, he relied upon dicta in B and Others and Quark as being strongly persuasive authority. 81 Richards LJ also relied on this authority, stating “... I agree with Brooke LJ that the right course is to follow the dicta in B and Quark and leave it to the House of Lords to decide whether those dicta are wrong”. 82 The Court of Appeal in Al Skeini was, of course, not bound to follow these judgments. As the facts of B and Others and Quark were materially distinct from those in Al Skeini, it is suggested that this should not have happened. 83 In addition to the decision in Al Skeini being premised on dicta in cases not directly in point; it is significant for the discussion it contains of the relationship between the Convention and the HRA. In this regard, Brooke LJ stated that the scope of the HRA need not be co-extensive with the Convention:

... this country was not obliged to incorporate the ECHR into its national law, either in whole or in part. The HRA would still be compatible with (or consonant with) the UK’s international obligations under the ECHR even if it were not co-extensive with the ECHR in its territorial scope. Furthermore, the House of Lords has recently made it clear that a person may have rights enforceable in Strasbourg and not in the UK if those rights accrued before the HRA came into force (see In re McKerr [2004] UKHL 12; [2004] 1 WLR 807 at [25] and [68]): the extent of the rights under national law depends on the language of the national statute (see McKerr at [63]). 84

This is important and in line with the extradition and expulsion authorities discussed above. It confirms that it would be lawful for courts in the United Kingdom to apply the HRA in a more limited way than that taken by the ECtHR in applying the Convention.

B and Others, 85 although not wholly extraterritorial in the sense of Al Skeini, is a second relevant recent case in this area. Here the Court of Appeal held that the actions

77 Ibid at para 121.
78 The latter being at issue in Ilascu v Moldova, n 36 above. In discussing effective control, Lord Sedley stated “[t]he decisions of the European Court of Human Rights do not speak with a single voice on the question whether such a level of presence and activity engages the responsibility of a member state on foreign soil”, ibid at para 193.
79 Ibid at para 125.
80 Ibid at para 148.
81 Ibid at para 147.
82 Ibid at para 211.
83 B and Others is discussed below and it will be recalled that Quark concerned the applicability of the HRA in territories where an article 56 declaration had been made.
84 Ibid at para 145.
85 N 1 above.
of United Kingdom consular officials in their offices in Melbourne, Australia, did not breach the Convention. The facts in this case were that two children who had been detained in the Woomera detention centre had found their way into the consulate. They argued that if handed back to the Australian authorities their rights would be infringed. On the facts, the court held against the applicants, stating that the treatment that the applicants would receive was not serious enough to warrant the United Kingdom’s disregarding its obligation under the Vienna Convention on Consular Relations 1963\textsuperscript{86} to return the two to the Australian authorities. Significantly the court analysed the case acting under the assumption that the situation in the consulate was within the jurisdiction of the United Kingdom under article 1.\textsuperscript{87} As a result the court’s subsequent decision that the HRA did apply in the same manner as the Convention itself was obiter, as Brooke and Sedley LJ noted in \textit{Al Skeini} above. Therefore, there remains to be a definitive judicial statement that the HRA applies in the same way as the Convention in wholly extraterritorial cases. Also germane here is the court’s view of the relationship between the Convention and the HRA. It cited with approval from the speech of Lord Hoffmann in \textit{McKerr}:

Although people sometimes speak of the Convention having been incorporated into domestic law, that is a misleading metaphor. What the Act has done is to create domestic rights expressed in the same terms as those contained in the Convention. But they are domestic rights, not international rights. Their source is the statute, not the Convention. They are available against specific public authorities, not the United Kingdom as a state. And their meaning and application is a matter for domestic courts, not the court in Strasbourg.\textsuperscript{88}

This, like \textit{Al Skeini}, confirms that the HRA may be applied differently to the Convention. It is not the Convention or Strasbourg jurisprudence that is determinative of the scope of the HRA. It is the HRA itself as interpreted under the relevant rules of United Kingdom law.

The final instance of wholly extraterritorial authority to be discussed is the Scottish case of \textit{Al Fayed}.\textsuperscript{89} Here the application of human rights law on a wholly extraterritorial basis was considered and rejected. Lord Drummond Young in the Outer House of the Court of Session dismissed a petition for judicial review of the Lord Advocate’s refusal to hold a public inquiry into the circumstances of Dodi Al Fayed’s death in Paris in August 1997 on the basis of Mohamed Al Fayed’s residence in Scotland. He held that the Convention normally only extends to events that occur within a state party’s territory and that there was no reason why Al Fayed’s right to a public investigation under article 2 should be enforceable in any other jurisdiction than France. He stated

The death of the petitioner’s son occurred in France. It follows that any obligations under the Convention in relation to that death are primarily those of France, and the obligations of the United Kingdom under the Convention do not extend to the investigation of such a death.\textsuperscript{90}

\textsuperscript{86} (1963) 596 UNTS 261.
\textsuperscript{87} The court stated ‘‘[w]e are content to assume (without reaching a positive conclusion on the point) that while in the Consulate the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of Article 1. Whether the conduct of Mr Court and Mr Mudie in fact infringed the Convention is a question that we shall consider when we come to the third of the issues raised by this appeal’’, n 1 above at para 66.
\textsuperscript{88} \textit{Ibid} at para 74, from \textit{In re McKerr}, [2004] 1 UKHL 12 at para 63.
\textsuperscript{89} N 2 above.
\textsuperscript{90} \textit{Ibid} at para 4.
In emphasising the importance of territory Lord Drummond Young stated:

The European Convention on Human Rights was concluded against a background of customary international law, and the obligations that it imposes on High Contracting Parties must be construed in the light of that background. Under international law, the jurisdiction exercised by a state is primarily territorial. While exceptions exist, notably in relation to ships and aircraft and diplomatic and consular premises, the primary rule is that a state is entitled to exercise jurisdiction over all persons and things within its own territory.\(^9\)

This, it will be recalled, mirrors the position in Bankovic in its emphasis on extant international law and the importance of territory. While Al Fayed is distinguishable from Al Skeini and B and Others, inter alia because the locus of the alleged violation was within the territory of another party to the Convention, it is relevant for its emphasis upon the importance of general international law and territorial jurisdiction and as such for supporting arguments in favour of a restrictive approach to HRA jurisdiction.

**CRITICISM OF THE LAW**

*State Sovereignty and Territorial Integrity*

The extraterritorial application of the HRA described and analysed above is subject to criticism on a number of grounds. The arguments against, and for, the extraterritorial application of human rights law apply to all states, not just the United Kingdom.\(^92\) As such the discussion below will not specifically address United Kingdom law and practice, but will be couched in general terms. Militating against the extraterritorial application of human rights are a number of factors that can be classed under the broad heads of state sovereignty and territorial integrity; neo-imperialism; universalism; extant fora; effectiveness; realpolitik issues and the conferral of legitimacy. Of the factors weighing against the extraterritorial application of human rights perhaps the most cogent is that it conflicts with one of the most fundamental rules of international law, the norm protecting the sovereignty and territorial integrity of all states. Amongst the many iterations of this rule is the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, which inter alia provides as a principle “. . . the duty not to intervene in matters within the domestic jurisdiction of any State, in accordance with the Charter”. It continues:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.\(^93\)

The application of human rights law in an extraterritorial way undermines this rule. As was emphasised in the jurisprudence above, in particular in Bankovic and

\(^91\) Ibid at para 8. Lord Drummond Young also stated that practical difficulties stood in the way of the extraterritorial application on human rights, these are noted below.

\(^92\) The United Kingdom is, of course, not alone in engaging in the practice. It occurs both within and outside the Council of Europe. This fact in itself weighs against the application of the law in this way as it creates the possibility of two or indeed more sets of (possibly incongruent) human rights laws applying to a single incident.

\(^93\) UN General Assembly Resolution 2625 (XXV), 24 October 1970, 25 UN GAOR, Supp (No 28), UN Doc A/5217 (1970), at 121.
Al Fayed, the importance of extant conventional and customary international law and the protection it affords to territory cannot be overlooked.

The norm protecting state sovereignty and territorial integrity is infringed by both forms of the extraterritorial application of human rights law. The application of law in a wholly extraterritorial sense violates it because it entails a court taking cognisance of an event that has taken place within the territory of another sovereign state.\(^{94}\) Clearly and necessarily this entails an intervention or interference within the internal affairs of that state. Under it, persons and activities within the territorial area of that third state are subjected to the application of extraneous law.\(^{95}\) The ability of that third state to act exclusively, or not act, in regard to the situation is frustrated. That the wholly extraterritorial application of human rights law must follow the exercise of extraterritorial effective spatial control or state agent authority does not negate this fact. Indeed in one sense it can be seen to compound that interference by adding to the exercise of executive control attempted judicial regulation. Extradition and expulsion cases also conflict with the rule protecting state sovereignty and territorial integrity. As noted above, they necessarily involve an “assessment of conditions in the requesting country”.\(^{96}\) “Assessment”, it is submitted, is reasonably deemed a form of interference. Additionally, assessment is in certain cases followed by an attempt to affect the actions of assessed state by attaching conditions to the extradition or expulsion such as the non-application of a specific punishment in the event of conviction. Here there is a further interference. In order to prevent infringement of the rule protecting state sovereignty and territorial integrity by both forms of extraterritorial application of human rights law, alleged human rights violations arising through the operation of justice, governance or other circumstances in a particular state should exclusively be addressed by the legal or political system of that state itself, the situs of the violation, not the courts of a third state. This applies even where that third state may be in some sense involved in the situation. If the territorial state is not able to act at the time of the alleged violation then it should be allowed to exclusively act (or decide not to act) when it is able to do so. International law not only protects state sovereignty and territorial integrity but also mandates the equality of all states. No one state is, or should be, an arbiter of another. Where the territorial state’s actions are thought to be deficient extraneous extant international mechanisms and procedures designed for exactly such circumstances, discussed below, can become engaged to address the situation. Although perhaps trite to note, state jurisdiction has been, and remains, predominantly and pre-eminently territorial.

Neo-imperialism

A second argument against the extraterritorial application of human rights is that it can be used and perceived as a form of neo-imperialism. This arises from the possibility that the extraterritorial application of law can be employed as a tool, either directly or indirectly, to impose upon or within a third state a foreign policy. Directly this takes place through the overt imposition of a rule or set of rules. Illustrating this phenomenon most graphically is not human rights but rather competition law, where

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\(^{94}\) As will be noted below, here the extraterritorial application of law can serve to legitimise previous illegality.

\(^{95}\) Of course municipal law is occasionally applied to persons and circumstances in third states. This normally occurs in the area of private law or exceptionally in regard to diplomatic and consular premises and activities and more generally in the area of criminal law. Similar arguments against the extraterritorial application of criminal law can be made as those against the application of human rights law extraterritorially, with greatest force in regard to non-nationals and residents. See further below.

\(^{96}\) Soering, n 13 above at para 91.
objections and disputes have arisen.\(^{97}\) As just noted however, attempts to affect the human rights-related policy of a requesting state in regard to the non-imposition of capital punishment on the grounds of human rights have occurred in certain extradition and expulsion cases. Indirectly, human rights-related policy can be imposed upon a third state through wholly extraterritorial cases where judgment is made upon the factual situation or legal system in it. Highlighting this rather starkly is Brooke LJ’s statement made in the context of a discussion of the level of effective control exercised by the United Kingdom in southern Iraq

And it is in any event very much open to question whether an effort by an occupying power in a predominately Muslim country to inculcate what the ECtHR has described as “the common spiritual heritage of the member states of Europe” during its temporary sojourn in that country would have been consistent with the Coalition’s goal, which was to transfer responsibility to representative Iraqi authorities as early as possible.\(^{98}\)

Setting aside the numerous other issues relating to the invasion of Iraq, the inculcation of one state’s or region’s “spiritual heritage” within a third state is objectively tantamount to an aspect of neo-imperialism. This point regarding wholly extraterritorial cases is, of course, not restricted to Iraq, but applies wherever a foreign human rights law is imposed within a third state. It is clear that both types of extraterritorial application of human rights law can be seen as aspects of a neo-imperialistic policy and can be either be pursued with the intent to affect law or governance in a third state or occur unintentionally as a by-product of extraterritorial state action. It should be noted however that the weight and scope of this argument turns, in part at least, on the nature of the human right in question. This issue forms the basis of the next argument against the extraterritorial application of human rights law.

**Universalism**

The disputed, or at least unsettled, issue of the universality of human rights provides further context for arguments against the extraterritorial application of human rights law. The question of universalism centres upon the question whether human rights have global application and meaning. If they do, then the arguments based on sovereignty and neo-imperialism above are clearly weakened.\(^{99}\) Here the only contentious issue is the unorthodox nature of the procedure by which universal human rights are protected, not their protection *per se*. On the other hand, if human rights are not universal but vary in application and meaning according to territory, culture *et cetera* then there is the real risk that the extraterritorial application of human rights law would entail the imposition of foreign and inappropriate rules. Otto points out the inherent danger:

In contemporary debates, the “universalists”, who are primarily Northern states, predict that even the slightest “dilution” of universalism will give the green light to tyrannical governments, torturers, and mutilators of women. The universalist position completely

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\(^{97}\) In *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation (Nos 1 and 2)*, [1978] AC 547, Viscount Dilhorne stated “[f]or many years now the United States has sought to exercise jurisdiction over foreigners in respect of acts done outside the jurisdiction of that country. This is not in accordance with international law and has led to legislation on the part of other states, including the United Kingdom, designed to protect their nationals from criminal proceedings in foreign courts where the claims to jurisdiction by those courts are excessive and constitute an invasion of sovereignty”, at p 631. A recent case has arisen where the United States is seeking extradition from Poland of a United Kingdom resident for allegedly contravening its trade restrictions, see *The Times*, 10 April 2007.

\(^{98}\) *Al Skeini*, n 1 above at para 127.

denies that the existing universal standards may themselves be culturally specific and allied to dominant regimes of power. As political philosopher Daniel Bell observes, “even some of the most thoughtful proponents of human rights in the West do not admit the possibility that every society need not settle on exactly the same conception of vital human interests”. At the same time, “cultural relativist” counterarguments from Southern states entrench an intense polarization of views. The relativist position advances alternative claims to universal Truth that have their foundation in non-European cultural traditions and rejects the current human rights paradigm as oppressive for developing states with different cultures.\(^\text{100}\)

It is between those states and regions that emphasise a different conception of human rights that the dangers inherent in the extraterritorial application of human rights law are most readily apparent, such as between Africa and Europe. From an African perspective, it has been written

> Human rights, if they are to be truly universal must be multi-cultural: “the European student should study the African Charter in order to better understand African perspectives and conceptions of human rights as an important constituent part of a universal concept of human rights”. As Cobbah argues, “western and non-Western scholars should seek to overcome their gaping chauvinism and help admit other world-views into the international discourse”.\(^\text{101}\)

Whilst it is beyond the scope of this article to enter into the universality debate, there is no doubt variety in the human rights protected and emphasised by various instruments and in their interpretation in states and regions.\(^\text{102}\) This variation and lack of practical universality ensures that it cannot be certain that the rights protected in one territory are, or should be, protected in another. And in line with the arguments above, the protection of a right by a state acting extraterritorially that legitimately does not have a place in the domestic law of the situs of the alleged violation interferes with that state’s sovereignty and territorial integrity and can be perceived as an act of neo-imperialism.

**Extant Fora**

The existence of fora and mechanisms designed to address situations where states are thought to be unable or unwilling to protect or redress alleged human rights violations within their territory weighs against the extraterritorial application of human rights law. There are a number of such regional and international fora and mechanisms such as that under the European Convention of Human Rights; the United Nations Committee on Torture; the United Nations Human Rights Committee; the International Committee of the Red Cross as well as numerous non-governmental organisations such as Amnesty International. In regard to the European regional intergovernmental system Lord Drummond Young has stated:

> ... the structure of the Convention as a whole indicates that it is built around the principle of the exclusive territorial jurisdiction of each High Contracting Party. This appears from the provisions of the Convention that deal with breaches of their obligations by High Contracting Parties. The scheme of the Convention is that any complaint about such a

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\(^{100}\) D Otto, “Rethinking the ‘Universality’ of Human Rights Law” 1997 CHRLR 1 at p 8, footnotes omitted.


\(^{102}\) As an example, the particular and expansive interpretation of article 8 of the Convention by the ECtHR is not widely shared. An instance of which is found in *Berrehab v The Netherlands*, (1988) EHR (Series A) 138, where the Court held that a Moroccan national, the former husband of a Dutch national, was entitled to remain in The Netherlands in an exercise of his right to family life in order to maintain contact with his daughter.
breach must be taken not to the authorities of another state but to a supranational authority, the European Court of Human Rights.\textsuperscript{103}

Clearly, one of the reasons for the creation of regional mechanisms was to address situations where territorial states are unwilling or unable to act, at all or sufficiently. In such cases an individual within a participating state could, in certain circumstances, argue before the regional authority that that state was acting in contravention of the applicable treaty. Further, under some regional regimes there is the opportunity for inter-state complaints. Under the Convention this is governed by article 33 (individual petition is provided for by article 34).\textsuperscript{104} The possibility of inter-state complaints particularly weakens arguments in favour of the extraterritorial application of human rights by state parties \textit{vis-à-vis} other state parties. Surely, the use of an agreed system is the desirable course. This would prevent both accusations and the possibility of bias. The unilateral extraterritorial application of law by states parties subverts the essence of these schemes in regard to both inter-state and individual complaints.

In addition to regional systems are international intergovernmental mechanisms that act to vitiate the need for, and utility of, unilateral state action. The Committee Against Torture, created under article 17 of the Torture Convention, is one such mechanism. The Committee engages in three types of activity: scrutiny of state party reports and, where accepted by the relevant state party; consideration of inter-state (article 21) and individual complaints (article 22). Through the report of a state allegedly responsible for torture under an inter-state or individual complaint the Committee Against Torture becomes seized of the situation. This, to a certain extent at least, obviates the need for municipal legal systems to take cognisance of the issue.\textsuperscript{105} Similar to the Committee Against Torture but broader in scope is the Human Rights Committee established by article 28 of the International Covenant for the Protection of Civil and Political Rights 1966. It also scrutinises state reports, and where accepted by state parties, examines inter-state complaints (article 41) and individual petitions (First Optional Protocol).\textsuperscript{106} The Committee Against Torture and the Human Rights Committee are, of course, institutions specifically designed to address human rights violations. That they do so relatively successfully at an intergovernmental level, to a certain extent at least, vitiates the need for the unilateral extraterritorial application of human rights law. Indeed, the extraterritorial application of law by individual states can be inimical to intergovernmental attempts to address and protect human rights. This is because it may give rise to a perception that unilateral action is the preferable manner to address human rights violations that are not, or can not, be addressed by the government of the \textit{situs} of the violation. This in turn could weaken arguments in favour of enhancing the effectiveness of these intergovernmental mechanisms. It is submitted that concerted co-ordination with, and assistance to, these institutions is what is required rather than the usurping of their functions by individual states unilaterally.

\textsuperscript{103} \textit{Al Fayed}, n 2 above at para 20.

\textsuperscript{104} Article 33 provides "Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party".

\textsuperscript{105} The efficacy of the Committee Against Torture is limited in that it does not deliver binding judgments and that only those states that are party to the Torture Convention and have accepted the possibility of art 21 and art 22 complaints are subjected to this procedure. See generally A Dormenval, "UN Committee against Torture: Practice and Perspectives" (1990) 8 NQHR 26. It is worth noting that art 7(1)(f) of the Statute of the International Criminal Court prescribes as a crime against humanity the act of torture. To fall within the definition the act \textit{inter alia} must be committed as part of a widespread or systematic attack directed against any civilian population. As such, and indeed it being concerned with criminal sanctions not human rights protection, it is only tangentially an alternate forum to municipal courts acting extraterritorially.

The work of other international and non-governmental organisations also militates against the application of human rights law extraterritorially by individual states. Perhaps pre-eminent here for our purposes is the International Committee of the Red Cross (ICRC). As the work of the ICRC often takes place in areas of conflict where municipal law may not be applied at the time, its activities usefully address concerns behind certain arguments in favour of extraterritorial jurisdiction. Admittedly it does not adjudicate possible human rights violations. It does, however, work to ameliorate conditions that could give rise to further violations. At a non-governmental level there are a large number of organisations that are relevant, such as Amnesty International. Being non-governmental, this and similar organisations are not constrained by political or diplomatic considerations. They can investigate and publicise human rights violations without engendering accusations of neo-imperialism or political bias. Indeed it is preferable, for reasons of apparent and actual objectivity, that all three types of organisation – intergovernmental, hybrid and non-governmental – identify acts where human rights violations are alleged or suspected. The existence and activities of these organisations largely counter the argument that the extraterritorial application of law is needed because human rights abuses occur in a legal and political vacuum. A final, albeit controversial, mechanism that should be noted and may be employed to address extraterritorial human rights violations are memoranda of understanding governing the treatment of extradited or expelled persons. These agreements address the reasons why the law is applied abroad in extradition and expulsion cases, namely the concern over possible future treatment. The United Kingdom government in its current efforts to address terrorism has concluded two of these agreements, with Jordan on 10 August 2005 and with Libya on 18 October 2005. These memoranda provide that persons returned to these states from the United Kingdom will be treated in a humane manner in accordance with internationally accepted treatment.

**Questionable Effectiveness**

Concerns over the effectiveness of the extraterritorial application of human rights law augment the arguments above and support a restrictive approach to the law being applied in this way. Effectiveness is conceived in terms of achieving actual human rights protection and redress for violations, including the prevention of violations through the operation of an immediate and enforceable deterrent and the provision of some form of satisfactory and public redress to victims of violations. As regards wholly extraterritorial cases, it is debatable whether the application of human rights abroad generally prevents or redresses violations in a meaningful way. As with national cases (but without the domestic press coverage and level of political scrutiny) the

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107 The ICRC describes itself as neither an intergovernmental organisation nor a non-governmental organisation but rather a hybrid in that it is a private association under Swiss law yet given a mandate and recognised by public international law, at http://www.icrc.org/eng.


109 Amnesty International's website is found at http://www.amnesty.org/.


111 Pannick argues that the rendition of terrorist suspects abroad will not be successful in that courts will not be swayed by the existence of the memorandum, see D Pannick, “Britain Sending Terrorism Suspects Abroad? It’s Not Going to Happen” The Times 27 September 2005. This appears not to be the case in that the Special Immigration Appeals Commission upheld the Home Secretary's decision to deport Abu Qatada to Jordan 26 February 2007, see http://news.bbc.co.uk/1/hi/uk/6396447.stm.

112 Wilde states "...one should not be too sanguine as to the value of international human rights law to provide meaningful and effective review of extraterritorial state action", n 108 above at p 784.
application of human rights law abroad in wholly extraterritorial cases can entail the acceptance by a state of judicial self-scrutiny. It is clear that executive state action giving rise to effective extraterritorial control and state agent authority is exceptional and would be likely to entail danger to the security of its nationals. States engaged in such behaviour are likely to view human rights considerations as secondary. It is reasonable to assume instead that that state’s priorities would be the success of the extraterritorial mission and the safety of its nationals. It is preferable that the territorial state apply its law instead of having the state acting extraterritorially putatively conditioning and scrutinising its own behaviour. As above, if this is not possible then other extant fora can take cognisance of the issue. As regards extradition and expulsion cases, questions can also be raised about the effectiveness of the application of human rights abroad. Admittedly, in certain specific instances, such as United States v Burns and Soering, the extraterritorial application of law was arguably effective in the sense that it led to assurances by the prosecuting authorities in the United States that the accused person(s) would not be subjected to a death sentence if convicted. In other cases, such as Ullah and Wright v Scottish Ministers, the “stringent test” set by the courts meant that the litigation did not prevent the extradition or expulsion and so was not effective in that sense. It is here necessary to consider the impact of an “effective” extradition or expulsion case on other rules of law and state practice. A case such as Soering, for example, resulted in an interference with the sovereignty of the United States of America. The law applied in this way may also create an incentive for states to turn to irregular methods of rendition.

Realpolitik Considerations – State Security

Two related realpolitik considerations support the intraterritorial application of human rights law. The two aspects of a state’s national interest adversely affected by the application of the law in this way are its security and the danger that it becomes a haven for suspected and convicted criminals. As regards the former, the extraterritorial application of law may affect a state’s security by limiting its ability to protect itself. The “war on terror” and engagement in Iraq, some argue, merit a new approach to international relations as well as a re-evaluation of existing law and legal protections. Tony Blair stated in a speech on 5 March 2004, in the context of the changing threats to the United Kingdom:

The characterisation of the threat is where the difference lies. Here is where I feel so passionately that we are in mortal danger of mistaking the nature of the new world in which we live. Everything about our world is changing: its economy, its technology, its culture, its way of living. If the 20th century scripted our conventional way of thinking, the 21st century is unconventional in almost every respect. This is true also of our security. The threat we face is not conventional. It is a challenge of a different nature from anything the world has faced before. It is to the world’s security, what globalisation is to the world’s economy.

Of course, it is impossible to state with any degree of certainty whether the global situation is as Blair suggests. If, for the purposes of argument, one assumes that it

113 [2001] SCC 7, decided in the Canadian Supreme Court.
114 N 13 above.
115 Of course capital punishment per se is not prescribed by international law.
116 In regard to the latter, the law in certain jurisdiction including Scotland and the United States does not discourage irregular renditions. For Scotland see HMA v Vervuren, n 2 above and the United States United States v Alvarez-Machain, (1992) 119 LEd 441.
117 Cited at http://www.number-10.gov.uk/output/Page5461.asp.
118 This is a very controversial topic, and one outside the bounds of this article. For a recent work in the area see R Ashby Wilson (ed), Human Rights in the “War on Terror” (Cambridge University Press, 2005).
is, then it is perhaps not unreasonable that the spatial application of human rights law be revisited and limited. This would be justifiable upon the grounds that it is objectively more likely that those subjected to extradition or expulsion and perhaps also those in the theatre of extraterritorial state activity abroad are involved in actions inimical to the security of either the territorial state or a third state than other persons. Admittedly, it is by no means certain that these persons are in fact involved in harmful activity. And indeed the “new threat” Blair identifies may not in fact be real. However, since a line must be drawn at the margins of the application of municipal law at some point, it is submitted that it is reasonable and logical to draw it more narrowly than widely.

Realpolitik Considerations – Safe Havens
The possibility of states becoming havens for those suspected and convicted of serious crime supports the argument against the extraterritorial application of human rights law. This applies in particular but not exclusively to extradition and expulsion cases. It can occur, for example, where persons migrate to a particular state so as to escape the legal system of the territory where they have committed a crime. In Soering the ECHR stated in this regard:

What amounts to “inhuman or degrading treatment or punishment” depends on all the circumstances of the case . . . Furthermore, inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights. As movement about the world becomes easier and crime takes on a larger international dimension, it is increasingly in the interest of all nations that suspected offenders who flee abroad should be brought to justice. Conversely, the establishment of safe havens for fugitives would not only result in danger for the State obliged to harbour the protected person but also tend to undermine the foundations of extradition. These considerations must also be included among the factors to be taken into account in the interpretation and application of the notions of inhuman and degrading treatment or punishment in extradition cases.119

Similar concerns have been expressed in Canada where suspects from the United States of America have entered the country, at least in part, to escape the possibility of capital punishment. Following the decision to extradite the two accused in United States v Burns, the then Canadian Minister of Justice, Alan Rock, stated “ . . . that Canada cannot be allowed to become a safe haven for criminals, no matter what their nationality, who seek to escape the penalty of the State in which they chose to commit a crime”.120 Clearly it is not in the interests of any state to become a safe haven for criminals. Those persons involved in serious crime would be attracted to those states and would bring with them the attendant possibility of recidivism.121 This argument also exists where human rights are applied in a wholly extraterritorial sense. Here persons may choose to subject themselves to a state’s extraterritorial spatial control or stage agent authority in order to avail themselves of protection they might otherwise not have. Whilst the safe haven in this scenario is extraterritorial, similar concerns as to possible recidivism and cost apply in territorial safe havens.

119 N 13 above at para 89.
121 In addition to the possible danger posed is the financial cost where such persons are apprehended and subjected to legal proceedings. In certain cases there could also be medical expenses arising from the treatment of persons whose extradition or expulsion is pending. More generally, the inefficient use of resources is germane where there may be two investigations into a single incident. Lord Drummond Young in Al Fayed stated that such a possibility weighed against the application of Scots law in that case, n 2 above at para 15.
Conferral of Legitimacy

The final factor in opposition to the extraterritorial application of human rights law is that it may confer a degree of unwarranted legitimacy upon situations and states. This point applies mainly to wholly extraterritorial cases. It is to the effect that the application of a state’s law may lead to the presupposition that the extraterritorial activity necessary for the law to be applied in this way in the first instance was itself lawful or, at least, in some sense acceptable. The application of law may in a sense regularise the status quo ante and deflect scrutiny from the legality of the extraterritorial spatial or personal effective control. In this regard the question has been posed “... does subjecting extraterritorial action to legal regulation merely provide greater legitimacy to extraterritorial action without actually placing such action under any meaningful constraint?”

It is certainly arguable that the application of a state’s municipal law (albeit extraterritorially) suggests that the extraterritorial spatial or personal control was in a sense regular. If the action was not lawful it seems reasonable to assume that a state’s municipal law might not apply in its domestic courts in the circumstances. Of course, this point is not unreasonably countered by the suggestion that (regardless of a past illegality or irregularity) law, including that state’s municipal law, should be applied in order to prevent and redress human rights abuses arising from the activity. Overall, however, it is submitted that there is merit in the conferral of legitimacy point. The application of human rights law abroad may deflect attention from the more important issue of the previous illegal or irregular behaviour. This argument can also be made as regards extradition and expulsion cases. Legitimacy can be seen to be given here, for example, where a court considers the prison conditions in a third state in which the legality of the government of that state itself is in question. A focus on a particular aspect of a state’s government or machinery may lead to an inference of general legitimacy.

Again, as above, this can be countered by the argument, that in spite of debate over the legality or regularity of a government, individuals should not be deprived of their human rights. In this case, however, one could argue that concerns over the legality or legitimacy of a government should prevent consideration of an extradition or expulsion in the first instance.

DEFENCE OF THE LAW

The Rule of Law

There are, of course, arguments and factors supporting the extraterritorial application of human rights law. These include the rule of law; the need to cover lacunae in human rights protection and non-discrimination. The rule of law argument applies to wholly extraterritorial cases and is to the effect that the law should apply equally to all persons including the government. It can be understood to mean that the law should apply to territory and persons under the effective control of a state’s forces or agents wherever they act. The applicability of law should not, it can be argued, be

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122 R Wilde, n 108 above at p 780. He goes on implicitly to answer the question in the negative.

123 See generally on illegitimacy B Roth, Government Illegitimacy in International Law (Oxford University Press, 2001).

124 This is the second of the three facets of the rule of law expounded by Dicey, see AV Dicey, Introduction to the Law of the Constitution, 10th ed (Macmillan, 1939).

125 The rule of law has a fairly long pedigree in international law. It is referred to in, for example, the United Nations Declaration of Human Rights 1948, GA Res 217A (III), GAOR, 3rd Sess. Part 1 at p 71, and the preamble to the European Convention on Human Rights 1950. It is not entirely clear whether these provisions relate to the rule of law at an international or municipal level. See NS Marsh, “The Rule of Law as a Supranational Concept” in AG Guest, (ed) Essays in Jurisprudence (Oxford University Press, 1961) p 240. Highly sceptical of the concept at an international level is Koskenniemi who states that the “... vision of a Rule of Law between states ... is yet another reformulation of the liberal impulse to escape politics ...” in M Koskenniemi, “The Politics of International Law” (1990) 1 EJ 4 at p 6.
negated purely by reason of the *situs* of the actions of the officials in question. Arguments to this effect underline recent criticisms of the actions of the United States government and certain other states over so-called rendition flights.\textsuperscript{126} Two important practical questions arise when one considers the rule of law in extraterritorial circumstances: what law should apply and in which forum should it be applied? In regard to the former question there are three possibilities: the law of the state acting extraterritorially; the law of the *situs* of the actual or future violation\textsuperscript{127} and public international law. The applicability of the law of the state acting extraterritorially, as discussed above, contravenes rules of public international law protecting state sovereignty and territorial integrity and may give rise to accusations of neo-imperialism. These same rules support the view that it is the law of the *situs* of the actual or future violation which is most legitimately applied. Territorial state jurisdiction should normally prevail. As regards general public international law and customary human rights norms in particular, this *corpus* of law will generally apply in addition to applicable municipal law. The central issue is in what forum it should be applied, if at all.

In regard to the *fora* that should adjudicate possible human rights violations there are, again, three options: courts of the state acting extraterritorially; those of the *situs* of the alleged extraterritorial violation and internationally constituted courts or tribunals. As regards the two possible sets of municipal courts, it is preferable, for the reasons mentioned above (state sovereignty and territorial integrity) that the courts of the *situs* of the act take cognisance of the alleged violation. That states generally do not apply foreign public law adds support to this point; on the assumption that it is the law of the *situs* of the alleged violation that should be applied.\textsuperscript{128} Indeed, it is very unlikely that one state would apply the human rights norms of another state in its own domestic courts. It follows that the doctrine of the rule of law militates in favour of the courts of the state of the *situs* of the actual or future violation applying domestic law either immediately following the alleged violation or when they are able to do so. If this is not possible, then the next preferable option is for internationally constituted courts or tribunals to apply either the law of the *situs* or public international law. As discussed above in regard to extant *fora*, this is preferable *inter alia* to guarantee as far as possible the objectivity of the process. Overall, then, the rule of law lends weight to arguments in favour of the application of human rights law abroad in an ambiguous way. It firstly favours the application of law to all persons and governments. This applies to situations where effective control of territory and persons is exercised on an extraterritorial basis by a state’s forces and agents. Law must apply regardless of the *situs* of the activity. If this does not happen states may be encouraged to act extraterritorially and thus escape legal restriction. However the doctrine also militates against the application of the law of the state acting extraterritorially because of extant rules of international law outlined above. There is here a clash between the rule of law-mandated desire to apply law including, perhaps, foreign municipal law and the rules that prescribe interference and intervention within the domestic jurisdiction of all states. This conflict is remedied by prioritising firstly the rule of territorial law and

\textsuperscript{126} The European Parliament recently approved a report condemning those European states complicit in the activity by allowing aircraft involved in the operation to land in their territory, see *The Guardian* 15 February 2007. Of course, various other actions of the United States in its “war on terror” have also engendered similar criticism.

\textsuperscript{127} This assumes, of course, that the extraterritorial human rights violation will take place in an area governed, notionally at least, by a body of municipal law. This is not always the case, for example it may occur on a stateless vessel on the high seas.

\textsuperscript{128} States generally refuse to apply the penal and revenue law of other states, see E Crawford, *International Private Law* (Sweet and Maxwell, 1998) at pp 25–32.
secondly, if this is not possible, the rule of applicable regional or international human rights law through established mechanisms.

Gaps in Human Rights Protection

A second argument in favour of the extraterritorial application of human rights law follows the first in that it relates to the applicability of law. It is more specific, however, in that it suggests that the law be applied to remedy a gap, or perhaps more controversially a deficiency, in human rights protection. As regards wholly extraterritorial cases, the lacuna in human rights protection is caused by a state's forces or agents exercising territorial or personal control outwith its territory and thereby preventing or limiting the application of the law of the situs (again, as above, this assumes that law is in fact applied in the situs).\(^\text{129}\) Clearly, where the law of the situs is rendered practically inapplicable by extraterritorial control, it is reasonable that some form of regulation should fill the void. Indeed, here the need may be greater than otherwise because of the increased probability of human rights abuses as the state actors operating abroad may not feel constrained by law.\(^\text{130}\) The extraterritorial application of human rights may serve a useful purpose in conditioning the behaviour of state representatives abroad by attaching to control a concomitant responsibility. Indeed it may perhaps thereby prevent extraterritorial activity in the first place, thus acting to protect state sovereignty and territorial integrity. As discussed above however, it is suggested that the extraterritorial application of law is, at best, a secondary option. Action usurping national regulation will, in most cases, conflict with the norms protecting state sovereignty territorial integrity and as such be unlawful. As noted above, the extraterritorial application of human rights may perhaps deflect and indeed compound this illegality.

As regards extradition and expulsion cases, the extraterritorial application of human rights law can act to fill a gap in human rights protection and remedy perceived deficiencies in a third state's human rights law and practice. In the former case, a state will examine the law in the requesting or destination state and discover an absence of relevant human rights protection and then afford the individual subject to removal protections that he or she otherwise would not have had. This is done by attaching conditions to the extradition or expulsion or, indeed, by a refusal to proceed with the rendition. Here protection is given where none existed. In the latter case, a state will assess and deem insufficient or deficient existing protection in a third state and either condition the extradition or expulsion or refuse to proceed with it. Of course, the distinction between a gap and a deficiency in the law is not always evident. Examinations of the nature of protection, if any, are made by the states extraditing or expelling the person. This, in itself, weighs against the extraterritorial application of law, especially in the light of the debate over universalism. However, it is clear that the extraterritorial application of law in extradition and expulsion cases can fill a gap in human rights protection. Certainly, as regards widely agreed basic and fundamental human rights, such as the right to be free from torture, it is to be supported. More generally however, for a number of the reasons discussed above including, again, state sovereignty and territorial integrity but also universalism and extant fora, it is desirable that it is used rarely and in limited circumstances only.

\(^\text{129}\) Of course the application of one state's human rights law abroad may result in the granting of protection and redress where none existed previously or the granting of protection and redress in regard to a different set of rights.

\(^\text{130}\) Wilde states "...the risk of human rights violations committed by the States involved may well be higher in these extraterritorial contexts than in the State's own territories", n 108 above at p 756.
Discrimination
A third argument in favour of the extraterritorial application of human rights is based on non-discrimination.\textsuperscript{131} It provides that a failure to apply human rights law in wholly extraterritorial cases leads to differing levels of protection being afforded to those under a state's control within and outside its territory. Undoubtedly this is true. Where a state protects human rights internally then the non-application of human rights law in areas or in regard to persons under its effective control outside its territory inevitably results in differential treatment. Clearly, discrimination in the application of human rights protection upon no objectively justifiable basis is undesirable. This finds expression in the non-discrimination provision in the Convention. Article 14 of the Convention provides

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

The question that arises here is whether the \textit{situs} of the alleged violation is a justifiable basis for discrimination in application. The list of grounds, whilst not exhaustive, does not expressly include territory. This exclusion is perhaps understandable because human rights are, of course, generally protected on an intraterritorial basis only. However, discrimination on the basis of the \textit{situs} of the alleged violation does exist and, indeed, is practically inevitable. As regards the territories related to United Kingdom, there exists discrimination in that the HRA does not apply in its 14 Overseas Territories.\textsuperscript{132} More generally, discrimination in wholly extraterritorial cases is inevitable, because it is, in practice, impossible for states to ensure that the full range of human rights protected within their territory – particularly the positive obligations upon them – are met where they exercise effective control over an area or personal control over an individual outside their territory. The resources and infrastructure necessary to support a complete and developed system of human rights protection cannot be exported. The most effective way to minimise discrimination in the application of human rights law is, of course, not to apply human rights law abroad but to limit the number of circumstances and occasions where extraterritorial control is exercised.

An argument based on non-discrimination can also be made in favour of the extraterritorial application of human rights in extradition and expulsion cases. Persons who face trial or confinement abroad are, of course, subjected to different treatment from those who are not extradited or expelled. This discrimination is different from that in wholly extraterritorial cases, however, as it is a third state which is responsible for the trial or confinement. The only avenue available to obviate discrimination in extradition and expulsion cases is not to extradite or expel the individual and instead to try or confine him or her within that state. This is something that is not unreasonable, certainly in the case of nationals and residents of the extraditing or expelling state.\textsuperscript{133}

\textsuperscript{131} It has been written that case law supports three policy arguments in favour of human rights applying to extraterritorial state action: a failure to apply results in a double standard of legality, discrimination in protection on the basis of nationality and a vacuum in protection where the sovereign is prevented from acting, in Wilde, n 108 above at pp 796–797. The first two of these can be considered together under the heading discrimination. The last has been discussed above.

\textsuperscript{132} See Quark, n 1 above. Admittedly the difference between a United Kingdom Overseas Territory and, say, a United Kingdom run prison in Iraq is marked.

\textsuperscript{133} For a discussion of the factors in favour of nationality based jurisdiction see P Arnell, “The Case for Nationality Based Jurisdiction”, (2001) 50 ICLQ 955.
CONCLUSION

Human rights law has been applied in both wholly extraterritorial and extradition and expulsion cases. Analysis of recent United Kingdom case law highlighted that the authority in favour of extraterritorial application, although extant, is relatively weak. It is only in regard to extradition and expulsion cases where a possible violation of article 3 is at issue that the authority is clearly and strongly in favour. This relatively weak authority, coupled with the weight of the arguments against the application of law in this way within the cases themselves and existing more generally, supports the conclusion that only very exceptionally should human rights law be applied on an extraterritorial basis. No state, including of course the United Kingdom, can be a global enforcer of human rights. United Kingdom, ECHR and other municipal and international authorities must continue to emphasise, as certain of them have, the basic underlying fact that the globe is comprised of sovereign and territorially distinct states. Not only should law generally not be applied extraterritorially but perhaps of even more import, personal and spatial extraterritorial control must also be discouraged. A cessation of such activity would to a certain extent obviate the perceived need for the extraterritorial application of law in the first instance. Additionally, all states must be encouraged to strengthen the rule of law and human rights protection within their territories. It also must be assumed that all states contain legitimate, effective and adequate legal systems. Where this assumption is not objectively reasonable then the existing international, regional and non-governmental organisations charged with protecting human rights must be engaged to address the issue. Particularly and presently, it is to be hoped at the time of writing that the House of Lords takes a restrictive and narrow approach to the question of the application of the HRA in Al Skeini and that the generally limited success of applicants in extradition and expulsion cases continues.

[Editorial note: Al Skeini reached the House of Lords as [2007] UKHL 26 on 13 June 2007, the majority of the appeals being dismissed and the remaining case being remitted back to the Divisional Court.]
THE 2005 TERRORISM CONVENTION: A FLEXIBLE STEP TOO FAR?

ELIZABETH CHADWICK*

"And what do the people say"? asked Syme.
"It's quite simple what they say", answered his guide.
"They say we are a lot of jolly gentlemen
who pretend they are terrorists".
"It seems to me a very clever idea", said Syme.**

INTRODUCTION

On 16 May 2005, the Council of Europe opened a new Convention on the Prevention of Terrorism¹ for signature by Council of Europe member states, the European Community, and other participating states.² The intent behind this recent initiative was to up-date existing Council of Europe instruments for the prevention of international terrorism in the post-9/11 legal environment.³

The 2005 Terrorism Convention does not define any new terrorist offences beyond those contained in the conventions listed in its Appendix.⁴ Instead, the Convention seeks to fill what has been identified by the Council of Europe’s Committee of Experts on Terrorism (CODEXTER) as a gap in coverage,⁵ and thus seeks to criminalise certain behaviour that holds the potential to lead to the commission of acts of terrorism. Three new offences deemed “predicate” to the existing treaty offences incorporated by the Appendix are created: public provocation to commit a terrorist offence (article 5), recruitment for terrorism (article 6), and training for terrorism (article 9). Accessory (ancillary) offences (article 9) criminalise “complicity” (such as aiding and abetting) under articles 5–7, and “attempt to commit an offence” under articles 6 and 7. Article 8 provides that no “terrorist” offence, as such, need actually to occur.

The Explanatory Report highlights concern in the Council of Europe to concentrate on closer co-ordination between member and other participating states in their shared domestic policies and laws.⁶ Indeed, given “the special climate of mutual confidence

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² Entry into force 1 June 2007, which required six ratifications, including four Council of Europe member states, art 23(3). Article 24 of the Convention provides for accession by states other than those participating in its elaboration. Article 31 provides for denunciation. Of five non-member participating states (Canada, the Holy See, Japan, Mexico, and the United States), none, as of 21 May 2007, has signed the Convention.

³ Eg, the 1977 European Convention on the Suppression of Terrorism, ETS No 90, and its Amending Protocol, ETS No 190.

⁴ Ten UN and international conventions are listed, ranging from the 1970 Hague Convention on the Unlawful Seizure of Aircraft, to the 1999 New York Convention for the Suppression of the Financing of Terrorism. Article 28 of the Convention provides for modification of this list.

⁵ The Committee of Ministers had tasked CODEXTER to “elaborate proposals for one or more instruments (…) with specific scope dealing with existing lacunae in international law or action on the fight against terrorism”. Explanatory Report, para 13.

⁶ Greater co-operation on prevention and judicial matters is also contemplated: Explanatory Report, paras 26 and 27.
among like-minded states” deemed already to exist, it was hoped the criminalisation of certain kinds of speech or behaviour would be reasonably straight-forward. Nevertheless, a measure of substantive difficulty remains – even among “like-minded states” – due to an obvious potential for conflict: the criminalisation of recruitment or training might appear straight-forward enough, but new offences relating to speech or behaviour which could be construed as “glorifying” terrorism could encroach on existing human rights standards. In particular, the new article 5 offence of “public provocation to commit a terrorist offence” raises concern in that it seeks to criminalise, *inter alia*, the “distribution, or otherwise making available, of a message to the public”, and thus directly targets public rights of access to information and freedom of expression.

In that the post-9/11 legal environment has been characterised by what has been termed “an increasingly ‘militant democracy’”, it is the purpose of this discussion to explore some implications of article 5. The text of and commentary to article 5 of the 2005 Terrorism Convention are first outlined, and its prohibitory parameters identified. Of particular interest, an in-built differentiation in status between those individuals who may be charged with the relevant offences raises immediate concerns regarding any neutrality in approach to the problem of provocation to terrorist violence. The requirement of intent is similarly circumscribed by flexibly applied contexts of identity, so enforcement of these new offences could well import the seeds of minority discrimination for purposes of a fair trial, as is highlighted. Finally, after a brief look at the British implementation of article 5, it is concluded that the initiative, while no doubt well-intentioned, may well provide another worrying opportunity for Europe to seek to impose its standards on a wider basis.

**EXEMPTIONS AND INTENT**

History is replete with the battle lines carved between sought-for freedoms and prohibited behaviour. The potential for the new predicate offences to clash with rights associated with speech is recognised in the Explanatory Report to the Convention, as follows:

> This is a crucial aspect of the Convention, given that it deals with issues which are on the border between the legitimate exercise of freedoms, such as freedom of expression, association or religion, and criminal behaviour.

Developments in individual human rights can come at the cost of arbitrarily-held power, yet the domestic responsibility for human rights implementation remains with state governments, and thus provides an extra dimension to frameworks of state legitimacy. Assuming for the sake of argument that the essence of human rights is their equal application to all, it remains the case that the content, import, and desirability of individual rights can only be grasped through access to information, *eg*, by means of education, association, religion, *etc*. In turn, legitimate law – and, in view of the consequences of conviction, criminal law in particular – should be characterised by its neutral and transparent application. In that individuals in possession of equal rights

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7 Explanatory Report, para 39.
9 Explanatory Report, para 30. See also para 226 (as of 16 May 2005, one Council of Europe member state had yet to ratify the European Convention on Human Rights).
nonetheless should remain alert to the political contexts in which laws are interpreted and applied, it is of preliminary concern that article 5 seemingly permits a high level of political control over the criminal labelling process. Article 5 states as follows:

1. For the purposes of this Convention, “public provocation to commit a terrorist offence” means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or more such offences may be committed.

2. Each party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law. [Emphasis added.]

Article 5(1) seeks to make criminal behaviour which is deemed officially to create a risk that a terrorist offence might be committed. For the criminalisation of “public provocation” in article 5, expressions of support for terrorist offences and/or groups may be direct or indirect, as well as ex ante or ex poste to the possibility of a terrorist offence. Also required is a physical act: the dissemination of information to the public. An attempt to create a potential risk of terrorist violence is not contemplated, as article 9(2) (attempt) does not apply to article 5. The Explanatory Report simply notes that it was felt to be “conceptually difficult”. Article 5(2) then confines the prohibited risk-creation specifically to unlawful and intentional behaviour, as is now discussed.

The Issue of “Status”
The Convention is concerned with the status of an actor. One “common aspect” of articles 5 – 7 of the Convention is that government action, inter alia, is exempt. As noted in the Explanatory Memorandum,

82. The expression “unlawfully” derives its meaning from the context in which it is used. Thus, without restricting how Parties may implement the concept in their domestic law, it may refer to conduct undertaken without authority (whether legislative, executive, administrative, judicial, contractual or consensual) or conduct that is otherwise not covered by established legal defences or relevant principles under domestic law.

83. The Convention, therefore, leaves unaffected conduct undertaken pursuant to lawful government authority.

In other words, the official power to identify prohibited “expressions of support for terrorist offences” permits the exemption from prosecution of those who wield that very power. Consequently, what is said seems less the issue than who says what, when, where, and to whom. Whether or not this particular approach encapsulates and incorporates the immunity traditionally afforded by the act of state doctrine, the fact that the politically dominant class can automatically exempt itself and its agents from prosecution illustrates a potential for double standards when the time arrives to delimit transparently any justifiable frameworks of the state’s monopoly on the use of force.

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10 See Explanatory Report, para 87.
11 Explanatory Report, para 133.
12 Contrast para 282: “this Convention does not condone or make lawful otherwise unlawful acts, or preclude prosecution under other laws” in the context of the armed forces.
13 By which a differentiation is allowed between the conduct required of ordinary citizens, and that of state officials or other representatives. See, eg, the United Nations Convention on Jurisdictional Immunities of States and Their Property, Annex to UNGA Resolution 59/38 (16 December 2004); G Hafner, et al (eds), State Practice Regarding State Immunities (Martinus Nijhoff, 2006).
The automatic exemption of government action thus impacts on legitimacy. Although purporting to be a question of context,\textsuperscript{14} the prohibited behaviour is instead preliminarily determined on the basis of personal status. A presumption that Council of Europe members and other participating states are stable and law-abiding enough to be termed "like-minded" is then stretched to incorporate "non-provoking", which further imposes on an accused a heavy burden of proof indeed when the time arrives to fight prosecution or extradition. In turn, a second level of flexibility exists for co-operating states which choose to approach their respective security policies in modes of solidarity: individuals who are deemed to express support for terrorism across state borders can be treated more systematically through seemingly similar contexts.\textsuperscript{15}

Although it smacks somewhat of trite relativism to state that the generalised official rhetoric of "like-minded states" on issues such as terrorism and national security can obscure equally viable language regarding "rights" entitlements, once the un-/lawfulness of a statement or other dissemination of information is made a function of personal or social identity, that statement can more readily be approached in governmental language employed to describe measures necessary for the maintenance of law and order.\textsuperscript{16} The use of official techniques to isolate and segregate dissenters is then but a step away, as the silencing of competing claims to legitimacy is systematised and hence, normalised.\textsuperscript{17} However, if civil discord erupts, or is otherwise exacerbated, national cohesion and integration are harmed.

Uncertainty in effect is also to be anticipated, as any clear distinctions between lawful authority and unlawful behaviour can be difficult to trace. The grey area growing within the economics of Western security policies provides a case in point, as many core functions, including policing and imprisonment, are contracted-out to third parties.\textsuperscript{18} Frequently sourced in private rather than public law, such corporate arrangements find their putative rationale in market models of accountability, thereby creating a legal vacuum in which "deniability" can thrive. As for the liability of legal entities in general,\textsuperscript{19} the Committee of Ministers of the Council of Europe made recommendations as early as 1988.\textsuperscript{20} In Recommendation No R (88) 18, Appendix, paragraph 8, the following is noted:

When determining what sanctions or measures to apply in a given case, in particular those of a pecuniary nature, account should be taken of the economic benefit the enterprise derived from its illegal activities, to be assessed, where necessary, by estimation. [Emphasis added.]

\textsuperscript{14} Explanatory Report, para 82.
\textsuperscript{15} Eg, of (1) binary branding (good/evil, right/wrong), or (2) coercive, differential labelling (how the provocateur is to be characterised). JG Merquior, Foucault (Fontana Press, 1985), at 92, links such terms to Foucault's attributes of "carceral society". See also H Stewart, "Protection pips US production", \textit{Sunday Observer, Business}, 29 April 2007, at 2 (over 20 per cent of workforce employed in "garrison" economy).
\textsuperscript{16} For a similar conclusion in the context of English criminal law, see C Harding, "The Offence of Belonging: Capturing Participation in Organised Crime" [2005] Crim LR 690, at 698.
\textsuperscript{17} Chomsky terms this "the totalitarian discipline deemed appropriate with the (anti-terrorist) propaganda system". N Chomsky, Pirates and Emperors (Black Rose Books, 1991), at 86. Of interest, see also V Dodd and R Norton-Taylor, "Al-Qaida plan to infiltrate M15 revealed", \textit{The Guardian}, 7 April 2006, at 1 (suspension of state benefits to households linked to suspected terrorists).
\textsuperscript{18} For a discussion in the context of armed conflict, see C Walker and D Whyte, "Contracting Out War? Private Military Companies, Law and Regulation in the United Kingdom" [2005] 54 ICLQ 651.
\textsuperscript{19} Defined as "corporations, associations and similar legal persons", Explanatory Report, para 135.
\textsuperscript{20} Recommendation No R (88) 18, and Appendix, of the Committee of Ministers to Member States Concerning Liability of Enterprises Having Legal Personality for Offences Committed in the Exercise of Their Activities (adopted 20 October 1988, 420th meeting of the Ministers' Deputies).
The 2005 Terrorism Convention permits the criminalisation of legal entities in Article 10. The purpose of article 10 is to permit the imposition of liability “for the criminal actions undertaken for the benefit of that legal person”,21 as follows:

1. Each party shall adopt such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal entities for participation in the offences set forth in Articles 5 to 7 and 9 of this Convention.
2. Subject to the legal principles of the party, the liability of legal entities may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

Therefore, to pose one example, a strategy of provocation by “the distribution, or otherwise making available, of a message to the public”, as made (conditionally) criminal by article 5 of the Convention, could be pursued by a journalist, a private prison employee, or a law enforcement officer. In accordance with the status bias of the Convention, each actor would be capable of lawful differentiation, even though each could, by so acting, provide benefit (not merely “economic”) to the organisation for which each worked. The journalist could face prosecution, the prison employee might; the case of the law enforcement officer is even less clear.

There is thus an obvious potential for article 5 on its face to “chill” journalistic coverage as easily as extremist commentary. Accordingly, the Committee of Ministers of the Council of Europe has chosen to remind governments and members of the press of their reciprocal responsibilities. On 2 March 2005, at the 917th meeting of the Ministers’ Deputies, it issued its “Declaration on freedom of expression and information in the media in the context of the fight against terrorism”.22 This Declaration contains two lists: one “calls on” the member state public authorities, inter alia, not to curtail or obstruct media professionals “unnecessarily” when reporting on terrorist matters; the other “invites” the media and journalists to consider various “suggestions”, such as a responsibility not to contribute to the aims of violent groups, and the duty not to self-censor if to do so would deprive the public of necessary information.23 The aims of both lists are equally laudable.

The Issue of Intent
The mental element, or mens rea, required to secure a conviction under article 5 is that of “intent”. As proof of intent varies from country to country in accordance with constitutional arrangements and local tradition, the Explanatory Report for the Convention notes simply that “[t]he drafters of the Convention agreed that the exact meaning of ‘intentionally’ should be left to interpretation under national law”.24 However, by retaining such flexibility regarding domestic law standards for the requirement of mens rea, the Council of Europe has made assessments of the appropriate contexts for prosecution even more problematic, uncertain, and open to abuse. While mutuality of state interest in the suppression of international terrorism is of course necessary before assistance and co-operation arrangements can be made workable, to leave the mental element of “provocation” to individual state discretion

21 Explanatory Report, para 135 [emphasis added].
23 An example of this balance is provided by editorial decisions in September and October 2005 (not) to publish the now-infamous “Danish cartoons”. See, eg, L Harding, “How one of the biggest rows of modern times helped Danish exports to prosper”, The Guardian, 30 September 2006, at 24 (global protests sparked in which at least 139 people were killed).
24 Explanatory Report, para 85.
undercuts the transparency of that mutuality; any remotely politicised aspect of the processes of characterisation and identification is potentially left to reflect the dictates of domestic culture and the power relations within it.

Moreover, the notion that liability should fall only on persons having sufficient awareness of the possible consequences of their actions is fairly uncontroversial, so it is somewhat surprising that both “knowledge and intent” are not required by article 5. The cognitive conditions for criminal responsibility become especially crucial in the interpretation of “context”, given that a terrorist incident need not occur (article 8), and that “the distribution, or otherwise making available, of a message to the public” must merely “cause a danger” (article 5). To require both elements would also seem useful for purposes of a fair trial. As noted by Werle and Jessberger, writing of the “highest” level of international criminal law, that of “universal” jurisdiction,

[The] intent requirement relates to conduct and consequences only, while the knowledge requirement relates to circumstances and consequences only. Therefore, the intent of the perpetrator need not cover the circumstances of the crime, while his or her knowledge need not cover the criminal conduct. The only material element which has to be covered by both intent and knowledge is the consequence of a crime. Nonetheless, such a high standard of proof does not apply to terrorist crimes, which remain creatures of treaty law and, generally speaking, UN Security Council action. There is no over-arching international definition of, or prohibitory convention for, “terrorism”, as such. Instead, terrorist crimes are more indirectly suppressed internationally by means of a piecemeal approach to bi- and multi-lateral crime-control treaties, and through domestic penal laws designed to suppress the harmful behaviour of non-state actors, which typically have only actual or potential trans-boundary effects. This type of international prohibitory regime is not intended to create “universal” obligations, but rather, to minimise or eliminate the potential havens from which such crimes can be committed and to which criminals can flee to escape prosecution and punishment.

Therefore, compliance with the 2005 Terrorism Convention, although a matter of inter-state treaty obligation for those states which choose to adopt it, remains a matter for domestic state implementation, interpretation and effect. As crime-control conventions at the trans-national level require an incriminating act only to have specific consequences, the addition of a standardised “knowledge” element would of course compound any difficulties in implementation. In the present example of the many behavioural elements specifically proscribed by article 5 when in combination, the intent requirement of “creating a risk” is especially circumscribed, as it can only with difficulty be made to extend objectively both to conduct and terrorist consequences, beyond the merely speculative. Also to require proof of knowledge of “risk creation” would make prosecution inordinately difficult.

26 Ibid, at 38. There is no jurisdiction, per se, over crimes of international terrorism under the Rome Statute of the International Criminal Court, article 5, UN Doc A/CONF 183/9 (17 July 1998), reprinted [1998] 37 ILM 1002. However, the Rome Statute perhaps indicates future standards.
29 Eg, see above, n 4.
30 N Boister, loc cit, n 27, at 955.
Assuming knowledge or awareness of the prohibited conduct is not provided for by the Convention, it is regrettable nonetheless that proof of a cognitive condition alongside, or even within, the voluntative one is not also required. As one can surmise that the only material element covered by intent is that of "conduct-within-context", i.e., without lawful authority, there must then be gathered merely the narrow proof of intent to disseminate information in support of terrorism; any concrete terroristic consequences of such dissemination are irrelevant. It could also well be asked precisely how, when the time arrives for individual states to assess the evidence of the requisite offending minds, terrorist crime is actually deterred. To require so little from official assessments of "risk creation" instead seems only to open the door to potential abuse, to lack legitimating transparency, to offer few guarantees as to consistency in effect, and to risk compounding the potential for status bias in Convention differentiation.

ENFORCEMENT OF THE SYSTEM

The Explanatory Report makes it quite clear that the criminalisation of "incitement to terrorism", or "apologie du terrorisme", is intended to fill a gap which CODEXTER found in member and observer state legislation and case-law. As such, the concept of "public provocation" is central to the drafting efforts, as it implicates measurable conduct. In thus targeting certain positive acts of communication by private and/or corporate individuals, within the context of a projected commonality in purpose among "like-minded states" for a crime-prevention approach to behaviour and speech, the essence of the 2005 Terrorism Convention seems to permit the strengthening of institutional orthodoxies such as could lead to the alienation of entire communities, as is now discussed.

An Assumption of Commonality?

Koskenniemi notes that "international law is a European tradition. Nevertheless, like many other European traditions, it imagines itself as universal." Intriguingly, he adds, "the appeal to common interest often reflects the speaker's wish to realise his special interest without having to fight". With specific regard to the Convention, the relevant "speaker" is quickly identified: the Council of Europe. However, if in fact imagining European needs and values to be "universal", might it also be further postulated that the Council's attempt to criminalise certain aspects of public behaviour carries some obvious dangers of "over-reach" such that the Convention could constitute "a hegemonic manoeuvre, an attempt by Europe to regain some control in a novel configuration of forces?" Phrased another way, is there an expectation that this European model for controlling behaviour could, or indeed, should, be applied more widely?

If so, the resulting framework of analysis is revealing. First, the Convention excludes the actions of government. Of course, governments can and do exempt themselves from

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31 Curiously, not equivalent terms. Cf the Preamble to UNSC Resolution 1624 (14 September 2005), S/Res/1624 (2005), relating to "the justification or glorification (apologie) of terrorist acts that may incite further terrorist acts". Article 1 of Res 1624 refers only to "incitement".
32 Explanatory Report, para 17.
34 M Koskenniemi, loc cit, n 33, at 116.
prosecution,\textsuperscript{36} but one fundamental assumption then appears to be that member and observer state government personnel are not capable of “intentional” (albeit consequence-less) provocation of terrorist offences and/or groups, or if so capable, such action can otherwise be justified for reasons of state.\textsuperscript{37} Secondly, as the speaker's (or member state’s) “official” activities are expressly exempt, only private individuals or groups may be pursued. The resulting hierarchy of potential culpability is implicitly non-conducive to transparency in jurisdictional approach, and any question of deterrence is immediately transformed from one where the ratifying state asserts its jurisdiction over prohibited conduct, to one where, after the intersection of identity and activity triggers the relevant status, prosecutorial proceedings may, or may not be commenced.

Accordingly, any decision to prosecute an article 5 offence will reflect official policy.\textsuperscript{38} Safeguards are built into the Convention, certainly, but prosecutorial flexibilities come into play at the national level. For example, the “political offence exception”\textsuperscript{39} to the extradition of suspected terrorist provocateurs is excluded by article 20(1),\textsuperscript{40} but article 20(2) permits states not to apply paragraph (1).\textsuperscript{41} If extradition is denied in application of article 20(2), there remains a duty to prosecute pursuant to paragraph (7), “unless the requesting Party and the requested Party agree otherwise”. Article 21 provides additional means to refuse extradition should it appear that an alleged perpetrator could, if extradited, be subjected to torture, inhuman or degrading treatment or punishment, or the death penalty,\textsuperscript{42} or where extradition has been requested in order to prosecute a person for political or other impermissible purposes. Article 21 is silent on any duty to prosecute.

Given Council of Europe concerns when drafting article 5 of the Convention regarding domestic state flexibility in the context of freedom of expression, the Explanatory Report in paragraphs 76 – 105 provides a lengthy discussion within which the following generic demarcation appears:

The Committee therefore focused on the recruitment of terrorists and the creation of new terrorist groups; the instigation of ethnic and religious tensions which can provide a basis for terrorism; the dissemination of “hate speech” and the promotion of ideologies favourable to terrorism, while paying particular attention to the case-law of the European Court of Human Rights concerning the application of Article 10(2) of the ECHR, and to

\textsuperscript{36} See, eg J Revill and P Kelbie, “Lords to shame MPs over secrecy bill”, The Observer, 20 May 2007, at 6 (bill to exempt public scrutiny of MP expenses); R Norton-Taylor, “Watchdog urges end to ban on MP phone taps”, The Guardian, 20 February 2007, at 4; N Chomsky, \textit{op cit}, n 17, at 89, who stresses the limits of a doctrinal system in which definitions of “terrorism” and “terrorist” are restricted to a certain class of criminal acts and actors.


\textsuperscript{38} For a similar argument, albeit within a different context, see Notes, Anon., “Constructing the State Extraterritorially” [1990] Harv L Rev 1273, at 1304.

\textsuperscript{39} Speaking generally, this exception means politically-motivated acts of violence are deemed non-extraditable; a custodial state may nonetheless retain a duty to prosecute. However, see C Walker, \textit{loc cit}, n 8, at 438 n 84, citing the Joint Committee on Human Rights, \textit{Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters} (2005 – 06 HL 75; HC 361), para. 176 (“there are today no circumstances in the world in which violence can be justified as a means of political change”).

\textsuperscript{40} Article 20(1) states in pertinent part, as follows: “None of the offences referred to in Articles 5 to 7 and 9 . . . shall be regarded, for the purposes of extradition or mutual legal assistance, as a political offence, an offence connected with a political offence, or as an offence inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such an offence may not be refused on [those] sole ground[s]”.


\textsuperscript{42} Cf Committee of Ministers, \textit{Guidelines on Forced Returns} (adopted 4 May 2005, 925th meeting of the Ministers' Deputies).
the experience of states in the implementation of their national provisions on “apologie du terrorisme” and/or “incitement to terrorism” in order to carefully analyse the potential risk of a restriction of fundamental freedoms.  

The Council of Europe concedes that “[t]he provision [article 5] allows parties a certain amount of discretion with respect to the definition of the offence and its implementation”, and the discretion, or margin of appreciation allowed by article 10(2) ECHR similarly permits “like-minded state” flexibility over individual expression when policy appears to mandate a curtailment of speech. Article 10(2) of the ECHR permits the freedom of expression to be qualified by

[S]uch formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. [Emphasis added.]

Obviously, individual speech which poses a danger to wider community interests has little place in a democratic society. It must be queried nonetheless whether the structure of the article 5 initiative against some communicators and not others is in fact a proportionate restriction on thought and conscience, expression, association and assembly in terms of public safety, public order or the protection of rights and freedoms of others, or instead, is simply too draconian a response, unlikely to address associated failings in intelligence-gathering, and risks creating a schism capable of destroying the commonality generated by the more positive aspects of globalisation between immigrant communities and the more indigenous populations.  

Some Benefits of Mutuality in Approach
Terrorist offences are traditionally the subject of international concern. While state complicity in such offences taking such diverse forms as relatively open support for particular “humanitarian causes” poses different challenges than more surreptitious, “deniable” funding streams, the centrality of flexibility in state decision-making in individual cases can frequently generate undesirable synergies. For example, the adoption by a state of a liberal approach to non-extradition can risk its reputation, as it could be seen to condone particular violent acts, an impression compounded by any subsequent “light-touch” custodial state prosecution undertaken in compliance with the maxim “aut dedere, aut judicare”, or in the alternative, and much more seriously, the offer of a safe haven to an alleged violent offender.

Even though variations in policy choice do cause distortions in transparency in approach to international crime, such variations permit sovereign states to signal issue-solidarity, and/or make seem more natural (or “national”) those differences for which state borders stand. The geographical and/or cultural extension of jurisdiction collectively by “like-minded states” may further assist in reinforcing or restoring the

43 Explanatory Report, para 88.
44 Explanatory Report, para 98.
45 For a similar argument made about governmental responses to the Irish “Troubles” of the 1970s, see D Bonner, “Responding to Crisis: Legislating Against Terrorism” [2006] 122 LQR 602.
46 See, eg, the Preamble to The Convention for the Prevention and Punishment of Terrorism (16 November 1937), Vol VII Hudson, International Legislation No 499: “Being desirous of making more effective the prevention and punishment of terrorism of an international character”.
47 See, eg, the list of terrorist incidents, wars, coups and revolutions between 1945 and 1988, in P Brogan, World Conflicts (Random House of Canada Ltd., 1989), at 555 – 583. See also N Chomsky, op cit, n 17.
48 “Extradite or prosecute”.
dialogue of a more localised, national interest, and facilitate the re-positioning of individuals within a more appropriate, policy-controlled juridical space. Such known operational variations mean however that a purportedly neutral jurisdictional discourse can carry the potential for any but neutral effects. S/he, in possession of her or his "civil equality", will then stand alone before laws which prohibit certain acts, yet, due to background status classifications or more insidious bias, may be afforded a justification in limited circumstances.

A quite separate challenge for modern foreign policy makers in the fight to contain terrorism is to reconcile the first function of diplomacy – communication among states – with the different realities of “standard-setting” and “standard-keeping” in the area of human rights, particularly as “it is in connection not with trade but with security that the card of national interest is most frequently played against human rights”.

This implies that any universality in substantive approach to article 5 implementation and interpretation cannot be anticipated; the social and economic contexts of terrorism vary widely within “like-minded” Council of Europe member and participating states as different as the United Kingdom, the Russian Federation, and Turkey. Instead, any benefits to be derived from collective state action must reside in the “proportionate” limitation of speech permitted by article 5 flexibility, which can facilitate as easily as deter official displays of armed force to control municipal life.

Therefore, the exemption of “lawful” government action (however characterised) from prosecution under articles 5 – 7 and 9 of the 2005 Terrorism Convention does not quite re-assure. The close control over national security certainly so frequently deemed paramount in Western social order can also help germinate the seeds for elite reinforcement of many culturally insular or conservative aspects of national life. For example, to view various legally-regulated areas, such as foreign aid, immigration, education, and sport to name but a few, through the lens of colonial history, makes more readily apparent any lingering fragments of ethnic bias that may persist. Moreover, in the event of a declaration of a state of emergency due to terrorism or other reason, governments retain the power to curtail rights and to re-assert domestic control over individuals; article 15 of the ECHR was drafted for this purpose.

Debate about the causes of terrorism can thus become the first casualty of efforts to stem the occurrence of terrorism simply because much anti-terrorism legislation, including article 5 of the 2005 Terrorism Convention, stifles wider debate. Moreover, once the definitions of “terrorism” and “terrorist” have been neatly confined by distinctions between “lawful” and “unlawful” acts and actors, and criminal liability attributed accordingly, the search for “causes” has been lost. Given the varying parameters of coercive power existing within different states, the law-making “speaker” within each will also mediate the interpretation of the law, whilst perhaps occasionally handing to law enforcement agencies the more visual role of “neutral” arbiter whenever that speaker feels it incumbent to pursue private and/or corporate individuals whose public speech “should” be proven (under domestic evidentiary rules) to carry an


51 Derogation must be “strictly required by the exigencies of the situation”, and done in accordance with other international law obligations, ECHR, art 15(1). Article 15(2) does not permit derogation from arts 2 (non-war-related right to life), 3 (no torture, etc), 4(1) (no slavery, etc), and 7 (no ex post facto criminal convictions).

[I]ntent [as domestically interpreted] to incite . . . [unlawful violence], where such conduct, . . ., causes a danger ["elite"-assessed] that one or more such offences may [but, need not] be committed.

If flexibility in approach to domestic law-and-order issues proves to be the key to the Convention's operational effectiveness, it will then be arguable that the Convention memorialises what would appear to be a tacit agreement among Council of Europe member and participating states to ignore each other's domestic excesses. Unless close scrutiny of human rights records cannot be so easily avoided, any "contextual" assault effected by article 5 of the Terrorism Convention on the, admittedly outer, acceptable perimeters of freedom of expression and association could thus effectively deliver to Convention signatories a further "golden" opportunity with which to project as "universal" another potential Western "hegemonic manoeuvre".  

IMPLEMENTATION BY THE UNITED KINGDOM

On 30 March 2006, the Terrorism Act 2006 received the Royal Assent. It is to come into force "on such day as the Secretary of State may by order made by statutory instrument appoint". One of the stated purposes of this Act is to implement the "distribution, or otherwise making available" of article 5 of the Terrorism Convention, which is done in sections 1 (encouragement of terrorism), 2 (dissemination of terrorist publications), and 3 (application of sections 1 and 2 to internet activity, etc). As previously discussed, the 2005 Terrorist Convention is an international law instrument, so the United Kingdom retains flexibility as regards its domestic implementation. Treaty incorporation is a matter of international obligation, however, and if a statute is specifically intended to incorporate a treaty, the statute and treaty should be interpreted consistently. As of the time of writing, the United Kingdom has not ratified the Convention, but the matter is under consideration.

What is immediately noticeable about the British implementation of article 5 is a subtle alteration of both language and perspective. In section 1(1) of the Act, the phrases contained in Convention article 5 - "public provocation to commit a terrorist offence", "distribution, or otherwise making available, of a message", "intent to incite", and "causes a danger" - are re-configured as follows:

This section applies to a statement that is likely to be understood by some or all of the members of the public to whom it is published as a direct or indirect encouragement or other inducement to them to the commission, preparation or instigation of acts of terrorism or Convention offences. [Emphasis added.]

Section 1(2) makes it an offence to publish or to have had published a prohibited "statement", and either to intend to encourage or induce members of the public to

53 M Koskenenmi, loc cit, n 33, at 118, and 113, respectively.
54 "An Act to make provision for and about offences relating to conduct carried out, or capable of being carried out, for purposes connected with terrorism; to amend enactments relating to terrorism; to amend the Intelligence Services Act 1994 and the Regulation of Investigatory Powers Act 2000; and for connected purposes" (2006 Ch 11).
55 Terrorism Act 2006, s 39(2). This has since been done. The Terrorism Act 2006 (Commencement No 1 and No 2) Orders 2006, SI 2006/1013 (in force 13 April 2006), and SI/2006/1936 (in force 25 July 2006), respectively.
56 Explanatory Notes, para 20, accessed at http://www.homeoffice.gov.uk. Paragraph 20 adds: "[t]his new offence supplements the existing common law offence of incitement to commit an offence".
57 See, eg, the 1969 Vienna Convention on the Law of Treaties, art 18, 1158 UNTS 331.
commit an act of terrorism, or to be reckless as to whether a publication has such an effect. References to the “public”

(a) are references to the public of any part of the United Kingdom or of a country or territory outside the United Kingdom, or any section of the public; and

(b) . . . also include references to a meeting or other group of persons which is open to the public (whether unconditionally or on the making of a payment or the satisfaction of other conditions).

In respect of this new offence, “direct encouragement” presumably would be clear enough. “Statement” is defined in section 20(6) as referring to “a communication of any description, including a communication without words consisting of sounds or images or both”. How a statement is to be determined depends on its contents as a whole, and the “circumstances and manner of its publication”. As for “indirect” statements, section 1(3) provides the following guidance:

For the purposes of this section, the statements that are likely to be understood by members of the public as indirectly encouraging the commission or preparation of acts of terrorism or Convention offences include every statement which –

(a) glorifies the commission or preparation (whether in the past, in the future or generally) of such acts or offences; and

(b) is a statement from which those members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances. [Emphasis added.]

Section 20(2) states that “glorification” includes any form of praise or celebration, and cognate expressions are to be construed accordingly.

The shift in emphasis from a specific standard (causes a danger, as determined officially) to a more diffuse one (reasonable inference by members of the public) is perhaps not as striking as at first appears; in the final analysis, both will be judicially interpreted. Moreover, the section 1(2) requirement of individual intent or recklessness somewhat mitigates against the need to show a credulous audience. In other words, as section 1(1) appears to focus primarily on audience “effect”, there must only be some measurable indication that members of the public have paid attention long enough reasonably to infer that what they have seen, heard or read could be a prohibited statement. Assuming some measurable degree of audience receptivity, section 1(2) then requires proof either of individual intent or of recklessness as to the likely effect on the public of the communication.

The equal attention paid to the intentional or reckless communication potential of a prohibited statement is of course explicable on the basis of the British adversarial, common law tradition involving three parties in a courtroom (judge, prosecution, defence). The Convention emphasis on official assessments of risk creation purportedly depends rather more on the “prosecutorial” and confessional approach (prosecuting magistrate, defence) favoured by many Council of Europe member states. However, section 1 does not sit entirely compatibly alongside article 10 ECHR in that the relative

59 An earlier version required an offender to “know or believe, or have reasonable grounds for believing”. Annex to Letter, 6 October 2005, from the then Home Secretary, Charles Clarke, to Parliamentary party opposition leaders, accessed at http://www.homeoffice.gov.uk.

60 Terrorism Act 2006, s 20(3).

61 This definition presumably includes facial and/or hand expressions, as the Explanatory Notes, para 95, refer to “a communication of any description”, for example, “images such as videos”.

value of political speech is not made a mitigating factor. Indeed, section 17 ("commission of offences abroad") implies that the nature of the regime being attacked is irrelevant. This alone indicates a wide prosecutorial discretion, and stands in contrast to the long history of support afforded by the United Nations for post-colonial rights of national self-determination.

The British approach to article 5 of the Convention might further permit a flexibility that may well prove in fact to interfere more with the freedoms of expression, information and of the press, as section 1 seemingly incorporates wider issues, such as those posed by potential or future risks. For example, a particular individual not yet in command of the rhetorical or communicative ability to attract a relevant "public" may still be deemed to create a risk of "encouragement". While article 5 of the Convention does address such a person, in that it is the individual "intent to incite" in disseminating a message to the public that creates the risk, it should be recalled that due to the conceptual difficulty of standardising the mental element article 9(2) (attempt) of the Terrorism Convention does not apply to article 5. Although section 5 of the Act ("preparation of terrorist acts") does not apply to the section 1 offence, section 17(2)(a) and (g) of the Act does prohibit "attempt" if a suspect does anything outside the United Kingdom that would breach section 1.

[S]o far as it is committed in relation to any statement, instruction or training in relation to which that section has effect by reason of its relevance to the commission, preparation or instigation of one or more Convention offences.

The British approach to implementation does however contain a visible (albeit opaque) "principle of certainty". When presented in draft form to parliament in September 2005, it was the stated intention of the then British Home Secretary to draw up a list of historical terrorist acts committed over the last twenty years which it would be a criminal offence to "glorify". Immediately, free speech advocates, the academic community and others protested about the effect of such an "offence" on research, and/or on those groups which advocate the use of violence to achieve political change, as was the case with the ANC in its struggle against apartheid-era South Africa. The putative list was duly abandoned by the following October. Thus, although the requirement of intent or recklessness applies equally only to "unlawful" behaviour as originally delineated by article 5 of the Convention, a British emphasis on audience effect or receptivity may assist in narrowing prosecutorial discretion to a more concretely ascertainable level.

As for the other aspects of the article 5 prohibition of "provocation", sections 2 and 3 of the Terrorism Act 2006 concern, respectively, the dissemination of terrorist publications and the application of sections 1 and 2 to internet activity, etc. Curiously,

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63. See C Walker, loc cit, n 8, at 436. For a brief account of the lineage of "glorification" in British immigration law, see ibid, at 434 – 436. See also I Traynor, "EU crackdown to target employers of illegal migrants", The Guardian, 17 May 2007, p 24 (British opt-out on EU criminal justice regimes).

64. However, "[the government has emphasised that account will be taken of art 10 in its application", C Walker, loc cit, n 8, at 436, citing the Government Response to the Committee's Third Report of this Session: Counter-Terrorism Policy and Human Rights: Terrorism Bill and related matters (2005–06 HL 114, HC 888) 15 at n. 75.

65. See, eg, "Measures to eliminate international terrorism", above, n 28.

66. Arguably, the earlier definition, above, n 59, would also have done so. See also Terrorism Convention 2005, Explanatory Report, para 103: "[the term 'to the public' makes it clear that private communications fall outside the scope of this provision]"

67. Or, attract a defence of merely "joking with friends". See, eg, V Dodd, "Terror accused admits joking about bombing Commons", The Guardian, 16 September 2006, at 6. Section 1(6) provides for a defence to prosecution under the section.

68. Section 5 prohibits intentional preparatory acts such as possessing items that could be used for terrorism. Explanatory Notes, para 30.

section 17 (offences committed abroad) does not apply to sections 2 or 3. Section 2 prohibits various acts of distribution, *e.g.*, selling, lending, transmitting, “providing a service to enable”, *etc.*\(^{70}\) Section 3, in applying sections 1 and 2 to internet activity, provides for a form of “take-down” notice (presumably of use to ISPs) as a means of self-protection from prosecution,\(^ {71}\) and thus complements the increasingly regulatory online environment, as deepened in recent years by amendments to “civil-side” copyright infringement required by domestic implementation of the 2001 “Infosoc” Directive of the European Community,\(^ {72}\) and extraordinary criminal offences provided by the Council of Europe’s 2001 Convention on Cybercrime.\(^ {73}\)

British implementation of Convention article 5 *via* a standard which depends on measurable proof of audience “understanding” has yet to be proved either an inspired choice in the fight against terrorism, or a flexible semantic tool for use by the government when called upon to avoid hard questions regarding possible administrative failures or awkward policy choices. However, any question as to whether initiatives to deter terrorist acts should be focused exclusively on the civilian population, or conversely, should also incorporate strong mechanisms of oversight to ensure continuous governmental accountability, needs to be ever at the fore when the time arrives to prosecute individuals for such “predicate” offences, as carved from a value-laden, and non-absolute freedom of expression. To do otherwise risks an escalation in provocation by each side in the “war on terror”, making it far more difficult to solve wider questions of human solidarity between immigrant and indigenous populations within Council of Europe member and participating states.

**CONCLUSION**

Rapid industrialisation throughout the 20th century shifted the social fabric of life from the local to broader concerns, *e.g.*, through economies of scale, greater social mobility, and mass consumption. In the wake of such changes, it has been fairly inevitable that opposing factions have arisen: those wishing to preserve the stability and controls of the past, and those pushing at the boundaries of such control. Equally, both sides to the “war on terror” utilise the same or similar technologies, yet do so from very different perspectives. One side – the state – holds centralised power and due authority, as enforced through its legal monopoly on the use of force; the other side – the “terroristic” – refines its powers of surprise, and its willingness to break rules.\(^ {74}\)

While each side must rely on its most convenient, if not precisely “best”, weapons, it is in the choice of weaponry that different battle strengths are revealed.

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\(^{70}\) See C Walker, *loc cit.* n 8, at 434, for an account of recent government efforts to use lists of extremist bookshops to deport non-UK citizens. See also A Barnett, “Bookshop’s messages of racist hate”, *The Observer*, 4 February 2007, at 5 (Birmingham bookshop raided by police).


\(^{73}\) CETS No 185, in force 1 July 2004, criminalises certain acts of copyright infringement. The Terrorism Convention 2005 Explanatory Report, para 93, states regarding article 5 that: “The current provision is construed on the basis of the Additional Protocol to the Cybercrime Convention concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No 189, Article 3)”. Of interest, see Editor’s Week, Bell, “Are regulators too late for the internet party?”, *The Guardian*, 9 September 2006, at 42 (jurisdictional difficulties in regulating online content); I. Traynor, “Russia accused of unleashing cyberwar to disable Estonia”, *The Guardian*, 17 May 2007, at 1.

Change – particularly rapid change – can lead to entrenchments in position, and an intensifying repetition of familiar routine. States which react to non-state uses of violence with a blunt law-and-order approach may seek to control the many whilst maintaining the facades of democratic governance.\textsuperscript{75} Such predictable methods as repressive legislation aimed at individual movement, association, behaviour and thought represent attempts only to contain the often uncontainable, yet serve to illustrate the many ways in which governments employ the bureaucratically-anachronistic language of 20th century chain-of-command mass production (eg, through rule-bound institutionalised hierarchies, etc), which, in turn, can reinforce a “bunker mentality” in “like-minded states” and alienated communities, alike. This stands in contrast to the modern terror network, which, being more fluid and often peer-to-peer, “gets things done” by relying on self-managing, committed local cells, organised and sophisticated online contacts and local agendas.

There are thus many dangers posed by international legislation such as the 2005 Terrorism Convention, not the least of which is that mutually-agreed flexibility can come at the cost of democratic accountability. As noted by Kureishi, “[If] the home-grown British bomber is our headache, he is also our symptom”.\textsuperscript{76} Hierarchical, centralised control over the lives of individuals not only can indicate unequal civil “partnerships”; it can also push individuals into forming self-help communities which may or may not be deemed “trustworthy” by the authorities. Short-termist governments, ensconced in the “familiar, understood” which utilise the rhetoric of social exclusion, risk a herd-like, popular backlash against the globalised “other, within”. To call upon the certainty, fixity and moral absolutes of some notional past is to do little other than to alienate certain sectors of society further, provoke renewed forms of discrimination, and awaken the xenophobia lurking within many criminal justice systems.

The 2005 Terrorism Convention is therefore an excellent example of international law with a decidedly European twist. In attempting to be a “one size fits all, with a heart”, it expresses a concern for human rights and freedoms, and leaves states as disparate as Russia and Italy free to incorporate its terms “flexibly” in order to name and prosecute what each may choose to view as “terrorism”. The in-built differentiation in status codified by the Convention, and the flexibility permitted as to the implementation and enforcement of its provisions, thus should put paid to any lingering doubts there may yet be regarding “whether” unlawful violence should be approached solely as “unauthorised” acts or actors, as a decision to prosecute now may so easily function as policy. Accordingly, if this initiative is indeed intended for more “universal” application, it can only be hoped that the term “universal” acquires a new meaning, as not only is it apparent that “bombs cannot break terror networks”;\textsuperscript{77} it is equally clear that the perpetrators of violence can wear many masks.

\textsuperscript{75} Contrast C Walker, \textit{loc cit.} n 8, p. 427, who notes that, after the London bombings of 7 July 2005, the government did not pass any “legislation within short order”.
\textsuperscript{76} H Kureishi, “Reaping the harvest of our self-disgust”, \textit{The Guardian}, 30 September 2006, at 30.
\textsuperscript{77} S Zuboff, “Multinationals should listen to the street – not the City”, \textit{The Observer}, 10 September 2006, at 9.
THEORISING THE GOVERNANCE OF NOT-FOR-PROFITS

CHRISTOPHER A. RILEY*

INTRODUCTION

Current interest in the governance of not-for-profits flows from two converging sources. One is the growing social and economic importance of such organisations, and indeed of the broader “third sector” of which they form a large part. It has been estimated, for example, that in England and Wales there are 190,000 charities alone, with a combined annual income of £38 billion.¹ This growing importance is in turn reflected in a number of recent governmental initiatives, including the creation of an “Office of the Third Sector” within the Cabinet Office² and the appointment of a Minister and a Director General for the sector.³

The second source of interest flows from the continuing attention devoted to governance in general, and to the governance of organisations in particular. The epic proportions (and gestation) of the Companies Act 2006 bear witness to that,⁴ alongside a range of other private sector⁵ and governmental initiatives.⁶ And whilst for-profit corporations still enjoy the greater part of this attention, reforms have increasingly addressed not-for-profits too, again with action from both government,⁷ and non-governmental bodies.⁸

That governance should have come to enjoy such prominence ought hardly to surprise us, for it addresses fundamental questions about the objectives and regulation of organisations that, in modern economies, have come to dominate our lives. Devising an appropriate governance regime for not-for-profits must proceed, however, from an understanding of the role played by such organisations within our society. This article tries to advance our thinking on that issue. The third and fourth sections examine, and evaluate, the two leading theories that have been offered to explain the role of not-for-profits, namely that they are a response to governmental failures, or that they are a response to market failure. It will be argued that although these theories are often seen as being in competition with each other, they ought rather to be seen as complementary, each adding something significant to the other. Taken together, they offer a valuable account of not-for-profits. That account remains, however, incomplete.

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² The Office brings together two previous governmental initiatives: its “Active Communities Directorate” and its Social Enterprise Unit. See generally http://www.cabinetoffice.gov.uk/third_sector/.

³ (Ed) Miliband was appointed as Minister in May 2006, and Campbell Robb as Director General in October 2006. Coinciding with their appointments, the Government also launched its “Comprehensive Spending Review 2007: The future role of the Third Sector in social and economic regeneration”. See http://www.hm-treasury.gov.uk/documents/public_spending_and_services/third_sector/pes_thirdsector_policyreview.cfm.

⁴ The Act weighs in at 1300 sections, plus 16 Schedules, and is the culmination of a review process launched in 1998.

⁵ See, for example, the Financial and Reporting Council, The Combined Code on Corporate Governance, (June 2006), available at http://www.frc.org.uk/documents/pagemanager/frcCombined%20code%202006%20OCTOBER.pdf


⁸ See for example the ICSA/NCVO, Code of Governance for the Voluntary and Community Sector (draft, 2005) available at http://www.ncvo-vol.org.uk/hs HOUR/id=2327
In particular, the explanations they give emphasise the instrumental role of not-for-profits – their ability to deliver the goods or services that the state, or for-profits, struggle to supply.

Certainly, this instrumental aspect of not-for-profits is important. Also significant, however, is the fact that not-for-profits do, and should, function as what will be called “participatory communities”. The fifth part explores this character of not-for-profits, arguing that they constitute a shared enterprise in which their various stakeholders can develop a relationship that is richer and fuller than that of a mere arms-length “consumer” of goods or services. Such participation is sometimes an end in itself, rewarding participants with a sense of belonging, of being a member of a team pursuing a collective endeavour. And sometimes it provides a means whereby participants can exercise their need to express and explore their deeply held values and commitments. The sixth part expands on how the governance of not-for-profits might respond to this participatory and expressive role, noting some concrete examples of governance measures necessitated by it. It does not, however, aim to set out a comprehensive blueprint for such a regime. That is, to be sure, an important task, but not for here. We begin, however, by addressing some definitional and conceptual issues raised by our enquiry.

SOME PRELIMINARIES

The first concerns the meaning of “not-for-profits” themselves. This seems an obvious place to begin and yet identifying the essence of such organisations demands in part the very enquiry that the remainder of this article undertakes. Still, for now we can at least say enough to provide a footing for the discussion that will follow. Not-for-profits, notwithstanding that label, should not be understood as being precluded from making profits.\(^9\) Rather what is, and should be, prohibited is the distribution of profits. They are, or ought to be, subject to what Hansmann calls a “non-distribution constraint”,\(^10\) or what the UK government referred to as a “lock on assets”.\(^11\) It will be argued later that this negative restriction on not-for-profits tells only part of the story, and that as important is the positive obligation as to how their assets are to be used. But that discussion can wait.

We might also note that not-for-profits form a part of the broader “third sector”, a grouping of organisational types that sit between the state and the for-profit sector, and which are usually taken as including, in addition to not-for-profits, social enterprises, mutual organisations and co-operatives. Not-for-profits might themselves also be further subdivided into different types. So, for example, some – but by no means all – not-for-profits will also be charities (within the definition of the Charities Act 2006, section 1).\(^12\) Further, they may also take a variety of legal forms: as trusts, unincorporated associations, or corporate bodies. This article concentrates upon the last of these, and uses the terms organisation and company interchangeably.

That says something of not-for-profits, but what about governance? That term is generally understood to be concerned with both the exercise, and the regulation, of power. In the corporate context, it has been defined by Parkinson as “the system

\(^9\) It would be quite impractical for any organisation to hit a precise “break even” point in relation to each and every transaction undertaken, or even over some accounting period.


\(^12\) The definition applies to charities in England and Wales. For Scotland, see the Charities and Trustee Investment (Scotland) Act 2005, s 7.
through which those involved in the company’s management are held accountable for their performance, with the aim of ensuring that they adhere to the company’s proper objectives. Governance, on this account, is distinct from, and in a sense higher than, the way an organisation is actually managed. Note also that the governance regime we are addressing here is one that will arise in virtue of having adopted the legal form of a not-for-profit (company). We are not concerned, then, with all the regulation that will apply in virtue of the particular area of activity (educational provision, housing, political campaigning, or whatever) that the not-for-profit happens to undertake.

Much of the theorising – both positive and normative – about not-for-profits has been drawn from economics, or from economically minded lawyers. Economists were, however, relatively slow in devoting attention to the not-for-profit sector. This could be seen as a consequence of the method of neo-classical economics, which tended to ignore organisations in general. The emphasis was on how markets operated, rather than on the internal workings of organisations. These were often regarded merely as “black boxes” that did not need to be “opened up” and explained. The increasing attention that has been given to not-for-profits, then, can be seen as part of a growing interest in the internal workings of firms, and of economic institutions, more generally.

Nevertheless, the tendency has remained to view the market as the dominant, and “prior”, mechanism for producing and allocating goods or services, and to see not-for-profit organisations (and, similarly, the state) as exceptional correctives to some failing in the market. Thus, economic orthodoxy takes as its starting point a collection of atomistic individuals who act rationally in pursuit of their own self-interest. The ties that bind these individuals together are economic exchanges. Individuals trade with each other because each thinks she will be left better off by so doing. Such exchanges are co-ordinated by the “price mechanism”: the prices for resources (including for labour) that markets generate. Sophisticated models are then constructed to explore the end state or “equilibrium” to which this transacting will give rise under a set of conditions usually referred to as “perfect competition”. Finally, the problem of market failures – that is, situations in which the conditions of perfect competition are not realised – is introduced. Such failures undermine the process of free-exchange, preventing it from reaching the optimal end state predicted by the model of perfect competition. Institutions, such as the state, or not-for-profits, are then explained as a rational response to these market failures. The first theory we shall examine clearly falls into this category. Interestingly, however, it sees not-for-profits as a solution not merely to market failures, but to government failures too.

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14 For a useful overview of the contribution of economic analysis to the not-for-profit sector, see “Preface” in HK Anheier and A Ben-Ner (eds) The Study of Nonprofit Enterprise: Theories and Approaches (Kluwer Academic, 2003). Sokolowski has noted that the significance given to not-for-profits by economists arises because this form of enterprise seems to challenge the basic assumptions of economic analysis, namely rational choice and utility maximisation. See SW Sokolowski, “The Death Knell of Utilitarianism: A Review and Theoretical Implications of To Profit or Not to Profit” (2000) 11 Voluntas 375.

15 This point has been made many times by those writing about the economics of business (for-profit) firms; see for example OE Williamson, The Economic Institutions of Capitalism (The Free Press, 1985); M Krashinsky, “Stakeholder Theories of the Nonprofit Sector” in HK Anheier and A Ben-Ner (eds) The Study of Nonprofit Enterprise: Theories and Approaches, op cit, at p 126.


17 Such exchanges are usually referred to as “Pareto superior” moves: moves which leave at least one person better off, and leave no one else worse off.

18 Indeed, firms in general have been explained as a response to the transaction costs incurred in transacting across markets; see RH Coase, “The Nature of the Firm” (1937) 4 Economica 386.
PUBLIC GOODS AND GOVERNMENTAL FAILURE

This first theory has been particularly associated with Weisbrod, and takes as its starting point the difficulties faced by for-profit firms in supplying “public goods”. Such goods are said to display two qualities. First, they are “non-rival”, so that one person’s consumption of the good does not preclude another person’s consumption. The significance of this is that the cost of production does not increase with the quantity produced, so it costs no more to produce the good for many consumers as for a few. Clean air, or national defence, are commonly-cited examples. This promises a significant economic benefit, since the production of non-rival goods ought to be highly cost effective; a television programme, once made, can be consumed by millions as cheaply as by a few. The second quality of a public good is, it might be said, more of a curse. Such goods are “non-excludable”: it is difficult to exclude non-payers from consuming the good or service. There is no easy way, for example, of preventing non-payers from enjoying the benefits of national defence, or of clean air. Similarly, as Slavinski notes, “[o]ne of the best examples of a pure public good is material aid to the indigent, from the point of view of the nonrecipients of that aid.” To be sure, the cost of aid may increase as the number of recipients increases, and potential recipients might easily be excluded too. However, non-recipients stand in a quite different position. My happiness that famine victims are being helped does not reduce your happiness about it. And even if you contribute nothing towards the cost of famine relief, still it is impractical to exclude you from whatever happiness you may experience.

The non-excludable quality of public goods results in for-profit firms typically providing a lesser quantity of such goods than consumers collectively desire, given the modest “unit cost” of producing such goods. The state has often been seen as the appropriate corrective to this problem, for it can provide public goods and then compel consumers to pay for that provision, through its legal power to levy taxation. Weisbrod’s insight, however, was to note that, in addition to the market’s failure to deliver public goods, there may also be a form of “government failure” resulting in the state under-providing such goods (at least for some sections of the population). Suppose that taxpayers are heterogeneous in their demands for public goods. Some would prefer, say, more public service broadcasting, or more overseas aid, than would others. Government, argued Weisbrod, will tend to choose a level of supply that satisfies the “median voter”, leaving high demand taxpayers undersupplied. This problem can be addressed to some extent through the way in which political (and

19 For an early account of this, see eg BA Weisbrod, “Toward a Theory of the Voluntary Non-Profit Sector in a Three-Sector Economy” in ES Phelps (ed) Altruism, Morality and Economic Theory (Russell Sage, 1975).
21 This analysis assumes that the happiness which non-recipients experience arises just in virtue of others being helped. Where, however, a non-recipient’s happiness depends on her knowing that it was her donation that helped the recipient, then the good is clearly excludable.
22 The extent of the failure of private, profit-seeking, firms to supply public goods is itself a matter of dispute. Coase, for example, famously showed how lighthouses, often regarded as a clear example of a public good, were privately owned in Britain (with ships being compelled to pay for them on entering ports). See RH Coase, “The Lighthouse in Economics” (1974) 17 J of Law and Economics 357–76.
23 As Weisbrod makes clear, the point is that different citizens want different quantities of any given public good given the “price” that will be payable for those different levels of provision. Price here means the amount of additional tax that the citizen would have to pay for an increase in the quantity of that good. See the later version of his “Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy” in BA Weisbrod (ed) The Voluntary Nonprofit Sector: An Economic Analysis (Lexington Books, 1979).
24 It will also leave “low-demand” taxpayers over-supplied, but whilst that may be a political problem it is not part of the explanation for not-for-profits.
therefore taxing) communities are constructed. But not-for-profits, it is argued, can be understood as an alternative response. They deliver the public goods that high-demand taxpayers want but which the state, playing only to the median taxpayer, is unwilling to provide.

Weisbrod’s median voter explanation for not-for-profits has been widely influential. Aspects of the theory have been subject to empirical testing (especially in the context of the USA) and the data have been seen as reasonably supportive of Weisbrod’s analysis. So, for example, the theory predicts that, all other things being equal, there will be a greater abundance of not-for-profits where communities are more heterogeneous (and thus have more diverse demands for public goods). Kingma suggests that the experience of the USA, with its politically, religiously and ethnically diverse population, and its flourishing not-for-profit sector, provides at least impressionistic support for this hypothesis. And he notes a number of empirical studies showing that heterogeneity in race, and in income, education and age, are likewise positively correlated with larger not-for-profit sectors.

There are, however, two inter-related reasons for doubting the explanatory power of the “median voter” theory, particularly in its application to the UK. First, and perhaps most obviously, public spending, say as a proportion of GDP, is rather higher in the UK than in the USA. Whatever the reason for this, it suggests there may be a rather smaller gap in the UK between the current level of state provision and the aggregate demands of its citizens. Second, a large – and growing – proportion of not-for-profit activity in the UK is funded by the state itself. This role of not-for-profits (and indeed of the broader third sector) as deliverer of state-funded services has been, for example, central to the current government’s relationship with the sector, as reflected in a range of recent governmental publications. Yet the median voter theory has little to say about this development, for the following reason. Where not-for-profits act as the deliverer of state funded services, the state has already decided to tax citizens up to the level necessary to pay for such services. The decision to use not-for-profits for their delivery must, then, be explained by something other than the state’s supposed reluctance to tax and to spend more than the median voter will approve. As Slivinski put it, for Weisbrod

the not uncommon event in which the government contracts with a profit-making or nonprofit organization to provide a service and then pays the organization for that service

28 See also BA Weisbrod, “The Future of the Nonprofit Sector” (1997) 16 J of Policy Analysis and Management 541, at pp 542-543, noting “the growing importance of nonprofits everywhere, as population migration and the flow of information through television and computers have the effect of magnifying diversity in country after country.”
29 On the claimed correlation between the size of the not-for-profit sector and a “religious heterogeneity index”, see HK Anheier, Nonprofit Organizations: Theory, Management, Policy (Routledge, 2005), at pp 122-3.
32 It may, rather plausibly, also suggest that factors other than heterogeneity explain the level of public expenditure, which would again require some qualification of the median voter theory.
33 See eg The Charity Commission, Stand and deliver: The future for charities providing public services (The Charity Commission, February 2007) ch 1.
34 HM Treasury, Exploring the role of the third sector in public service delivery and reform (HM Treasury, 2005); Office of the Third Sector, Partnership in Public Services: An action plan for third sector involvement (Cabinet Office, 2006); HM Treasury, Comprehensive Spending Review 2007, op cit.
with tax dollars is counted as an instance of government provision. . . . it is worth noting that it leaves aside a whole range of questions about the choice between government production and contracting for production by the private sector.\(^{35}\)

However, whilst it is legitimate to criticise the limited significance of the median voter explanation for not-for-profits (especially for the UK), it must also be acknowledged that that explanation has now been supplemented by additional reasons for "governmental failure" — reasons that more convincingly explain governments' refusal to provide, or to deliver, all those services their citizens may demand. First, liberal states must often pursue a policy of neutrality between different individuals' competing conceptions of the good life, requiring a policy of non-intervention in many areas of social life. The state might, for example, have a policy of secularism that precludes it from supporting faith groups. Similarly, much organised political activity — from "party politics" through to single-issue campaigning — must be conducted outside of the state apparatus. To be sure, some states might be prepared to provide some funding to political parties or campaign groups, but still the state stands at arms length to such parties or groups.\(^{36}\) Indeed, in many cases the very point of the organisation in question is to challenge, and attempt to change, the state's own policies.\(^{37}\) The Citizens' Advice Bureaux provide but one example of such organisations that are (very largely) funded by, but whose very work requires independence from, the state.\(^{38}\)

Second, Weisbrot has noted how governments may lack information about what citizens actually want,\(^{39}\) and how the self-interest of government officials may distort the state's provision. Frumkin argues that voluntary organisations may be able to identify and respond to social needs more quickly than can government.\(^{40}\) And Douglas has suggested a number of "categorical constraints" which attend state provision.\(^{41}\) Such provision must be fair and equitable, and state officials must be accountable. One manifestation of these "categorical constraints" is the relative uniformity of state provision, compared to the diversity seen in the not-for-profit sector.\(^{42}\) In part, this echoes Weisbrot's argument that the state must adopt a single level of service that is reflective of the median voter, whereas the not-for-profit sector can produce a whole range of differentiated goods, or levels of service, responding to the varying demands of different groups of citizens. Douglas' point goes further, however, for he notes that sometimes it may be a choice not between more or less of some good, but between two very different social policies — to support pro-life, or

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\(^{36}\) Relatedly, as Krashinsky has noted, "nonprofit providers provide a layer of insulation between the government and potentially awkward decisions": M Krashinsky, "Stakeholder Theories of the Nonprofit Sector" in HK Anheier and A Ben-Ner (eds) The Study of Nonprofit Enterprise: Theories and Approaches, op cit, at p 131.

\(^{37}\) This is not to suggest that all groups are equally meritorious simply because they represent an alternative, or a challenge, to the state. Whilst de Tocqueville famously enthused about the contribution of voluntary associations to American democracy (A de Tocqueville, Democracy in America, translated and edited by HC Mansfield and D Winthrop, University of Chicago Press, 2000), Hobbes warned of the dangers that voluntary associations might present for the state; T Hobbes, The Leviathan, ed CB Macpherson (Penguin, 1977).

\(^{38}\) According to the 2005–6 Annual Report for the Citizens Advice service, the body comprising and supporting the individual CAB, 81.7 per cent of the service's income was derived from government grants. See http://www.citizensadvice.org.uk/index/publications/annualreportarchive/annual-report-2006-html/index.htm.


pro-abortion, policies for example. The state must often speak with a single voice, whereas the not-for-profit sector can reflect society’s divergent views.

A further problem suffered by the state lies in its relative inability to experiment. Governments must “adopt the convinced approach of acting on certainties rather than the tentative approach of the experimentalist”.43 The voluntary sector, by contrast, is seen as more free to innovate44 and to initiate action.45 Finally, it is argued, state provision tends to suffer from a greater burden of bureaucracy. The state must be accountable for what it does. It must be able to show that it is treating recipients of its services fairly and equally.46 These requirements necessitate that the state’s provision be more “formalised”, leading in turn to some of the “red tape” for which the state is routinely criticised.

**Governance and the “Government Failure” Theory**

What implications does the government failure theory have for the governance of not-for-profits? At first sight, the theory would seem to offer a “deregulatory” answer to that question. If the comparative strength of the sector lies in its ability to innovate, and its freedom from the red-tape and the “burdensome requirements” of fairness and accountability that attend state provision, then onerous regulation might do much to undermine these strengths.47 A lighter regulatory touch, that defers to the private ordering of participants within not-for-profits, on the other hand, should help to preserve those qualities. The governance regime ought, for example, to work with organisations’ own definitions of their objectives or “mission”, rather than imposing upon them some competing account of organisational objectives, or some “public benefit” requirement.48 Similarly, a deregulatory approach would caution against mandating the internal decision-making structures of not-for-profits. If organisations wish, say, to permit stakeholders a right to participate in the running of the organisation, then they should be free, but certainly not compelled, to do so. Disclosure and accounting obligations should likewise be as light touch as possible. And the courts should be slow to second-guess the decisions of those running such organisations, including in particular their decisions about the distribution of organisational resources amongst potential beneficiaries.

To be sure, this deregulatory approach would still sanction the law playing a facilitative role, providing a legal infrastructure that supports the creation and administration of not-for-profits. “Legal vehicles” – such as specialised forms of company – can be established by the state, which those creating not-for-profits can then easily and cheaply employ as the legal form for their organisation. The UK’s recent development of new legal forms for “community interest companies”,49 and

44 See also T Hayes, *Management, Control and Accountability in Nonprofit Voluntary Organizations*, op cit, at pp 29–31. Hayes notes, however, that “in some instances, the innovative content [of not-for-profits’ outputs] may be of dubious value, especially in cases where the innovation is of the ‘pseudo’ variety and is, in fact, merely used as a funding device.”
45 This tendency towards variation in the “internal structure” of not-for-profits seems to gain some empirical support from Leiter’s finding of “surprisingly little” “isomorphism” (meaning the tendency towards sameness) among not-for-profits in Australia. See J Leiter, “Structural Isomorphism in Australian Nonprofit Organizations” (2005) 16 *Voluntas* 1–31.
46 See P Frumkin, *On Being Nonprofit: A Conceptual and Policy Primer*, op cit, at p 77, “[there is a fast-growing disjunction between public sector emphasis on accountability and universalism and the sometimes well-defined missions and commitments of many nonprofit organizations]” [footnote omitted].
48 For a criticism of the rules governing “community interest companies” for their insistence upon “a community benefit” as a precondition for being allowed to use this legal form, see AJ Dunn and CA Riley, “Supporting the Not-for-Profit Sector: The Government’s Review of Charitable and Social Enterprise” *op cit, at pp 651–3.
“charitable incorporated organisations”, perform this task. Similarly, the state can promulgate “default rules” which anticipate the private ordering that participants within not-for-profits would themselves otherwise choose, thereby saving such participants the transaction costs of adopting their own express rules. Nevertheless, a deregulatory approach would urge that such rules remain defaults, capable of exclusion by participants who favour alternative governance arrangements.

Yet there are counter-veiling reasons urging caution in travelling too far down this deregulatory road. For one thing, demonstrating that a lack of bureaucratic regulation has, historically, contributed towards the growth of the not-for-profit sector is a quite different matter from showing, normatively, that such regulation would be unwelcome. Why should we not prefer a smaller, but more regulated, sector? The requirements of fairness and accountability that characterise state provision can plausibly be viewed as positive qualities to which the not-for-profit sector should aspire, rather than downsides to be avoided by a suitably deregulatory regime. And whilst the mere label of public goods does not justified treating not-for-profits that supply them as public bodies, we might note again that much provision by the not-for-profit sector is as an agent of the state, delivering goods paid for from the public purse. Moreover, insofar as the not-for-profit is a charity, the subsidies such organisations receive through tax concessions might justify imposing higher standards on such bodies.

Although, then, the governmental failure theory might seem to prescribe a deregulatory governance regime, that prescription is clearly debatable. Moreover, any attempt to press this issue further is hindered by a fundamental limitation of the theory in explaining the role of not-for-profits. The explanation the theory offers is essentially negative. It shows why the state does not provide (or deliver) all the public goods or services citizens demand, and thus reveals the vacuum in state provision or delivery that not-for-profits might fill. However, what is clearly also required is a positive theory of why not-for-profits are able to fulfil (at least some of) this unmet demand. Such a theory must explain not merely why there is a demand for the non-state provision (or delivery) of public goods, but also why this demand is for specifically not-for-profit, as opposed to for-profit, supply (or delivery). As James and Rose-Ackerman have noted, “[t]he Weisbrod model explains why private provision of public goods may exist. However, it does not explain why this private production is nonprofit.”

It is perhaps tempting to think that the answer lies in the lack of the beneficiaries’ resources: recipients of, say, famine relief can hardly afford to purchase such relief from a for-profit provider. Yet not-for-profits must still acquire all the inputs necessary to make such provision. If they are able to secure volunteer labour, donations from supporters, and the like, to cover these costs, the question remains why not-for-profits are better able than are for-profits to acquire such inputs. Similarly, it is not enough to show that government in the UK (as elsewhere) is increasingly keen to use the private sector to deliver state-funded services; that begs the questions of when, and why, it chooses to delegate such delivery to the not-for-profit, rather than to the for-profit, sector?

Finally, the importance of showing when (and why) not-for-profits are preferred to for-profits is particularly necessary given that much not-for-profit activity is in fact concerned with the supply of essentially private goods. From large universities to small

50 See the Charities Act 2006, Part 2, Chapter 8.
51 The concept of “public goods” is an economic one, and it seems doubtful that that necessarily requires those who supply such goods to be under “public body” like obligations.
“charity-shops” and church tea-rooms, much of the sector is supplying goods that are neither non-rival nor non-excludable. In many such areas, not-for-profits compete alongside for-profit businesses, a position that is likely to increase with moves towards greater “commercialism” by not-for-profits and the growing emphasis upon “social enterprise”.\(^{53}\) What has now become the orthodox explanation for the boundary between the for-profit and the not-for-profit sector is provided by the second theory we shall address, and to that we now turn.

**ASYMMETRIC INFORMATION AND THE VALUE OF TRUST**

This theory has its origins\(^{54}\) in research preceding that of Weisbrod,\(^{55}\) but its full (and most general) statement appeared first in the seminal work of Hansmann, at the beginning of the 1980s.\(^{56}\) Hansmann’s analysis, like Weisbrod’s, starts with a problem of market failure. However, his concern is not to show, negatively, why government also fails.\(^{57}\) Instead, he wants to show, more positively, why not-for-profits can offer a solution to the specific instance of market failure that he identifies.\(^{58}\)

That failure is one of “asymmetric information” – the situation where one party to a deal knows less than the other. If a consumer cannot determine whether the product she is being offered is a good one or a “lemon”,\(^{59}\) then there is a risk that her ignorance will be exploited by a supplier that is intent upon maximising its profits. The same analysis can be applied where a donor gives money to purchase a good or service for another: shelter for the homeless, relief to overseas famine victims, and so on. Such a donor often has no – or at least no practical – way of discovering whether her donation is ever actually used in the way she expected.

The not-for-profit form, it is argued, provides a safeguard for donors and consumers against the exploitation of their ignorance. This safeguard is achieved by the non-distribution constraint (or “asset lock”) to which not-for-profits are subject. Profits must be retained within the organisation. This constraint reduces the incentive to exploit consumers’ or donors’ ignorance, providing an important reassurance to them, and making them readier to trust not-for-profits. It is this enhanced trust enjoyed by not-for-profits in the face of significant informational asymmetry that can give them an advantage over for-profits, and explains why (and when) not-for-profits flourish and survive even when in competition with for-profits.

The literature has noted a number of situations in which the problem of informational asymmetry is likely to be particularly severe. Contracting for the future

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53 The promotion of social enterprise within the UK now falls within the remit of the Office of the Third Sector; see http://www.cabinetoffice.gov.uk/third_sector/social_enterprise. For some of the theoretical issues raised by this move towards greater commercialism, see BA Weisbrod (ed) *To Profit or Not to Profit: The Commercial Transformation of the Nonprofit Sector* (Cambridge University Press, 1998).

54 For the history behind Hansmann’s work, and his contribution to theorising not-for-profits, see PD Hall, “A Historian’s Perspective” (1999) 28 NVSQ 213.

55 See eg KJ Arrow, "Uncertainty and the Welfare Economics of Medical Care" (1963) 53 *The American Econ Rev* 941–73.

56 See especially HB Hansmann, “The Role of Nonprofit Enterprise” op cit.

57 In explaining the general tendency of economists to ignore the choice between nonprofit and governmental enterprise, Hansmann has noted “the fact that contemporary economic theory offers a much more coherent view of the role of for-profit enterprise than it does of the role of governmental enterprise…” See HB Hansmann, “Economic Theories of Nonprofit Organization” in WW Powell (ed), *The Nonprofit Sector: A Research Handbook* (Yale University Press, 1989), at p 34.

58 This explanatory framework is not limited to business firms, but can be extended to a much broader range of organisations. So, in HB Hansmann, *The Ownership of Enterprise* (Harvard University Press, 1996) Hansmann generalises this theory to explain a range of different types of firm as responses to different forms of market failure.

supply of services, for example, will often be more problematic than buying mass-produced goods,\textsuperscript{60} whilst informational asymmetry also increases as the complexity of the service increases. Someone purchasing, say, medical or dental treatment largely relies on the provider to determine just what treatment is appropriate, and judging whether the service contracted for was actually delivered is similarly difficult. These problems are exacerbated where the consumer is buying something for a third party (explaining the prevalence of "donative" not-for-profits).\textsuperscript{61} In such cases the consumer may have no easily available information about whether the contract was actually fulfilled. Take again the example of a donor who wishes to contribute towards the relief of poverty overseas. Even if she were able to specify exactly what is being bought by her donation,\textsuperscript{62} still the fact that the item is being provided for another (geographically distant) person makes it difficult for her to ascertain whether this good or service is in fact delivered. Even if the donor were able to ascertain whether the organisation to which she donated has been making some provision, still it is unlikely she can determine whether her own contribution was actually spent in that way, or was merely siphoned off into someone else's pocket.

Of course, asymmetrical information is ubiquitous. This might be seen to challenge the descriptive accuracy of Hansmann's account, for we might then wonder why there remain so many for-profits. However, not every instance of information asymmetry is likely to lead consumers to choose to deal with a not-for-profit.\textsuperscript{63} If the parties are "repeat players", then even for-profit organisations will balance the benefits gained by exploiting their private information against the loss of future business from this consumer. If for-profits care about their reputations, they have a (entirely self-interested) reason sometimes to act in trustworthy ways. Further, the law often does much to protect consumers against opportunism. It might impose mandatory obligations on better-informed parties, such as requirements to supply goods of reasonable quality, to carry out work with reasonable care and skill, and so on. Even if the rules are merely excludable defaults, attempts by better-informed parties to exclude them can alert the consumer to the fact that she may be being sold a lemon.\textsuperscript{64} Licensing regimes can be used to weed out some traders who are untrustworthy (and to provide a threat to those that remain).\textsuperscript{65} And technological developments, such as the explosion in information that the internet has facilitated, can reduce the costs to consumers of becoming better informed.

\textit{Governance in the Face of Asymmetric Information}

The theory clearly adds much to our understanding of the role of not-for-profits. The problem of informational asymmetry is a well-recognised phenomenon in both economic and legal literature, and it is plausible to think that not-for-profits can help

\textsuperscript{60} A Bacchicho and C Borzaga, "The Economics of the Third Sector" in HK Anheier and A Ben-Ner (eds) \textit{The Study of Nonprofit Enterprise: Theories and Approaches}, op cit, at p 29.

\textsuperscript{61} The term is Hansmann's, and refers to those not-for-profits that are funded through donations, rather than by selling their goods or services to consumers.

\textsuperscript{62} This will often be most unlikely. Transaction costs make it expensive for her to do so, and in any case donors may think that the recipient organisation, armed with fuller information about local needs, will better judge how her donation can best be used. To be sure, many charitable organisations "sell" specified benefits which donors can buy for the charity's beneficiaries (see, for example, the "Oxfam Unwrapped" campaign: \url{http://www.oxfamunwrapped.com/WhereYourGiftsGo.aspx}). In fact, many of these schemes allow for the charity to use the donation to purchase the named item or a related one.

\textsuperscript{63} Car repairs, central heating servicing and dental work are three obvious examples of work that is highly technical yet for which we predominantly employ for-profit businesses.

\textsuperscript{64} For a brief discussion of some of the issues raised by these so-called "penalty defaults", see CA Riley, "Designing Default Rules in Contract Law: Consent, Conventionalism, and Efficiency" (2000) 20 OJLS 367.

\textsuperscript{65} See, for example, the licensing regime under the Consumer Credit Act 1974 that requires those who provide consumer credit to be licensed by the Office of Fair Trading.
to alleviate its risks. There seems some correlation between those situations where information asymmetry is likely most severe – especially where donors fund the consumption of others – and those situations where not-for-profits flourish. Furthermore, the theory provides a powerful counter-argument against (at least some of) the deregulatory implications of the “government failure” theory discussed above. The task is not merely to make not-for-profits look attractive compared to the state, but also compared to for-profits. Given that, the case for regulation that will ensure the trust of those dealing with not-for-profits becomes much more compelling.

It is strongly arguable, however, that Hansmann places too much emphasis upon the non-distribution constraint as the governance mechanism which builds such trust, an over-emphasis that is necessitated by the very way he constructs the enquiry he is undertaking. For Hansmann, it is the non-distribution constraint that defines the not-for-profit organisation. His enquiry is precisely why organisations, defined by reference to that constraint, survive. Since he wants to explain the survival of firms with a non-distribution constraint, he necessarily must take that constraint as being decisive to their survival. As he writes, “I have stressed the nondistribution constraint as the essential characteristic that permits nonprofit organizations to serve effectively as a response to contract failure.”

Given that, however, it is surprising to find Hansmann rather equivocal about the actual effectiveness of that legal constraint (at least in the United States). He observes that enforcement lies in the hands of each state’s attorney general, yet few resources are committed to that task. As a result “with such limited policing, it is not surprising that the managers of many nonprofit organizations succeed, to a greater or lesser extent, in evading the nondistribution constraint and in enriching themselves at the expense of the organizations and their patrons.” Not-for-profits can become, as it has been put, “for-profits in disguise”.

It might be counter-argued that things are rather different in the UK. For charities, the reasonably strong regulatory functions performed by the Charity Commission do much more to ensure a proper lock on assets. Likewise, one of the reasons for the government’s introduction of a new legal vehicle – the Community Interest Company (“CIC”) – for non-charitable not-for-profits was the need to provide an effective asset lock for such enterprises. And the statutory scheme for such companies suggests that that lock will indeed likely be more effective. There is, for example, a statutory cap on distributions, supplemented by detailed regulations specifying permitted distributions, and overseen by the “Regulator of Community Interest Companies”.

However, this counter-argument is unconvincing, and for two reasons. First, although a sizeable number of CICs have already been formed, it would be premature to conclude that the CIC is largely replacing alternative vehicles for non-charitable

66 See HB Hansmann, “The Role of Nonprofit Enterprise” op cit, at p 838.
67 HB Hansmann, “The Role of Nonprofit Enterprise” op cit, at p 873.
68 He acknowledges that the Internal Revenue Service might take an interest in breaches of the constraint, but even there suggests it has “not been particularly zealous”; ibid, at p 874.
69 HB Hansmann, “The Role of Nonprofit Enterprise” op cit, at p 874.
70 See eg R Steinberg and BH Gray, “The Role of Nonprofit Enterprise” (1993) 22 NVSO 297.
71 The Charity Commission deals with charities in England and Wales, but a similar observation applies for those that are registered in the Scottish Charity Register, given the oversight of the Office of the Scottish Charity Register.
73 Given the very recent introduction of this legal form, any prediction of its likely effectiveness must be speculative.
76 The website of the Regulator or Community Interest Companies lists a population of 779 CICs as at the 5 March 2007; see http://www.cicregulator.gov.uk/coSearch/companyList.shtml.
not-for-profits which lack this effective lock on assets. Many “ordinary” not-for-profit guarantee companies (which lack an effective lock on assets) remain. We would require more evidence that such companies are failing to attract the trust of their donors or consumers before trumpeting the importance of the non-distribution constraint to the success of not-for-profits. Second, the very fact that, in the US, a flourishing not-for-profit sector exists notwithstanding the absence of a really effective lock on assets must cast doubt on whether the presence of such a lock in the UK has much impact on the success of the sector here.

This is not to suggest that an effective lock on the assets of not-for-profits is normatively insignificant or undesirable, only that such a lock may be less important than Hansmann suggests in explaining the survival of not-for-profits. Moreover, if that is correct, then the governance regime for not-for-profits must look beyond a lock on assets to a variety of additional measures necessary to secure effective trust by those dealing with not-for-profits. To that point we return below. Before doing so, however, we address a more fundamental challenge to Hansmann’s analysis of not-for-profits, namely that it fails to reflect the extent to which not-for-profits can be regarded as “participatory communities”, in which participation is an end in itself, or is a means of discovering and expressing the values of participants.

NOT-FOR-PROFITS AS PARTICIPATORY COMMUNITIES

Both the theories considered above adopt an “instrumental” view of the role of not-for-profits. They are explained as responding to instrumentally-rational calculations by those who deal with, and thus sustain, such organisations. Those who want, say, more public goods than the state is willing to provide, or who wish to donate to others but appreciate their own comparative ignorance, calculate that sometimes they will better fulfil their preferences by dealing with not-for-profits. Such reliance on instrumental rationality to explain the behaviour of economic agents is hardly surprising, for instrumental rationality is central to (mainstream) economic analysis.

It has the obvious advantage of “parsimony”, for it allows simple yet elegant explanations of economic phenomena to be produced. These do not need to account for, say, some individuals’ desire for more public goods than the “average citizen”, or their wish to spend their money improving the lives of others. Such preferences can simply be taken as given and, moreover, as arising “exogenously” in the sense of outside of the institutions (in this case, not-for-profits) that are being explained. Such preferences cause, but are not caused by, those institutions.

Although instrumental rationality surely explains some behaviour by those involved with not-for-profits, it also misses two significant, and inter-connected, aspects of such behaviour. These are, first, the value to many stakeholders of participating within the organisation and, second, the expressive aspects of such participants’ relationships. We shall say more in a moment to justify this emphasis upon participation, but first we need to clarify the sense in which participation is being employed here. The term is

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77 *ie*, guarantee companies that are not CICs, since the latter can also be formed as a species of guarantee company.

78 For such companies, the lock on assets will be “self-imposed” (typically through a provision in the company’s own constitution). Enforcement of such a provision suffers from a number of legal difficulties. Only members of the company (as opposed to, say, a customer or donor) have *locus standi* to enforce such constitutional provisions, whilst actions brought against the company’s directors for breaching their duties (say by acting for an improper purpose) would need to be actions by the company itself (or, exceptionally, as derivative actions).

79 Or at least they act as if they calculated.

being used to mean any close involvement in the life of the organisation. It would include taking part in company decision-making (through whatever organ of the company), but would extend beyond this to, say, a personal relationship between a donor and a not-for-profit under which the former makes repeated gifts to the latter.\textsuperscript{81} Of course, participation defined in this way is not unique to not-for-profits. Employees of for-profits clearly participate within such organisations, as do their investors and sometimes their suppliers and consumers too. The claim here is only comparative. On average, participation is, it is being argued, more significant to those who say, donate to, or consume the output of, not-for-profits than it is for those who consume the goods or services of for-profits. And the same for those who work for not-for-profits compared to those who work for for-profits. And so on. Similarly, it is also clear that the importance of participation will vary a good deal amongst the different stakeholders of a not-for-profit (or indeed between different not-for-profits). Many a donor may seek no close relationship with an organisation to which she gives money. Many consumers may be perfectly happy to conduct their relationship with a not-for-profit entirely at arms-length.

The value of participation to stakeholders can arise in a number of ways. First, there are what might be termed “in process” benefits from a feeling of belonging within a community, from being part of a team that is working collectively towards some goal, the value of which matters deeply to the participant. Therapeutic self-help groups and faith-based communities provide somewhat extreme examples of this phenomenon, but more worldly examples abound. In an age when political democracy can seem increasingly impersonal or impoverished, other communities are sought for opportunities to debate one’s visions and to formulate, defend and pursue concrete actions for change.\textsuperscript{82} To be sure, such participation may have an eye to the eventual destination to which it is hoped to steer the organisation, but the journey itself may be just as significant to participants.

The second source of benefits from participation takes us into the “expressive” aspects of some stakeholders’ relationships. This builds, in turn, on the notion of “expressive rationality” to explain some economic behaviour. The idea is that some action is not so much aimed at securing an objective that the agent already has (say to secure some decent service for herself in the face of her ignorance, or to give help to others), but rather is part of what Hargreaves Heap has called “the project of making sense of the self”.\textsuperscript{83} There are several different elements to this. Partly, it suggests that some of our economic decisions are about expressing the values we hold dear. When we buy red noses, for example, or choose not to send our children to private schools (a decision, in a sense, not to be a consumer), we are also\textsuperscript{84} making public statements about the values we cherish, and thus the sort of people we are. The not-for-profit sector can then be explained as enabling people to fulfil this expressive need. As Frumkin has argued,

\begin{quote}
the [nor-for-profit] sector can be seen as valuable because it allows individuals to express their values and commitment through work, volunteer activities, and donations. By committing to broad causes that are close to the heart or by giving to an effort that speaks
\end{quote}

\textsuperscript{81} Thus, in explaining the not-for-profit, participation is deliberately not being tied to a taking part in governance. For our later purpose of prescribing the governance regime of a not-for-profit, however, such a linkage must be made.

\textsuperscript{82} For an argument on the necessity of participation to the reinvigoration of civil society, see K Thomson, From Neighborhood to Nation: The Democratic Foundations of Civil Society (University Press of New England, 2001).


\textsuperscript{84} This is not to deny that part – and sometimes the dominant part – of our motive may be the desire to achieve the objective that this cause pursues.
directly to the needs of the community, nonprofit and voluntary action answers a powerful expressive urge.\textsuperscript{85}

Of course, this "expressive need" can sometimes have self-interest at the helm. We may wish to make a public statement about the kind of people we are – generous, caring, charitable – in order, as Posner notes,\textsuperscript{86} to enjoy an enhanced status and the better opinion of others.\textsuperscript{87} The point here concerns only the existence – and not necessarily the virtue – of this expressive motive.

There are, moreover, two other elements to this idea of "making sense of the self" that go beyond just expressing one's currently held values. First, sometimes we simply are not sure what our values are. Some of our behaviour is exploratory: trying to work out what we think is right and wrong, and not merely what will give us the best "payoffs" in satisfying our existing preferences. Volunteering to work with asylum seekers, for example, may be partly about trying to work out just where we really stand on the range of issues that phenomenon raises. Secondly, sometimes we know the sort of person we want to be, and yet we also know that we do not yet "think" like that; have not yet really internalised the values we wish we held. Participation in organisations can be a means of making ourselves think and be like the persons we wish we were.\textsuperscript{88} We join, say, environmental pressure groups not just because we want to make the world a greener place, nor just to tell the world how green we are, but sometimes also because we know we are actually less green than we would like to be.\textsuperscript{89} This also undermines the idea, noted above, that our preferences arise "exogenously". Participation in not-for-profits will sometimes be the cause, and not merely the consequence, of our preferences.

A final benefit of participation accrues primarily to those stakeholders who will consume the outputs of the not-for-profit. For them, participation also provides a mechanism for communicating their preferences to the organisation, and being involved in the design and the delivery of the goods or services they will consume. It can thus empower them in a way that being a mere contractor in the market, or a passive recipient of state welfare policies, may well fail to do.\textsuperscript{90}

We have stressed then, these twin aspects – of participation and expressive rationality – of the relationships between stakeholders and not-for-profits. There are, as we have seen, inter-connections between them, but each might operate alone. We can sometimes express our values even whilst remaining as arms-length consumers. There is, for example, currently a profusion of wrist-bands, ribbons and other accessories which one can purchase and wear to express ones support for a variety of causes. Those who do so may be expressing their values, but they frequently participate little in the organisation which sells them. And we may participate in organisations sometimes for very instrumental reasons; say, as noted already, just to ensure the good or service we receive is to our liking. But much expressive activity is pursued by participation, and much participation is expressive in character.\textsuperscript{91}

\textsuperscript{87} Such "social" esteem might, of course, have economic consequences, as where businesses are favoured because of their reputation as contributors to good causes.
\textsuperscript{88} The idea might be expressed in Frankfurt's terminology of "second order desires"; we have the capacity (unless we are what Frankfurt terms "wantons") to reflect on our first order desires, and to select the first order desires we wish we held;
\textsuperscript{89} H Frankfurt, "Freedom of the will and the concept of a person" (1971) \textit{68 J of Philosophy} 5.
\textsuperscript{90} The point does not only apply to membership of not-for-profits, as seems to be shown by the rush to join (for-profit) gyms in the (apparently often failed) hope that it will foster a desire for exercise.

This need not, of course, be legal membership of the organisation.
One consequence of this emphasis upon participation and expressive rationality in the context of not-for-profits is that such organisations no longer appear quite such a residuary phenomenon, merely picking up the slack from market- or government-failure. We may support not-for-profits even when we think that a for-profit might, say, deliver more of our donations in aid to the cause we support. We might wish to express our commitment to the values that organisation supports, and to disavow the idea that any organisation should make a profit out of human suffering. Acknowledging the participatory and expressive roles of not-for-profits also suggests a different emphasis in thinking about why we trust not-for-profits. Rather than seeing such trust as a response to a constraint on distributions, trust may flow from one’s own participation, from one’s identification with the values of the organisation, and one’s personal relationship with those who lead it.

Finally, note how the participatory nature of not-for-profits also offers a different explanation for why they are sometimes chosen for the delivery of state-funded services, in preference to delivery by the state itself, or by for-profits. “Informational asymmetry”, for example, looks a poor explanation for why the state chooses not-for-profits, rather than for-profits, for the delivery of state-funded services. The fact that an organisation is precluded from distributing profits may provide some reassurance to the state about the quality of service it is buying. However, given the power of the state as a contracting party, together with the likely size of the contract and the fact that the parties will be “repeat players”, one suspects that informational asymmetries are much less severe than where, say, an individual makes a one-off, small donation to a good cause. Rather, the state may deliver goods or services through not-for-profits because it genuinely wishes to support the values of the sector (and perhaps because politically it softens the move towards the privatisation of state provision). Moreover, for some commentators, a clear strength of the not-for-profit sector lies in the moral commitments of its participants, commitments that can in turn energise volunteers, donors, and social entrepreneurs and “add value” to the services they deliver.\(^92\) Such commitments can perhaps be seen most clearly in the case of faith-based organisations, and also underpin attacks on welfare state policies that may deliver services but also lead to dependency.\(^93\) However, similar views also find support in (secular) communitarian thinking, which praises not-for-profits for promoting a “self-help” approach to social problems, and for giving a sense of empowerment and autonomy to both participants within not-for-profits themselves, and to the broader society in which not-for-profits function.\(^94\)

The Supply of Not-for-Profits
We have, so far, concentrated upon the importance of participation and expressive rationality to those stakeholders who deal with an organisation once formed. However, these concepts are relevant also in understanding the supply of not-for-profits in the first place. It is obvious (yet still helpful) to observe that not-for-profits must be formed by those who desire their existence sufficiently to be troubled to create them. As Ben-Ner and Hoomissen noted, not-for-profits should be regarded “at their inception, as coalitions of individuals who associate to provide themselves and others with goods or services that are not adequately supplied by either for-profit or government organisations.”\(^95\) Whilst acknowledging the “mutual” nature of not-for-profit creation,

\(^93\) See DG Green, Reinventing Civil Society (Institute of Economic Affairs, 1993);
however, it is also important to stress that the process will often be led by “social entrepreneurs”. Such social entrepreneurs may, for example, be future consumers who take the initiative in encouraging others to organise themselves: a parent, for example, who rallies other parents to join her in forming an after-school club, a nursery, or whatever. Or they may be individuals or groups who recognise some unmet demand from others and take the lead in creating an organisation to meet it.

The question of what characteristics make a social entrepreneur has received a good deal of attention. Young, for example, has sought to identify different types of social entrepreneur who may instigate the formation of not-for-profits, and then to relate those types to the subsequent behaviour of not-for-profits themselves. However, their motives for forming a not-for-profit are likely to reflect those discussed already in relation to other stakeholders. Sometimes the motive will be instrumental – better to ensure the availability of the goods or services to be produced by the not-for-profit. Other times the motive will include the possibility of future participation in the life of the not-for-profit, and the wish to express, explore or internalise the entrepreneur’s values.

We might pause here to note a rather different emphasis in explaining the creation of not-for-profits. Ben-Ner (and his co-authors) have argued that what motivates some future participants to bother to create a not-for-profit (rather than merely, say, waiting for someone else to do so), is the control they will subsequently enjoy by so doing: “[a] nonprofit organization will be formed only if a group of interested stakeholders (individuals or organizations) has the ability to exercise control over the organization”. “Control” here seems to mean “effective” or “practical” control: the power of “determining a firm’s objectives and inducing management and employees to pursue these objectives”.

There is clearly some connection between this emphasis on control, and the importance attached in this article to “participation”. For Ben-Ner, the prospect of the passive protection afforded by, say, the non-distribution constraint is insufficient to explain the creation of not-for-profits. Rather, creators want control, and since that control is to be “direct”, participation within the organisation seems an essential part of achieving that. However, there are good reasons for placing some distance between the participatory element of not-for-profits, and the “control account” of not-for-profits advanced by Ben-Ner. For one thing, in the control account, control itself is seen in instrumental terms. Those forming, or sustaining, not-for-profits are motivated by the control they will enjoy, and that control is desirable because it ensures the organisation will act in ways desirable to them – to deliver the goods or services they want, at the right price, or of the right quality. Participation is not seen as desirable in its own right – as an end in itself. This ignores the fact that stakeholders may participate in not-for-profits not to achieve control, but because they find it rewarding to have an area of life in which they have the chance to speak, and in which they can share and defend ideas for change. Likewise, participation as an exercise in expressing, discovering or internalising the values that stakeholders hold dear is similarly left out

96 See D Young, Entrepreneurship and the behavior of nonprofit organization: Elements of a theory (Yale University PONPO Working Paper No 4, 1980)
97 See also S Rose-Ackerman, “Altruism, Ideological Entrepreneurs and the Non-profit Firm” (1997) 8 Voluntas 120.
99 The difference between “de facto” and “de jure” control has found judicial recognition in the jurisprudence on the derivative action in English company law; see Prudential Assurance Co Ltd v Newman Industries Ltd (1980) 2 All ER 841.
of this instrumental view of control. Second, the emphasis placed upon control suggests a benign view of the power relations within not-for-profits. There are, it will be argued below, real problems in converting participation into control, and whilst steps to secure greater control by participants is one strategy the governance regime might adopt, it would not be wise to place too many eggs in that particular basket.

THE GOVERNANCE OF NOT-FOR-PROFITS AS PARTICIPATORY COMMUNITIES

If not-for-profits are indeed to be understood as participatory communities, then what governance implications follow? To repeat the caveat in the introduction to this article, the aim here is to suggest in outline some of these implications, but not to offer a full and detailed governance prescription for not-for-profits. Note also that the account of not-for-profits as “participatory communities” has developed incrementally. In particular, it has sought to build upon, rather than in any sense replace, the two leading, prior theories of not-for-profits: those based upon government failure, and upon informational asymmetries. Those prior theories continue to offer important implications for the governance regime for not-for-profits. Take first the government failure theory. As noted above, that account of not-for-profits is essentially negative, showing why the state does not provide (or deliver) all the public goods or services citizens demand. Nevertheless, it provides a necessary and important reminder that the governance regime must facilitate the sector to step in where the state cannot or does not work. Moreover, it must also take some care not to overburden the sector with regulation that will negate the very reasons why the sector is sometimes, quite appropriately, preferred to the state. However, as we noted earlier these are not “knock down” arguments in favour of a wholly deregulatory approach, and counter-veiling concerns about the importance of fairness and accountability, as well as the responsibilities that follow from the receipt of public funds, can justify necessary regulation. This may not, of course, always require legal regulation. Codes of practice may sometimes offer a better compromise between the need to raise standards and the need to avoid overburdening organisations with expensive and inflexible regulation.\textsuperscript{101}

Building Trust and Fiduciary Obligations

Similarly, the asymmetrical information account of governance rightly emphasises the importance of trust to the survival of not-for-profits, and therefore the importance of a set of regulatory mechanisms designed to ensure trustworthy behaviour by those who control such organisations. These must include a “lock” on organisational assets. We noted above, however, concerns about the effectiveness of this constraint. Moreover, there are at least two other good reasons why such a lock is likely to make a modest contribution to the governance of not-for-profits. First, it is essentially negative. It says something of what a not-for-profit may not do with its resources but does not tell us, positively, what it must do.\textsuperscript{102} Yet those dealing with a not-for-profit are surely concerned to ensure that its mission is effectively pursued, not merely that money is not spent in undesired ways. Most donors to Oxfam, for example, surely want to know Oxfam spends their money in “overcoming poverty and suffering”, rather than merely

\textsuperscript{101} See for example the ICSA/NICO draft Code of Governance op cit n 8; Home Office, Compact on Relations Between Government and the Voluntary and Community Sector in England (Home Office 1998).

\textsuperscript{102} A Ben-Ner and B Gui, “The Theory of Nonprofit Organizations Revisited” in HK Anheier and A Ben-Ner (eds), The Study of Nonprofit Enterprise: Theories and Approaches, op cit, at p 7.
that it refrains from inappropriately distributing their donations. Second, as many have noted, not-for-profits do suffer from disadvantages of their own compared to for-profits. The absence of the profit motive can dull the incentives on their managers to run the organisation efficiently. They also have, it is argued, a tendency to over-longevity; they are “cushioned” against downturns in demand for their goods or services, and therefore slower to terminate uneconomic operations.\(^{103}\) Those are problems the non-distribution constraint hardly addresses.

Beyond the lock on assets, trustworthiness by those running not-for-profits can also be addressed through the imposition of legal duties upon their directors. In addition to a legal duty to act with a necessary level of competence (or “care and skill”), fiduciary duties can also demand loyalty to the interests of the organisation through the imposition of obligations to account for secret profits, to exercise powers for proper purposes, to avoid conflicts of interest and to promote the success of the organisation.\(^{104}\) All this is quite familiar from the regulation of for-profit companies. In the context of not-for-profits, however, the formulation or application of these duties must respond to two sources of complexity. First, suppose that we assumed that not-for-profits had only an instrumental role, satisfying the demands of their beneficiaries (and, through the latter, of the organisation’s donors). Nevertheless, directors would still need to choose between different policies that would treat, say, current beneficiaries differently \textit{inter se} (to subsidise some outputs at the expense of others), or that would treat, say, current and future beneficiaries differently (to provide more for less cost now, or to reduce expenditure now in order to provide more or better services later). The fiduciary duty upon directors to act in the best interests of the organisation must extend to an obligation to show that beneficiaries have been treated fairly \textit{inter se}.

The second source of complexity arises because of the tension between the instrumental and the expressive roles of not-for-profits. Frumkin has made the point that the trend towards demanding greater “professionalism” of those running not-for-profits poses a threat to the eclecticism of the sector, and the private values and commitments of its participants.\(^{105}\) The rise of “professionalism” can itself be seen as, in part at least, a product of the increased emphasis upon accountability, upon high standards of corporate governance, and upon the rational pursuit of organisational (instrumental) goals. The point here is that the board must strike a fine balance between pursuing such professionalism, yet taking care not to lose the eclecticism and expressive aspects of not-for-profits.\(^{106}\) And the review of directors’ behaviour for alleged breaches of duty must be sensitive to this balancing exercise (in a way that is unnecessary for for-profits).\(^{107}\)


\(^{104}\) A good deal of the literature in the USA has addressed the question whether the duties on not-for-profit directors should be the same as, or more, or less, demanding than the corresponding duties on directors of for-profit companies; see for example HJ Goldschmid, “The Fiduciary Duties of Nonprofit Directors and Officers: Paradoxes, Problems and Proposed Reforms” (1997–8) 23 J of Corp Law 631; JJ Fishman, “Standards of Conduct for Directors of Nonprofit Corporations” (1987) 7 Pace L, Rev 389.


\(^{106}\) Since it is the duty of care and skill to which directors are subject that speaks most directly to this issue, there may be some cause for concern that that duty has taken an increasingly objective turn. See for example Norman v Theodore Goddard (a firm) [1992] BCLC 1028; Re D’Anj of London Ltd: Coup v D’Anj [1994] 1 BCLC 561. This objective standard has now been codified in Companies Act 2006, s 174. For arguments against such a move (albeit in the context of for-profit companies) see CA Riley, “The Director’s Duty of Care and Skill: The Case For an Onerous But Subjective Standard” (1999) MLR 697.

\(^{107}\) This is so notwithstanding the move towards so-called “enlightened shareholder value” in the statutory definition of the director’s duty to promote the success of the company in the Companies Act 2006, s 172. It seems clear that directors are to have regard only instrumentally to the various interests and “stakeholders” set out in ss 172(1)(a)-(e), insofar as doing so will work “for the benefit of the members as a whole”.
Such sensitivity must also be practised by whatever "external" regulatory agency is charged with the oversight of not-for-profits. The need for such an agency follows in part from the inevitable limitations in both the non-distribution constraint itself, and other mechanisms such as the imposition of fiduciary duties. Further, failures within any particular not-for-profit impact not only upon the beneficiaries of that particular organisation. Rather, they can undermine the not-for-profit "brand", justifying action to maintain confidence in the sector as a whole. Finally, the need for an external regulator also reflects the fact that for at least some not-for-profits (those that are charities) the public subsidises their activities through tax concessions, and has a legitimate interest in ensuring some public benefit in return. However, as important as such a regulatory function may be, still its review of directorial conduct must take account of the different roles that not-for-profits play, and which directors can legitimately balance.

Stakeholder Democracy
We noted before how participation can take a variety of forms, and might, but need not, involve taking part in internal decision-making. Here, however, we move to consider that issue, being perhaps the one where the participatory nature of not-for-profits has the greatest significance. Of course, democratic participation itself remains a fairly broad concept, the conditions for which might be expressed in more or less demanding ways, and to achieve which a variety of institutional arrangements are feasible.

One such arrangement is through the (legal) status of membership of the organisation. The very category of member is admittedly a difficult one. In for-profits, its equivalent – the shareholder – corresponds to a clear economic relationship. In not-for-profits, however, this is not the case. Rather, membership is an additional status that can be made available to other stakeholder relationships, such as donor, consumer, beneficiary, employee, supplier and so on. The rights and duties attaching to the category of member can, then, be fashioned by law to facilitate membership and achieve a role that supports the proper function of not-for-profits and, more specifically, that provides a vehicle through which those stakeholders who wish to participate within the organisation are able to do so.

If participation is to be effective, however, the governance regime must strive to make member-democracy a rather less hollow slogan than is too often the case in for-profit companies. The regime must make membership easy to acquire (and give up). Member participation requires rights to attend, and to vote, at member meetings, but surely much else besides. Full information is a pre-requisite for meaningful engagement with the organisation. Although an important part of this disclosure must relate to the financial health of the not-for-profit, it is clear that it cannot cover only that. Disclosure must reflect both the instrumental and expressive roles or, as it is sometimes said, these multiple "bottom lines". Of course, this sort of "narrative" business reporting raises difficult issues, as the UK government's recent

108 Or perhaps, better, a number of different "sub-brands", such as charities, social enterprises, and so on.
109 See for example, the essays in J Elster (ed), Deliberative Democracy (Cambridge University Press, 1998).
110 This has, of course, long been one of the principal advantages of the guarantee company form, through the content of their pro-forma constitution ("Table C").
efforts to achieve this in relation to listed companies make painfully clear. But, once again, it is a difficulty that cannot be avoided, given the different roles that not-for-profits perform.

Participation might also be facilitated, especially in larger organisations, by supplementing rights of attendance at formal meetings with rights to participate electronically, and by engagement outside of formal meetings. It is worth noting here, for example, that the UK government has shown some interest in adapting company law to the technical developments that the internet is making possible, and some modest steps have been taken to facilitate such developments. Regional or "devolved" democracy may also be more important: not only might regional meetings make participation easier, but members' identification with the organisation might be with its local, rather than national, operations.

Participation through membership does not, of course, exhaust the possibilities of direct involvement in not-for-profits. It may be that membership is reserved for a relatively limited number of stakeholders, such as those who founded the organisation, its major donors, and so on. Or perhaps even where membership is open to all, there will be good reason why not all potential participants will choose to acquire that formal status. Organisations must, then, consider mechanisms enabling other non-member stakeholders to participate too, mechanisms that are proportionate to the interests in participation of these different stakeholders. There is, to be sure, an element of the prudential here. Good organisations will appreciate the advantages they might derive by facilitating the widest participation by their stakeholders. But the governance regime can do much – even if not by legal compulsion – to steer organisations down this road.

**Participation Versus Control**

Although participation by members (or indeed by other stakeholders) is likely to do something, instrumentally, to police not-for-profits, and to ensure that they hold fast to their own missions, still it is important to emphasise that "participation" is not the same as, and does not guarantee, "control". Those who create a not-for-profit – including its "social entrepreneurs" – are likely to secure for themselves the initial control of the organisation. Thereafter, control may be spread somewhat more widely through the organisation as participation increases, but there are limits to this process. The exercise of full and effective control by all stakeholders would require a level of commitment greater than many stakeholders might wish to expend, especially given the non-instrumental motive behind much participation. Further, those managing organisations enjoy considerable power to manipulate the release of information so as to buttress their own position, however carefully disclosure regimes are prescribed. There is the also the problem of expertise – or the lack of it. Control requires not only the acquisition and processing of information, but also the ability to understand what that information reveals. Moreover, unless control is to be entirely "negative" – preserving the status quo by blocking management's proposals – stakeholders also need

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113 For a discussion of some of the problems in providing fair and reliable measures of not-for-profit performance, see A Dunn and CA Riley, "Supporting the Not-for-Profit Sector: The Government's Review of Charitable and Social Enterprise" op cit, at pp 634-9.


115 JC Coffee, "Shareholders Versus Managers: the Strain in the Corporate Web" (1986) 85 Michigan Rev 1, remains an excellent discussion of these issues (albeit in the context of for-profit companies).
to offer proposals of their own. Yet many stakeholders will lack sufficient business experience to judge managements’ past record, or to suggest ways of improving its future performance.

These various difficulties are similar to those which face dispersed shareholders of widely-owned companies. Indeed, that comparison is revealing. The largest not-for-profits have memberships running into hundreds of thousands and more. The Royal Society for the Protection of Birds, for example, boasts a membership of over one million, whilst the National Trust has approximately 3·4 million members. Even in smaller not-for-profits, the number of their stakeholders will likely be much larger than the number of shareholders in a business firm with a similar sized turnover. Once we equate stakeholders with shareholders, we see that many not-for-profits are rather close to the “Berle and Means” corporation, with a large dispersed membership and beset by the separation of ownership and control.

If the above arguments are plausible, they suggest that not-for-profits are likely to be controlled, at worst, by their managers and, at best, by a relatively limited proportion of their stakeholders. And there is the risk that such control will be abused, used to further the interests of those in control rather than the mission of the organisation itself. Against this conclusion, Ben-Ner and Hoomissen have sought to downplay the likely conflicts of interest between controllers and non-controllers. In particular, they argue that where the organisation must supply the same good, of the same quality, to both controlling and non-controlling consumers, then those consumers who happen to be in control will have little incentive to skimp on quality. By doing so, they would also reduce the quality of the service provided to themselves. The example Ben-Ner and Van Hoomissen suggest is a child-care organisation controlled by some of the parents of its enrolled children. If the organisation must supply the same quality of care to all children, then a non-controlling parent can be reasonably confident that controlling parents will be keen to maintain high standards.

However, there are several problems with this argument. First, it probably has less application to incompetence than to deliberately self-serving behaviour by those in control. A controlling-parent who is doing her incompetent best, and hurting her own child’s quality of care, will likely find it more difficult to raise the standard of her behaviour (than to stop deliberately reducing the quality of care). Moreover, even where controllers and non-controllers alike must consume the same output, still controllers can use other means to favour themselves. They can tailor the (uniform) output so that it is more in tune with their own preferences, rather than those of non-controllers. They can use side payments to subsidise their own consumption, or they can inflate the expenses or remuneration they receive for participating at members meetings, and so on. Finally, the “uniform output” argument also applies poorly to the situation where patrons donate money for the provision of goods or services to others. In those cases, there is not the sense of all patrons – controlling and non-controlling alike – sitting in the same boat to consume the same output.

118 AA Berle and GC Means, The Modern Corporation and Private Property (Harcourt Brace, 1932)
120 This is not to say that controllers cannot charge differential prices if that furthers the organisation’s objectives. The point is only that controllers might act abusively in so doing.
Given that, it remains necessary to impose constraints upon the exercise of control by members, including in particular the imposition of fiduciary obligations upon them. They ought to be required to exercise their votes in the best interests of the organisation, rather than in their own sectional interests. So doing would represent a departure from the position that UK company law has historically taken in respect of for-profit organisations. Aside from some exceptional cases, members of for-profit companies are entitled to vote in their own self-interest. Finally on this point, it is worth emphasising how widely this requirement would penetrate inside corporate governance structures. Besides obvious examples, such as the right to hire and fire directors, or to change the company’s constitution, it would apply also in relation to those areas where approval of managerial action is required, to derivative actions, and even to proceedings under the unfair prejudice regime of sections 994–995 of the Companies Act 2006.

**Board Structure**

Given the gap between participation and control, attention must also be given to the composition of the board. Within the UK, most recent attention to board composition has followed from the work of the Combined Code on Corporate Governance, with its emphasis upon non-executive directors. Here, the guiding aim has been to secure a sufficiently strong presence of non-executives who are independent of the company’s management. Independence is defined essentially negatively, with a number of relationships with management being specified as precluding independence. The assumption is that in the absence of such relationships, the non-executive is likely to be an adequate representative of the interests of shareholders. It is questionable whether this same approach can be appropriate for not-for-profits. Although a good deal of governance attention on not-for-profits has focussed on the independence of boards, it is arguable that the board must be not only independent of management, but also more closely representative of the variety of interests that not-for-profits accommodate. Rather than merely expecting a disinterested board paternalistically to decide what is in the best interests of different beneficiaries, the board can itself become a more democratic organ.

**CONCLUSIONS**

Not-for-profits are difficult organisations to pin down. Their very name adds to the temptation to define them by what they are not, rather than by what they are. Yet we must understand the positive role they play if we are to develop a proper account of the purpose of their governance regime. To be sure, they take up some of the “slack”

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121 Perhaps the most familiar is a shareholder resolution to alter a company’s articles of association, which must be passed “bona fide for the benefit of the company as a whole”; *Allen v Gold Reefs of West Africa* [1900] 1 Ch 656. See also *Clemens v Clemens* [1976] 2 All ER 268 for a rare case in which this principle was applied outside of the context of an alteration of the articles.

122 See *eg North-West Transportation Co Ltd v Beatty* (1887) LR 12 App Cas 589. This principle can also be seen to underpin those cases in which shareholders’ voting agreements have been upheld; see *eg Russell v Northern Bank Development Corp Ltd* [1992] 1 WLR 588, [1992] 1 BCLC 1016; CA Riley, “Vetoes and Voting Agreements: Some Problems of Consent and Knowledge” (1993) 44 NELQ 34.

123 See Companies Act 1985, Part X.

124 *Op cit.*

125 The Combined Code now recommends, for Listed Companies, that one half of the board (excluding the Chair) be independent non-executives; see provision A.3.2. Smaller (sub-FTSE 350) companies are recommended to have at least two independent non-executives.

126 Provision A.3.1.
where government is (increasingly) reluctant to provide or deliver. And they help to engender the trust of those who deal with them in virtue of the lock imposed upon their assets. But as important as those aspects are, not-for-profits are still more than that. They are participatory communities. Some participation is instrumental – aiming for control of the organisation the better to ensure that the demands of those dealing with them for the goods or services they produce are effectively delivered. And some participation is “expressive” – allowing the participant to discover, or to proclaim, who she is, or who she would like to become. The challenge that the governance of not-for-profits must meet is to accommodate these multiple organisational roles.
LIFTING THE VEIL ON SECULARITY – A DISCUSSION OF LAW, LIBERTY AND RELIGIOUS DRESS

RACHAEL STRETCH*

INTRODUCTION

Leyla Sahin was a student at Istanbul University until she was told that in order to continue her studies there she would have to remove her headscarf. Unwilling to comply with an order, which she believed to be contrary to her faith, Leyla Sahin left Istanbul university and restarted her studies elsewhere. Crucially she also applied to the European Court of Human Rights arguing that the Turkish ban on Islamic headscarves in university was contrary to article 9 of the European Convention on Human Rights.¹ Sadly for Leyla Sahin, the European Court rejected her claim. Whilst it accepted that a ban on religious dress would limit the expression of a religious belief, it agreed with the Turkish state that such a restriction was necessary to protect Turkish secularity and hence Turkish democracy.² Further west, in France, a recent law has sought to remove “conspicuous” religious dress and symbols from all levels of state education.³ This law was in part motivated by a perceived threat to secularity and a desire to reinforce and underline this crucial aspect of French legal identity.

The aim of this article is to identify what secularity means and how it has influenced the law. In doing so it will focus on the experience and development of secularity in France and Turkey and it will also consider the close link between secularity and the Western liberal understanding of human rights and their legal protection. It will argue that the values associated with secularity, namely state neutrality, individual freedom and a progressive, democratic state do not necessarily demand a ban on all forms of religious dress and current interpretations of secularity have stretched and distorted its initial rationales.

Although this article focuses on Turkey and France, they are not the only jurisdictions to have considered how to react to religious dress.⁴ In Switzerland schoolteachers are prohibited from wearing overtly religious dress because this might exert too much pressure on the religious beliefs of their students⁵ and in Germany, the Federal Administrative Court has confirmed that individual Länder can restrict the rights of teachers to wear religious dress.⁶ Closer to home, the House of Lords has ruled that a South London school was justified in refusing to allow a schoolgirl to wear the jilbab.⁷ Crucially in this case, the school uniform had been adapted for Muslim students and did allow them to wear a headscarf and the claimant was able to attend another school where she would be allowed to wear the jilbab.⁸ On the other hand, the fact that British law and practice has been to allow pupils to wear religious dress does not mean that overtly religious symbols are completely accepted in the UK. Jack

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¹ Application Number 44774/98.
² Application Number 44774/98, paragraphs 115–123.
³ Article L141–5–1 of the Education Code.
⁴ Sahin v Turkey Application Number 44774/98 paragraphs 55–65.
⁸ Ibid, paragraphs 25 and 50.
Straw’s comments that he found it easier to communicate with women who were not veiled received widespread sympathy, and the decision by an infant school to dismiss a classroom assistant who was veiled has not attracted much criticism.

Nevertheless, although secularity is relevant beyond France and Turkey it is suggested that these two jurisdictions give particularly useful examples of the impact of secularity on human rights. Turkey is unique in being a secular country with a largely Muslim population. It is arguable that there is more of a conflict between the all encompassing nature of Islam and secular government than there is between civil government and Christianity, and indeed much of this article will focus on how traditionally Christian democracies have responded to Islam. It is therefore interesting to consider whether the question of whether the Muslim headscarf should be permitted in schools might raise different concerns in a country where Islam is the majority religion and part of that country’s history, than in a country where Islam is a minority religion and a relatively recent phenomenon. As for France, secularity has a particular resonance in France as a crucial aspect of that country’s legal identity and culture and it is noticeable that, perhaps because of this, the law on secularity and education in France is especially harsh. In other words, secularity is so central a part of French legal identity that to consider secularity without addressing the French approach to secularity and the law would be artificial and unhelpful.

THE DEVELOPMENT OF SECULARITY

The Development of Secularity in Turkey
Secularity became part of Turkish legal culture and identity after the creation of the Turkish Republic. When the new Turkish Republic was founded in 1921, its leaders were keen to distinguish the new regime from what had gone before. In their minds, the Empire had been old fashioned and unable to respond to the modern world. In particular, the influence of religion had stopped development and had placed power in the hands of imams rather than leaders who would be able to promote Turkey as a thriving, industrialised nation. Perhaps unsurprisingly therefore secularity was a key principle in the new Turkish Republic. Sharia law was abolished and a Western style Civil Code introduced. The constitution was redrafted so that Islam was no longer identified as the state religion; instead the state was to be secular. Political parties were forbidden from using religious propaganda. As for education, religious schools were banned, as was the teaching of the Arabic script.

Secularity was closely identified with Atatürk, and following his death in 1946, perhaps inevitably, secularity was relaxed. Religious education became part of the school curriculum, outward expressions of Muslim belief such as the wearing of Islamic headscarves and pilgrimages to Mecca became more popular and some political parties began using pro-Islamic rhetoric and advocating pro-Arab and pro-Islam policies. This relaxation led to concerns that the Republic was under attack from fundamentalists and in 1980 the secular nature of the government was reasserted following a military

10 Dokupil, op cit p 68.
11 Ibid p 69.
12 Ibid p 70.
13 Bleiberg, op cit pp 135–137.
coup.\textsuperscript{14} Following this coup, a new, overtly secular constitution was drafted. Article 2 declares that Turkey is a secular Republic; article 24, whilst recognising an individual’s freedom of religion, makes it clear that an individual’s freedom to practise a religion does not affect the secular nature of the Republic and article 10 advocates equality and states that no one should be in a privileged position because of their faith.

\textit{The Turkish Approach To Islamic Dress}

Although Atatürk’s reforms curtailed religious dress\textsuperscript{15} they did not specifically ban the wearing of headscarves and the wearing of the Islamic headscarf, especially in rural areas, continued to be popular. Headscarves were first explicitly banned from universities in 1980s and whilst the ban initially only covered staff,\textsuperscript{16} it was soon extended to students.\textsuperscript{17} In 1989 a proposal to relax the ban and allow students who had been excluded to return to their studies was blocked by the Turkish Constitutional Court who ruled that secularity was guaranteed by the constitution\textsuperscript{18} and therefore the Turkish legislature could not usurp the constitution by passing an ordinary law that would supposedly limit the scope of secularity.\textsuperscript{19}

\textit{The Development Of Secularity In France}

Just as secularity in Turkey was seen as separating the Turkish Republic from the experience of the Ottoman Empire, secularity in France was used to advance the principles of the new French Republic as distinct from those of the \textit{ancien régime}. Secularity was seen as an essential part of the revolutionary ideal of “liberty, equality and fraternity”. The freedom of secularity would lead to more moderate and liberal laws, the equality would mean that no one would be disadvantaged, or privileged because of their faith or lack of it, and finally secularity would unite the brotherhood of individuals as citizens of France rather than dividing them on the basis of their different religious experiences.

Throughout the nineteenth century the battle between the church and the newly emerging French state continued. Whilst the church itself, and much of the population, who still attended church, regretted its lost influence and power, an emerging political class were keen to insure that the development of France and its citizens was in the hands of the state rather than those of the church. During this time two models of secularity developed. The first was defiantly anti-religion and saw the church as a backward and anti-democratic influence, in contrast, the second, and more moderate strain of secularity, claimed to be more neutral. It argued that there should be the respect for all religions but no religion should be favoured and the church and state should be separate. Supposedly, it was this second view that was to dominate.

Education was seen as an essential means of developing and installing the ethos of the Republic.\textsuperscript{20} In 1905, a law was passed stating that public education must be secular.\textsuperscript{21} Despite this law, throughout the early years of the 20th century the idea of a secular public education system remained controversial, and the issue only really became settled, at least in respect of the Roman Catholic Church, with agreements

\textsuperscript{14} Bleiberg, \textit{op cit} p 137-8; Dokupil, \textit{op cit} p 73.
\textsuperscript{15} Hat Law 1925, Dress (Regulations) Act 1934.
\textsuperscript{16} \textit{Sahin v Turkey} Application Number 44774/98 paragraph 36.
\textsuperscript{17} \textit{Ibid}, paragraph 34.
\textsuperscript{18} \textit{Sahin v Turkey} Application Number 44774/98 paragraph 39; Turkish Constitution 1982 article 2.
\textsuperscript{19} Bleiberg, \textit{op cit} pp 140-143.
\textsuperscript{20} For a more recent version of this please see the speech of Prime Minister Raffarin introducing the proposal to ban overtly religious dress in schools on 3 February 2004.
\textsuperscript{21} Law 9 January 1905.
between the church and state in 1924, and possibly also with the declining influence of the church throughout the last century.\textsuperscript{22} Today the principle of secular public education is supported by all the main political parties in France, and secularity is upheld as an essential and constitutionally protected part of French legal culture and identity.\textsuperscript{23} Whereas the relationship between the church and the state is now largely resolved, in more recent years the focus of secularity has been on Islam.

\textit{The French Approach To Islamic Dress}

During the late 1980s secularity and education once again became newsworthy as some Muslim schoolgirls began wearing the Islamic headscarf to school. Although some colleges saw this as a personal choice,\textsuperscript{24} others considered it to be against the 1905 law and consequently, in 1989 three schoolgirls, aged 13, 14 and 15, were expelled from a school in the Paris suburbs for wearing Islamic headscarves. Unsure what the correct interpretation of the law on secularity was, the government applied to the Conseil d’ Etat\textsuperscript{25} for an opinion on whether the wearing of religious symbols in school contravened the requirement that state education was secular. On 27 November 1989 the Conseil d’ Etat gave its opinion. It ruled that religious symbols were permitted as a personal expression of religious beliefs. They would, however, become illegal if they were ostentatious and were being used to preach.

Sadly, this statement just led to further uncertainty and confusion. Whether a religious symbol is a sign of personal belief or being used to preach is difficult to judge, in particular because it would mean deciphering the intention of the wearer: did he or she intend to preach? As well as determining how it would affect onlookers: would they be converted? Perhaps because of these difficulties, different colleges adopted different approaches and college principals felt that the hard, and often unpopular decision, whether to exclude a pupil for her religious dress was unfairly forced upon them. Moreover, the case law from the Conseil d’ Etat which shows that court overturning expulsions on the basis of religious dress\textsuperscript{26} might itself suggest that the criteria governing when a religious symbol was allowed and when it was not were difficult for schools to interpret and apply.

During the late 1980s and early 1990s the problem of France’s response to religious symbols and in particular Islamic headscarves continued. In 1994 the Minister of Education, Francois Bayrou, published a circular, setting out the government’s view. It stated that ostentatious religious symbols were banned from schools. This was a development from the Conseil’s view. No longer did it have to be shown that the symbol or dress was intended to preach, it was enough that it was noteworthy, significant and stood out. After this circular, the number of girls expelled from school because of Islamic dress increased, which does perhaps support the idea that the circular represented a more hard-line view than the Conseil d’ Etat’s opinion had done.\textsuperscript{27} Nevertheless, there were still difficulties of interpretation, especially around what is meant by “ostentatious”.

In part because of this lack of clarity, but also because the wearing of the Islamic headscarf seemed to be increasing,\textsuperscript{28} and there were fears that this was linked to fundamentalist Islam, the government decided to legislate. The Stasi Commission was


\textsuperscript{23} Constitution of 1958 article 1.

\textsuperscript{24} Unlike most British state schools, French state schools do not have a uniform.

\textsuperscript{25} The Conseil d’ Etat is the most senior administrative court in France. As well as judging individual cases, it also has an advisory giving role.


\textsuperscript{28} Although it is questionable whether this perception that the wearing of the hijab was increasing was accurate.
set up to investigate secularity and education and to consider what, if any, law would be appropriate. It decided that secularity was vital and should be maintained and in relation to religious symbols, it argued that a law was necessary and proposed that conspicuous religious symbols or dress would not be allowed in state schools.

The advice of the Stasi Commission was eventually followed and on 17 March 2004 a law was passed banning ostentatious religious symbols. This was a slight change from the Commission’s recommendations which had also covered political symbols and dress. This law was inserted into the Education Code as Article L141–5-1 and eventually came into force at the start of the 2004–5 academic year.

TURKISH AND FRENCH CONCEPTS OF SECULARITY COMPARED

Whilst both Turkey and France are secular jurisdictions, their interpretations of secularity and the development of secularity in the two countries does differ. One key distinction is the context within which secularity operates. In France, secularity is well established as a vital aspect of national identity. In the debates in the National Assembly prior to the introduction of the 2004 law on religious dress, none of the deputies disputed that France was a secular country, or should remain a secular country and eventually the ban was adopted by a massive majority. Outside the National Assembly, whilst there has been, at times vociferous, opposition to the ban, it has come from a small minority. Although France does have a Muslim population, it is a minority, and in any case some Muslims may not feel a religious obligation to wear a headscarf, or may prioritise participating fully in public state education over their religious duties. Outside the Muslim population, opposition to the ban has been fractured. Although socialist groups would usually support immigrants and marginalised groups, many on the left support the ban because covering up is viewed as oppressive towards women. Furthermore, secularity has traditionally been identified with progress and reform and as a result limits on secularity have tended to be dismissed as reactionary and often right wing. In contrast, for many on the right, banning overtly religious dress is seen as supporting French identity against threats from alien cultures.

In contrast, secularity in Turkey was more recently introduced and there is not the same political consensus about how secular the Turkish state should be. Furthermore, in relation to Islamic headscarves, as the majority of the population in Turkey consider themselves to be Muslims, the question of whether headscarves should be allowed in universities will have a wider significance. At one time, Turkish women who wished to wear an Islamic headscarf would have been dismissed as rural, uneducated and fundamentalist, but this view of the types of Turkish women who wish to wear the headscarf is stereotypical and overly simplistic and it is surely contradictory to depict a woman as ignorant, oppressed and a fundamentalist for wishing to wear an Islamic headscarf whilst recognising that the reason why she is in trouble for wearing the headscarf is because she wishes to pursue a university education.

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29 The Stasi Commission was a body led by the Mediator of the Republic, Bernard Stasi, and with 20 other members.
30 The law received cross party support. It was voted in with 494 votes for against 36 no votes and 14 abstentions.
31 494 votes in favour; 36 against.
33 Ibid pp 569–570.
35 Bleiberg op cit p 151–2.
Another important distinction is who, or what is secular. In France, the traditional interpretation of secularity is that it is a duty that the state has not to prioritise any religious doctrine. This has meant that teachers and other representatives of the state have not been allowed to wear anything that would indicate a religious faith because this might be seen as indicating the state's support for that religion. In fact, one of the arguments against the French ban is that it has distorted the traditional concept of French secularity, turning what was once a duty of the state to support the freedom of her citizens into a duty imposed on the most vulnerable of citizens. In contrast, in Turkey it seems that it is the citizen who has an obligation to be secular rather than the state. Imams are civil servants and their prayers and sermons are controlled by the government. Similarly, religious teaching is allowed but is controlled by the state. Linked to this is the argument that whilst secularity in France has been associated with individual human rights, secularity in Turkey is promoted as benefiting the state as a whole. From the beginning of the Turkish Republic, secularity was used to promote the modernisation of Turkey. At the end of the First World War, it was the industrialisation of the West that Atatürk wanted to import into Turkey. Western ideals of liberal democracy were accepted as long as they did not interfere with the modernisation and efficiency of the new Turkish Republic, but they were far from being the central purpose of the new regime. In other words the difference seems to be this: in France secularity has traditionally been used to protect and support the freedoms of the individual, whereas in Turkey secularity is used to reinforce the relationship between the state and the mosque by ensuring that the state controls and oversees the mosque rather than the other way round.

The difficulty with this is that this linking of "good" French secularity with individual rights, as opposed to "bad" Turkish secularity being used to benefit the state is arguably over simplistic. Even if the main justification for secularity in France is the support that it gives to individual autonomy, it is also the case that the French state benefits from secularity. The fact that a country is secular does suggest a particular idea of its government and organisation. It may mean that decisions are made in a particular way, and in particular that the decision making process is controlled by a particular group, or elite, of people. This can be seen in the history of France where one reason for secularity was that the newly politicised and powerful bourgeois elite wished to retain and expand their power and did not want to have to share it with alternative influences such as the church. Furthermore, in France secularity has been used as a unifying ideal, stressing that individuals are to be treated the same, as citizens of France, rather than being discriminated against because of their background. Whilst this seems very laudable, the difficulty is that the concept of citizenship may be used to blend out difference and dissent and for some individuals the concept of French citizenship may be based on ideas and symbols that will be very alien and possibly discriminatory. Moreover, it is clear that the French idea of assimilating different cultures and religions into a single notion of Frenchness is not the only way to achieve unity. An alternative is to respect difference and recognise the particular needs of certain groups.

37 See for example Markaux, decided 3 May 2000 by Conseil d' Etat.
39 C Killian, op cit pp 570–571.
40 Idriss, op cit pp 267–8, 283.
THE VALUES ASSOCIATED WITH SECULARITY

Advocates of secularism contrast it with theocracy. They claim that secularism promotes democratic and progressive government and that in the secular state the citizen benefits by having greater autonomy and freedom of conscience. The next section of this article will examine whether, and to what extent, secularism does support these values, and in particular whether these values require religious dress to be restricted.

*The Survival Of The Democratic State*

One of the main arguments in favour of secularism is that it protects the democratic, progressive state against reactionary, theocratic forces. This rationale can clearly been seen in two cases involving Turkey. In the first, which involved an Islamic party, *Refah Partisi*, it was argued that banning this group was necessary to protect secularity and therefore democracy; later in the *Sahin* case it was argued that banning religious dress was necessary for the same reasons.

Whilst few would argue against promoting and preserving democracy, this does not mean that either banning political parties or restricting religious dress are actually necessary to achieve this. In fact, it is possible both these measures may be pointless or possibly even counterproductive. One difficulty with the reasoning in *Refah Partisi* is whether it is appropriate, or even possible, to protect democracy by restricting some individuals' democratic rights, or whether democracy might be stronger by allowing dissent, even extreme and potentially threatening dissent. There is also the argument that allowing groups such as *Refah Partisi* to participate in Turkish democracy might have had the advantage of moderating their views, whereas outlawing them might just lead to retribution and a more hardline attitude. Moreover, even if the ban on an extremist Islamic party is theoretically justified, this might not mean that banning the party was appropriate because although the views expressed by some of its adherents were extreme, it was not established that these were widely held within the party or were representative of the party's policies.

Furthermore, it might seem contradictory to argue that secularism supports democracy when in the *Refah Partisi* case, the banned party were the most popular party in Turkey and armed force was used to dissolve them. There is clearly evidence that many in Turkey would prefer Islam to have a greater role in public life, even if they would not necessarily support the reintroduction of sharia law. The problem with the banning of *Refah Partisi* is that it may give the impression that secularism can only benefit a cosmopolitan, urban elite and that far from supporting democracy it has only survived by being imposed on an unwilling population.

Despite the problems with the judgement in *Refah Partisi*, that decision is easier to understand that the *Sahin* ruling. Some members of *Refah Partisi* did advocate the imposition of sharia law and the removal of democracy and the fact that they were popular could mean that they might actually have been able to achieve this. In contrast, Leyla Sahin was one student who chose to wear an Islamic headscarf and there is no suggestion at all that she had pressured other students into doing the same.

The idea that it is possible for liberal democracies and their organs, such as the European Court, to overreact to threats to democracy and secular values is suggested in the dissenting judgement in *Sahin* in which Judge Tulkens commented:

43 *Sahin v Turkey* Application Number 44774/98 paragraphs 55–65.
[Only indisputable facts and reasons whose legitimacy is beyond doubt – not mere worries or fears – are capable of satisfying that requirement and justifying interference with a right guaranteed by the Convention ... [m]ere affirmations do not suffice – they must be supported by concrete examples [but] such examples do not appear to have been forthcoming in [this] case.

The argument that secularity protects the democratic state from reactionary religious forces is not all that convincing in respect of France. Whilst it might be true that in the early years of the French Republic, the Roman Catholic Church represented a rival power base and a threat, this is surely no longer the case. The influence of the Church has decreased and the democratic nature of the French state is well established. Furthermore, it is suggested that there is no clear evidence that fundamentalist Islam is a threat to France, even if the numbers of Muslims in France is increasing due to both conversion and immigration. Muslims are still a minority in France and even if their numbers do increase this in no way means that French Muslims will be a homogeneous group, all fundamentalist and all opposed to French democracy. It is true that there is evidence of friction between some Muslim youths and the French authorities but this can be attributed to poor, social conditions in the largely immigrant suburbs and it is arguable that the solution lies in assistance and increased opportunities and involvement for these youths rather than in harsh secular policies.\textsuperscript{46}

Secularity and Neutrality

Supporters of secularity claim that it is not anti-religion but instead adopts a neutral position towards religion, and that whilst no religion is supported by the state neither is any religion or believer discriminated against. Consequently, it could be argued that a secular state protects freedom of conscience because the state does not promote one religion to the detriment of others. The problem with this is that in reality secularity may not actually be neutral. For example, it is possible that the restrictions of secularity may restrict the some faiths more than others. In addition, it is arguable that secularity is not neutral because it favours a particular belief system, which is material and humanist, and supports a particular concept of liberty over other alternatives.

In France, even if the intention of secularity is neutral, its impact arguably is not. In relation to education, for example, whilst education is supposed to be secular, the school year usually fits around Christian festivals whilst being less well adapted to the festivals of other religions.\textsuperscript{47} In short, claiming that the state should be neutral and not support any religion will not impact equally on all faiths.

As for the March 2004 law on religious dress, it is clear that this will affect some religions more than others. The law refers to “ostentatious” dress. It is arguable that in France Islamic headscarves, for instance, or the Sikh turban, are more conspicuous than the crucifix because they are more unusual. Moreover, the March 2004 law restricts outward, conspicuous displays of religious faith. The trouble with this approach is that outward displays of faith are more important to some religions that others. For example, whilst the wearing of a cross may be a sign of belief for a Christian, and may be a preference for him or her, it is unlikely to be a requirement of belief in the same way that a turban might be for a Sikh, or a headscarf for a Muslim woman.\textsuperscript{48} Another problem is that whilst the French law states that it applies

\textsuperscript{46} Idriss, op cit p 283.

\textsuperscript{47} Ibid, p 277.

to all religions, it has so far only been used against Sikhs and Muslims\(^{49}\) and some Muslims feel that the fact that religious dress in school was not perceived as a problem until the Islamic headscarf became an issue is telling, and that in reality the law is more concerned with minimising Islam than it is with protecting secularity.\(^{50}\)

Another issue is that religion may be only one of several motivations behind the decision to wear a particular item of clothing. For instance, a girl may choose to wear the Islamic veil, partly because of her faith, but also because of her cultural background and because politically she prefers not to wear sexualised clothing. This could mean that because the French law bans religious clothing, it could be that an item of clothing will be acceptable or not depending on what student is wearing it. In other words, an agnostic student who has decided to cover her head because she likes the way it looks will be permitted to remain in class, whereas a student from a Muslim background who does the same may not. In one case, an Islamic student, who had originally worn the full hijab, had, after being challenged by the school, changed to wearing a small bandana which covered most of her head. The Court of Appeal in Nancy was clear: this was still overtly religious dress.\(^{51}\) It was even suggested that a beret or baseball cap could potentially be religious clothing and therefore not permissible if they were worn by a student to protect her modesty. The problem with this approach is that not only does it seem discriminatory but it also means that there is very little room for compromise in the new law. In this case, the student had agreed to modify her dress and had tried not to offend secular sensibilities by wearing a fairly moderate version of religious dress, this, however, was not enough and she was excluded from school. Moreover, it is interesting that the school excluded the girl because it was known that she was wearing the bandana for religious reasons, therefore it seems that it was not so much the dress that was a problem, but the student’s beliefs themselves.

Another issue is that secularity promotes a particular viewpoint that is hostile towards religious faith rather than just being neutral towards it. It has different objects and values, it prioritises human achievements and wants and does not recognise religious offence as harm. This point is made by Javier Martinez-Torron who has argued: “Secularism then becomes a sort of official religion . . . Religious intolerance transforms religious dogma into the law of the state. Secular intolerance transforms the law of the state into a religious dogma.”\(^{52}\) This can arguably be seen in both France and Turkey where secularity is seen as a crucial aspect of national identity. Whilst this can be seen as something which unites citizens, there is also the danger that anyone who does not wholly subscribe to the ideals of secularity is rejected as an outsider.\(^{53}\)

**Secularity and Freedom**

The idea that secularity promotes freedom is linked to the two values already mentioned. Secularity by promoting democratic government, as opposed to theocratic or autocratic government, allows the citizen to make his or her own choices without

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\(^{49}\) Since the introduction of the law, 12 cases of expulsions because of religious dress have been appealed in the French courts. Of these nine concern Muslim girls covering their heads and three concern Sikh boys wishing to wear the turban. This does not necessarily mean that other religions have not been affected by the new law. It could be that Christians, Jews, Hindus and Buddhists have just not appealed against their expulsions.

\(^{50}\) S Knights, *op cit*, p 507.

\(^{51}\) Decision of Nancy Court 24 May 2005 – 05NCC1273.

\(^{52}\) Ibid, at 203.

these being curtailed by the dictates of a state sponsored religion. Moreover, because the state is neutral in relation to religion this can include the choice not to follow a religion or to follow a minority religion.

In his article on the French ban on religious dress, Steven Gey explores this aspect of secularity and argues that the French law enables students to make free choices about their religious beliefs and practices free from the overbearing influence of their parents or backgrounds.\(^{54}\) He argues that by banning the wearing of the headscarf in class, the French government is allowing a Muslim student the freedom not to wear the headscarf despite the influence and possibly the pressure of her family and community to do so. The state secular education system is offering her an alternative value system against which she can compare the religious values of her family and make a choice.

The problem with this is that, whilst secularity does allow the student the choice not to wear religious dress, it does not allow her the choice to wear religious dress. Furthermore, whilst it is true that a student’s parents, or her upbringing or background might overly influence her and might in reality curtail her choices, the fact that the school has the power to exclude her for wearing religious dress is also going to curtail her choices. For example, in France it is suggested that removing a child from school because of his or her religious dress should be a last resort and mediation should be tried first. The obvious problem with this is that for the school and for the law, there is only one correct response to that mediation: to remove the offending religious dress and therefore the mediation is of questionable value.

Moreover, even if secularity does support freedom, it promotes a particular concept of freedom: one that is based on a liberal concept of human rights. This can be seen in the distinction that is made between a religious belief and public expression of that belief.\(^{55}\) The former seems to be allowed as part of an individual’s autonomy whilst the later is restricted as interfering with secularity.\(^{56}\) The difficulty with this is that for many believers the dichotomy is false and having faith means and requires expressing that faith in public.

In relation to European human rights it seems that religious expression will sometimes compete with other rights and values and when it does, it seems that it will often be the loser. In Sahin, for example, the majority of the European Court of Human Rights agreed with Turkey that it was appropriate to restrict Leyla Sahin’s freedom to express her religion because this might be dangerous or offensive in a secular country. In contrast, as Judge Tulkens in his dissent in Sahin explained, when other rights such as freedom of expression threaten public safety and the community the European Court has been more ready to uphold the individual’s rights and has been very cautious in allowing the state to restrict the individual’s rights.\(^{57}\)

**CONCLUSION**

This article has considered how secular jurisdictions have responded to the issue of religious dress. Both France and Turkey have significantly restricted religious dress and symbols in the public arena, considering that an outward expression of religious faith weakens state secularity and perhaps provides a first stage towards undemocratic,

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\(^{55}\) Sahin v Turkey, Application Number 44774/98, dissenting opinion of Judge Tulkens at paragraph 6; H Gilbert, “Redefining Manifestation of Belief in Leyla Sahin v Turkey” [2006] ECHR LR 308–326.


\(^{57}\) Sahin v Turkey Application Number 44774/98, dissenting opinion of Judge Tulkens at paragraph 9.
theocratic government. In both France and Turkey securality is seen as an essential element of the democratic state’s legal culture and it is clear from the history of France and Turkey that securality and the weakening of the power of religious institutions has coexisted with increased personal freedoms and state democracy.

That having been said, securality does not demand, or need bans on religious dress. Although securality is clearly against an individual being constrained by religious rules, this freedom becomes less significant if the individual is prohibited from following them. In other words, it is difficult to equate securality with freedom if it has merely replaced religious intolerance and dogma with secular tyranny. Looking specifically at religious dress, if religious dress remains a matter of choice it is questionable how one person’s choice to adopt religious dress can harm another individual or restrict his or her freedom or choices. There are of course a few exceptions to this. It could be that if someone in authority wears religious dress this could be perhaps intimidate others into adopting religious dress. Alternatively, there might be some extreme forms of dress that might restrict the wearer’s activities and might make some aspects of school life, or employment difficult. Nevertheless, most of the debates on religious dress have focused on the headscarf and it is suggested that a religious veil covering a woman’s head is not such an attack on the values of securality that the secular state is justified in requiring it to be banned.

Moreover, a supportive and united community can be fostered whilst respecting and allowing expressions of religious belief. In fact this freedom to be other and to express individual difference might actually have the effect of strengthening common bonds. This is a view which is explored by Habermas and also by Lyons and Spin who argue for a distinction between “regressive and destructive forms of difference” and “legitimate claims to affirm identity” to overcome the traditional paradigm of tolerance and embrace the approach to difference based on a relationship of mutual recognition.

To conclude, this article has focused on religious dress because that is where the concerns over securality have been focused. It is suggested that the argument over whether a Muslim schoolgirl should be permitted to wear an Islamic headscarf to school is both too insignificant and conversely too important to be restricted in order to support securality. It is too insignificant because it can not attack the foundations of state securality and therefore should not usually be curtailed, and it is too important because the cost to the individual of not being allowed to follow his or her religion by wearing particular clothing is too great.

59 D Lyon and D Spin, op cit at p 340.
CASE AND COMMENT

The address for the submission of material for this section is given at the beginning of this issue

CAUSE OF ACTION FIRST; FREEZING INJUNCTION AFTER

Fourie and others v le Roux and others
[2007] UKHL 1

(House of Lords)

(Lord Bingham of Cornhill; Lord Hope of Craighead; Lord Scott of Foscote; Lord Rodger of Earlsferry; Lord Carswell)

In Fourie v le Roux, the House of Lords has given the freezing injunction one of its infrequent dustings, before firmly placing it back on the shelf marked “interim remedy: for use in contentious cases only”. This reinforces, as we will see, the place of the freezing injunction within the combined ambit of two potential conceptual approaches: as necessarily tied to a conventional cause of action in tort, contract or under statute (“the substantive approach”) and as a procedural technique (“the procedural approach”) rather than as aligned to the recovery and securing of assets (“the purposive approach”). The additional issue as to the award of indemnity costs on discharge of the injunction is not within the scope of the present piece.

FACTS

Before reaching the doors of the House of Lords, Fourie travelled a tortuous path, not all of which has been reported, and involving some excursions to the Court of Appeal still listed by Casetrack as part heard or awaiting reserved judgments. I seek here to unravel and simplify to some extent, so as to extract the points that are actually of precedent value to those involved in the complex world of the freezing injunction.

The starting point, then, is a South African manufacturer of car wheels: Herlan Edmunds Engineering Pty Ltd (“HEE”), which, together with its parent company (Herlan Edmunds Investment Holdings Limited (“HEI”)), went into liquidation in South Africa in 2004. Mr Fourie, and, later, Mr Muthany and Ms Appel were appointed as provisional liquidators1 of both companies with, of course, the objective of gathering in as much of the assets of both companies as possible on behalf of their creditors.

1 The South African Companies Act 1973, section 368 allows the master to appoint a provisional liquidator at the time of making a winding up order until a final liquidator is appointed. This provision is, except that in England and Wales a provisional liquidator may be appointed prior to the making of the winding up order, equivalent to Companies Act 1985, section 532 (not repealed by Companies Act 2006).
In this they were frustrated by the activities of Mr Le Roux and his associates. Mr Le Roux owned the majority of the shares in HEI and was a former director of both HEE and HEI. He was alleged to control a number of other companies which featured as respondents in the earlier stages of the English litigation, of which the most significant (and the only one surviving as respondent to the House of Lords) for current purposes was an English company, Fintrade Investments Ltd ("Fintrade") of which he owned, directly or beneficially, the whole share capital.²

HEE purchased its car wheel business in 2001, appointing Fintrade as its distributor. HEE was clearly struggling at this point and was placed in provisional liquidation on the application of the company from which it had bought the business, being apparently rescued from that liquidation by a finance agreement, the benefit (including security over HEE’s equipment) of which was subsequently purchased by Mr Le Roux; Mr Le Roux and Fintrade contributing funds to discharge the liquidation. In 2002, Fintrade and HEE entered into a further financing agreement, (also involving security over HEE’s assets being given to a company related to Fintrade). Allegations were made that all these (and another deed of assignment between HEI, HEE and Fintrade), at least in the versions relied on by the respondents, were backdated forgeries. However, in November 2003, relying on the 2001 finance agreement of which Mr Le Roux now held the benefit and the finance agreement in favour of Fintrade, Mr le Roux and Fintrade obtained an order from the South African Magistrates’ Court enforcing the security and attaching the equipment of HEE ("the magistrates’ court order"). In June 2004, however, Mr Fourie was appointed provisional liquidator of HEE and HEI on the application of another creditor of the companies and he then issued an application in the High Court of South Africa naming Mr le Roux and others. That application required the respondents to show cause why the equipment should not be attached, instead, in favour of the liquidator and sought the setting aside of the magistrates’ court order.³ The High Court of South Africa at this point also issued a letter of request to the English courts ("the first letter of request") asking the English courts to recognise the liquidation proceedings and the position of Mr Fourie as liquidator and to permit him to bring "such legal proceedings in the High Court [in England and Wales] as may be necessary".⁴ On 12 July 2004, Mr Fourie then obtained a freezing injunction, without notice, from Park J against Mr le Roux and other respondents⁵ ("the first freezing injunction") in response to the first letter of request. No substantive claim having been issued in South Africa (other than the liquidation proceedings and the magistrates’ court claim) or in this jurisdiction, the first freezing injunction was contingent on the usual undertaking to issue a suitable originating application. An originating application was duly issued in this jurisdiction, but only repeated the claim for a freezing injunction without seeking any substantive relief based on a more conventional cause of action. In July 2004 the South African High Court issued a second letter of request ("the second letter of request"). It appears to have been understood that the South African court had no mechanism to assert jurisdiction over Fintrade or Mr le Roux by, for example, granting permission to serve them out of the jurisdiction.

The originating application was heard by Norris J in late July and continued the first freezing injunction until December, without prejudice to the respondents’ intention,

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² Another individual respondent, Mr Vermaak, was dropped from the proceedings at a comparatively early stage.
³ This application was successful on 8 September 2004 although then stayed pending appeal.
⁴ Re Herlan Edmunds Engineering. [2004] EWHC 2260 (Ch), per Mr J Jarvis QC at [15].
⁵ In July 2004 all but three of the respondents were dropped from the proceedings, leaving Mr le Roux and Fintrade as principal respondents.
expressed at that hearing, to apply for its discharge. This application for discharge came before Mr Jarvis QC as a deputy Chancery Division judge on 30 September 2004. He discharged the first freezing injunction, awarding indemnity costs against Mr Fourie. He did, however, grant a fresh freezing injunction ("the second freezing injunction") against Mr le Roux and Fintrade on a without notice basis that afternoon, again on the understanding that substantive proceedings would be issued. The claim form subsequently issued sought relief under both South African company and insolvency statutes (jurisdiction to deal with which derived from the first letter of request and Insolvency Act 1986, section 426) as well as in respect of economic torts, originally phrased as being subject to English law, although this limitation was later dropped.

The return date for the second freezing injunction, granted in favour of Mr Fourie, his co-liquidators and HEE itself (unlike the first freezing injunction granted in favour of Mr Fourie alone), came before Blackburne J in October 2004. Rejecting the claims based on South African statute via the first letter of request and Insolvency Act 1986, section 426 as a result of the lack of specificity in the letter of request, the second freezing injunction was nevertheless continued on the basis of the non-statutory claims in respect of which a claim form had been issued in London, so vesting jurisdiction in the High Court. Whilst technically a continuation, the order as it emerged from Blackburne J’s court was in favour of HEE alone and in a smaller amount ("the third freezing injunction") such that the second injunction as then in place was also terminated.

March 2005 saw the involvement of the Court of Appeal in (a) an appeal against the discharge of the first freezing injunction (since the third freezing injunction was now in place, this was an attempt to dislodge the costs order made on discharge rather than a serious attempt to reinstate the first freezing injunction) and (b) an appeal against the financial limit of the third freezing injunction. Both appeals were dismissed although an adjustment to the costs order was made in respect of the discharge of the first freezing injunction.

The second letter of request, confined to HEE and much more specific than the first, came before Blackburne J in May 2005, and jurisdiction to act on the request was confirmed.

The next, and currently final, reported episode – aside from an appeal from the detailed assessment of costs in the Court of Appeal – was the review by the House of Lords of the March 2005 Court of Appeal decision in respect of the first freezing injunction. On 24 January 2007, the House of Lords dismissed the appeal on the basis that, in the absence of a properly formulated substantive cause of action both (a) in existence at the time and (b) articulated before Park J, the first freezing injunction had not been properly made and (albeit by a four to one majority) that the award of indemnity costs on its discharge had been justifiable.

There, for the moment, the dispute rests.

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6 [2004] EWHC 2260(Ch).
7 [2004] EWHC 3234 (Ch).
8 [2004] EWHC 2557 (Ch).
9 [2005] EWCA Civ 204.
10 Per Lord Scott in [2007] UKHL 1 at p 329.
11 [2005] EWHC 922 (Ch).
12 [2006] EWHC 1840 (Ch).
ISSUES ARISING

Whilst reading of the saga involves issues of insolvency law and procedure and of the availability of freezing injunctions in this jurisdiction in aid of foreign courts, as well as the principles underlying the award of indemnity costs; the underlying theme, and, of course, the main submission to survive to the House of Lords, was that seeking validation of what I have described as the substantive approach, which, it is only fair to say, has been the historical approach. A freezing injunction (previously a *Mareva* order), whose purpose is conventionally expressed as being to secure assets in the hands of the respondent or sometimes in the hands of third parties, in anticipation of a monetary award or in aid of enforcement of a judgment; is an interim procedural remedy listed in Civil Procedure Rules 1998 ("CPR") r 25.1 which describes the courts of England and Wales as being empowered to grant:16

(f) an order (referred to as a "freezing injunction") –
   (i) restraining a party from removing from the jurisdiction assets located there; or
   (ii) restraining a party from dealing with any assets whether located within the jurisdiction or not;

(g) an order directing a party to provide information about the location of relevant property or assets or to provide information about relevant property or assets which are or may be the subject of an application for a freezing injunction;

Interim remedies are not, then, intended to be self-standing or an end in themselves but to exist only as an adjunct to and in aid of some substantive claim. The question for discussion by the House of Lords in *Fourie v le Roux* was, if that substantive approach remained the basis of the jurisdiction, to identify the nature of that substantive claim (which I will refer to as the "foundation" for the grant of the freezing injunction) as it might exist at the time of the application to Park J. However, during the course of its route to the House of Lords, a number of other possible foundations came, as we will see, under discussion. A further layer of complexity is added by the need to formulate an appropriate procedural approach: when and how should the foundation be identified and in what kind of proceedings?

*The conventional foundation: a cause of action (justiciable in England and Wales)*

The archetypal situation in which a freezing injunction is obtained is, of course, that in which the substantive claim is based in contract, tort or statute and the substantive relief sought is monetary: damages; debt or perhaps the taking of an account. The fact that substantive proceedings have not yet been issued on the basis of that cause of action and seeking that relief is not fatal to the application for the injunction and, indeed, CPR Part 25 and in particular PD 25a and its standard form order proceed on the basis that an injunction can be granted on the basis of an undertaking to issue such a claim. Both the first and second freezing injunctions in *Fourie v le Roux* were granted on the basis of such undertakings and resulted, in the former case, in the issue of an originating application which merely repeated the claim for a freezing injunction; but in the second case a claim form reciting a more detailed repertoire of claims. Equally clearly and at the opposite end of the spectrum, the freezing injunction can be granted in aid of execution: following the formal merger of the initial cause of action with the judgment debt.17


15 S 1 1998/3132 as subsequently and substantially amended.

16 The power to grant injunctions specifically appears in Supreme Court Act 1981, s 37.

17 Even if the judgment is yet to be quantified. A freezing injunction may also be made in aid of the enforcement of an order for costs: *Jet West v Haddican*, [1992] 2 All ER 545, CA.
Nevertheless, there are a number of riders even to this principle which bear
discussion. First, where a cause of action exists, if it is no more than speculative, it may
not be appropriate to grant the injunction prior to formal establishment of liability;\textsuperscript{18}
indeed, the strength of the underlying cause of action is a factor in the exercise of the
equitable discretion to make the order in the first place. Second, where there is a cause
of action against one co-defendant, a freezing injunction may sometimes be granted
against other co-defendants against whom there is not, technically, a cause of action.\textsuperscript{19}
a rare example of the freezing injunction as pure procedural technique detached from
the substantive foundation.

A dictum of Lord Diplock in \textit{The Siskina} is generally relied on in support of the
principles governing the relationship between interim injunctions and their foundation
in a cause of action:

A right to obtain an interlocutory injunction is not a cause of action. It is dependent
upon there being a pre-existing cause of action against the defendant arising out of an
invasion, actual or threatened by him, of a legal or equitable right of the plaintiff
for the enforcement of which the defendant is amenable to the jurisdiction of the
court.\textsuperscript{20}

The reference here to a “threatened” invasion of the applicant’s rights permits the
anticipatory or \textit{quia timet} interim injunction designed actually to prevent the wrong
being committed or completed (ie the cause of action actually arising) pending
resolution of the issues in dispute between the parties (as, for example, an injunction
prohibiting publication of allegedly libellous material or the commission of an alleged
nuisance). In such cases there is, indeed, generally found to be a requirement in the
\textit{American Cyanamid}\textsuperscript{21} criteria for grant of such interim injunctions that monetary
compensation should not be a sufficient remedy. The freezing injunction is, of course
found in precisely the opposite case: where damages \textit{will} be an adequate remedy
provided assets from which to pay such damages can be secured. It is that conceptual
difference that underlies the fact that it is established, despite indications to the
contrary in the early stages of the development of the jurisdiction,\textsuperscript{22}
that a freezing injunction will not be granted contingently on the coming into existence of a cause
of action at soemrome point in the future.\textsuperscript{23} The focus not only on a (substantive)
cause of action but in addition, on the monetary nature of the (procedural) remedy
sought is also significant: it has been held that a freezing injunction is not appropriate

\begin{itemize}
\item[\textsuperscript{18}] Polly Peck International plc \textit{v Nadir}, [1992] 4 All ER 769, CA.
\item[\textsuperscript{19}] See \textit{TSB Private Bank International SA \textit{v Chabra}}, [1992] 1 WLR 231, Ch D; \textit{Yukong Line Ltd \textit{v Rendusberg Investments
Corporation and others}} [2001] 2 Li Rep 113, CA.
\item[\textsuperscript{20}] [1979] AC 210, at p 256.
\item[\textsuperscript{21}] \textit{American Cyanamid Co \textit{v Ethicon Ltd}}, [1975] AC 396, HL.
\item[\textsuperscript{22}] See \textit{A \textit{v B}} [1989] 2 Li Rep 423, QBD in which a conditional order was made to take effect as soon as the cause of action
arose.
\item[\textsuperscript{23}] \textit{Veracruz Transportation \textit{v VC Shipping Co Inc}} [1992] 1 Li Rep 353, CA; \textit{The P}, [1992] 1 Li Rep 470, QBD; \textit{Zucker \textit{v Tyndall
\end{itemize}
where the substantive claim is not for a monetary remedy but only for a declaration;\textsuperscript{24} \textit{contra} a conventional, interim injunction.\textsuperscript{25}

The first freezing injunction in \textit{Fourie v Le Roux} failed for the lack of clear identification before Park J of an extant (substantive) cause of action in respect of which monetary relief was being sought (procedural). Mr Jarvis QC had regarded this point as not a mere “procedural irregularity” which could be cured by the identification of causes of action and issue of proceedings some two and a half months later, but as “going to the root of the jurisdiction”\textsuperscript{26} to grant the order in the first place. The substantive and procedural were, hence, intertwined.

Before the Court of Appeal, however, counsel for the applicants sought to distinguish between the existence of causes of action (substantive) and the existence of, or intention to issue, proceedings in respect of such a cause of action (procedural). Appropriate causes of action, it was argued, must have existed in order to allow Mr Jarvis QC to grant the second freezing injunction and there was no suggestion that these had only come into existence in the hiatus between 9 July 2004 and 30 September 2004. Counsel for the respondents countered that no causes of action under English law had been identified before Park J and suggested that “jurisdiction to make an interim order depends on its activation by the commencement of substantive proceedings or an undertaking so to do”.\textsuperscript{27} The latter view was preferred; there having been no “activation of the jurisdiction whether by the issue of substantive proceedings in England or by an undertaking to do so”.\textsuperscript{28} Consequently the matter was conceived of as both substantive (existence of a cause of action) and procedural (issue of proceedings or an undertaking to do so), with the procedural requirement of issue definitively determining the jurisdiction. The standard form of freezing injunction annexed to PD 25 does, of course, contain such an undertaking:

\begin{quote}
[as] soon as practicable the Applicant will issue and serve a claim form [in the form of the draft produced to the court] [claiming the appropriate relief].\textsuperscript{29}
\end{quote}

Assuming the first freezing injunction was granted in this format or something close to it, there was, then, such an undertaking in procedural form. The procedural problem was in fact that the originating application issued in England and Wales following the grant of the first freezing injunction sought only a freezing injunction and no relief based on a substantive cause of action sufficient retrospectively to “activate”, in the words of the Court of Appeal, the jurisdiction to grant the interim order. This may have been because it was thought that, as a result of either or both the statutory provisions discussed further below, the substantive relief to which the first freezing injunction attached was to be adjudicated in South Africa rather than in England and Wales and that therefore the only relief in respect of which any form of domestic proceedings could be issued was the freezing injunction itself but that \textit{something} had to be issued in this jurisdiction. There seems little reason to issue an originating application in, presumably, the same terms as the application for interim relief otherwise than to comply with what had been interpreted as a “merely” procedural requirement. Clearly, the cross border statutory provisions, such as Civil Jurisdiction and Judgments Act 1982, section 25, are predicated on the basis that the foundation

\textsuperscript{24} \textit{Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co.} [1986] 2 LI Rep 439 (note), CA; \textit{Siporex Trade SA v Comdel Commodities Ltd} [1986] 2 LI Rep 428, QBD.

\textsuperscript{25} \textit{Op cit} at [60].

\textsuperscript{26} \textit{Op cit} at [37].

\textsuperscript{27} \textit{Op cit per} Mance V-C at [38].

\textsuperscript{28} in Schedule B at paragraph (3).
cause of action is being adjudicated elsewhere (in which case there would be no purpose in issuing a duplicate claim for substantive relief in this jurisdiction) but what can be inferred from the views both of Mr Jarvis QC and the Court of Appeal is that the real problem was that it was unclear, at least until the afternoon of 30 September, to what the freezing injunction was intended to be an adjunct; in whom such a claim might vest against whom and in what jurisdiction it would be sought: a problem of the substantive approach. However, merely undertaking in the terms of the standard order to “issue and serve a claim form... claiming the appropriate relief” does not of itself require the nature of the substantive claim to be identified; recognition of this being, I suggest, inherent in the Court of Appeal’s insistence, as the definitive act, on the subsequent issue of proceedings. Frequently, of course, a draft claim form can be made available to the court at the initial hearing, but there is no absolute requirement in the CPR that it should be. A jurisdiction validated only retrospectively, is, of course, far from ideal.

What is odd about this latter-day emphasis on the identification of a cause of action is, of course, that the strength of the applicant’s case on the foundation cause of action has generally been stated to be one of the factors in the exercise of the discretion to grant a freezing injunction in the first place; irrespective of the presence or otherwise of a draft claim form and irrespective of any proceedings subsequently issued. So the cause of action should necessarily be discussed as part of the oral application in any event: an easier route to the same result. The threshold was placed by Mustill J (as he then was) in 1984, following discussion of the authorities, as

a good arguable case, in the sense of a case which is more than barely capable of serious argument, and yet not necessarily one which the judge believes to have a better than 50% chance of success.  

If that threshold is not made out in argument on the initial application then no formal undertaking to issue proceedings (proceedings perhaps doomed to failure or immediate strike out under CPR r 3.4) will cure the situation. Any application made without identifying a cause of action should therefore fail on the grounds that sufficient strength in the underlying cause of action has not been demonstrated, whether a claim form has been issued or not. What issuing proceedings should achieve is focus: committing the applicant to the cause or causes of action initially relied on; and that focus is equally desirable whether the freezing injunction is granted in aid of a claim that is justiciable in England and Wales or, by statute, in aid of foreign judicial activity. It is this question of focus, tending to give precedence to the procedural aspects, however, rather than the strength of the foundation cause of action that concerned the House of Lords in confirming that the failure to identify a cause of action before Park J was fatal to the first freezing injunction. So, Lord Bingham allowed the procedural in effect to define the substantive:

[the claimant cannot of course guarantee that he will recover judgment, nor what the terms of the judgment will be. But he must at least point to proceedings already brought, or proceedings about to be brought, so as to show where and on what basis he expects to recover judgment against the defendant.]

30 The first freezing injunction being granted in the names of the liquidators only, HEE’s non-participation being regarded in the Court of Appeal as also being fatal to the first freezing injunction.

31 Ninemia Maritime Corp v Trave Schiffsahrgesellschaft mbH & Co KG, [1984] 1 All ER 398 at p 404. This formulation was confirmed by the Court of Appeal.

32 See Capper, D., “Asset Freezing Orders – Failure to state the cause of action”, (2007) 26(APR) CQJ 181–184 at 183: “[e]vidence can be overlooked in the emergency situations that asset freezing orders are sought in, but an applicant that is not in a position to tell the court what cause of action it needs the asset freezing order to protect is guilty of egregious abuse of process”.

Lord Scott found it unhelpful to formulate the problem as one of “jurisdiction” – the court patently having some jurisdiction over Mr le Roux and Fintrade who were within the country at the time the order was made – but whether, having technical *in personam* jurisdiction over the respondents, Park J’s discretion had been properly exercised. In the complex circumstances surrounding the *Fourie v le Roux* litigation, some imagination could have, it was suggested, been applied to generate a substantive claim justiciable in England and Wales:

I find it very difficult to visualise a case where the grant of a freezing order, made without notice, could be said to be properly made in the absence of any formulation of the case for substantive relief that the applicant for the order intended to institute. It has to be inferred that, at the time of the application to Park J, Mr Fourie’s counsel were unclear whether the substantive proceedings would be proceedings in South Africa or in England and, in either case, unclear what the cause or causes of action would be. But at the least a draft claim form could have been prepared claiming an inquiry as to what Mr Le Roux and Fintrade had done with the assets they had seized [under the *magistrate’s court order*] and to the return of those assets or damages for their conversion. It seems to me significant that, when the freezing order was discharged in the morning of 30 September 2004, an adequate claim form was produced by that afternoon.\(^{34}\)

Both Lords Bingham and Rodger signalled the importance of the identification of a (substantive) cause of action as part of the safeguards for the respondent. This is clearly right, at least in the normal case, although the emphasis on the status of the (domestic) proceedings related to that cause of action contains the potential for confusion in cross-border cases where the cause of action will, necessarily, be litigated elsewhere. The House of Lords did, however, reject the notion adopted by the Court of Appeal of a retrospective “activation” of the jurisdiction to grant the order taking place on the subsequent issue of substantive proceedings. Without referring specifically to the conventional formulation of the criteria for the granting of the injunction (including reference to the strength of the underlying cause of action) the House of Lords related the question of substantive relief to the question of the discretion, rather than jurisdiction.

The House of Lords has, then, brought the question at least of the existence (although not necessarily the strength) of the underlying cause of action back into the foreground, albeit in terms that continue to place emphasis on the issue of formal proceedings. As the strength of the underlying cause of action has always been and remains one of the criteria for the grant of the injunction in the first place the decision of the House of Lords, in fact, once one strips away this emphasis on issue of a claim form, creates, I suggest, no new law, but reminds us of what has always in fact been the case. Best practice is, then, as it always has been, to attend the without notice hearing armed, in a domestic case, with a draft claim form rather than allowing oneself to be seduced by the breadth of the standard undertaking into thinking that this is something that need only occupy the mind after the event; the discipline of completing the claim form before making the application providing a necessary focus on the freezing injunction as an adjunct to something else. In a foreign case, identifying the foundation for the injunction should lead to discussion whether the undertaking should be phrased in terms of the issue of a domestic procedural claim at all.

Lord Bingham, it will be noted, suggested that the applicant must identify “on what basis he expects to recover judgment against *the defendant*” (my italics) and Lord Scott suggested a claim for an inquiry against both Mr Le Roux and against Fintrade. When

\(^{33}\) *Op cit* at [3].

\(^{34}\) *Op cit* at [35].
it was suggested to Mr Jarvis QC that the magistrates' court proceedings in South Africa could be sufficient foundation for the freezing injunction, he regarded it as “fatal” that one of the (then) respondents to the first freezing injunction had not been involved in those proceedings (a procedural point). There is, however, precedent for suggesting that, provided a cause of action could be identified against either Mr le Roux or against Fintrade, that would not necessarily preclude the making of an order against other respondents, at least where the additional respondent is or has been formally joined to the proceedings in which the foundation cause of action is asserted; the procedural utility of the ancillary order here outweighing the dictates of the substantive approach. In TSB Private Bank International SA v Chabra, 35 an order was made against a company joined under RSC Ord 15 r 6(2)(b)(ii) (now CPR r 19.2(2)): the principal respondent being the majority shareholder in that company – because the company might have received assets from the principal respondent; a situation which bears some comparison with that of Mr le Roux and Fintrade.36 In Mercantile Group (Europe) AG v Aiyela, a freezing injunction in aid of execution was granted against the defendant’s wife (all claims against her having previously been dropped) and confirmed by a Court of Appeal including Bingham MR (as he then was), who said:37

I am very pleased to reach that conclusion, for if jurisdiction did not exist the armoury of powers available to the court to ensure the effective enforcement of its orders would in my view be seriously deficient. That is in itself a ground for inferring the likely existence of such powers, since it would be surprising if the court lacked power to control wilful evasion of its orders by a judgment debtor acting through even innocent third parties. The jurisdiction is of course one to be exercised with caution, restraint and appropriate respect for the legitimate interests of third parties. But that the jurisdiction exists, both in relation to the disclosure order and the Mareva injunction, I do not doubt.

Finally, in Yukong Line Ltd v Rendsburg Investments Corporation,38 a differently constituted Court of Appeal (the point having been actually conceded by counsel) expressed the view that:

It is now settled law that, although the Court has no jurisdiction to grant an interlocutory Mareva injunction in favour of a plaintiff who has no good arguable cause of action against a sole defendant, it has power to grant such an injunction against a co-defendant against whom no direct cause of action lies, provided that the claim for the injunction is ancillary and incidental to the plaintiff’s cause of action against that co-defendant.39

Whilst the House of Lords in Fourie v Le Roux stressed the importance of a cause of action, and appears to have been contemplating a cause of action against both or all respondents to the freezing injunction, the question of an ancillary order was, of course, not canvassed. Consequently, there is nothing in their Lordships’ speeches which necessarily precludes the exercise for the future, I suggest, of the ancillary jurisdiction.

Insofar as attention is centred on the proceedings in which causes of action are asserted, a difficulty appears when the underlying judicial activity in respect of which the freezing injunction is sought is an insolvency proceeding. There are no conventional

35 [1992] 1 WLR 231, Ch D.
36 In Aiglon Ltd v Gau Shan Co Ltd, [1993] 1 LI Rep 164, QB (Comm), Insolvency Act 1986, s 423 was used as a foundation for an “ancillary” order against a company thought (as was Fintrade) to have been involved in an asset-stripping exercise.
39 Ibid, per Potter LJ at [37].
“parties” to a winding up petition; there may be no dispute or contention about what is due;\(^{40}\) there are no formal “claims” based on causes of action. Nevertheless, the activities of the liquidators involve the identification and securing of assets: precisely the kind of activity in which, taking a purposive approach, one can see a parallel with the freezing injunction. And in *Fourie v le Roux*, of course, the injunction was sought not only in aid of an insolvency, but a foreign insolvency, when jurisdiction to make the order at all had to be derived from statute.

*The mainstream cross-border foundation: Civil Jurisdiction and Judgments Act 1982, section 25*

The position in *Fourie v le Roux* is complicated, of course, by the fact that, except for the short period when economic torts under English law were relied on, the principal causes of action that might have been identified as a possible foundation for the first freezing injunction would have been justiciable in South Africa so that the issue of a domestic claim form would be inappropriate in any event (unless the exercise of imagination suggested by Lord Scott identified domestically justiciable claims).

Before Mr Jarvis QC, the applicants sought an entitlement to the first freezing injunction as being in aid of foreign proceedings by virtue of Civil Jurisdiction and Judgments Act 1982, section 25; a provision originally intended as an enactment of the relevant provisions of the Brussels Convention but subsequently extended by the Civil Jurisdiction and Judgments Act (Interim Relief) Order 1997\(^{41}\) to proceedings in some other jurisdictions. This argument had, however, not been made fully before Park J except by way of passing comment, and was, consequently bound to failure on introduction at this later stage. The argument is, however, worth considering as part of the wider picture of the interplay between the domestic jurisdiction to grant freezing injunctions in aid of domestic proceedings and both (a) cross-border and (b) insolvency jurisdictions.

A freezing injunction is patently susceptible of being granted by virtue of section 25.\(^{42}\) A series of criteria for doing so was given by Neuberger J (as he then was) in *Ryan v Friction Dynamics*, noting the need for care in exercise of the jurisdiction because the court would know less about the foreign proceedings than it would in a domestic case but also emphasising the substantive approach, including the relevance of the strength of the underlying cause of action:

> Just as when exercising its primary jurisdiction to grant a freezing order, the court should not make such an order under section 25 unless the basic requirements are satisfied, namely that the claimant has a good arguable case and there is a real risk of dissipation.\(^{43}\)

Section 25, however, refers not to causes of action but only to “proceedings”, giving precedence to the procedural over or in addition to the substantive. An extant cause of action may yet be asserted in “proceedings” (as in the domestic situation where the order is granted on the basis of an undertaking to issue proceedings). Judicial

\(^{40}\) See, for an example, the Australian decision *re Independent Insurance Company Ltd*, [2005] NSWSC 587, NSW Supreme Court, in which one ground for objection to the making of an injunction in New South Wales in response to a letter of request from the English court in aid of an English liquidation, was the lack of any *lis inter partes*; discussed in Quinlan, M and Norton, E, “Say ‘please’: letters of request in cross-border insolvencies” at http://www.aar.com.au/pubs/insols/foinsolsep05.htm, accessed 2 April 2007.

\(^{41}\) SI 1997/302.


\(^{43}\) *Op cit* at p 84.
proceedings, of course, may, of course not involve a “cause of action” as conventionally defined, or, even if there is a cause of action, may not involve a dispute (as where, for example, liability is admitted but quantum remains at large). The claim in the foreign court may have been issued against only those defendants in respect of whom that court can assert jurisdiction.44

The first case is catered for in the wording of section 25(1), allowing for relief to be granted here where “proceedings have been or are to be commenced . . .”. As to the second case, the use of the word “proceedings” appears to add an explicit filter to the jurisdiction: only causes of action asserted in “proceedings” attract the possibility of relief; or that the assertion of a cause of action is what defines the foreign judicial activity as “proceedings”. In Haiti v Duvalier, however, it was said in the Court of Appeal that “[s]ince the enactment of section 25, either a claim for interim relief is itself a cause of action, or there can be proceedings and a claim without a cause of action”.45 The (foreign) claim in that case was, however, nevertheless couched in terms of tracing and money judgment claims; ie there was a clearly identifiable foreign cause of action even if there was none domestically and this statement is best understood as reading “a domestic cause of action” for “a cause of action”. Neuberger J would appear to have shut off the possibility of the most radical expression of the procedural approach: that provided there are foreign “proceedings”, there is the possibility of relief in the absence of a conventional cause of action, a result consistent with that in Fourie v le Roux. Whilst there were clearly allegations of asset stripping and the like against Mr le Roux, they had been raised in South Africa only in support of the application which resulted, inter alia, in the first letter of request. The argument raised on behalf of the respondents in Fourie v le Roux was, however, that the South African liquidation and judicial activity were not “proceedings” for the purposes of the rule; there being no trial or judgment involved.46

Mr Jarvis QC, noting that as a statutory enactment of the Brussels Convention, section 25 was to be construed “in a European way”,47 limited the jurisdiction of the English courts in granting a freezing injunction to circumstances in which the claim (aka the “proceedings”) would be sufficient to permit an English court to grant a freezing injunction, that is, by defining “proceedings” at least in the case of a freezing injunction, as “the kind of proceedings in which a domestic freezing injunction would be ordered”, where a conventional cause of action can be delineated. An alternative, apparently rather desperate, attempt to rely on the magistrates’ case as “proceedings” also failed as being too narrow to substantiate the much wider freezing injunction now being sought and as not involving Fintrade (which was a respondent to the freezing injunction application); although, as we have seen, provided there is a cause of action against one defendant, freezing injunctions have been made on an ancillary, procedural, basis against third parties.

Discussions about the legislative use of the word “proceedings” have arisen in other contexts. So, for example, in re Unisoft Group Ltd (No 1),48 the Court of Appeal was

44 In Crédit Suisse Fides Trust SA v Cuoghi, [1998] QB 818, CA it was determined that the fact that the foreign court had no jurisdiction over the respondent to the freezing injunction sought did not preclude the making of the order by a court in England and Wales, provided that court had such jurisdiction. This is entirely proper: if the foreign court had jurisdiction over the respondent it could exercise it to grant a similar order and the courts of England and Wales would need to be involved only in its enforcement over assets within the jurisdiction.

45 [1990] 1 QB 202, CA per Staughton LJ at p 211.

46 In reliance on re International Power Industries NV, [1985] BCLC 128 where an application was made under Evidence (Proceedings in other Jurisdictions) Act 1975 in aid of a US investigation, the analogy being between the “fact finding” nature of the discovery application and the “asset finding” nature of a liquidation.

47 [2004] EWHC 2260 at [39]. One might question, however, the relevance of a “European” interpretation when the section was being invoked in its extended, non-European aspect.

48 [1993] BCLC 1292, CA.
invited to consider applications under Companies Act 1985, section 459 (now replaced in Companies Act 2006) – which, similarly, do not result in a trial or a judgment for damages – as being “other proceedings” for the purposes of the then statutory ground for the award of security for costs under Companies Act 1985, section 726, and held that such an application fell within the ambit of the term. If section 459 is sufficient foundation for security for costs, it might be possible then to suggest by purposive analogy that a freezing injunction is no more than “security for damages”. A section 459 petition has been considered to be sufficient to support a freezing injunction on an apparently more purposive basis:

... a s 459 petition, which is no more in essence a monetary claim than a creditor’s winding up petition, was nonetheless based on a sufficient cause of action to give the court jurisdiction to grant interim relief, including a freezing order.50

When the section 25 point was advanced in the Court of Appeal in *Fourie v le Roux*, it was held, and conceded, that the foreign insolvency proceedings were insufficient to raise a jurisdiction to grant a freezing injunction under section 25, less because the South African judicial activity was not “proceedings” but because there was no such jurisdiction in relation to the domestic equivalent, giving primacy to the substantive cause of action:

... the relief which is sought in England must correspond to the relief sought in the foreign proceedings... interim relief is defined in section 25(7) as being the kind of relief which the English court has power to grant in proceedings related to matters within its jurisdiction. To my mind this serves to emphasise that the foreign proceedings must have a claim, the equivalent of which in England would be sufficient for the English court to accept jurisdiction for granting a freezing order.51

Whilst, in the Court of Appeal, a slightly more generous approach was taken, the focus remained on the underlying cause of action: “... the foreign claim must be such that the relief sought in England can be identified as interim relief in relation to the final order sought abroad in the proceedings relied on”.52

The English courts have, however, granted freezing injunctions by way of interim relief in aid of domestic insolvency proceedings. So, in the first instance decision *Revenue and Customs Commissioners v Egleton*, (judgment delivered on 19 September 2006), where a petitioning creditor who wished to avoid the delay inherent in waiting for liquidators to be appointed sought a freezing injunction, it was commented that:

The reason why freezing orders are not in practice sought or obtained in relation to the assets of companies the subject of creditors’ winding up petitions is probably that statutory provisions such as those invalidating transactions after the presentation and/or advertisement of the petition generally afford appropriate protection to the company’s creditors.53

Here, counsel had argued that there was no jurisdiction to grant an injunction against respondents who were (like Mr le Roux) a director and controller of the company to be wound up and (like Fintrade) a company which had had dealings with

50 To be repealed by Companies Act 2006.
53 [2005] EWCA Civ 204, *per* Mance V-C at [42].
54 *Ibid* at [32].
55 *Per* Briggs J, in *Revenue and Customs Commissioners v Egleton*, [2006] EWHC 2313, (Ch) at [21].
the company to be wound up, because, *inter alia*, the petitioning creditor was "pursuing no cause of action for a money judgment for the effective enforcement of which a freezing injunction would preserve a fund".\(^{55}\) Briggs J pointed out that, as was apparently conceded by counsel, if this was right, a disputed debt would permit interim relief to be given because there was a cause of action, before or after judgment; but an undisputed debt, leading directly and only to a creditor's winding up petition, would not attract the same relief. Not only was the order granted but also made on an ancillary basis against non-parties.

...in my judgment the particular nature of the relief sought by means of the presentation of a creditors' winding up petition does not disable the petitioner from asserting that it is pursuing a cause of action for the purpose of conferring jurisdiction upon the court to grant appropriate interim relief, whether by way of freezing order or otherwise.\(^{56}\)

The approach taken by Briggs J is more purposive: the focus being on the nature of the (asset-retrieving) relief sought rather than on whether or not the claim is technically contentious or the precise nature of the linked judicial activity. Nevertheless, whilst Lord Scott in the House of Lords in *Fouie v le Roux* thought that it was clear that there was jurisdiction "in the strict sense" to grant an order under section 25, it was contingent on being "to recover money awards [the applicants] might succeed in recovering in proceedings in South Africa"\(^{57}\) that is, contingent on formulation of a cause of action.

*The cross-border insolvency foundation: the letter of request and Insolvency Act 1986, section 426*\(^{58}\)

The application for the first freezing injunction to Park J had been, however, most explicitly based on Insolvency Act 1986, section 426, permitting "the courts having jurisdiction in relation to insolvency law" in the United Kingdom to assist other courts with similar jurisdiction and, apparently, a draft originating application based on this section had been taken to that hearing. Consequently the jurisdiction here is not terminologically constrained by an additional procedural filter: it is clearly available in aid of insolvency proceedings, albeit not as of right.\(^{59}\) The jurisdiction to assist was defined by Morritt LJ in *Hughes and Hannover Rückversicherungs AG*, an application by Bermudian provisional liquidators for an injunction, as combining

(a) [the English court's] own general jurisdiction and powers and either (b) the insolvency law of England and Wales as provided for in the Insolvency Act 1986, the specified sections of the Company Director Disqualification Act 1986, and the subordinate legislation made under any of those provisions; or (c) so much of the law of the relevant country as corresponds to that comprised in (b ).\(^{60}\)

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\(^{55}\) *Ibid*, at [14].

\(^{56}\) *Ibid*, at [15].

\(^{57}\) *Ibid*, at [31].

\(^{58}\) Had the UNCITRAL Model Law been in place, however, whilst art 21.1(g) "Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State" raises the same argument about whether in fact the order would be available in domestic law or in aid of domestic proceedings; art 21.1(e) provides a more explicit basis for a freezing of assets, at least in the insolvent company: "Suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor to the extent this right has not been suspended under paragraph 1(e) of article 20" would have assisted, but only to the extent that the assets frozen in the hands of Mr Le Roux and Fintrade could be said to be the property of HEE.

\(^{59}\) The fact that the power is discretionary is emphasised in, for example: *re Focus Insurance Co Ltd*, [1996] BCC 659, Ch D; *re Business City Express Ltd*, [1997] BCC 826, Ch D; *re JN Taylor Finance Pty Ltd*, [1999] BCC 197, Ch D; *re Television Trade Rentals Ltd*, [2002] EWHC 211 (Ch).

\(^{60}\) [1997] BCC 921, CA at p 938.
Mr Jarvis QC concluded that only category (a) was relevant to this application, no claims at that stage being made under English statutes or under the South African equivalents. The English court was, therefore, being asked to exercise its own powers in aid of the South African proceedings. This formulation was also rejected, on the ground that, the first letter of request having been phrased in extremely wide terms, that, again,

[section 426 does not enable a foreign insolvency practitioner to come to the English court to claim relief which the English court would not otherwise grant unless he falls within categories (b) and (c) of Morritt LJ’s formulation.61

Nevertheless, Mr Jarvis QC felt it significant that, in his view, there were not (or perhaps were no longer) extant insolvency proceedings in South Africa to which a section 426 order could attach:

... if there are existing foreign insolvency proceedings and the assistance of the English court is required, for example to obtain documents in England, then an originating application based on section 426 will be appropriate. On the other hand, if there are foreign proceedings and a freezing order is sought in aid of those proceedings, then an originating application based on section 25 will be appropriate. I am totally unable to accept Mr Bloch’s submission that in some way section 426 gave the court jurisdiction in the circumstances of this case.62

As we have seen, the argument that the court would never grant a freezing injunction in aid of domestic insolvency per se seems doubtful.

However, the section 426 point then fell for further consideration by Blackburne J, dealing with the application to continue the second freezing injunction.63 By this time an attempt had been made to identify statutory claims under South African insolvency law as well as non statutory claims for conspiracy and economic torts as a basis for the order, rather than relying on the South African insolvency alone. Here, however, the first letter of request caused a procedural impediment; its terms too generic expressly to confer jurisdiction in respect of the South African statutory claims under section 426.64 As to the non-statutory substantive claims, vested more clearly in HEE than in its liquidators, and likely to be governed by South African law in any event, even if heard here (Fintrade at least being domiciled in this jurisdiction and there being potential to obtain permission to serve out of the jurisdiction on Mr le Roux under CPR rr 6.20 and 6.21), Blackburne J found there to be a jurisdiction to grant a conventional freezing injunction, making specific findings as to the risk of dissipation by the two respondents in an attempt to frustrate the purpose of the liquidation. This, based on different grounds, in the name of HEE as well as of its liquidators, and in a smaller amount was, then, the third freezing injunction.

The Court of Appeal, at the time of the unsuccessful attempt to revive the first freezing injunction was only invited to review the amount, rather than the basis of the third freezing injunction. The House of Lords, whilst commenting on Civil Jurisdiction and Judgments Act, section 25 in passing did not address section 426: the point being more firmly that, whatever the derivation of the foundation sought to be relied on, the person who had had needed to address it was Park J some two and a half years earlier.

62 Ibid at 51.
64 Factual errors at least in the letter of request do not necessarily invalidate it: Duke Group Ltd v Carver [2001] BPIR 459, Ch D.
CONCLUSION

Clearly, as we have seen, the decision in *Fourie v Le Roux* does not answer all questions, in particular that of the possible survival of the ancillary freezing injunction. As far as the conventional domestic freezing injunction is concerned, the House of Lords has simply reinforced the need to focus on the underlying cause of action at the point of the initial application, aside from the separate need to draft and issue suitable originating proceedings afterwards. However, at least insofar as insolvency proceedings are concerned, the question remains whether there is a need for an express power to freeze assets at the periphery of an insolvency, on a purposive basis, without the need for the liquidator or petitioning creditor to be in a position to assert a substantive cause of action, here or elsewhere, against at least one respondent in possession of assets. If there is such a need, legislation, it would seem, must supply it.

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*MA (Cantab), FHEA, solicitor, Nottingham Law School. I am grateful to my colleague Maureen Maksymiw for her helpful comments on this article in draft. Errors and omissions remaining are very much my own.
BOOK REVIEWS

Book reviews and books for reviewing should be sent to
the address given at the beginning of this issue

PUBLIC INTERNATIONAL LAW

Law Among Nations. An Introduction to Public International Law, by
GERHARD VON GLAHN and JAMES LARRY TAULBEE, New York, Pearson,

In 2007, Law Among Nations reached the biblical age of eight editions. It is, by all
standards, an unusual work. It is a textbook on international law, but its title
(deliberately) deviates from those which international law books usually carry. It is not
a casebook, but one of its most prominent features is its case studies. It modestly
proclaims to be “An Introduction to Public International Law” – but it offers
profound analyses of 20 odd fields of international law.

The creator of the work – Gerhard von Glahn – was Professor in Political Science
and an accomplished authority on international law. His perception of international
law was that of a system of rules which was not above its subjects, but applied among
them; a ius inter gentes instead of a ius supra gentes. He himself taught the topic at the
University of Minnesota, and he conceived his book with the specific intention of
addressing undergraduate students of the discipline. The “relatively brief text” (Glahn’s
words) which was first published in 1965 (768 pages even then), was a success. Glahn
unfortunately passed away in 1997: two years after he had been able to see the
publication of the seventh edition.

The eighth edition is prepared by James Larry Taulbee, Associate Professor at the
Department of Political Science at Emory University. Taulbee, too, is a well established
authority in the fields of international relations and international law; he has published
extensively on topics as varied as terrorism, the definition of aggression, Human
Rights, mercenaries and environmental concerns. All the same, being in charge of Law
Among Nations must have been a daunting task. Generations of scholars grew up with
this work and will cast suspicious looks at its new appearance and its new master. Is
our old friend still recognisable? We needn’t have worried. Taulbee has mastered the
task.

It is a truly Herculean achievement. The problem with editing Law Among Nations
lies in the immense range of the topics which it tackles. The eighth edition covers areas
as diverse as the law of the sea, international humanitarian law, jurisdiction over air
space and outer space, environmental law, international criminal law and Human
Rights – in addition to the more traditional areas which must not be amiss in any
international law book (sources, relationship between international and domestic law,
international legal personality, and so forth). This in itself sets the work apart from
most textbooks in the field – it is extremely rare to find, in one volume, an expert
presentation of so many different branches of the discipline. In the few cases in which
it is done, the writers tend to cut corners or withdraw to familiar territory (a chapter on international criminal law thus becomes an extensive discussion on the legality of the Security Council resolution establishing the Yugoslavia Tribunal). Not so Glahn/Taulbee. Each chapter is composed with extraordinary care and leaves no doubt about the profound expertise of its authors. To stay with the example of international criminal law: Taulbee’s chapter on War Crimes Tribunals provides an outline of the development of international criminal tribunals which is perhaps without equal in its clarity and content. This includes a review of the Leipzig trials and the trials following the Armenian massacres – issues for whose inclusion one cannot usually hope in a textbook on international law. It examines in some detail the Eisentrager, Akayesu and Nahimana cases, speaks about the national prosecution of international criminals, discusses Yamashita and Vietnam, the ICTY, the ICTR and the Special Court for Sierra Leone, and concludes with an analysis of the development, functions and criticism of the International Criminal Court. The substantive international criminal law is discussed in other chapters.

Taulbee has also succeeded in the difficult task of bringing Glahn into the 21st century. In the ten years since the last edition, some areas of international law have made quantum leaps. New developments include the entire case law of the International Tribunal for the Law of the Sea, the entire case law of the international criminal tribunals, the Land Mine Convention, the legal repercussions of 9/11 and the war in Iraq. Taulbee incorporates all of these changes. He gives his date of writing as April 2006, and must have worked right to the deadline: the new edition even deals with the death of Milosevic in March 2006 (although, oddly enough, it leaves out the capture of Ante Gotovina in December 2005).

The new editor states that he has “pruned many discussions and eliminated others entirely”. On the whole, the structural changes serve their purpose. For instance, a separate chapter on “Sources” was perhaps long overdue (the seventh edition had incorporated this topic in the introductory first chapter). On the other hand, one is sad to see the law of occupation disappear into the more general “International Humanitarian Law” – if only, because Glahn’s reputation was to a great degree based on his expert knowledge in this field. “Coercion Short of War” and “Intervention” cease to exist as chapters in their own right, and this is a shame, especially as current events show that intervention (even in its non-belligerent form) is still a significant aspect of international law. But cuts had to be made somewhere, as new candidates were begging admittance: it would be difficult to deny that, for instance, the Protection of the Environment deserves a fuller treatment than that which it was accorded in the previous edition (when it was discussed among the “non-traditional duties of States”).

The wealth of references which Taulbee provides is witness of the considerable effort that went into the careful updating of the classical text: scholarly articles and materials of international law maintain their traditional place, but they are joined by a generous offering of websites which direct students to further, and regularly updated, documentation (see for instance, the references provided on the issue of Guantánamo Bay).

It is a fair assumption that this style is part of a greater philosophy which underlies the composition of the entire work. Glahn wanted to talk to students, including learners who had never broached the complex field of international law before. His book had to be accessible. To this day, this is one of Law Among Nation’s most intriguing features: rarely does a work convey such a great amount of information, and is at the same time so captivating in style. Glahn and Taulbee impose upon themselves a discipline of writing which ensures a comfortable reading experience. Their language
stays clear of convoluted complexities. They tell a fascinating story which eases their
readers into a chapter, before they have to get to the more abstract theories. It is quite
sneaky at times. It is difficult not to admire a book whose chapter on environmental
law starts with the words:

In 1969, Thor Heyerdahl of Kon-Tiki fame undertook another perilous expedition. He had
noted a design similarity between boats on Lake Titicaca (Peru and Bolivia) and those
depicted on tomb walls in Egypt . . .

While we are sailing with Heyerdahl in his papyrus boat to the New World, we come
across lumps of tar on the ocean which pose a hazard to our vessel. Would you believe
it – we are suddenly in the net of international environmental law and find it difficult
to stop reading.

Similarly, what a difference there is between law books which start their treatment
of State Responsibility with the International Law Commission’s debates on the Draft
Articles and Taullbee’s chapter which starts as follows:

In 1985, French agents boarded the Greenpeace ship Rainbow Warrior while it stood
moored in the harbor at Auckland, New Zealand. They set explosive devices that sank the
ship and killed one person on board.

These examples are not only teasers; they are an important feature of the entire text
and serve pedagogical functions beyond the immediate attraction of interest. They are
much appreciated illustrations of a topic which students traditionally find difficult to
grasp, and they facilitate the retention of the material that has been introduced. Glahn
and Taullbee’s examination of expropriation is not restricted to the General Assembly
Resolutions of 1962 and 1974, customary law and arbitration awards – it also provides
famous historical cases of expropriation (Nasser and the Suez crisis, Salvador Allende
and ITT) which make the dead letter of the law come to life.

And is it really necessary to begin a review of the Peace of Westphalia with an
article-by-article examination? Taullbee does it differently. He introduces us to the
reactions which the two treaties received. Once we learn that the Holy Father called the
agreement, which ended one of the bloodiest wars in Europe, “null, void, invalid,
unjust, damnable, reprobate, inane, empty of meaning and effect for all time”, it is
rather difficult to chase this landmark of history from our minds.

One of the preconditions of accessibility is the establishment of common ground with
the readers. It is a feature, which, strangely, is frequently ignored by writers on
international law. But the fact remains that the majority of cases in this field occurred
when the average undergraduate student was not yet born. Few of them have more
than a vague recollection of the end of the Soviet Union and the Gorbachev era.
Making the law tangible to a new generation might be one of the most difficult
challenges academics have to face. Taullbee excels in it. He does not shy away from
references to the silver screen or the plywood box to make his point; he uses Armistad
to illustrate the development of international criminal law, Master and Commander
to explain the background of the Paquette Habana, and reminds us that CSI: Miami and
Law and Order contain episodes which deal with the status of embassy premises. These
examples are important not only for their benefits to the relationship between writer
and reader. They also show that international law is not an abstract system based in
the outer spheres of heaven, but that it influences our culture and our daily life to a
considerable degree.

It serves a similar purpose when Glahn and Taullbee embark on an explanation of
the rationale and motives behind decision-making on the international plane. This
approach certainly does justice to international law which can never be fully
understood if it is seen as divorced from the realities of political life which influence the minds of its protagonists. And yet it is rare to find this interesting perspective in textbooks on the topic. The authors of *Law Among Nations* deal with the reasons behind the decisions of international law in a way that reveals their expert knowledge on the political life in which the law moves – for instance, by discussing the reluctance of powerful States to submit to an international system of adjudication, or by talking about international judges themselves whose courage may be impaired by not wishing to appear as “international legislators”. This presentation of the international legal system establishes the appeal of *Law Among Nations* beyond the legal community. It is truly a presentation of law in context.

A review of *Law Among Nations* would not be complete without a reflection of the case studies, which had been so important to the creator of the book. Glahn sought to achieve a combination between a classical textbook and a collection of cases and materials; *Law Among Nations*, in his view, “obviates the use of a casebook”. That may have been a tad optimistic. But the many cases that are introduced fulfil a purpose which a casebook cannot hope to achieve: they appear as natural illustrations of concepts of the law, rather than as individual decisions, from which the law must be drudgingly deduced. His case studies share the qualities that mark the style of the entire book: they are easy to read, concise and to the point. Hardly any of them occupies more than two pages.

As a general rule, each case is divided into the headings “facts”, “decision”, “issue” and “reasoning”. The “facts” section (the explanation of the background) is particularly useful – and this too, is a road less travelled. How many students actually do know the story behind the Janes and the Neer Claim – or what happened in that case with the exotic name of the Home Missionary Society?

Taulbee has thankfully retained the case studies and has expanded on them by incorporating more recent decisions which are presented in the same appealing way. He has also introduced tables which, throughout the book, provide a quick overview of the often complex issues which constitute international law. The ones on Human Rights instruments, on pollution conventions and on international courts are excellent examples of this. It is an approach for which students, with good reason, are grateful; and one would wish to see it adopted by more textbooks in the field.

It is difficult to find fault with a book which so fully lives up to its objectives, and indeed, exceeds them in many regards. One criticism that could be made concerns Taulbee’s apparent coyness with regard to some of the more sensitive issues. In a world which is increasingly governed by extremes, a conscientious lawyer is expected to provide an evaluation of the events. Taulbee does that, sometimes – his treatment of the International Criminal Court and its opponents leaves little doubt about his opinion on the matter. But when it comes to certain other areas of the law – say, the detention of prisoners at Guantánamo Bay (by 2006 in its fourth year), Mr Taulbee displays a politeness which the issue does not deserve. He does present the questions which arise from the status of so-called “enemy combatants”, but his conclusion is somewhat timid: “The courts have yet to rule on the substantive questions of how to determine ’enemy combatant’ status.” Gitmo, the smelly elephant in the drawing room of international law, is left to live another day.

Glahn and Taulbee’s *Law Among Nations* is a book that should not be amiss in any law library. It is an excellent, friendly introduction for students of the discipline; and a rejuvenating tonic for disillusioned lecturers. It is at the same time a scholarly and thought-provoking volume which does not shy away from exposing its readers to stimulating questions. One of the best examples, in my view, is the deeply interesting
debate, in the context of the use of force, of the degree of utopian idealism that new international law can afford. These are fresh and unusual perspectives which are urgently needed in a debate on current issues of the law. But the outstanding quality of *Law Among Nations* lies in its unrivalled style, which converts even the most complicated concepts of international law into clear, accessible and immensely interesting fields of academic debate. This is the rarest of all law books: it is a readable book.

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SALE OF GOODS


It is a difficult task for a reviewer to comment on a book which has a history of almost 140 years. *Benjamin’s Treatise on the Law of Sale of Personal Property* was first published in 1868, some 25 years before the codification of English sales law in the Sale of Goods Act 1893. Seven further editions appeared until 1950. In 1974, under the general editorship of Professor Guest, a modern version of *Benjamin* was created, and this book – the subject of the present review – has just been published in its seventh edition. The current edition has been prepared by nine leading academics, all of whom are recognised as leading authorities in the field, and six of whom have been involved in previous editions of *Benjamin*.

The book is divided into eight parts, with most parts comprising several chapters, bringing the total to 25 chapters. The first part examines the nature and formation of the contract of sale, and examines both the specific nature of sales contracts and the relevance of general contract law principles. Part Two then turns to what may be regarded as the main substance of any contract of sale: the transfer of property and risk. Here, the concept of the seller’s title is examined first, followed by a discussion of the rules regarding the passing of property, risk and frustration, and the difficult area of transfer of title by non-owners (often referred to as “title conflicts”). The third part, dealing with performance, examines the concept of delivery as well as payment and acceptance of the goods.

In the fourth part, the law regarding defective goods is examined. Starting first with an analysis of how statements regarding the goods are classified, the book then deals with the implied terms as to description, quality, and fitness for purpose, before discussing the remedies that are available in respect of defective goods at common law, such as those applicable in respect of misrepresentation and mistake. It is at this point that the book deals with what has perhaps been one of the most significant developments since 2002 (when the previous edition was published): the implementation of the EC Directive on Consumer Sales and Associated Guarantees (99/44/EC), the biggest impact of which was the addition of a new Part 5A to the Sale of Goods Act 1979, providing specific remedies for consumer cases where goods fail to meet the requirements as to quality and fitness for purpose specified in the contract. These are rather complicated and based on the desire to maintain if at all possible the contractual relationship even where there has been a breach. This is an approach that is firmly rooted in civil law systems and consequently fits rather uneasily with the common law approach. Added to this is that the drafting of the directive itself could have been clearer, but its shortcomings are nothing compared to the complexity of the provisions implementing this aspect of the directive into UK law. The discussion of the current law, together with all the new questions thrown up both by the new remedies themselves and the relationship with existing rules, is thorough and comprehensive. This reviewer fully endorses the conclusions of the analysis that “the overall result shows the problems of superimposing on a system with particular presuppositions and techniques another system with different presuppositions and techniques, and assuming that they can run in tandem”.

The final chapter in this part then deals with exemption clauses, an area which may be subject to reform, should the Law Commission’s proposals in this area be enacted.

1 Page 668.
Part Five consists of only one chapter, examining specific rules on consumer protection that pertain to the sale of goods. It commences with a discussion of the private law rules on consumer protection, such as the special rules applying to distance selling, or the recently introduced provisions on manufacturers’ guarantees. Contracts other than sale involving the supply of goods, as well as contracts for services, are also dealt with. Questions of difficulty, such as the rights of a person using the goods who did not buy them, are also raised, although the discussion on this issue is rather too brief. Greater consideration could have been given to the operation of the Contracts (Rights of Third Parties) Act 1999, for example. The chapter also considers the challenges consumers face when seeking redress, as well as the additional protection offered to consumers under the criminal law as well as through administrative procedures. A final short section deals with key aspects of consumer credit. This chapter is perhaps unduly brief in some respects, although there are references to more detailed works on the topic. One wonders whether the repetition of some material already dealt with elsewhere in more depth might have been avoided in favour of a more thorough discussion of aspects directly affecting consumers.

In Part Six, the discussion turns to the remedies available to the seller and buyer respectively. The first chapter in this part concentrates on the seller’s “real remedies”, i.e. remedies that may be exercised in respect of the goods forming the subject-matter of the contract. The remaining two chapters then examine the personal remedies of the seller and buyer respectively.

One of the book’s strengths is its treatment of both domestic and international sales law. Part Seven, which is the largest single part in the book and sub-divided into seven chapters, provides a discussion of international (or overseas, in the language of the book) sales. The first chapter in this part provides a general overview. Subsequent chapters then examine first CIF and FOB contracts, before turning to other special terms and provisions found in international sales contracts.

The financing of international sales transactions raises its own specific challenges, and the book therefore analyses first the use of negotiable instruments in international sales, and then the use of documentary credits. In respect of the latter, the book suffers from the fate that so often befalls books on fast-moving areas of law, which in this case has been the adoption of a new revision of the Uniform Customs and Practice for Documentary Credits (UCP), the UCP600. This might necessitate an early update to the current edition. The final chapter in this part is dedicated to export credit guarantees.

The final part of this book also comprises one chapter only, and this deals with the conflict of laws (or private international law). Here, the discussion centres on the difficult question of which law applies to the various aspects of a contract of sale that crosses jurisdictional borders.

It is difficult to do full justice to the depth and breadth of discussion, and quality of analysis, found in this book within the confines of this review. By way of general conclusion, there can be no doubt that this book remains the key point of reference on the law relating to the sale of goods. The present edition is thorough, as up-to-date as modern production processes allow, and provides a comprehensive account of the relevant law. The editors are to be congratulated for their achievement, and it is hoped that further editions will continue to maintain the high standard set by this edition.

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