The Bar Review

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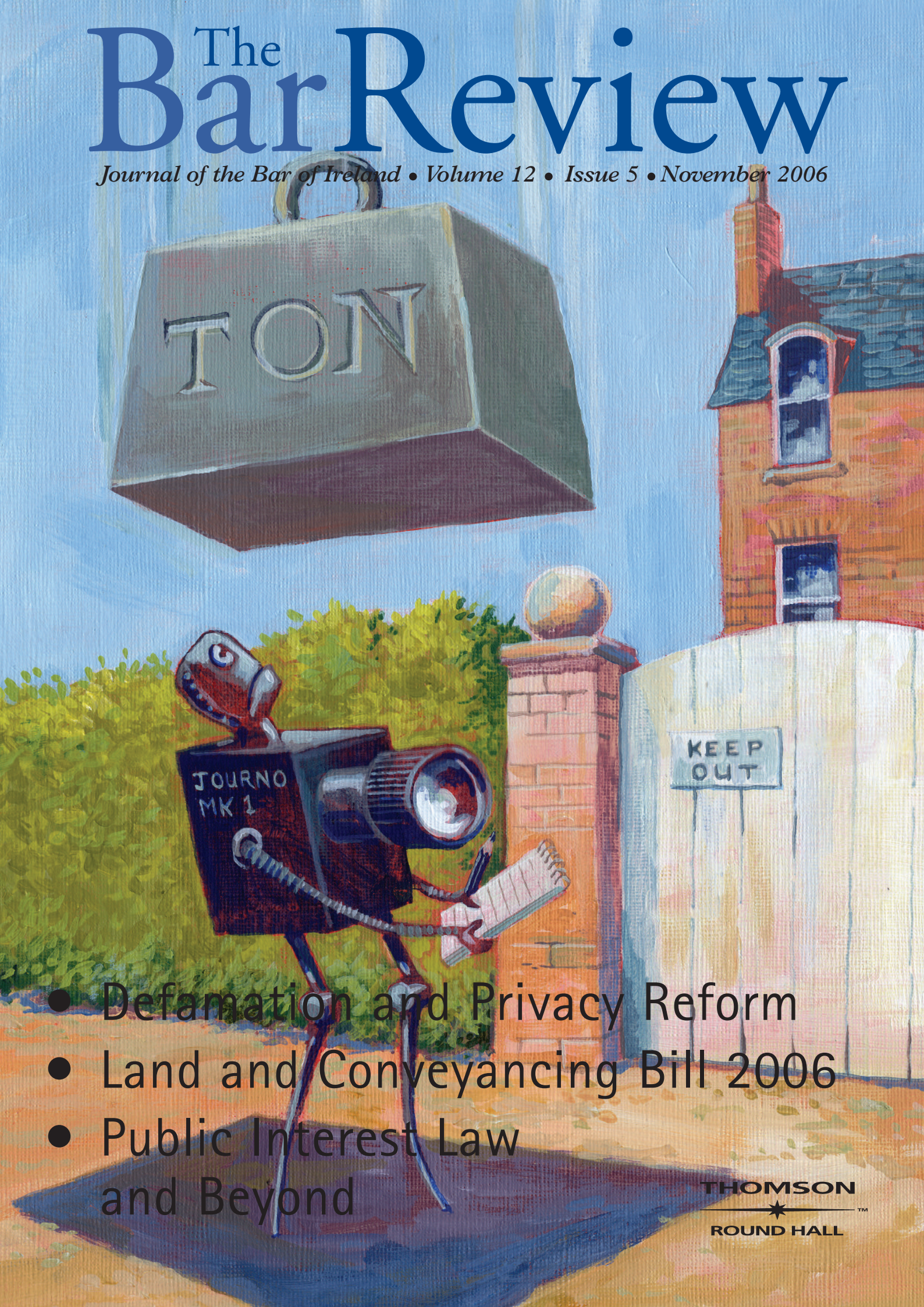

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The Bar Review

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European Arrest Warrant Conference

A conference on the European Arrest Warrant will be held on Thursday, 16 November 2006 from 2-6pm in the Royal Irish Academy, 19 Dawson Street. The conference is sponsored by the DPP and speakers include Prof. Dermot Walsh, Thomas O'Malley B.L., Patrick Gageby S.C. and a EUROJUST representative. A wine reception follows. The cost is €200 or €150 for members of the Irish Centre for European Law. To register or for further details call (01) 896 1845 or visit www.icel.ie."

Family Law Reporter Appointed

The Courts Service has appointed Dr. Carol Coulter as a family law recorder on a one year pilot basis. The project will record and create reports of family law proceedings for the first time; will gather and present statistics on family law matters before the courts; and will assemble and distribute information regarding the family law process and courts.

Dr Coulter - BA (Mod) TCD, PhD, TCD and Dip Legal Studies, DIT - has worked for the past 20 years for The Irish Times and has worked as its Legal Affairs Correspondent for the last seven years. In 2001 she was awarded the Law Society's Justice Media Award in print journalism for writing on family law, and in 1990 she won National Media Award for campaigning journalism for her coverage of the Birmingham Six and Guildford Four miscarriages of justice.
Dr. Coulter will work exclusively with the Courts Service and will be on leave of absence from her duties at the Irish Times.

Update of "Murdoch's Dictionary of Irish Law"

Henry Murdoch is interested in hearing from suitably qualified person interested in updating his book, "Murdoch's Dictionary of Irish Law", the first edition of which appeared in 1988 and is now in its 4th edition (in 2004) at 1,255 pages. Updating the book also involves updating the electronic product "Murdoch's Irish Legal Companion" .

If you would like to receive an information pack on what would be involved in such updating, please contact: Henry Murdoch BL, 10 Haddington Lawn, Glenageary, Co Dublin – phone (01) 2800460 or email: henry.murdoch@ireland.com

€5,000 Raised for Niall Mellon Township Challenge

Chris Meehan BL would like to thank everyone who generously contributed towards the Niall Mellon Township Challenge to mark his testimonial match with the Bar Soccer Club last year. He is delighted to have reached the target of €5,000, which is enough to pay for the building of a new house for a family in South Africa with no administration or other costs. This Project was launched in 2002 by an Irish builder, Niall Mellon, with a personal donation of €1m to improve the appalling living conditions of people living in shacks in Cape Town. In a major expansion of their house-building programme, the Niall Mellon Township Initiative will build at least 400 houses in two townships this year.

National Adult Literacy Agency Training Courses

NALA are holding a series of one day training courses on plain English from October 2006 to March 2007. This course will introduce participants to the literacy issue in Ireland, the most common barriers to clear information and the benefits and techniques of plain English. Plain English is a style of writing that the intended reader can understand after a single reading. The course is aimed at those whose work involves writing or putting documents together.

For more details on the course, or to discuss training especially for your organisation, please contact Clodagh McCarthy, NALA's Plain English Co-ordinator, at cmccarthy@nala.ie or on (01) 809 9194.

The Development of Public Interest Law in India

Colin Gonsalves, Advocate of the Indian Supreme Court and founder member of the Human Rights Law Network, was invited by FLAC to give a talk recently on Public Interest Law and Litigation (PILL) in India and how it can be used to advance human rights. A summary of the main innovations in Indian PILL, as described by Mr Gonsalves, is summarized below.


[Photo by Derek Speirs]

The development of Public Interest Law in India can be traced from the mid-1970's, when the then Prime Minister, Indira Gandhi was found guilty of corruption during the election. The subsequent loss of her position resulted in a period of significant instability, resulting in the declaration of a state of National emergency with the suspension of fundamental rights. A challenge in the High Court to the suspension of the right to Habeas Corpus found that the declaration could not result in the suspension of all fundamental rights. However, this decision was reversed by the Supreme Court, resulting in what has been considered by many as the Court's "darkest period".

Following the emergency, the early 1980's saw a resurgence of Public Interest Law, as the Supreme Court sought the trust of the many who felt let down by its previous decision. The initial resurgence can be traced in part to a case taken up by the Chief Justice following his receipt of a letter regarding the inadequacies of migrant workers' rights. Adopting a novel approach, the Supreme Court began to consider how the poor and illiterate would access the courts. Perhaps one of the most significant developments during this period was the expansion of locus standi, such that any individual could now take a case on behalf of the greater population.

Enhancing access further, the Court then sought to ease the process of taking a case by reducing the burden on an applicant to gather and submit sufficient evidence. Instead, the onus has switched to the Court to fulfil this function and it is assisted in doing so by Court appointed Commissioners. In this way, the burden of proof has effectively shifted. If for example, an individual alleges a violation of human rights, he/she will not be expected by the Court to provide exact proof of this. Instead, it is the responsibility of the Court to ensure that all relevant evidence is obtained and submitted. Further innovations have resulted in an epistolary jurisdiction, such that an individual can merely submit a postcard to the Court alleging a complaint and this may be treated as a public interest petition.

Approach to International Law

The progressive approach of the judiciary in India has resulted in an innovative interpretation of International law. In contrast to the restrictive approach in many European jurisdictions, which find International conventions "non-justiciable" unless transposed into national law, the Courts in India do not require such transposition in order to be relied on. When considering the issue, the courts found that any International convention which gives citizens increased rights does not need to be transposed into National law in order to be relied on by an individual. By extension, it also found a necessity to transpose any convention seeking to either reduce or take away fundamental rights. In this way, International law can be seen to intermingle automatically with National law in India and it is often used by both individuals and the judiciary.

Examples of 'PILL' cases

Refugee rights

India is not a signatory to the 1951 Convention Relating to the Status of Refugees and there is no reference to refugees under the Constitution. However, the right to life is recognised under the Constitution and the courts have extended this right to any individual who comes to India. In this way, as asylum seekers are protected under the Constitution, they cannot be returned to their country of origin under the principle of non-refoulement.

Protection for women against sexual harassment

No legislation has been enacted which protects women against sexual harassment. However, when considering the issue, the Supreme Court looked to the provisions of CEDAW which provide that women cannot be discriminated against. By expansion, this was held to include sexual harassment in the workplace. Following on from this decision, guidelines were drawn up by the Supreme Court using article 21 against sexual harassment.

Right to food

Due to widespread poverty in India, death by starvation is common. In a case before the Supreme Court, it was submitted that an obligation exists on the part of the Government to feed people. In response, the Government sought to argue that insufficient resources meant that it was not possible to feed everyone. In a landmark decision, the court rejected this reasoning holding that "when it comes to an enforcement of fundamental rights, we will never entertain an argument that the Government has no funds". Following orders of the court a number of schemes were introduced, including the midday meal programme and the work for food programme.

Housing rights

Housing rights are not contained in the Constitution. However, the Supreme Court has incorporated these rights as part of the right to life.

Gay rights

Progress has been made following the introduction of the first legal journal on Gay and Lesbian rights. A constitutional battle is currently taking place for the repeal of article 377 which outlaws "sexual activity which is against the natural order".

ADR and Arbitration Opportunities for the Bar

Colm Ó hOisín SC, Chairman of ADR and Arbitration Committee

The ADR and Arbitration Committee of the Bar Council was first established in 1997**.** The Committee's function is to promote the participation and interest of the profession in arbitration and alternative forms of dispute resolution. There have been significant developments in this area in recent times. The purpose of this Article is to survey some of those developments and explain to members some of the main areas of the Committee's work.

Mediation[1]

In recent years, the Irish Government has shown an increasing desire to encourage the use of arbitration and mediation as alternatives to litigation. ADR is seen as offering the possibility of removing some of the pressure from the courts and as offering a more palatable alternative to parties embarking on litigation. This policy is to some extent a reflection of initiatives in Europe, such as the EU's 2002 Green Paper on Alternative Dispute Resolution in Civil and Commercial Matters, which was followed in 2004 by a Commission Proposed Directive on Mediation in Civil and Commercial Matters. The Commission sees the benefit of ADR in the context of access to justice. The Green Paper stated:

> "ADRs offer a solution to the problem of access to justice faced by citizens in many countries due to three factors: the volume of disputes brought before courts is increasing, the proceedings are becoming more lengthy and the costs incurred by such proceedings are increasing. And the quantity, complexity and technical obscurity of the legislation also help to make access to justice more difficult."

Domestically, the pro-ADR policy of the Government can be seen in a number of pieces of legislation in the past 3 years, including the Courts and Civil Liability Act 2004 and the Residential Tenancies Act 2004.[2]

The Rules of the Superior Courts relating to the Commercial Court make explicit reference to ADR. Order 63A, Rule 6(1)(xiii) provides that on the application of any of the parties, or of the Court's own motion, proceedings may be adjourned for a period not exceeding 28 days to allow the parties consider whether the matter should be referred to a process of mediation, conciliation or arbitration. Since the establishment of the Commercial Court at the beginning of 2004 (and up until the 9th October 2005), there have been 12 cases where such an order has been made and a process of mediation ensued[3]. This does not account for all mediations in cases coming before the Commercial Court however. In the same period, a further 10 cases went to mediation either on the parties' own initiative or at the suggestion of the Commercial Court Judge.[4]

Order 63A Rule 6(2) of the Rules provides that a judge in the Commercial Court may direct the parties to provide information in respect of the proceedings including 'particulars of any mediation, conciliation or arbitration arrangements which may be available to the parties."[5] A practice has developed of seeking a report from the mediator to the judge as to whether the parties make genuine efforts to reach a compromise. The contents of that report may have implications in relation to costs[6]. If it were reported that one of the parties was not approaching the mediation in good faith, or not making genuine efforts, that party might be penalised on costs at the conclusion of the litigation.

The independence and sole trader status of the barrister makes him/her particularly suited to the role of mediator. Of course, that role is somewhat different to the role of the barrister as an advocate. Accordingly, a degree of training in mediation is desirable even for experienced barristers. The key to being an effective mediator, however, is to have a good understanding of the legal and factual issues at the heart of the dispute and of the dynamics at play in that dispute. The experience of the barrister in the litigation of, and in settlement of, such disputes is of huge advantage in winning the confidence of the parties to the dispute and that of their respective legal teams.

There is a good deal of competition from other professions for work as mediators. It is up to us as a profession to make sure that there is a full appreciation in the wider community of the mediation skills of the Bar. Some of our members are already involved in organisations that promote mediation such as the Irish Commercial Mediation Association (www.icma.ie). There are other bodies such as the Mediation Committee of the IBA (International Bar Association) where there does not appear to be any involvement by Irish barristers. I would encourage members with an interest in mediation to join such bodies and to demonstrate that the Bar is taking an active part in the area.

1 See generally '*Mediation in Ireland – An Improving Environment*': Ercus Stewart and Anthony Moore 920050 12 (5) CLP 115; ' *Commercial mediation'* Klaus Reichert 8(4) 2003 Bar review 167; '*Commercial mediation a 2004 postscript*' Klaus Reichert 9(4) 2004 Bar review 126.

2 See also Disability Act 2005; Garda Siochana Act 2005; Health and Social Care Professionals Act 2005; Central Bank and Financial Services of Ireland Act 2005.

3 Source: Court Service and speech given by Kelly J. to Irish Commercial Mediation Association 18th Oct. 06: It is understood that of the 12 that went to mediation, 3 settled, 5 did not and 4 are 'ongoing'.

4 It is understood that of these 10 that went to mediation, 7 settled, 1 did not and 2 are 'ongoing'.

5 As a practical example of this, see judgment of Kelly, J., unreported, 2nd December 2005, in *Kay-El (Hong Kong) Limited v. Musgrave Limited* where the Judge stated, inter alia: - "At the conclusion of the applications for summary judgment, I took the view that given that the parties were by then fully alive as to the issues in dispute, that they had had a long and valuable trading relationship for about ten years and that further bills of exchange would mature soon, it was an appropriate case in which to exercise the power conferred by order 63A, rule 6(1)(xiii), so that an alternative form of dispute resolution (in this case mediation) might be considered. The parties not merely considered mediation as a way of solving their problem but actually proceeded to such a mediation within the permitted time. On foot of the order which I made, I was furnished with a report by the mediator who, unfortunately, had to record that although very substantial progress was made in the mediation, she was unable to finalise a solution. I should mention that the mediator expressed the view that the parties came to the mediation in good faith and made genuine efforts to reach a compromise. Such being so, the lack of success at mediation carries no costs implication for the litigation."

6 See extract of Judgement of Kelly J. in *Kay-El (Hong Kong) Limited v. Musgrave Limited* quoted at 4. above

Domestic Arbitration

There is considerable familiarity at the Bar with arbitration and many barristers have acted variously as arbitrators and as counsel. Our profession has an abundance of skilled, independent practitioners who are available to act as arbitrators.

Arbitration has long been used in this jurisdiction in domestic disputes as an alternative to litigation (and indeed in the construction sector, it is preferred to litigation as a mode of resolving disputes). It is probably the case, however, that arbitration could be more widely exploited as a means to resolve certain types of disputes more efficiently and speedily than through the Courts.

The Bar Council has identified small claims in the business sector as one area where arbitration may be a better option for the user. Following consultation with business organisations such as Chambers Ireland, the Irish Small & Medium Enterprises Association (ISME) and the Small Firms Association, the Bar Council set about tailoring a scheme to the needs of the business community. The Small Claims Arbitration Scheme, which was launched towards the end of 2005, provides a cost effective, speedy and uncomplicated way for businesses to resolve small disputes, typically those having a value of not more than €7,500.[7] The Scheme provides businesses with the option of resolving smaller claims through arbitration when the costs of court proceedings might appear prohibitive, having regard to the low value of the claim. In many cases, disputes of this nature may never be litigated because of the fear of excessive costs and delay. Considerable work still needs to be done to increase awareness among solicitors and the business community at large of what is a very worthwhile Scheme. Promoting the Small Claims Arbitration Scheme will be one of the priorities for the ADR and Arbitration Committee this year. The Committee will also be endeavouring to identify additional niches where the Bar can usefully assist in developing a dispute resolution scheme to fit the particular needs of the user.

International Arbitration

In line with the growth in international trade and the trend towards globalisation over the past 20 years, there has been a surge in the use of international arbitration. Arbitration is the preferred method of resolving many international business disputes. Arbitral awards are more readily enforceable than court judgements and neither party to such dispute may be willing to allow the national courts of their opponent to adjudicate the dispute.

The majority of international arbitration is conducted under the umbrella of an arbitral institution such as the ICC (International Chamber of Commerce) International Court of Arbitration, the LCIA (London Court of International Arbitration) or the ICDR (International Centre for Dispute Resolution). Arbitrations not involving an arbitral institution are known as '*ad hoc arbitrations*'.

Because of the private nature of arbitration, it can be difficult to gauge the volume of international arbitration which is taking place. An indication of the size of the market can however be seen in a survey carried out by '*The American Lawyer – Focus Europe*' in 2005[8]. That survey noted 130 international arbitral disputes with at least $100 million at stake, which had either resolved or were continuing, between January 2003 and June 2005. These disputes fall into two categories; firstly, the more traditional contract dispute; and secondly, the fast growing treaty dispute.[9] The survey provides a summary of the 50 biggest contract arbitrations and the 50 biggest treaty disputes, giving a brief summary of the nature of the dispute, and details of the counsel on each side and the identity of the arbitrators.

To date, Ireland has not played a particularly prominent role in the world of international arbitration. At a recent Seminar hosted by the National Committee of the ICC in Farmleigh House in Dublin[10], Professor Pierre Tercier, the Chairman of the ICC International Court of Arbitration, expressed surprise that there had been so few ICC Arbitrations in Ireland and that there were relatively few appointments of Irish arbitrators to ICC cases. He indicated that this was a matter of concern to the ICC particularly in view of the dynamic nature of the Irish economy and its prominence internationally. It is reasonable to expect that in order to address this situation, the ICC will in the future make a greater effort to locate the seat of more of its cases in Ireland. There is a level of support and goodwill to Ireland's claims to increase its role in the world of international arbitration and for our part, we must do the work to take full advantage of that goodwill. It is also obviously essential that the solicitors firms that have an input into the drafting of contracts to ensure that arbitration clauses are put into contracts designating Ireland as the seat of any arbitration that may arise.

The ICCA 2008 Conference

In June 2008, the Bar Council will be hosting the International Council for Commercial Arbitration (ICCA) Conference. ICCA is the leading worldwide organisation devoted to promoting international arbitration and other forms of dispute resolution. It holds congresses and conferences every two years for the presentation of papers and discussion of topics concerning both the theoretical and practical aspects of international dispute resolution. This is probably the most prestigious international conference in international arbitration and dispute resolution. The hosting of the 2008 Conference in Dublin by the Bar Council will put Dublin and Ireland on the international arbitration map in a way like never before. The timing of the Conference has a particular significance in arbitration matters as it coincides with the 50th Anniversary of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on the 10th June 2008. This Convention is the bedrock upon which modern international arbitration is based and has been acceded to by approximately 140 States. By virtue of the Convention, an international arbitral award carries great advantages of enforceability over litigation in State Courts.

Our colleague, Klaus Reichert, did enormous work in preparing a bid to host the Conference on behalf of the Bar Council. The Bar Council bid succeeded in beating off stiff competition from Singapore and Sydney. A subcommittee (under the chairmanship of Klaus) of the ADR and Arbitration Committee has been set up to organise this Conference. There will be over 500 delegates at the Conference, including all significant

7 The detail about the Small Claims Arbitration scheme and its rules can be accessed at www.lawlibrary.ie.

8 See *www.americanlawyer.com/focuseurope/scorecard0605.html*

9 Treaty arbitrations are generally arbitrations arising out of Bilateral Investment Treaties (BITs). A Bilateral Investment Treaty (BIT) is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in the state of the other. In addition to determining the scope of application of the treaty, that is, the investments and investors covered by it, virtually all bilateral investment treaties cover four substantive areas: admission, treatment, expropriation and the settlement of disputes. ICSID (The International Centre for the Settlement of Investment Disputes) was established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Convention) which came into force on October 14, 1966. The Convention is given effect in Irish law by the Arbitration Act 1980. There has been a dramatic increase in the number of such Treaties in recent years. The ICSID website www.worldbank.org/icsid mentions 1100 Treaties in existence of which over 800 were concluded since 1987. In parallel with the growth in the number of Treaties, there has been a very significant increase in the number of ICSID arbitrations. It should be mentioned however that other arbitral institutions such as the ICC also deal with BIT arbitrations.

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players in the international arbitration field and all the international law firms who are involved in this work. It is important that the Bar uses this opportunity to demonstrate the range of skill and expertise which it has in the area.

In conjunction with the ICCA Conference, the Young Arbitration Practitioners Group will be holding its own conference in Dublin. Peter Shanley BL, has been designated as the person to co-ordinate this Conference on behalf of the Bar.

The Bar should demonstrate a greater interest in international arbitration and in the various arbitral institutions. A number of our colleagues have been appointed as arbitrators to ICC arbitrations in recent years but there is clearly scope for an increase in the level of such appointments. We should also be interested in developing our participation as counsel at such arbitrations (which realistically may be the practical way to advance a practice in the area). Our profession should seek to engage in a greater way in international arbitration by attending/ speaking at the many international conferences in the area and by involvement in organisations in the area such as the Arbitration Committee and the Litigation Committee of the IBA (International Bar Association), the Young International Arbitrators Group[11], the ICDR's 'Young and International', and the Chartered Institute of Arbitrators (Irish Branch or European Branch). Encouragement should be given to our members to have articles on topics of interest published in international journals on arbitration and dispute resolution. We should also seek to increase our level of contact with the main arbitral institutions, namely the ICC, the LCIA (London Court of International Arbitration) and the ICDR – International Centre for Dispute Resolution (which has its European Headquarters in Dublin).

In order to develop Ireland as a centre of international arbitration it is, of course, important that all of the various different sectors with an interest in bringing arbitration work to Dublin work together in a common cause. Earlier this year, the Dublin 2008 Committee was established. This Committee is a partnership between the Bar Council of Ireland, Law Society of Ireland, Chambers Ireland and the ICDR (International Centre for Dispute Resolution). The Attorney General, Rory Brady, S.C., is Patron to the Committee. Its aim is to develop arbitration and mediation in Ireland and to promote Dublin internationally as an ideal venue for arbitration hearings (taking full advantage of the increased profile the city will have by virtue of the ICCA 2008 Conference). It is obviously significant that the two branches of the legal profession and the business community are working together to advance these aims. The Committee is currently undertaking a number of different projects. A brochure promoting Dublin as a premier venue for international arbitration has already been circulated internationally. Contacts have been made with all the different agencies of the State to enlist their support. A proposal for a new Arbitration and Mediation Bill has been submitted to the Attorney General and comments have been invited from interested groups in the arbitration and mediation sector.

Ireland has succeeded in establishing itself internationally in a number of disparate sectors over the past 30 years, including the International Financial Services Centre and the software and pharmaceutical industries. Such success was achieved by all of the relevant agencies of the State working together to achieve a common goal. There is no reason why similar success cannot be achieved in the arbitration and dispute resolution field, provided all of the interested parties work in unison. We have many advantages being English speaking, neutral and having a stable economy with a very reliable judicial system. We also have a familiar legal framework for arbitration having adopted the UNITRAL model law in international arbitration (under the International (Commercial) Arbitration Act 1998).[12]

Forum for Arbitration/Mediation

If the Bar is to take a greater lead in promoting arbitration and mediation in Ireland, it is important that it marshal as effectively as possible its capacity and resources in the area. A considerable number of members at the Bar have experience and qualifications in the areas of arbitration and mediation. It is proposed to establish an arbitration and mediation forum at the Bar in order to draw in the wide spectrum of the profession with an interest in these areas. Through the forum, information on arbitration and mediation can be disseminated more effectively to members. Seminars and conferences on particular topics in the area can be organised. Such a forum should assist in putting arbitration and mediation more centre stage at the Bar, rather than being left on the fringes. This will allow younger members with particular skill and expertise in alternative dispute resolution to gain some recognition and also encourage debate and discussion as to how the profession can promote itself more effectively in the changing dispute resolution environment.

Training

It is important that members of the profession be encouraged as far as possible to undergo training and obtain appropriate qualifications in both arbitration and mediation. There are Diplomas available from UCD, the Chartered Institute of Arbitrators, and Queen Mary University of London (online) in the area of international arbitration. Bodies such as the IBA run workshops in the area and attendance at conferences and seminars obviously assists in building not only a profile in the area, but also an expertise. In 2004, a number of mediation courses were organised by the Bar Council for members in order to ensure that there were a sufficient number of accredited mediators at the Bar. Training in mediation needs to be an ongoing process. It is very important that we continuously endeavour to expand the pool of recognised mediators and arbitrators within the profession. The Committee will embark on a review of the available courses and training in the arbitration and mediation area and ensure that information in this regard is properly disseminated to members.

Conclusion

The Bar cannot stand still but must be able to adapt to changes in the dispute resolution environment. Indeed our aim should be to be at the vanguard of any developments that promote more efficient and effective ways of resolving disputes consistent with the requirements of justice. We also have a particular challenge in view of the growth of our profession to ensure that the Bar promotes the skill and expertise of its members in all forms of dispute resolution as effectively as possible. There are considerable opportunities for our members in arbitration and mediation provided that, as a profession, we can give the area sufficient attention. ●

11 This organisation is sponsored by the LCIA – London Court of International Arbitration

12 The case for Ireland as a centre for international arbitration is more expansively dealt with on our website *www.dublinarbitration.com*. See also articles, Anglade, '*Developing International Arbitration in Ireland*' 5 No. 3, Journal of the Irish Bar pp. 143 (1999); '*Ireland as a Venue for International Arbitration*' Colm Ó hOisín, International Journal of Legal Information, Vol. 29 No. 2, 244 (Summer 2001); '*Ireland as a Venue for International Arbitration, Five Years On – where do we stand*', 8(3) 2003, Bar Review 117

Defamation and privacy reform: a democratic model of media freedom?

Eoin Carolan BL

Introduction

This article argues that the Government's proposals for defamation and privacy reform have significant conceptual implications. The Bills arguably clarify an issue which has remained unresolved (and largely unaddressed) by Irish courts up to this point – just what values are involved in the protection of the freedom of the press.

Section I – Theories of Press Freedom

(i) The Free Market Model

Broadly speaking, the question of why we protect the freedom of the press can be answered in two, very different ways. The first school of thought sees media freedom as a specific example of the more general constitutional entitlement to freedom of speech.

Advocates of this view tend to value expression for its own sake. Ensuring the ability of individual citizens or the press to put forward their opinions and ideas is regarded as a way of guaranteeing the entitlement of all to contribute to, and to participate in, the process of public debate. From the democratic point of view, this is justified by reference to the notion of the 'free market of ideas'. This theory argues that a democracy is strengthened when robust and uninhibited public debate is encouraged.

Milton captured the essence of this notion neatly in his 17th century *Areopagitica*, when he remarked: "Let [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?"

According to this system, there can be no restrictions on the ideas that can be advanced in any debate. Filter mechanisms based on orthodox notions of truth cannot be tolerated. As with free market theories of economics, this idea trusts in the ability of the market to determine the value of a particular proposal. Theories succeed or fail on their own merits. In legal terms, the adoption of this theory thus tends to result in a situation of generally unrestricted media freedom.

This 'free market' model is closely associated with the First Amendment jurisprudence of the U.S. courts. The American Constitution's protection of this entitlement is couched in famously absolute terms: 'Congress shall make no law … abridging the freedom of speech, or of the press'. It is therefore unsurprising that the philosophy of the free market of ideas has dominated the American approach to questions of media freedom.

Early support for this theory was provided by the eminent judicial duo of Holmes and Brandeis J.J., who delivered a series of dissenting judgments which strongly opposed the imposition of any constraints on the expression of opinions and ideas.[1] This reflected their belief that '[t]he best test of truth is the power of the thought to get itself accepted in the competition of the market'.[2]

Holmes and Brandeis JJ.'s judgments exerted considerable influence on later American jurists. As Vinson C.J. explained in *Dennis*, 'there is little doubt that subsequent opinions have inclined toward the Holmes-Brandeis rationale'[3]. The seminal decision in *New York Times v. Sullivan* was thus heavily influenced by their views.

The background to this case is well known, and accordingly requires only the briefest review. A police officer, accused in a New York Times advertisement of infringing the civil rights of black residents of Montgomery, Alabama, issued a claim for defamation on the basis of a number of factual errors contained in the piece.

Brennan J., for the majority of the Court, felt that the First Amendment demonstrated America's 'profound national commitment to the principle

* Lecturer in Constitutional Law, Trinity College Dublin. This is an amended version of a paper delivered at *the Defamation, Privacy and Media Regulation* conference on September 30th, 2006.

1 *Abrams v. U.S.* 250 U.S. 616 (1919); *Schaefer* v. *United States*, 251 U.S. 466 (1920); *Pierce* v. *United States*, 252 U.S. 239 (1920); *Gitlow v. New York* 268 U.S. 652 (1925).

2 250 U.S. 616 (1919), *per* Holmes J.

3 *Dennis v. U.S.* 341 U.S. 494 (1951).

that debate on public issues should be uninhibited, robust, and wide-open, and ... may ... include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials'[4]. The Supreme Court thus held that a defamation suit, when taken by a public figure, would only be sustained where actual malice was found.

The focus of an American defamation enquiry is therefore the honesty of the person making the claim, rather than the truth or otherwise of the allegation made. This reflected the Court's belief:

> "That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive". [5]

(ii) The Democratic Model

On the contrary, a rival interpretation of media freedom has more recently emerged, in which the media is conceived in primarily didactic terms.[6] Journalists are expected to inform the public about the actions, praiseworthy or otherwise, of their elected officials. On this view, democracy is strengthened when the public makes an informed electoral choice. As the Canadian Supreme Court explained:

> "The media have a vitally important role to play in a democratic society. It is the media that, by gathering and disseminating news, enable members of our society to make an informed assessment of the issues which may significantly affect their lives and well-being."[7]

The logical corollary of this position is that there is no constitutional protection for inaccurate or false reporting. In fact, supporters of this idea of the media-as-educators have argued that a *Sullivan*-style immunity for untrue claims is actually damaging for democracy. Two members of the U.S. Supreme Court have since argued that:

> "[E]rroneous information frustrates th[e] values [of the First Amendment] .... There is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[8]

This perception that the *Sullivan* rule had allowed 'the stream of information about public officials and public affairs [to become] polluted ... by false information' was also repeated by Burger C.J. and Rehnquist J. in *Coughlin*[9]. It remains, however, a minority view in the U.S.[10]

Other jurisdictions have, in considering this issue of political libel, expressed a preference for this 'democratic' conception of media freedom. The Canadian Supreme Court declared that 'the dissemination of falsehoods ... exact a major social cost by deprecating truth in public discourse'[11], concluding that '[f]alse reports are 'inimical to the search for truth', and 'harmful to the interests of a free and democratic society'[12].

The logic of this argument has also been accepted by courts in Australia[13] and New Zealand[14], and by the House of Lords[15]. The judges have, in each case, rejected the American approach, insisting instead that the media's democratic function is limited to the publication of true and accurate stories about public figures.

(iii) Implications

These two approaches thus offer very different visions of the place of the press in a democratic society. According to the American 'free market' image, the media plays a vital role in facilitating the articulation and discussion of opposing ideas, regardless of the truth or merits of the opinions outlined. The constitutional protection of the press thus aims to secure the representation of different opinions in public debate. There can be no content restrictions on media speech.

According to the democratic model, the press is supposed to ensure that the public are equipped to make an informed judgment about the qualities of their representative officials and institutions. The constitutional protection of the press is implicitly confined to stories which are accurate, and which concern issues relevant to the democratic process. Restrictions based on the content of stories, and on their accuracy, are permitted – perhaps even encouraged.

Section II – Recent Irish Caselaw

The domestic authorities on the freedom of the press do not, on the whole, definitively prescribe an Irish model. Some of the more recent constitutional cases have, however, discussed the media in essentially informational terms. Kelly J. warned in *D.P.P. v. Independent Newspapers* that an improper interference with the constitutional protection of the press would result in the 'possible undue cramping of the media in their coverage of public affairs and newsworthy events'[16]. Similarly, in *Irish Times v. Ireland*[17], the Supreme Court explained the constitutional importance of media coverage of criminal trials in terms of their ability to inform the public, and thereby expose the administration of justice to ongoing scrutiny.

This analysis is also supported by Article 40. 6. 1 (i)'s (of the Constitution) description of the media as the 'organs of public opinion', and by recent Irish decisions on both defamation and privacy. This suggests that the democratic model may influence the development of Irish law on these issues even if the Bills are not enacted.

Defamation

In *Hunter v. Duckworth*[18], for example, O'Caoimh J. referred with approval to the decisions of the English, Australian and New Zealand courts. In particular, the judge adopted the judgment of Lord Nicholls in the House of Lords in *Reynolds*. The immediate focus of this decision was, of course, on the liberalisation of the law of defamation by extending the defence of qualified privilege to any publication found by the courts to be the product of 'responsible journalism' on the part of the press.

Liberal in its effects, this approach is, however, restrictive in its ethos. In his judgment, Lord Nicholls provided a list of non-exhaustive factors which, he felt, illustrated what constituted responsible journalism. These *indicia*, which O'Caoimh J. expressly affirmed, construe the media as an educator of public opinion, constitutionally charged with the task of publishing accurate stories about relevant figures.

4 376 U.S. 254, 270 (1964).
5 376 U.S. 254, 271-272 (1964), citing *N. A. A. C. P.* v. *Button*, 371 U.S. 415, 433 (1963).
6 For a more general discussion of democratic theories of freedom of expression, see O'Neill, "Corporate Freedom of Expression" (2005) 27 D.U.L.J. 185.
7 *CBC. v. New Brunswick* [1991] 3 S.C.R. 459, at 475.
8 *Dun & Bradstreet v. Greenmoss Builders* 472 US 749 (1985), *per* White J. and Burger C.J. dissenting.
9 *Coughlin v. Westinghouse Broadcasting & Cable,* 476 U.S. 1187 (1986)
10 A number of American academics have called for a re-examination of *Sullivan.* See, for example, Epstein, "Was New York Times v. Sullivan Wrong?" (1986) 53 UCLR 782; Bollinger, "The End of New York Times v Sullivan: Reflections on Masson v New Yorker Magazine", [1991] Sup. Ct. Rev. 1.
11 *Hill v. Church of Scientology* [1995] 2 S.C.R. 1130, at 1183, *per* Cory J.
12 [1995] 2 S.C.R. 1130, at 1174.
13 *Lange v. ABC* (1997) 145 A.L.R. 96.
14 *Lange v. Atkinson* [2000] 3 N.Z.L.R. 385.
15 *Reynolds v. Times Newspapers Ltd.* [2000]2 A.C. 127.
16 [2003] 2 IR 367, at 394.
17 [1998] 1 IR 375.
18 [2003] IEHC 81.

From the point of view of the truth of a publication, for example, the courts are urged to consider '[t]he steps taken to verify the information', '[w]hether comment was sought from the plaintiff', '[t]he source of the information', and '[w]hether the article contained the gist of the plaintiff's side of the story'. There factors are all animated by a desire to ensure the story's accuracy.

Lord Nicholls further focuses the court's attention upon the issue of 'the extent to which the subject matter is a matter of public concern', thereby implicitly accepting the notion that there are some matters which are immune from public – and, by extension, press – scrutiny.

In this, there are obvious connotations of the democratic model. Unlike the American approach, the logic of *Reynolds* values a publication, not as a contribution to a public debate (which thus deserves protection in its own right, regardless of its merits), but as a means of ensuring the public is properly informed about *public* affairs.

Privacy

The scope of the constitutional guarantee of media freedom has also been connected to this question of public interest in a recent Irish case on the right to privacy. In *Cogley v. R.T.E*, the second set of plaintiffs sought to restrain the broadcast of footage from the Leas Cross nursing home which, they claimed, had been obtained in breach of their and their patients' respective rights to privacy.

Clarke J. accepted the importance of balancing the protection of privacy against the constitutional requirement 'that there be a vigorous and informed debate on issues of importance'. He thus held that the footage in question could be broadcast on the ground that it involved 'issues ... of the highest public interest'.[19]

Clarke J. was, however, clear that the public character of the material in question would be a very significant factor in the court's analysis of such cases. In particular, he felt that a court would have to examine an assertion of public interest very carefully in cases where material had been unlawfully obtained. Even where no allegation of illegality was made, however, he emphasised that the individual's right to privacy would not have to be balanced against the need for 'vigorous and informed debate' in situations where:

> "The underlying information sought to be disclosed was of a significantly private nature and where there was no, or no significant, legitimate public interest in its disclosure."[20]

He further went on to warn that the courts should be conscious of 'the fact that it is all too easy to dress up very many issues with an exaggerated or unreal public dimension'[21]. That he regarded such intensive scrutiny of the suggested public interest in a particular publication as a prerequisite to a claim of constitutional protection appears to indicate a belief, on Clarke J.'s part, in the democratic conception of press freedom.

It is against this backdrop of an apparent judicial preference for the democratic model of media freedom that the Government's proposed reforms fall to be considered.

Section III – The Defamation Bill 2006

How then does the proposed Irish legislation fit into this debate? From the point of view of the Defamation Bill 2006, Schedule 2 of the Bill expressly refers to the 'public interest' as being served by the Press Council's efforts at 'ensuring ethical, accurate and truthful reporting by the press'. The democratic model's emphasis on accuracy over participation is clearly evident here.

Furthermore, the introduction of a defence of 'fair and reasonable publication on a matter of public importance' in section 24 echoes the approach of Lord Nicholls in *Reynolds*. Section 24 (1) limits the defence to a publication which was 'for the purposes of a discussion of a subject of public importance, the discussion of which was for public benefit'. This connects the Bill's protection of the media's freedom to the extent to which its coverage of issues remains within the parameters of whatever constitutes 'public importance'.

Section 24 (2) meanwhile lists a number of factors which the courts shall take into account when considering a section 24 plea. These factors are reminiscent of Lord Nicholls' criteria of responsible journalism. Tellingly the final catch-all factor refers to 'any other means taken to *verify* the assertions and allegations concerning the plaintiff in the statement'. This again indicates a concern to secure, as far as possible, the veracity of media reports. The courts' attention is directed by section 24 (2) towards questions of verification and presentation. In its emphasis on accuracy over pure participation, the Bill is therefore more appropriately identified with the 'democratic' interpretation of the freedom of the press.

Section IV – The Privacy Bill 2006

A reading of the Privacy Bill 2006 indicates that it is also so inspired. Of course, the very introduction of a tort of violating privacy demonstrates a conviction on the part of the Government that the freedom of the press does not extend to a 'free market'-style regime of unrestricted publication. The protection of the right to privacy, as Clarke J. noted in *Cogley*, will frequently conflict with competing constitutional interests like the freedom of the press. The Bill's commitment to the democratic conception of press freedom thus operates to exempt the media from the statute's most significant strictures.

Section 4, for example, obliges the court to have regard, *inter alia*, to an individual's 'office or position' when determining that person's expectation of privacy. This logically implies that public officials, when acting in the course of their office, are entitled to a lower level of privacy protection.

Section 5 (e), meanwhile, establishes a defence that an impugned publication was an 'act of newsgathering', once it can be shown that the act in question was, *inter alia*, 'for the purpose of discussing a subject of public importance' and 'fair and reasonable in all the circumstances'.

The Privacy Bill thus conforms to the idea of press freedom, already considered in the context of the Defamation Bill, which protects only those media publications of public benefit and importance, which fall within the parameters of the media's designated pedagogic role.

19 [2000] 2 A.C. 127, at 204-205.
20 [2005] 4 I.R. 79, at 94.
21 [2005] 4 I.R. 79, at 95.

Section V – Practical Implications?

From an academic perspective, the reform proposals contained in the Defamation and Privacy Bills arguably represent the adoption in Ireland of the increasingly popular 'democratic' conception of media freedom. Rejecting an American-style *carte blanche* for the publication of stories of questionable merit, the Bills embrace the view that the media deserves specific constitutional protection only for as long as it truthfully educates and informs the public.

This final section will thus briefly consider the possible practical consequences of this development.

(i) The concept of 'public importance'

The first broad area of concern for the media will be the way in which the courts define just what constitutes a 'subject of public importance'. The democratic model would require that media coverage be restricted to 'public' matters. The courts have, however, historically been reluctant to editorialise media matters. As Lord Hoffman maintained:

> "[A] freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the right to publish things which government and judges ... think should not be published. It means the right to say things which 'right thinking people' regard as dangerous or irresponsible."[22]

These Bills, however, do direct the courts to take the 'public importance' of a publication into account.[23] The judiciary are obliged, regardless of their misgivings, to consider this concept. Furthermore, the fact that neither Bill attempts to clarify this important qualification means that the courts are likely, for reasons of certainty, to be required to develop some employable criteria of 'public importance'.

How might this be defined? It seems likely that a court's interpretation of the public interest will differ sharply from the editor's understanding of what the public is interested in. The democratic model suggests that the 'public importance' of a publication will be tied to the extent to which it facilitates the public in exercising an informed electoral choice. It may therefore be connected with the conduct of elected officials, or with issues likely to affect the outcome of an election or referendum process.

In this, comparisons can be drawn with decisions in Australia and New Zealand. Freedom of the press in Australia has been derived from the representative nature of its federal democratic process.[24] It is thus logically confined to 'freedom of communication concerning governmental or political subjects'[25]. The courts have, however, expansively interpreted this notion to cover commentary about the actions of state officials, and unelected, executive figures like local police officers.[26]

In New Zealand, the public interest in ensuring media freedom has been defined in terms of 'access to information which directly affects [elected officials'] capacities to carry out their public responsibilities'[27]. The courts have therefore restricted the defence of 'public interest' qualified privilege to narrowly electoral issues.

> "[T]he wider public may have a proper interest in respect of generally-published statements which directly concern the functioning of representative and responsible government .... In particular, a proper interest ... exist[s] ... about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities *directly* affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities."[28]

Although it is difficult to predict with confidence the way in which the Irish courts will interpret this test of 'public importance', these examples show that it is likely to extend to encompass, at best, matters of a broadly political or governmental character. This would suggest, for example, that constitutional protection will not apply to stories about celebrities.

Clarke J.'s judgment in *Cogley* offers some support for a generous interpretation of the test. The *Cogley* coverage concerned the activities of private individuals. The judge held, however, that the questions raised were clearly of public importance. This suggests that the Irish courts will not find 'public importance' only in situations in which elected officials are directly implicated or involved.

It is nonetheless interesting to note that Clarke J.'s description of the precise nature of the public interest at issue concentrated chiefly on the implications of the observed activities for the regulatory organs of the State.[29] He thus clearly interpreted public interest in primarily (if loosely) governmental terms. Taken together with his warning that the courts should be wary of allowing the assertion of a tenuous public interest, his judgment is thus something of a mixed blessing for media organisations. In his broadly governmental understanding of public interest, Clarke J.'s version of media freedom involves a much wider area of activity than is, for example, evidenced in the caselaw of the New Zealand courts. It also, however, unambiguously accepts the notion that there are certain activities (expressly including those of public officials in their private lives) which fall outside the scope of legitimate media coverage.

(ii) 'Fair and reasonable' publication

The other major issue raised by the Bills is just what constitutes 'fair and reasonable' publication. It has been argued above that the apparent adoption by the Bills of the democratic model of media freedom implies that legal protection will be confined to truthful and accurate reports. However, as the cited comments of Lord Hoffman show, courts have historically demonstrated an instinctive unwillingness to review the substantive merits of a publication. This perhaps reflects the traditional antipathy of the courts towards acting as arbiters of truth. As Jackson J. explained, 'if there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, [or] religion'[30].

Overseas courts have instead adopted a procedural approach in their attempts to secure the accuracy of media reports. The Australian High Court's definition of reasonableness in *Lange*, like Lord Nicholls' elaboration of the notion of responsible journalism in *Reynolds*, focused, not on the truth or otherwise of the allegation in question, but on the attempts of the journalist(s) in question to verify their allegations.

22 [2005] 4 I.R. 79, at 98.
23 *R. v Central Independent Television* [1994] Fam. 192, affirmed in *Judge Mahon v. Post Publications* [2005] IEHC 307.
24 Space precludes a consideration of the discrepancy between this term, and the more common reference in the case law to the 'public interest' of a publication.
25 *Theophanous v. Herald and Weekly Times* (1993-4) 182 C.L.R. 105.
26 *Lange v. ABC* (1997) 145 A.L.R. 96.
27 *Coleman v. Power* (2004) 209 A.L.R. 182.
28 *Lange v. Atkinson* [1998] 3 NZLR 424, at 464.
29 [1998] 3 NZLR 424, at 468. Emphasis added.
30 Out of the four specified heads of public interest, three of them related to the regulatory performance of the State.

The Irish courts may adopt a similarly procedural approach when considering whether publication was 'fair and reasonable'. In this way, the asserted democratic value in the propagation of truthful reports is likely to lead to much greater judicial interest in the way in which the press corps conducts itself. The focus of any such efforts on the part of the courts would logically be two-fold, dedicated to ensuring, first, the proper investigative verification of a report, and secondly, that it is then accurately presented when published.

What might be the consequences of this for editors and journalists? The most significant implications may relate to the ability of journalists to maintain the secrecy of their sources. It has already been noted how the accuracy of media stories is a key concern for the democratic model. It is difficult to see how this value can be vindicated by a judicial acceptance, at face value, of the assurances of a reporter that the source of the story was reliable. Can journalistic ethics trump a constitutional concern for truth in public discourse?[31]

Judges are at least likely to demand the provision of more information about the nature of the source, and the steps taken to verify the information obtained. A number of journalistic practices could be impugned. The doubtful reliability of so-called 'chequebook journalism' – where a source is paid for its information – means that it would obviously be called into question under a democratic model. The courts may similarly disapprove of an editorial decision to publish a story on the basis of a 'flyer' – the industry term for a suspect source. What about less clear cut cases? Will judges be satisfied if stories are published on the basis of a single source? If a source has, for example, been incorrect on one occasion, is that sufficient to render him or her unreliable? Will journalists be entitled to rely on claims made by other media organisations, or will they be required to investigate allegations for themselves?

Similar implications arise in relation to the presentation of a piece. Will a sub-editor's catchy headline be interpreted in court as a sensationalist distortion of the piece's overall content?

(iii) The Press Council's Code of Conduct

In terms of the judicial imposition of accuracy and content-based procedures, the Press Council's code of conduct could potentially play a very valuable role. The unwillingness of courts elsewhere to constitute themselves as editors-in-chief of media affairs has already been observed. One of the key difficulties facing a judge in this context is to ensure the adoption by the press of proper procedures, while allowing them the freedom to continue to fulfil their important constitutional role.

Lord Nicholls', for example, was at pains to point out that he wished to require no more than 'responsible journalism, ... a standard the media themselves espouse'. He accepted, however, that such a standard would have 'an element of unpredictability and uncertainty'.[32] His enunciation of a series of non-exhaustive criteria was thus an attempt to clarify the nature of the procedural obligations which the press should observe, thereby allowing them to orient their activities accordingly.

The Council's code of conduct, therefore provides the opportunity for agreeing press procedures in a non-judicial setting. As Lord Nicholls' decision in *Reynolds* makes clear, the courts do not wish to disrupt the investigative actions of the media. The 'democratic' model nonetheless requires that some accuracy- and content-based restrictions be imposed. If, however, the Press Council was to outline procedures which, in its view, represented 'fair and reasonable' journalism, there is a strong possibility that the judiciary would defer to this view.

This certainly seems to be the intention of the Bills. Section 24 (2) of the Defamation Bill specifies that adherence to this code of conduct is to be taken into account in determining whether the publication of a report was 'fair and reasonable'. Furthermore, Section 10 of Schedule 2 provides that the Council's code of conduct should cover 'rules and standards likely to ensure the accuracy of reporting' and 'that the privacy, integrity and dignity of the person is respected'. The development by the Press Council of a comprehensive code of conduct could thus act as a template for the courts' interpretation of what constitutes 'fair and reasonable' publication.

It is important, however, that the Council ensure that its designated procedures are sufficiently robust to satisfy the courts that the media are indeed fulfilling their democratic function. An interesting parallel can be drawn between the proposed responsibility of the courts to ensure fair and reasonable publication, and their existing jurisdiction to review the actions of administrative bodies on the grounds of procedural fairness. In both contexts, the courts are content to allow considerable operational autonomy to those bodies which work in an area on an everyday basis.

In judicial review cases, the courts do not second-guess the decisions of the administrative agency. They rather defer to the bodies' decisional primacy, intervening only in those instances in which the actions impugned are adjudged to have infringed the system's residual values of rationality and fairness. They do not demand that the correct result is reached in every case. The courts instead aim to ensure generally appropriate outcomes.

As the authorities on procedural fairness demonstrate, however, the judiciary will not refrain from the imposition of extensive procedural requirements where they believe that existing administrative methods are inadequate. In this, the courts are encouraged by their own everyday exposure to issues of procedural propriety. Such familiarity fosters a conviction that the courts are entitled and equipped to intervene where an administrative agency has failed to discharge its duty of fairness of procedural fairness.

In the context of the Government's proposed regulation of media affairs, the apparent dominance of the democratic model would require that the relevant regulatory obligations focus on the accuracy and public importance of reports. Arguably, the judges will defer to the Press Council's prescribed procedures as long as they are likely to produce accurate reports in the majority of cases. If, however, the code of conduct is regarded as a weak and ineffectual regime, the experience of administrative bodies indicates that the courts will probably prove willing to insist that more rigourous procedures are employed – an intervention which the democratic model's commitment to accurate and informed media reporting would certainly support.

Conclusion

The model of media freedom in these Bills improves the legal protection available to those media reports which fall within the margins of this model, while denying constitutional protection to those inaccurate or

31 *Board of Education v. Barnette*, 319 U.S. 624, 642.

32 With the Mahon Tribunal seeking the disclosure of the source of a leaked Irish Times story, the courts may soon have to consider the extent to which the democratic model influences Irish law on this issue.

irrelevant publications which do not educate or inform the public on issues of electoral or governmental concern.

In their apparent adoption of the democratic model, the Bills follow developments elsewhere in the common law world. The increasing emergence of this theory means that media freedom may not remain unaffected even in the event of a failure to pass these Bills. As the decisions in *Hunter*, *Cogley* and *Von Hannover*[33] demonstrate, questions of political libel and privacy are not going to go away. The courts will be called on to adjudicate on these issues as they arise in the future. If they do so in reliance on the democratic model, restrictions on the content and quality of reports may be introduced independently of any statutory regime. In such a scenario, many of the arguments above would still apply.

It has been suggested that the courts' reluctance to determine the truth or otherwise of every single contested allegation will not lead to a requirement of absolute accuracy. The other common law jurisdictions which espouse this model have instead been content to insist on the implementation of improved investigative procedures.

Taken together with the privacy-related requirement that reports cover issues of 'public importance', a consistent adherence to such procedures is likely to protect the media from the ominous threat of costly defamation or privacy proceedings. However, it is also probably the case that these developments will require Irish newsrooms to make considerable changes to the way they operate at present.

Postcript:

On the eve of the finalisation of this article, the House of Lords delivered judgment in *Jameel v. Wall Street Journal Europe*. Hailed as a re-interpretation of *Reynolds*, the decision was welcomed by the media as a 'protective shield to investigative journalism' which brought 'English libel law more in line with that of the United States'[34]. In reality, however, the decision falls firmly within the democratic model of media freedom. *Jameel* restates rather than reverses *Reynolds*. Lord Bingham emphasised, for example, the law's continuing commitment to the protection of the 'value of informed public debate of significant public issues'[35]. Repeating the courts' previous assertion that 'the public have no interest to read material which the publisher has not taken reasonable steps to verify'[36], Lord Bingham confined the availability of the *Reynolds* defence to those who have 'taken such steps as a responsible journalist would take to try and ensure that what is published is accurate and fit for publication'.

The Lords also reiterated the requirement that protected reports relate to matters of public interest. As Baroness Hale observed:

> "[T]he most vapid tittle-tattle about the activities of footballers' wives and girlfriends interests large sections of the public but no-one could claim any real public interest in our being told all about."[37]

Once again, accuracy and public importance are invoked as the central characteristics of responsible, and thus protected, journalism.

From a practical perspective, the most significant point in *Jameel* is the Lords' declaration that Lord Nicholls' *indicia* of responsible journalism are not 'a series of hurdles to be negotiated'[38] by a publisher seeking to rely on this defence. That they had been so treated be the lower courts had, in the Court's view, undermined the Lords' attempt in *Reynolds* to liberalise the law.

In future, therefore, this defence should be easier to invoke. This reflects the reluctance of the courts, alluded to above, to second-guess the decisions of expert editors. As Lord Hoffman noted:

> "The fact that the judge, with the advantage of leisure and hindsight, might have made a different editorial decision should not destroy the defence. That would make the publication of articles which are, *ex hypothesi*, in the public interest, too risky and would discourage investigative reporting."[39]

Despite media suggestions to the contrary, this does not amount, however, to a move away from the democratic model towards the more American idea of the free market. As the various judgments make clear, the courts' conception of media freedom will still encompass only *accurate* and *relevant* 'public interest' reports.

In fact, several of the possible procedure-oriented developments, about which this piece had speculated, were considered by the Lords with some degree of approval. Lord Hoffman, for example, looked to the Press Complaint Commission's Code of Practice as a specification of the standard of responsible journalism, to which the courts would pay particular regard. More significantly, the issue of the quality of the alleged source(s) of the report was canvassed before the Court. The journalist in question described, without identifying, the nature of his sources in an attempt to underscore their reliability. Lords Bingham and Hope went on, however, to express their concern 'that the information about Mr Dorsey's sources is incomplete'[40]. This indicates that – as this piece has already discussed – the judicial examination of the accuracy and veracity of sources may, in the future, become a commonplace practice. ●

33 [2000]2 A.C. 127, at 202.
34 (2005) 40 EHRR 1.
35 Dyer, "Law lords give media shield against libel in landmark ruling", *The Guardian*, October 12th, 2006.
36 [2006] UKHL 44, at para. 28.
37 [2006] UKHL 44, at para. 32.
38 [2006] UKHL 44, at para. 147.
39 [2006] UKHL 44, at para. 33.
40 [2006] UKHL 44, at para. 51

Notice to users of the Irish Statute Book CD Rom and website

The Office of the Attorney General regrets to advise users of the Irish Statute Book that a specific error has been identified which occurs where some hyperlinks have over-written text.

The error occurs when the phrase **"*sections x and y*"** or **"*section x or y*"** appears in the official Stationery Office version. An example of each type of error is given below. In both examples hyperlinks appear in bold.

Example 1-"sections x and y".
(This example is from SI No. 425/1996).
The Minister for Social Welfare, in exercise of the powers conferred on him by sections 21 and 29 of the Social Welfare Act, 1996 (No. 7 of 1996), hereby orders as follows:

Citation.
1. This Order may be cited as the Social Welfare Act, 1996 (Sections 17, 18, 19 and 25) (Commencement) Order, 1996.

Commencement.
2. Sections 17, 18, 19 and 25 of the Social Welfare Act, 1996 shall come into operation on the 2nd day of January, 1997.

*This is the **correct version** as it appears in the official hardcopy edition (available for sale from Government Publications Sales Office, Molesworth Street, Dublin 2).*

The Minister for Social Welfare, in exercise of the powers conferred on him by **sections 21** of the **Social Welfare Act, 1996** (No. 7 of 1996), hereby orders as follows:
Citation.
1. This Order may be cited as the **Social Welfare Act, 1996** (Sections 17, 18, 19 and 25) (Commencement) Order, 1996.

Commencement.
2. **Sections 17** of the **Social Welfare Act, 1996** shall come into operation on the 2nd day of January, 1997.

This is the electronic version. This version is incorrect as you will note that it omits reference to section 29 in the preamble and sections 18, 19, and 25 in Article 2.

Example 2-"section x or y".
(This example is from section 49(2) of the Stock Exchange Act 1995)
(2) An order under section 201 or 203 of the Companies Act, 1963, in respect of a proposed amalgamation (being an acquiring transaction) shall not be made until the Bank has given its approval to the acquiring transaction or the period referred to in *section 41* has elapsed without the Bank having given or refused to give approval.

*This is the **correct version** as it appears in the official hardcopy edition (available for sale from Government Publications Sales Office, Molesworth Street, Dublin 2).*

(2) An order **under section 201** of the **Companies Act, 1963**, in respect of a proposed amalgamation (being an acquiring transaction) shall not be made until the Bank has given its approval to the acquiring transaction or the period referred to in *section 41* has elapsed without the Bank having given or refused to give approval.

This is the electronic version. This version is incorrect as you will note that it omits reference to section 203.

Users should be aware of the problems outlined in the above examples and where appropriate should check the official Stationery Office version of the Act or statutory instrument concerned.

The problems occur in electronic versions of legislation from 1922 to 1998. No problems concerning hyperlinks have been identified in electronic versions of post 1998 legislation.The errors as described above are in no way attributable to the contractors of the ISB updates from 1999 to 2005.

The Office of the Attorney General would like to apologise for any inconvenience and confirms that it is currently working towards resolving the problem.

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CPD. Future Events in Michaelmas Term

The Bar Council cpd Continuing Professional Development

Activity	Topic	Details	Date
Seminar	**Occupiers Liability**	Recent Developments	Wednesday 1 November @ 4.30 pm The Park Inn hotel
Seminar	**The workings of the Private Residential Tenancies**	Practical aspects of the private Residential Tenancies Act 2004	Monday 6 November @ 4.30 pm
Seminar	**Developments in Company Law**	The impact of the European Insolvency Regulation on the winding up of companies in Ireland • The recent judgment of the European Court of Justice • Practice & Procedure regarding section 205 proceedings	Monday 13 November @ 4.30 pm
Seminar	**Probate Law**	Overview & updates	TBC
Conference	*** Extradition Law**		Saturday 2 December @ 9.00 am
Conference	*** Biomedicine & Ethics**		Saturday 9 December @ 9.00 am

Legal The Bar Review Update

The Bar Review
Journal of the Bar of Ireland. Volume 12, Issue 5, November 2006

A directory of legislation, articles and acquisitions received in the Law Library from the 24th June, 2006 to 13th October, 2006.
Judgment Information Supplied by The Incorporated Council of Law Reporting

Edited by Desmond Mulhere, Law Library, Four Courts.

ADMINISTRATIVE LAW

Statutory Instruments

Agriculture and food (delegation of ministerial functions) order 2006
SI 299/2006

Appointment of Special Adviser (Minister of State at the Department of
Health and Children) order, 2006
SI 303/2006

Appointment of special adviser (minister for health and children) order
2006
SI 245/2006

Appointment of a special adviser (minister for arts, sport and tourism) order 2006
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Enterprise, trade and employment (delegation of ministerial functions)
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SI 397/2006

District court (warrants of execution) rules 2006
SI 396/2006

District Court districts and areas (amendment) and variation of days (district no. 15) order, 2006
SI 452/2006

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SI 314/2006

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SI 461/2006

Rules of the superior courts (taxi regulation) 2006
SI 315/2006

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Information compiled by Robert Carey & Brian Kenefick, Law Library, four Courts.

Control of substances that deplete the ozone layer regulations 2006
REG/2037-2000
SI 281/2006

European Communities (animal by-products) (amendment) regulations
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SI 250/2006

European Communities (artist's resale right) regulations 2006
DIR/2001-84
SI 312/2006

European Communities (authorization, placing on the market, use and control of biocidal products) (amendment) regulations 2006
DIR/98-8, DIR/2006-50
SI 393/2006

European Communities (authorization, placing on the market, use and control of plant protection products) (amendment) (no. 2) regulations 2006
DIR/2005-57, DIR/2005-72, DIR/2006-5, DIR/2006-6, DIR/2006-10, DIR/2006-16, DIR/2006-19, DIR/2006-39
SI 283/2006

European Communities (authorization, placing on the market, use and control of plant protection products) (amendment) (no.3) regulations 2006
DIR/2006-45
SI 319/2006

European Communities (avian influenza) (amendment of regulations) regulations 2006
DEC/2006-321
SI 257/2006

European Communities (avian influenza) (control on imports of avian products from Romania) (amendment) regulations 2006
DEC/2006-396
SI 313/2006

European Communities (award of public authorities' contracts) regulations 2006
DIR/2004-18, DIR/2005-51, DIR/2005-75
SI 329/2006

European Communities (Belarus) (financial sanctions) regulations 2006
REG/765-2006
SI 426/2006

European Communities (control of organisms harmful to plants and plant products) (amendment) (no. 2) regulations 2006
DIR/2006-35
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REG/1236-2005
SI 366/2006

European Communities (cooperation between national authorities responsible for the enforcement of consumer protection laws) regulations 2006
REG/2006-2004
SI 290/2006

European Communities (dangerous substances and preparations) (marketing and use) (amendment) regulations 2006
DIR76-769, DIR/2005-59, DIR/2005-69, DIR/2005-84, DIR/2005-90)
SI 364/2006

European Communities (Democratic Republic of Congo) (financial sanction) regulations 2006
REG/889-2005, REG/1183-2005
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European Communities (enforcement of intellectual property rights) regulations 2006
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European Communities (hygiene of fishery products and fish feed) regulations 2006
Please see S.I as it implements a number of directives
SI 335/2006

European Communities (installation and use of speed limitation devices in motor vehicles) (amendment) regulations 2006
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Yugoslavia (ICTY) (financial sanctions) regulations 2006
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European Communities (licensing and supervision of credit institutions) (amendment) regulations 2006
DIR/2000-12, DIR/2006-29
SI 358/2006

European Communities (milk quota) (amendment) (no. 2) regulations 2006
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European Communities (Newcastle disease) (control on imports of avail products from certain districts of Bulgaria) (amendment) regulations 2006
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DEC/2006-354
SI 298/2006

European Communities (Newcastle disease) (control on imports from Romania)(amendment) regulations 2006
DEC/2006-501
SI 400/2006

European Communities (reinsurance) regulations 2006
DIR/2005-68
SI 380/2006

European Communities (Slobodan Milosevic and associated persons)(sanctions) regulations 2006
REG/2488/2000
SI 428/2006

European Communities (social welfare) (consolidated contributions and insurability) (amendment) (parental leave credited contributions) regulations 2005
DIR/96-34
SI 685/2005

European Communities (Sudan) (financial sanctions) regulations 2006
REG/1184-2005
SI 430/2006

European Communities (pesticide residues) (cereals) (amendment) (no. 2) regulations 2006
DIR/2005-70, DIR/2005-76, DIR/2006-4, DIR/2006-30
SI 260/2006

European Communities (pesticide residues) (foodstuffs of animal origin) (amendment) (no. 2) regulations 2006
DIR/2005-70, DIR/2006-30
SI 259/2006

European Communities (pesticide residues) (fruit and vegetables) (amendment) regulations 2006
DIR/2005-70
SI 192/2006

European Communities (pesticide residues) (products of plant origin including fruit and vegetables) (amendment) (no. 2) regulations 2006
DIR/2005-70, DIR/2005-74, DIR/2005-76, DIR/2006-4, DIR/2006-9, DIR/2006-30
SI 266/2006

European Communities (potato ring rot) (amendment) regulations 2006
DIR/93-85
SI 285/2006

European Communities (quality of shellfish waters) regulations 2006
DIR/79-923
SI 268/2006

European communities (undertakings for collective investment in transferable securities) (amendment) regulations 2006
DIR/85-611, DIR/88-220, DIR/95-26, DIR/2001-108, DIR/2001-107
SI 287/2006

Financial transfers (Belarus) (prohibition) order 2006
REG/765-2006
SI 425/2006

Financial transfers (Democratic Republic of Congo) (prohibition) order
2006
REG/889-2005, REG/1183-2005
SI 419/2006

Financial transfers (international criminal tribunal for the former
Yugoslavia (ICTY)) (prohibition) order 2006
REG/1763-2004
SI 417/2006

Financial transfers (Iraq) (prohibition) order 2006
REG/1210-2003
SI 423/2006

Financial transfers (Ivory Coast) (prohibition) order 2006
REG/174-2005, REG/560-2005
SI 421/2006

Financial transfers (Sudan) (prohibition) order 2006
REG/1184-2005
SI 429/2006

Safety, health and welfare at work (control of noise at work) regulations
2006
DIR/2003-10
SI 371/2006

Safety, health and welfare at work (control of vibration at work) regulations 2006
DIR/2002-44
SI 370/2006

Safety health and welfare at work (work at height) regulations, 2006
DIR/2001-45
SI 318/2006

Waste management (end-of-life vehicles) regulations 2006
REG/2000-53
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Acts of the Oireachtas 2006 (as of 13/10/2006)

Information compiled by Damien Grenham, Law Library, Four Courts.

1/2006 University College Galway (Amendment) Act 2006
Signed 22/02/2006

2/2006 Teaching Council (Amendment) Act 2006
Signed 04/03/2006

3/2006 Irish Medicines Board (Miscellaneous Provisions) Act 2006
Signed 04/03/2006

4/2006 Competition (Amendment) Act 2006
Signed 11/03/2006

5/2006 Social Welfare Law Reform and Pensions Act 2006
Signed 24/03/2006

6/2006 Finance Act 2006
Signed 31/03/2006

7/2006 Aviation Act 2006
Signed 04/0/2006

8/2006 Sea-Fisheries and Maritime Jurisdiction Act 2006
Signed 04/04/2006

9/2006 Employees (Provision of Information and Consultation) Act 2006
Signed 09/04/2006

10/2006 Diplomatic Relations and Immunities (Amendment) Act 2006
Signed 12/04/2006

11/2006 Criminal Law (Insanity) Act 2006
Signed 12/04/2006

12/2006 Registration of Deeds and Title Act 2006
Signed 07/05/2006

13/2006 Parental Leave (Amendment) Act 2006
Signed 18/05/2006

14/2006 Road Safety Authority Act 2006
Signed 31/05/2006

15/2006 Criminal Law (Sexual Offences) Act 2006
Signed 02/06/2006

16/2006 Employment Permits Act 2006
Signed 23/06/2006

17/2006 Health (Repayment Scheme) Act 2006
Signed 23/06/2006

18/2006 European Communities (Amendment) Act 2006
Signed 28/06/2006

19/2006 National Sports Campus Development Authority Act 2006
Signed 5/7/2006

20/2006 Defence (Amendment) Act 2006
Signed 12/07/2006

21/2006 National Economic and Social Development Office Act 2006
Signed 12/07/2006

22/2006 Hepatitis C Compensation Tribunal (Amendment) Act 2006
Signed 16/07/2006

23/2006 Road Traffic Act 2006
Signed 16/07/2006

24/2006 Building Societies (Amendment) Act 2006
Signed 16/07/2006

25/2006 Institutes of Technology Act 2006
Signed 16/07/2006

26/2006 Criminal Justice Act 2006
Signed 16/07/2006

27/2006 Planning and Development (Strategic Infrastructure) Act 2006
Signed 16/07/2006

Bills of the Oireachtas 13/10/2006

[pmb]: Description: Private Members' Bills are proposals for legislation in Ireland initiated by members of the Dail or Seanad. Other bills are initiated by the Government.

Information compiled by Damien Grenham, Law Library, Four Courts.

Air navigation and transport (indemnities) bill 2005
1st stage- Seanad

Broadcasting (amendment) bill 2003
1st stage –Dail

Building control bill 2005
Committee – Dail

Child care (amendment) bill 2006
1st stage- Seanad

Child trafficking and pornography (amendment) (no.2) bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Civil law (miscellaneous provisions) bill 2006
1st stage – Dail

Civil partnership bill 2004
2nd stage- Seanad

Climate change targets bill 2005
2nd stage – Dail **[pmb]** *Eamon Ryan and Ciaran Cuffe*

Comhairle (amendment) bill 2004
2nd stage – Dail

Competition (trade union membership) bill 2006
2nd stage – Dail **[pmb]** *Michael D. Higgins*

Consumer rights enforcer bill 2004
1st stage –Dail

Courts (register of sentences) bill 2006
2nd stage- Dail **[pmb]** *Jim O'keeffe*

Criminal justice (mutual assistance) bill 2005
Report stage – Seanad

Criminal Law (amendment) bill 2006
1st stage- Dail **[pmb]** *Jim O'Keeffe*

Criminal law (home defence) bill 2006
1ST stage- Dail

Defamation bill 2006
1st stage – Seanad

Defence (amendment) bill 2005
1st stage – Dail **[pmb]** *Billy Timmins*

Defence of life and property bill 2006
1st stage- Seanad **[pmb]** *Senators Tom Morrissey, Michael Brennan and John Minihan*

Electricity regulation (amendment) bill 2003
2nd stage – Seanad

Electoral (amendment) bill 2006
1st stage- Dail

Electoral (amendment) (prisoners' franchise) bill 2005
2nd stage – Dail *(Initiated in Seanad)* **[pmb]** *Gay Mitchell*

Electoral (preparation of register of electors) (temporary

provisions) bill 2006
1st stage- Dail **[pmb]** *Eamon Gilmore*

Electoral registration commissioner bill 2005
2nd stage- Dail **[pmb]** *Eamon Gilmore*

Energy (miscellaneous provisions) bill 2006
Committee – Dail

Enforcement of court orders bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Enforcement of court orders (no.2) bill 2004
1st stage- Seanad **[pmb]** *Senator Brian Hayes*

Fines bill 2004
2nd stage- Dail **[pmb]** *Jim O'Keeffe*

Fluoride (repeal of enactments) bill 2005
2nd stage – Dail **[pmb]** *John Gormley*

Freedom of information (amendment) (no.2) bill 2003
1st stage – Seanad **[pmb]** *Brendan Ryan*

Freedom of information (amendment) (no.3) bill 2003
2nd stage – Dail **[pmb]** *Pat Rabbitte*

Fur farming (prohibition) bill 2004
2nd stage- Dail **[pmb]** *Dan Boyle*

Genealogy and heraldry bill 2006
1st stage- Seanad **[pmb]** *Senator Brian Hayes*

Good Samaritan bill 2005
2nd stage – Dail **[pmb]** *Billy Timmins*

Greyhound industry (doping regulation) bill 2006
2nd stage – Dail **[pmb]** *Jimmy Deenihan*

Health (amendment) (no.2) bill 2004
Committee stage- Dail

Health (hospitals inspectorate) bill 2006
2nd stage – Dail **[pmb]** *Liz McManus*

Health (nursing homes) (amendment) bill 2006
1st stage- Dail

Housing (stage payments) bill 2004
2nd stage- Seanad **[pmb]** *Senators Paul Coughlan, Joe O'Toole and Brendan Ryan*

Housing (stage payments) bill 2006
1st stage- Seanad **[pmb]** *Senator Paul Coughlan*

Human reproduction bill 2003
2nd stage – Dail **[pmb]** *Mary Upton*

Independent monitoring commission (repeal) bill 2006
2nd stage – Dail **[pmb]** *Martin Ferris, Arthur Morgan, Caoimhghín ó Caoláin, Aengus ó Snodaigh and Seán Crowe.*

International criminal court bill 2003
2nd stage- Seanad *(Initiated in Dail)*

International peace missions bill 2003
2nd stage – Dail **[pmb]** *Gay Mitchell & Dinny McGinley*

Investment funds, companies and miscellaneous provisions bill 2006
1st stage – Seanad **[pmb]** *Senator Mary O'Rourke*

Irish nationality and citizenship (amendment) (an Garda Siochana) bill 2006
1st stage – Seanad

Irish nationality and citizenship and ministers and secretaries (amendment) bill 2003
Report – Seanad **[pmb]** *Feargal Quinn*

Land and conveyancing law reform bill 2006
1st stage- Seanad

Law of the sea (repression of piracy) bill 2001
2nd stage – Dail **[pmb]** *(Initiated in Seanad)*

Local elections bill 2003
2nd stage –Dail **[pmb]** *Eamon Gilmore*

Local government (business improvement districts) bill 2006
1st stage – Seanad **[pmb]** *Senator Mary O'Rourke*

Mercantile marine (avoidance of flags of convenience) bill 2005
2nd stage- Dail **[pmb]** *Thomas P. Broughan*

Money advice and budgeting service bill 2002
1st stage – Dail

National oil reserves agency bill 2006
Report stage- Dail

National oil reserves agency bill 2006
1st stage - Dail

National pensions reserve fund (ethical investment) (amendment) bill 2006
1st stage- Seanad

National transport authority bill 2003
2nd stage – Dail **[pmb]** *Ciaran Cuffe and Eamon Ryan*

Nuclear test ban bill 2006
1st stage - Dail

Offences against the state acts (1939 to 1998) repeal bill 2004
1st stage-Dail **[pmb]** *Aengus Ó Snodaigh*

Offences against the state (amendment) bill 2006
1st stage- Seanad **[pmb]** *Senators Joe o'Toole, David Norris, Mary Henry and Feargal Quinn.*

Official languages (amendment) bill 2005
2nd stage –Seanad

Planning and development (amendment) bill 2004
1st stage – Dail

Planning and development (amendment) bill 2005
Committee – Dail

Planning and development (amendment) (no.3) bill 2004
2nd stage- Dail **[pmb]** *Eamon Gilmore*

Postal (miscellaneous provisions) bill 2001
1st stage –Dail *(order for second stage)*

Prisons bill 2005
Committee – Seanad

Privacy bill 2006
1st stage- Seanad

Proceeds of crime (amendment) bill 2003
2nd stage – Dail

Prohibition of ticket touts bill 2005
2nd stage – Dail **[pmb]** *Jimmy Deenihan*

Public service management (recruitment and appointments) bill 2003
1st stage – Dail

Pyramid schemes bill 2006
2nd stage- Dail **[pmb]** *Kathleen Lynch*

Registration of wills bill 2005
Committee – Seanad **[pmb]**

Registration of lobbyists bill 2003
2nd stage- Dail **[pmb]** *Pat Rabbitte*

Residential tenancies (amendment) bill 2006
1st stage – Dail **[pmb]**

Road traffic and transport bill 2006
Report – Seanad

Road traffic (mobile telephony) bill 2006
Committee- Dail **[pmb]**

Sea pollution (miscellaneous provisions) bill 2003
Committee – Dail *(Initiated in Seanad)*

Sexual offences (age of consent) (temporary provisions) bill 2006
2nd stage – Dail **[p.m.b.]** *Brendan Howlin*

Sustainable communities bill 2004
1st stage – Dail **[pmb]** *Trevor Sargent*

Totalisator (amendment) bill 2005
1st stage – Seanad **[pmb]**

Tribunals of inquiry bill 2005
1st stage- Dail

Twenty-fourth amendment of the Constitution bill 2002
1st stage- Dail **[pmb]**

Twenty-seventh amendment of the constitution bill 2003
2nd stage – Dail **[pmb]** *Caoimhghín Ócaoláin*

Twenty-seventh amendment of the constitution (No.2) bill 2003
1st stage – Dail **[pmb]** *Arthur Morgan, Deputy Caoimhghín Ó Caoláin, Deputy Seán Crowe, Deputy Martin Ferris, Deputy AengusÓ Snodaigh*

Twenty-eighth amendment of the constitution bill 2005
1st stage- Dail

Twenty-eighth amendment of the constitution bill 2006
2nd stage- Dail **[pmb]** *Michael D. Higgins*

Twenty-eighth amendment of the constitution (No.2) bill 2006
2nd stage- Dail **[pmb]** *Dan Boyle*

Twenty-eighth amendment of the constitution (No.3) bill 2006
2nd stage- Dail **[pmb]** *Dan Boyle*

Waste management (amendment) bill 2003
2nd stage – Dail **[pmb]** *Arthur Morgan*

Water services bill 2003
Report - Dail *(Initiated in Seanad)*

Whistleblowers protection bill 1999
Committee - Dail **[pmb]**

Abbreviations

BR = Bar Review
CIILP = Contemporary Issues in Irish Politics
CLP = Commercial Law Practitioner
DULJ = Dublin University Law Journal
GLSI = Gazette Society of Ireland
IBLQ = Irish Business Law Quarterly
ICLJ = Irish Criminal Law Journal
ICPLJ = Irish Conveyancing & Property Law Journal
IELJ = Irish Employment Law Journal
IJEL = Irish Journal of European Law
IJFL = Irish Journal of Family Law
ILR = Independent Law Review
ILTR = Irish Law Times Reports
IPELJ = Irish Planning & Environmental Law Journal
ISLR = Irish Student Law Review
ITR = Irish Tax Review
JCP & P = Journal of Civil Practice and Procedure
JSIJ = Judicial Studies Institute Journal
MLJI = Medico Legal Journal of Ireland
QRTL = Quarterly Review of Tort Law
The references at the foot of entries for Library acquisitions are to the shelf mark for the book.

Public Interest Law and Beyond An Interview with Robert García

Aideen Collard BL

Aideen Collard BL with Robert Garcia in the grounds of the Old Kilmainham Hospital - Irish Museum of Modern Art

Robert Garcia delivering his paper with a slide of Central American children from the Anahuak Project in the background

As part of a ground-breaking initiative to examine the potential role of Public Interest Law and Litigation (PILL)[1], FLAC (Free Legal Advice Centres) has commissioned a series of conferences and seminars with the generous support of the Atlantic Philanthropies. The aim of the initiative is to explore how PILL can improve the position of disadvantaged groups[2] in Irish Society and FLACs efforts have been spearheaded by the trojan efforts of Noeline Blackwell, Director General. The positive response and level of interest generated both here and abroad over the last year was overwhelming and a host of eminent international speakers all eager to share their experiences have delivered enlightening papers. Most notable contributions were made by Julian Burnside QC from Melbourne who spoke enthusiastically about using the law to change the world, Roger Smith from JUSTICE on the explosive growth of test cases in the UK and by Fiona Doherty from the United States who described her suit against Donald Rumsfeld on behalf of former detainees in Iraq and Afghanistan. Outstanding contributions were also made by Geoff Budlender, who fought against the apartheid regime in South Africa and Andrea Durbach, author of 'Upington', who successfully represented 14 people wrongfully convicted to death for the killing of a white policeman in South Africa.[3] But one speaker who struck a real chord with the audience for his passion and absolute commitment to the cause of Public Interest Law was Robert García, Attorney and Executive Director of the Center for Law in the Public Interest and the City Project in Los Angeles. At the last PILL Seminar in June, I was very privileged to have the opportunity to interview him.

By the time I came to meet with García, I had already listened to him deliver two inspiring papers at the FLAC Conference in October 2005[4] and Seminar in June 2006[5], both held in the magnificent surroundings of the 17th Century Royal Kilmainham Hospital, now home to the Irish Museum of Modern Art. So I was in no doubt that I was in the presence of an exceptional human being, a human rights lawyer who has dedicated his life to a diverse range of Public Interest Law work from defending the convicted on death row to leading the Urban Park Movement in the United States. A graduate from Stanford University, García is a practicing lawyer with extensive experience in public policy and legal advocacy, mediation and litigation involving complex social justice, human health, environmental and criminal justice matters. He has influenced the investment of over $20 billion in deprived communities working at the intersection of social justice and sustainable regional planning. Along the way, he has achieved incredible victories in his tireless fight for equal access of the underprivileged to public resources and in particular, has saved dozens of acres of parklands in Los Angeles from development for the benefit of underprivileged communities. He has received numerous accolades and awards, including the Robert García Environmental Justice Award named in his honour for improving the environment in California, the President's Award from the California Attorneys for Criminal Justice and the Rigoberta Menchú Award.[6] Not only is he an inspirational role model to young aspiring lawyers with a social conscience, but he has also

1 PILL is not a term which is very familiar in an Irish context. It can be roughly defines as a way of working with the law for the benefit of vulnerable and disadvantaged people.

2 The systematically vulnerable groups in Ireland's booming economy include children, the disabled, mentally ill, the homeless, single parents, the elderly, ex-offenders, migrants, refugees & asylum seekers, travellers and the unemployed.

3 For a full set of papers from the Conference in October 2006, see *Public Interest Law in Ireland : The Reality and the Potential - Conference Proceedings* (2006) published by FLAC

4 *Race, Poverty, Justice, Katrina : Reflections on Public Interest Law and Litigation in the United States* (2005) by Robert García, in *Public Interest Law in Ireland : The Reality and the Potential - Conference Proceedings* (2006) published by FLAC

5 *Equal Justice, Democracy and Livability : Lessons from the Urban Park Movement* (2006) by Robert García, available from FLAC

6 From *www.clipi.org* (Website for the Center for Law in the Public Interest in Los Angeles)

been to the forefront in developing Public Interest Law and evolving it beyond pure litigation by successfully utilising diverse strategies to achieve Public Interest Law goals. With this in mind, I was curious to learn what had influenced and motivated García to have such passion, drive and strength of conviction in his work and how he believed Public Interest Law in Ireland could glean from his experiences.

To a greater or lesser degree, as lawyers, our career paths are moulded by our background, influences and life experiences. García is no exception. He was born in Guatemala but came to the United States as a young boy in the 1950's when his family fled the civil war there and was to claim the lives of over 200,000, mostly unarmed indigenous civilians, over the next fifty years. García fondly described the three major influences which impacted on his life and led him to undertake his vocation in human rights and civil liberties work. The first major influence was his grandfather, who was a linotypist and politically progressive as a member of the Labour Union in the Guatemalan government before it was overthrown. *"As a linotypist he read all the time and had to type in an encyclopaedia in Guatemalan for the publisher so he literally had an encyclopaedic knowledge and every time I saw him he was reading. Growing up, I went to a lot of schools and I think one of the ways I dealt with always being the new kid on the block was by constantly reading, owing to the influence of my grandfather."* Secondly, growing up in down town Los Angeles, he attended Catholic schools and the Sisters there had a profound influence on him. *"I remember I did something wrong once and one of the Sisters, for my penance made me read five books about the saints as children and I think the message I took away was that she expected me to grow up to be a saint. I don't think by any means I'm a saint but the notion that each of us has to do what he can to save his or her own soul, I think that's why I do what I do as an Attorney and I try to do justice and not just practice law."*

Enriched by his diverse upbringing, García developed a questioning mind and excelled academically, studying Law at Stanford Law School where he met the person who was to be his third major influence, his Professor. *"Tony Amsterdam has been the architect behind the movement to abolish the death penalty in the Courts in the United States for the last forty years now- I studied with him and once I became an Attorney, I did a case with him and everything I've ever done as a lawyer was influenced by him."* He instilled in García the importance of not just practicing law, but doing justice, and undoubtedly set the foundations for his future career path and dedication to human rights.

Upon graduation from Stanford University, García worked at a large New York Law Firm, litigating international cases against Iran in the wake of the Iranian Revolution and in an unlikely step for a budding human rights lawyer, he became a Federal Prosecutor under Rudy Giuliani prosecuting organised crime, public corruption and international narcotics trafficking cases. When I asked him how this work tallied with his social conscience, he was quick to reassure me that he only accepted the position on the basis that he would never seek the death penalty. It struck me that this added another sense of arbitrariness to the whole issue of the death penalty- that in addition to all the other factors such as race, income, quality of lawyer, State, etc., whether or not an accused faced the death penalty in the United States also depended upon the personal beliefs of the Prosecutor in question. García is vehemently opposed to the death penalty which he describes as being cruel and unusual in the way that being struck by lightening is cruel and unusual. *"It depends on factors which should have no role whatsoever in deciding who lives and who dies. We are not qualified as human beings to decide who should live and who should die and certainly the Nazis couldn't make those decisions……when we try to make those decisions, we are no better than Nazis."* It seems that García himself became dispirited by his role as a Prosecutor. *"I did not like the fact that how hard I worked made the difference between someone going to prison or not and the longer I worked, the longer somebody went to prison."*

Garcia also spent several years as a Defence Attorney representing people on death row in Georgia, Florida and Mississippi. Probably his most high-profile success during this time was working with Johnnie Cochran, Stuart Hanlon and others to overturn the conviction and death penalty in the case of the Black Panther member, Geronimo Pratt following twenty seven years in prison for a crime he did not commit. Pratt, a black man, was wrongfully convicted of the kidnap and murder of a white teacher as a result of a frame-up by the Los Angeles Police and Prosecutors as part of the war against the Black Panther Party conducted by the FBI and the LAPD.

However, the pressures of defending detainees on death row took their toll on García and he talked candidly about the tremendous pressure involved in knowing that how you conduct a case can mean the difference between the life and death of a client. *"I remember the first time I did a Supreme Court brief on behalf of a client on death row, I was sitting in my office writing and I saw red on the paper and I realised I was having a nose-bleed from the stress- it puts personal stress on the Defence Attorney, personal stress on the Prosecutor and personal stress on the Judge- there are Judges who resign from the Bench because they don't want to sentence people to death."* García also taught part time in Stanford Law School and served on the Board of Editors of the Stanford Law Review but turned down the opportunity of a career in academia as a professor owing to what he calls its 'monastic nature'. However, he continues to lecture widely and has published extensively on law and social issues.[7] Ultimately, he made a smooth transition from Criminal Law to Public Interest Law bringing with him and building upon his invaluable knowledge and experience.

García worked as an Attorney with the NAACP Legal Defence & Education Fund and became Executive Director of the Center for Law in the Public Interest in Los Angeles, which has just celebrated its 35th Anniversary. He describes the role of the Center as empowering communities through a collective vision for a comprehensive and coherent web of parks, schools, beaches, forests and transportation that promote human health, a better environment and economic diversity for all in a multi-cultural society. *"Our goal is equal access to public resources with equal justice, democracy and liveability for all."* His first major civil law victory was the landmark environmental justice class action in *Labor/Community Strategy Center v. Los Angeles County Metropolitan Transportation Authority (MTA).* The plaintiff class alleged that MTA operated separate and unequal bus and rail

7 Robert García's other publications can be sourced on *www.clipi.org* and include: *The Urban Park Movement : Equal Justice, Democracy and Livability in Los Angeles*, chapter in Dr. Robert Bullard's book on Environmental Justice to be published by the Sierra Club (forthcoming 2005); *Cross Road Blues : Transportation Justice and the MTA Consent Decree*, chapter in book Running on Empty edited by Prof. Karen Lucas (2004) ; *Healthy Children, Healthy Communities : Parks, Schools, and Sustainable Regional Planning*, 31 Fordham Urban Law Journal 101 (2004)

systems that discriminated against bus riders who were disproportionately low income people of colour. The parties settled the case after two years of litigation and mediation through a Court-ordered Consent Decree in which the MTA agreed to invest over $2 billion in the transport system, making it the largest civil rights settlement ever. MTA agreed to improve transportation for all the people of Los Angeles by reducing overcrowding on buses, lowering transit fees and enhancing country-wide mobility. García proudly recalled what this victory meant to him personally. "*After two years of litigation, with a team of twenty six attorneys who spent 10,000 hours on the case, 3,300 hours of which were mine, MTA agreed to settle the case by investing over two billion dollars to improve the bus system in Los Angeles making it the largest civil rights settlement ever. So that was a huge victory, we learned a great deal and the central issue was equal access to public resources.*"

Spurred on by this success, over the past five years, the Center for Law in the Public Interest focused on what has been coined the 'Urban Park Movement' which adopted diverse strategies to save lands from development and convert them into public parks. To set the scene to this aspect of his work, García described the plight of Los Angeles as being park poor with unfair park, school and health disparities. He used a map to starkly illustrate the unequal distribution of parklands in favour of the wealthy and privileged areas and explained that: *"Children of colour disproportionately live in communities of concentrated poverty without access to proper play areas or parks. The human health implications of the lack of places to play and recreate are profound. These children disproportionately suffer from obesity, diabetes and other diseases related to inactivity. This is the first generation in the history of the country in which children will have a lower life expectancy than their parents if present trends in obesity and inactivity continue."*

It was García's goal of achieving equal justice, democracy and liveability for all that drove him towards further landmark successes, most notably, the 'Cornfield' case. The 32 acre Cornfield was the last vast open space in the heart of Los Angeles near Chinatown in an area where there were neither green parks nor a blade of grass in any of the school playgrounds. In 1999, the City of Los Angeles and wealthy developers proposed building 32 acres of warehouses on the site without an environmental impact report. The Center brought together a diverse alliance of over 35 community, civil rights, environmental, business and civic organisations and leaders known as the Urban Park Alliance to stop this development and convince the State to purchase the site for a park. In this case, the Alliance challenged the proposed warehouses as one more product of discriminatory land use policies that long deprived communities of parks and recreation. The Alliance filed a complaint and persuaded the US Secretary of Housing and Urban Development to withhold any subsidies for the warehouses unless there was a full environmental review which considered the park alternative and the impact on people of colour and low income. Through this process, they were able to persuade the State to buy the site for what was to become the new Los Angeles State Historic Park. The Los Angeles Times heralded the Cornfield a 'heroic monument' and a 'symbol of hope'.

The Urban Park Alliance continued to gather momentum and was instrumental in stopping a power plant and rubbish dump in favour of a two square mile park in Baldwin Hills, the historic heart of African-American Los Angeles, which will be the largest urban park in the United States in over a century - bigger than Central Park in New York or Golden Gate Park in San Francisco. Last year, it also won an environmental law suit against the City and another developer to stop a commercial project at a former rail-yard known as Taylor Yard. It persuaded the State to purchase it and create a 40-acre park on the banks of the Los Angeles River, thereby greening the banks of the most environmentally degraded river in the world. It is notable that throughout this case, García represented the interests of Anahuak (an organisation for underprivileged children from Central America including Guatemala) and is very much of the belief that *"our children are the future".* These children were delighted with the new park space to play football and spend time with their families. For García, this had a deeper meaning and satisfaction as he had been afforded an opportunity to help less fortunate children from his home country to enjoy the quality of life to which they were entitled. García says of these victories: *"When we first won the Cornfield case, people dismissed that as a flash in the pan, when we stopped the power plant in Baldwin Hills, we started to build momentum and with Taylor Yard and three victories, we had a real Urban Park Movement going."* These cases exemplify the struggle by low-income people of colour in Los Angeles for liveable communities and demonstrate the power of utilising diverse strategies to achieve Public Interest Law ends. They set the trend for further similar successes in Los Angeles and beyond.

Intrigued as to how a small Law Centre with limited resources could achieve such incredible outcomes, I ask García about the strategies and mechanisms utilised. It is also evident from his papers that García does not view recourse to the Courts as necessarily being the best way of achieving Public Interest Law goals so I begin by asking him about his apparent reluctance to resort to litigation. He informed me that unfortunately, with an increasingly conservative Courts system and Congress, it is becoming harder to achieve civil rights and environmental victories and it would be considered malpractice to bring certain claims in the current climate. The power of litigation was also curtailed by the US Supreme Court decision in *Alexander v. Sandoval 532 US 275* (2001), which held that there was no standing for private individuals or groups (such as the class action in the MTA Case) to file a suit or enforce the discriminatory impact regulations issued by federal agencies under Title VI of the Civil Rights Act 1964. According to García, this was a step to roll back civil rights protections and close the courthouse door to individuals and community organisations challenging practices that adversely and unjustifiably impact people of colour and low income. *"So the bad news is that we can't win cases as easily anymore, and as a matter of survival, the Center for Law in the Public Interest for the past five years has sought to redefine Public Interest lawyering for the 21st Century. That may sound grandiose but its not. It is a matter of survival."*

García goes on to describe how the Center has evolved to address the limitations of litigation by adopting a diverse range of alternative strategies, including developing a collective vision to bring people together, coalition building and community organising, multidisciplinary

research and analysis, strategic media campaigns, legal advocacy outside the Courts, creative engagement of opponents to find common ground within the context of a broader campaign. He is however at pains to point out that litigation still plays an important role in the overall context of Public Interest Law and will depend upon the requirements of each case. Considering the procedural obstacles to Public Interest Law and litigation in the Irish Courts, including the difficulty in obtaining funding, *locus standi* issues and the risk of costs orders[8], such strategies are certainly worthy of serious consideration.

I ask García to elaborate on how these strategies operate in practice, whether they could be easily adopted in Ireland and in particular, how to mobilise communities to become a powerful force against State authorities and large companies, which have unlimited resources and power. He explains that the Center works closely with community-based organisations and that this is key to 'coalition building and community organising'. On this point, it occurs to me that there are numerous voluntary and community organisations within Ireland undertaking similar work and all striving to achieve similar goals without cohesive networking or liaison. As a result, services are provided on an *ad hoc* and piecemeal basis, leading to either scarcity or duplication and without obtaining the benefits of shared experiences and a united front. However, it is very heartening to note that through its Public Interest Law initiative, FLAC have been in contact with over 400 such organisations, thereby paving the way for future networking and cohesion in this area.

The Center for Law in the Public Interest in Los Angeles has also used multi-disciplinary research and analysis as a powerful tool for persuading the State to succumb to its aims. Statistics, graphs and maps illustrating the extensive inequalities between the rich and poor, along with reports demonstrating the benefits of parks on communities, have had a massive impact in backing up their campaigns. García describes this strategy: *"We've marked on maps, access to parks in Los Angeles by race, ethnicity, income, poverty, access to a car and so on using GIS tools and 2000 census data, along with historical analysis demonstrating that the distribution of parks and who they benefit is not an accident of unplanned growth but the result of a continuing pattern of discriminatory land use planning in the United States."*

The Center also engages in strategic media campaigns, openly providing details of its various causes of action to reporters in an effort to ensure that they provide balanced coverage and fully enable public participation. Coupled with public education and innovative methods of alternative dispute resolution, such as those used to broker the settlement in the Cornfield case, these strategies have become the preferred means of achieving Public Interest Law ends in the United States.

In conclusion, I ask García how he believes that Ireland can learn from his experiences in the United States. He modestly points out that this is very much a two way process and he is in Ireland as much to learn from the Irish experience as to share his own experiences. *"Knowing that we are not alone strengthens us because we face similar challenges. There are brilliant lawyers around the world addressing the very same issues we're confronting on a daily basis."*

He acknowledged that Public Interest Law is still very much in its infancy in Ireland and its untapped potential for enforcing the rights of the underprivileged in a rapidly changing society is enormous. The vulnerable groups in Ireland's booming economy include children, the disabled, mentally ill, the homeless, single parents, the elderly, ex-offenders, migrants, refugees, travellers and the unemployed. In the representation of the civil rights of such groups, he would like to see FLAC and other bodies involved in Public Interest Law take on board some of the lessons learned in the United States and in particular, the successful use of a diverse range of strategies for achieving its goals.

Undoubtedly, García's experiences in the United States will prove invaluable in the ongoing examination and analysis of the potential role of Public Interest Law and Litigation (PILL) in Ireland, following on from the preliminary research already carried out by Mel Cousins BL[9]. Garcia also acknowledged the importance of building upon pioneering initiatives already in place such as the LEAP (Legal Education for All) Project and the Voluntary Assistance Scheme operated through the Bar Council which provides *pro bono* legal assistance to NGO's[10]. Finally, he complemented FLAC and the Atlantic Philanthropies on their fantastic job in organising such an impressive and successful series of conferences and seminars. He agreed with me wholeheartedly, that this initiative is just the beginning of an exciting venture to utilise Public Interest Law and Litigation (PILL) in improving the position of disadvantaged and vulnerable groups in Irish Society and beyond. I left from my interview with Robert García greatly energised by his infectious enthusiasm and enriched by his experiences and the knowledge of what can be achieved against all the odds through sheer conviction and commitment. ●

The Dream begins with Children playing at the opening of the Los Angeles State Historic Park with City Hall and the skyline in the background on 23rd

8 *Procedural Obstacles to PILL* – FLAC Conference, 12th May 2006, Papers available from FLAC

9 In his preliminary research, Mel Cousins BL has identified four strands of Public Interest Law and Litigation (PILL), namely, law reform, legal education, community legal education and public interest litigation. See Report entitled '*Public Interest Law and Litigation in Ireland*' by Mel Cousins BL (October 2005) in the FLAC *Public Interest Law Conference Proceedings* cited at n4 above at p.13.

10 For further information on the Bar Council's Voluntary Assistance Scheme, contact the Scheme Administrator, Jeanne McDonagh at *jmcdonagh@lawlibrary.ie*, Telephone: 01 8175014

The Land and Conveyancing Law Reform Bill 2006: An Overview

Neil Maddox BL

Introduction

The recent publication of the Land and Conveyancing Law Reform Bill 2006 marks the beginning of the final phase of a project, started many years before, to codify, modernise and simplify the law relating to real property.[1] It seems likely that the contribution made by Professor J.C. Wylie to this endeavour, and to the understanding of land law generally, will be recognised by the new act bearing his name as its moniker.

This is a project that should be commended as the rarest of things– far-sighted law reform. Irish land law is bedevilled with peculiarities and anachronisms. It is a system of law designed to regulate property relations in a feudal society, not a modern capitalist economy. To date, the law has been adapted to modern conditions by piecemeal reform. The last real legislative initiatives took place in the nineteenth century, but those acts have become outmoded. This new bill is, of necessity, ambitious in its scope. It seeks to repeal all pre-1922 legislation relating to land and re-enact, often in substantially amended form, all of this law in a single piece of legislation. It proposes to abolish concepts that have long fallen into disuse and repeal rules which no longer serve any purpose. As such, it will simplify the job of the lawyer and judge and ease the burden on the all too frequently perplexed law student.

However, this will not happen immediately; indeed, the bill's introduction will have the opposite effect in the short term. Conveyancers, in particular, will have to be familiar with the old law and the new, and the interaction between the two will add another level of complexity to legal practice in this area in the years immediately following the commencement of the act. A comprehensive summary of the proposed changes is beyond the reach of this article. Its purpose is, instead, to give a brief overview of the main changes that are proposed.

Ownership of Land[2]

The new bill proposes to abolish the concept of feudal tenure. The State position as the ultimate intestate successor to a deceased person's estate and its rights as regards state property will be maintained. Statutory powers given to the State over land (such as compulsory purchase orders) will not be affected, as they are derived from legislation and not from the obsolete notion of tenure. This will not affect the freedom to dispose of a fee simple interest, the distinction between freehold and leasehold ownership, or the concept of estates which is to be retained, albeit in modified form.

On commencement of the act, the only freehold legal estate that may be created or disposed of will be a fee simple. The future creation of fee farm grants, leases for lives and fee tails will be forbidden. Almost every fee tail which could have been converted to a fee simple under the Fines and Recoveries Act 1834, immediately prior to the commencement of the act, will automatically be converted to a fee simple. Life estates will no longer be legal estates and will vest as equitable interests.

Tenancies at will and tenancies at sufferance will be excluded from the definition of a landlord and tenant relationship. The bill sets down a list of estates and interests which will subsequently comprise ownership of land. However, it also recognises that other estates may exist in equity that are not specified. This would seem to have regard to estoppel rights and rights under constructive and resulting trusts. The purpose of this part of the bill is mainly concerned with proscribing the number of legal estates that will comprise the ownership of land in the future. It is not, it would seem, to restrict or interfere with the courts inherent and flexible jurisdiction to recognise differing equities on the property.

Fee simple reversions or remainders (i.e. where the owner of the interest is not entitled to possession until the happening of a particular event) will now be dealt with on the basis of a trust arrangement. For example, where land is given to X for life, remainder to Y in fee simple, X's life estate and Y's fee simple remainder will be equitable interest and a trustee will hold the legal estate on their behalf.

Trusts of Land[3]

Almost all settlements and trusts relating to land will be come within the ambit of part 4 of the bill, including constructive and resulting trusts. Trusts of land held for a charitable purpose are exempted from the operation of this part and will continue to be governed by their own law. The existing body of law governing the operation of trusts will still be valid, subject of course, to the provisions of this part. As already adverted to, life estates will, in the future, be equitable interests governed by a trust arrangement, but this does not relieve the life owner's liability for waste. The presumption that a life owner who has not been heard of for seven years is dead is to be re-enacted, and a presumption will operate that a party to a conveyance has attained full age.

Section 19 governs the identity of trustees under different trust arrangements. The trustees under strict settlements, existing prior to the commencement of this part of the bill, will be the tenant for life and the trustees of the settlement. Under the Settled Land Act 1882, the tenant for life currently has some power to deal with the land and the purpose of this provision is to preserve a role for him or her in future dealings with the property.

1 A copy of the bill with an accompanying explanatory memorandum can be viewed at www.oireachtas.ie. The bill, which was published in June, implements many, but not all of the recommendations contained in Law Reform Commission, Report on Reform and Modernisation of Land Law and Conveyancing Law (Dublin, 2005).

2 Part 2, sections 9-14.

3 Part 4, sections 18-22.

The trustees for strict settlements, express trusts of land and for arrangements where land vests in a minor, any of which are created after the commencement of this part, may be nominated in the trust instrument. If no trustees are so specified, section 19(1)(b) sets down a list of priority for the appointment of a trustee; if any person is given a power of sale, or consent or approval to a power of sale, they will be deemed trustee; if there is no such person, then any person who has the power to appoint a trustee of the land will be deemed the trustee; if that person does not exist, then the settlor, or, for a trust created by will, the personal representatives of the testator will be the trustee(s).

For land subject to implied, resulting, constructive or bare trust arrangements, the trustees shall be the holders of the legal estate. If necessary, application may still be made to court to appoint trustees. The power of the trustees to convey and deal with the land as if they were full owners is to be given statutory expression. Specifically, the bill permits trustees to allow the beneficiary to occupy the land on prescribed terms or to sell the land and reinvest the proceeds in the purchase of another property with a view to allowing the beneficiaries reside there. However, these powers will still be subject to the general law of trusts (i.e. they must be exercised in the interests of the beneficiaries) and may be qualified in the trust instrument or by court order.

This part of the bill also deals with the position of the purchaser of trust property. It states that any conveyance of the trust property by the trustees will give the purchaser good title to the property, free from any such equities, which will then attach to the proceeds of sale. This will be irrespective of the fact that the purchaser had notice of these equities or of the fact that the beneficiaries were in actual occupation of the land at the time of sale.

There are several qualifications and restrictions on this particular provision. Where an express trust is involved, the consent of at least two trustees or a trust corporation will be required. This provision will not apply to fraudulent dispositions, equitable mortgages or equities to which the conveyance is expressly made subject. If land is held for a minor otherwise then by express trust, this equity may be protected by registration in the Registry of Deeds (for unregistered land) or Land Registry (for registered land). The provisions of the Family Home Protection Act 1976 will not be affected by this section. Provision is also made for the resolution of any disputes relating to the trust to be resolved in a summary manner. The court will be given a broad discretion to make whatever order or inquiries it deems necessary to resolve such disputes. It would seem that the beneficiaries of the trust could object to the selling of the trust property under this particular provision.

Freehold Covenants[4]

The complicated rules governing the enforceability of freehold covenants against successors in title are to be abolished. The rule of ***Tulk v. Moxhay***[5] is to be scrapped to the effect that positive and negative covenants will, in future, run with the land and be enforceable against future owners. A covenant that is clearly not intended to bind successors in title will be unenforceable by, or against them.

Freehold covenants will still be alterable or dischargeable by agreement. The court is also to be granted a new power to discharge or amend such covenants, if they constitute an unreasonable interference with the enjoyment of the property. The bill sets out a detailed, non-exhaustive list of factors to be taken into consideration by the court when exercising this power. These include: the development plan for the area, any change in the character of the area, whether any benefit is secured to the dominant owner, the amount of time which has elapsed since the covenant was entered into and the reasons for it at the time. The court will also be able to award compensation if any loss accrues as a result of its order modifying or discharging a freehold covenant.

Incorporeal Hereditaments[6]

Part 7 of the act deals with easements, ***profits á prendre***, and rentcharges. In most cases, it is proposed to reduce the period of user necessary for acquisition of easements and ***profits*** by prescription to 12 years. This coincides with the limitation period for adverse possession. If the owner of the land is a state authority, the period is 30 years. If the land is a foreshore, the relevant period is 60 years. 'User as of right' is defined in terms akin to those already established in law, as being 'enjoyment without force, without secrecy and without the oral or written consent of the servient owner'.

After commencement, legal title to an easement will only be established if there is an order of court and that order must be registered in the Land Registry or Registry of Deeds as appropriate. If both of these conditions are not fulfilled, it would appear the interest will still exist in equity. The requirement that the period of user be without interruption is reproduced in the bill and such interruption must still last for a continuous period of one year to prevent prescription.

Once 12 years of user have taken place after the commencement of the act, all claims to which this new period applies will have to be based on the new law, irrespective of any period of user that occurred prior to commencement. Where a period of user under the old law is near completion by the time of commencement, a claimant may bring a claim on the basis of the old law within three years of such commencement. Once this three year period has expired, the relevant period will become twelve years prior to the initiation of the court proceedings.

If there is continuous period of non-user of twelve years of the easement or ***profit***, a presumption of extinguishment will operate. This will not apply to interests which have been registered in the Registry of Deeds or the Land Registry, or to interests expressly created by the parties. A court will still be able to find that an easement or ***profit*** has been extinguished if there is clear evidence that there was an intention to abandon it.

Provisions altering the position relating to the reservation of such rights by a grantor in a conveyance are to be introduced. The rule that a reservation requires a re-conveyance of the interest by the grantee is to be removed. This will mean that the deed will be construed against the grantor, which is in line with the normal rules of construction.

The more arcane methods of acquiring easements or ***profits*** by implication are to be abolished. Acquisition at common law, under the doctrine of lost modern grant or under the rule in ***Wheeldon v. Burrows***[7] will no longer be possible. If an easement or ***profit*** is not expressly mentioned in a conveyance, there is provision that allows it to be recognised by implied reservation. In such a circumstance, the court must believe it reasonable to assume that such a reservation was in the contemplation of the parties (or would have been in the contemplation of the parties if they had adverted to it) at the time of the conveyance, as being included in it. Section 6 of the Conveyancing Act 1881 will be re-enacted, but modified. It will no longer operate to create new rights, to convert any quasi-right into a new one or to extend the scope of an existing right.

4 Part 7, chapter 4, sections 46-48.
5 (1848).
6 Part 7, chapters 1-2, sections 31-40.
7 (1879) 12 Ch. D. 31.

The future creation of rentcharges is to be prohibited with the exception of those created pursuant to a contract concluded before commencement, by statute or by court order.

Co-ownership

Part 6 of the act deals with co-ownership and partition. Currently, severance of a joint tenancy occurs in law if one party alienates his interest in the land by a conveyance or contract of conveyance, or if he or she acquires a further interest in the land. In future, such transactions will be void unless the written consent of the other joint tenant(s) is obtained. The vesting of an estate in a liquidator (or official assignee in the case of bankruptcy) or the registration of a judgment mortgage will not operate to sever a joint tenancy.

Severance in equity will still occur if there is mutual agreement by the parties or if it can be inferred from their conduct that severance has occurred. Thus, a joint tenancy will still be severable in equity by a 'course of dealing' of the joint tenants. However, it would seem that such a course of dealing cannot operate to sever the joint tenancy, if it only comprises of the unilateral actions of one party.

After commencement, those wishing to seek partition, or sale in lieu of partition, will have to apply under the new act. The applicant will have to have an estate or interest in the land to apply for such an order. Since all legal mortgages will operate by way of charge, and no estate or interest will vest in the mortgagee, there is an express provision that includes mortagees as persons having an interest in the property for the purposes of making the application. The court will be granted a broad discretion to make 'any such order relating to the land as...[it] thinks fit in the circumstances of the case', attach such conditions as it sees fit and will also have the option of making no order. It may also order 'accounting adjustments' to be made between the parties. This may include payment of rent to other co-owners where one co-owner is in exclusive occupation of the property and the payment of compensation to other co-owners where one co-owner has incurred disproportionate expenditure or received disproportionate benefits from the land. The new act will not in any way affect the jurisdiction of the court to make property adjustment orders under the Family Home Protection Act 1976, or the Family Law Acts 1995 and 1996.

Section 30 adopts the provision of the Bodies Corporate (Joint Tenancy) Act 1999 which entitles corporations to hold land as joint tenants, as if they were individuals. A company may hold with another company or with a person, and, on dissolution, the right of survivorship vests in the other joint tenants.

Conveyancing[8]

Contracts Relating to Land[9]

The requirement, in the Statute of Frauds that contracts for the sale of land must be evidenced in writing will now be contained in the new act. This will not affect the ability to enforce the contract in equity. Thus, the remedy of part performance will still be available. Section 50 overrules the nonsensical decision in *Tempany v Hynes*[10] to the effect that the entire beneficial interest in the land will pass to the purchaser once an enforceable contract for the sale of the property comes into existence. The vendor will still be under a duty to maintain the land as long as he or she retains possession and will still be liable for any loss or damage that occurs within the meaning of the contract of sale.

The vendor will retain the right to rescind if the purchaser fails to complete or breaches the contract. The restriction on the right to recover damages by a purchaser against a vendor who fails to make good title, known as the rule in *Bain v. Fothergill*, is to be abolished. Section 9 of the Vendor and Purchaser Act 1874, which provides for Vendor and Purchaser Summonses, is to be re-enacted. Section 52 dictates that, where a court refuses to order specific performance against a purchaser, it may order the return of part or all of the deposit paid by the purchaser.

Title[11]

In accordance with conveyancing practice, the act will reduce the statutory period for deducting a good root of title from 40 to 20 years. The rule that where the title commences with a lease or fee farm grant, the purchaser may require its production is to be retained.

The current law which dictates that the intended grantee or assignee of a lease may not call for the title to the fee simple or any superior tenancy, is also to be re-enacted, but qualified. If the tenancy to be granted is of more than five years duration, the grantee may:

In the case of a tenancy to be derived from a fee simple, call for a copy of the conveyance of that interest to the grantor; and

In the case of a sub-lease, call for a copy of the superior lease from which it is derived and a copy of any immediate assignment of that superior lease to the grantor.

The rule in *Patman v. Harland*[12] is to be abolished and a purchaser will no longer be fixed with notice of any defect in the title which would have been discovered if he or she had not been prevented from calling for certain title documents under this section.

The substance of all other provisions relating to title in the Vendor and Purchasers Act 1874 and the Conveyancing Act 1881 are to be re-enacted and the only significant alteration in these areas will be one of nomenclature.

Deeds[13]

A modern deed will, in future, be the only means of conveying a legal estate in land, subject to the common exceptions such as assents by personal representatives, a grant or assignment of a tenancy not required to be done by deed, and a surrender or conveyance taking effect by operation of law. Some of the older methods of transferring a legal estate (feoffment with livery of seisin, bargain and sale, covenant to stand seised) are to be abolished. The Statute of Uses 1634 is to be repealed and a voluntary conveyance of land will no longer create an implied resulting trust in favour of the grantor. An individual will no longer be required to use a seal to execute a deed, but this will still be necessary for corporations. Any requirement to use a deed to give authority to deliver a deed is to be abolished.

There will be new requirements which must be fulfilled before a document can be considered as a deed. First, it will have to be described at the head of the document in an appropriate manner (e.g. conveyance, charge, deed, indenture, lease) or expressed it to be executed or signed as a deed. Secondly, the document will have to be executed in the prescribed manner. This may still be carried out be signing and sealing the deed.

Alternatively, the deed will be duly executed if signed in the presence of an attesting witness, or if signed at the direction of the individual in the presence of an attesting witness or, acknowledged by the individual in the presence of a witness who attests the signature. The law on the execution of deeds by corporations will remain the same. An instrument executed by a foreign corporation will be a deed if it follows the legal requirements governing execution in the jurisdiction where the company is incorporated.

8 Part 8.
9 Ibid., chapter 1, sections 49-53.
10 [1976] I.R. 101.
11 Part 8, chapter 2, sections 54-59.
12 (1881) 17 Ch D 353
13 Ibid., chapters 3, sections 60-71.

The requirement that a deed must be delivered is to be retained. The mere affixing of the corporate seal by a corporation will not constitute full delivery. A corporation will be permitted to deliver a deed in escrow i.e. subject to a condition that must be satisfied before it becomes effective.

A person may still convey property to him or her self jointly with another. There will also be a provision allowing a person to convey land to him or her self in a different capacity, providing the interest is not leasehold e.g. a trustee conveying property to himself as a beneficiary under a trust or a personal representative issuing an assent to himself. A covenant entered into with oneself will still be unenforceable.

The need for words of limitation for unregistered land is to be removed. Any conveyance of unregistered land without words of limitation will pass the whole of the interest the grantor possesses unless a contrary intention appears in the deed.

Much to the joy of law students, the rule in ***Shelly's Case*** is to be abolished. The rule provides that a conveyance "to A for life, remainder to his heirs" will vest a fee simple in A. After the commencement of the act, A will take an equitable life estate, with his heirs taking a fee simple remainder. Provision will be made so that the new law may be used to cure defects in conveyances executed prior to the commencement of the act, so long as it does not affect rights acquired under the old law. However, such rights will have to be claimed within twelve years and registered, and the court will have discretion to refuse to make such an order if it believes no substantial injustice will be done to any party.

The law on fraudulent dispositions is to be simplified and any voluntary disposition of land made with the intention of defrauding a purchaser will be voidable by that purchaser. Any conveyance of property made with the intention of defrauding a creditor or other person will be actionable by any person prejudiced. This section does not affect bankruptcy/corporate insolvency law and a ***bona fida*** purchaser for value will be given statutory protection

Mortgages[14]

The most substantial change proposed by the bill in this area is to make a charge the only means of creating a legal mortgage over unregistered land. This will mean that legal mortgages over unregistered land will operate in an identical manner to legal mortgages over registered land. The creation of equitable mortgages will not be affected and they may still be created informally (e.g. by the equitable deposit of title deeds). Welsh Mortgages are to be abolished, as will the remedy of foreclosure.

The new type of mortgage of unregistered land will confer the normal security rights and remedies on a mortgagee, subject to the changes introduced in the act. Section 93 states that a mortgagee's powers and rights will not, in the future, be exercisable until 28 days notice is given to the mortgagor and the exercise of such rights will have to be necessary to protect the mortgaged property or to realise the mortgagee's security. A mortgagee will only be allowed take automatic possession of the mortgaged property if he or she obtains the written consent of the mortgagor. Otherwise, there will have to be a court order.

If it appears to the court that the mortgagor may, within a reasonable period of time, be in a position to pay arrears due on foot of the mortgage, the court will have a discretion to: adjourn the matter, stay the enforcement, postpone the date for delivery of possession or suspend the order for a period of time it deems reasonable. A mortgagee will be able to apply for possession of the land in the District Court if he or she has reasonable grounds for believing the mortgagor has abandoned the property or if urgent steps are necessary to prevent its deterioration or the entry of trespassers.

A mortgagee in possession of the mortgaged property will be obliged to proceed to sale in a reasonable time. If this is not appropriate, he or she will be put under an obligation to lease the property and use the rent received to lower the mortgage debt.

A mortgagee's possession in these circumstances will no longer be adverse to the mortgagor's title. The substance of the old law relating to the statutory power of sale will be preserved, as will the duty to account, and the statutory duty to obtain the best price reasonably possible will be extended to all mortgagees. It will be an offence not to notify the mortgagor of the result of the sale. Even though the mortgagee only has a charge, when exercising a power of sale he will have the ability to vest the mortgagor's entire estate in the purchaser, free from encumbrances that rank below the mortgage.

Judgment mortgages[15]

Of greatest relief to practitioners in this area, is the plan to replace the provisions of section 6 of the Judgment Mortgage (Ireland) Act 1850. The bill envisages that a new, and almost certainly, simpler procedure will be enacted by regulation under the Registration of Deeds and Title Act 2006. Section 99(2) of the Companies Act 1963 is to be amended, so as to give judgment mortgages the same priority in winding up as other charges. The power of a sheriff to seize land subject to a tenancy under a writ of ***fiere facias*** will be abolished. The remaining provisions mostly codify the existing law. A judgment mortgage is still to be treated as a voluntary conveyance when looking to priority, but a judgment mortgagee will have the same priority when the debtor becomes insolvent as an ordinary mortgagee.

Future Interests[16]

After commencement, future interests, whether vested or contingent will exist in equity only. There will be two exceptions to this: a possibility of reverter and a right of entry or re-entry attached to a legal estate, as these interests cannot exist in equity. The inordinately complex rules currently governing future interests are to be abolished; namely, the common law remainder rules, the rule against perpetuities, the rule in ***Whitby v. Mitchell***,[17] the rule in ***Purefoy v. Rogers***,[18] and the rule against accumulations. The abolition of these rules will, as a consequence, allow trusts and settlements to be created which will govern property ownership far into the future. Consequently, it is envisaged that this part of the bill will be commenced at the same time as other legislation which will make allowance for the variation of trusts. This will allow future owners to modify a scheme that has become outdated.

Conclusion

The recent publication of this bill may indicate that it will be passed in the near future. It does not follow that it will be commenced in its entirety immediately thereafter. It seems probable that the various sections will pass into law, possibly in stages, over a more prolonged time period than is usual.

At this point, with the exception of the transitional provisions which allow the old law to be utilised for a short period of time, almost all of the most common applications relating to land will have to be brought under the new act. There will inevitably be some teething difficulties at this stage; as such a large body of law is assimilated into the legal system. However, the greater benefit should not be forgotten. Applicants for partition, judgment mortgages, prescription, sale on foot of a mortgage etc. will then be relieved of the onerous task of trawling through the complexities and ambiguities of antique statutes. There will be a single body of law, drafted in modern language, to which reference can be made in a great many areas of land practice. This is to be greatly welcomed. ●

14 Part 9, sections 86-107.
15 Part 10, sections 111-119.
16 Part 3, sections 15-17.
17 (1890) 44 Ch.D. 85.
18 (1671)

A Goodyear for Auld Habits - Formalising the Practices of Plea Bargaining

Keith Spencer*

Introduction

The very practice of plea bargaining in this jurisdiction is still denied by some. However, an earlier article dealing with this subject[1] acknowledges that such a practice persists, shrouded not only in secrecy but a fog of dubious constitutionality. This author contends that the practice, which has a tendency to produce polarised opinions, should be placed on a more open and formalised footing.

Prosecutorial Plea Bargaining

Various manifestations of plea bargaining exist and are regularly practiced by prosecution and defence counsel, these include charge bargaining, fact bargaining, and plea bargaining *per se*. Charge bargaining takes two forms, the first relates to the number of charges, where the accused agrees to plead guilty to fewer charges in return for the remaining charges to be dropped, the second relates to the seriousness of the offence charged, where the accused agrees to plead guilty to a lesser charge. Fact bargaining, amounts to an agreement by the accused to change his plea to one of guilty in return for a prosecutorial promise to state the facts in a particular way so as not to emphasise aggravating features that may be present on the facts of the case. Finally, plea bargaining itself, strictly speaking, describes a guilty plea in return for the usual reduction in sentence tariff that will be given by a judge, which is usually set at one third of the actual sentence. The benefits of plea bargaining are the focus of this section and it is submitted, are experienced by all the main actors in the criminal process, namely, the accused, the prosecution, victims, witnesses, and the criminal justice system as a whole.

Prosecution

The main advantage that accrues to the prosecution from this process is that they do not have to endure the hazards and unpredictability of trial, and they are assured of at least one conviction. This certainty of outcome, is a considerable advantage when one considers that sixty per cent of contested cases end in acquittal.[2]

Defence

Upon any view, it is the defence that reaps the greatest reward from the process of plea bargaining, namely, the reduction in sentence, offence seriousness, or number of offences charge. This can be seen in economic terms as the State purchasing the guilty accused's waiver of his right to a jury trial, by holding out the prospect of a reduction in the eventual penalty. In this way, it puts a concrete value on rights, as well as respecting the accused's right of autonomy in allowing him to choose whether to waive his right, in sharp contrast to the strong paternalist leanings, of some legal systems which do not allow guilty pleas.[3] A guilty defendant can effectively reduce his sentence, sometimes by up to half, when he avails of plea bargaining to the fullest extent by 'double dipping' in the various options. He can do this first, by urging his counsel to charge bargain or negotiate the terms in which the prosecution will present his case to the judge, this will require that he pleads guilty and in doing so, not only will he receive a lower sentence for the lesser offence, or, the tamed factual account of such offence, but he will receive the sentence discount which should vary depending on how early in the process the guilty plea comes forward. Aside from these very material considerations, the accused will benefit from an early guilty plea by spending less time in the criminal justice system.

Victim

Victims too, experience benefits. Many victims wish to be spared the ordeal of testifying and facing cross-examination at trial and reliving the crime that was perpetrated against them. This rationale was enumerated by Finlay CJ., in *The People (Director of Public Prosecutions) v Tiernan*[4] when he considered a guilty plea to be a significant mitigating factor entitling the accused to a discount in sentence,[5] and said;

> "I have no doubt, however, that in the case of rape an admission of guilt made at an early stage in the investigation of the crime which is followed by a subsequent plea of guilty can be a significant mitigating factor. I emphasise the admission of guilt at an early stage because if that is followed with a plea of guilty it necessarily makes it possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination."

In this way, the victim is prevented much stress and anxiety which abounds during the period before trial and which is amplified and prolonged during the trial itself. It might be argued that the more robust victim will be denied his desire to have his day in court. While this might be so, such a desire can perhaps be assuaged by the ability of the victim to

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1 Charleton and McDermott, Constitutional Implications of Plea Bargaining Part I, (2000) Bar Review 476, and Part II (2000) Bar Review, 52

2 Ashworth and Redmayne, *The Criminal Process*, (2005, Oxford University Press)

3 The guilty plea was not available until recently in France, a change brought about after the Delmas-Marty Commission.

4 [1988] I.R. 250 p225

5 See *D.P.P. v RMc C* [2005]IE CCA 71.

represent his or her position to the prosecution through, for instance, a victim impact statement.

Criminal Justice System

The advantages to the criminal justice system are manifold. Plea bargaining undoubtedly reduces "cracked trials",[6] where the accused maintains his innocence right up until shortly before the trial (in many cases the day of the trial), at which point the accused 'cracks' and accepts a guilty plea. Due to the inconvenience that these trials cause, any measure that proposes to reduce their incidence should be given thorough consideration. Plea bargaining and it's corollary 'the sentence discount' combine to provide an institutional incentive to guilty persons to plead guilty at an early stage, and this in turn saves the criminal justice system from expending scarce resources in processing unnecessary trials. Given that there is a high percentage of acquittals in contested cases,[7]mainly due to the high standard of criminal proof, the leniency of juries, and the many exclusionary rules of evidence, it can be argued that plea bargaining reduces the number of situations where guilty people are acquitted of crime of which they are factually guilty.

Do the Innocent Plead Guilty?

The kernel of the arguments put forward by those who oppose plea bargaining tends to be that it is contrary to the presumption of innocence and that it leads innocent accused to plead guilty. It is submitted that the incidence of artificial pleading has been overestimated and that certain procedural safeguards, if implemented, can reduce any such pleading to a negligible sum. Admittedly, this figure will be a very difficult one to quantify due to the inherent unreliability of calculating it by reference to the numbers of convicts who maintain their innocence even after conviction. It is submitted that this is one reason for the overestimates. Most empirical evidence is equivocal or highly anecdotal,[8] regarding the exact extent of this 'artificial plea'.[9] Stated, at its highest, the argument projects that defendants can be reeled in by the combined effects of the large sentence discount and the possibility of charge bargaining to such a degree that they will succumb to this pressure and plead guilty when they are in fact innocent. In response to this, some commentators express the view that we must choose between a functionally and economically efficient criminal justice system or a system in which there are very few convictions and a minimal deterrence function attaching to the criminal law.[10] This author believes that the retention of plea bargaining is desirable, subject to a number of safeguards, many of which are already present in our current system of justice.

First, it would be contrary to the duty owed by a barrister to his client to allow him to plead guilty to an offence of which he knows him, or strongly suspects him, to be innocent. In such a case, unless the evidence is strikingly supportive of the prosecution case, counsel should advise his client to go to trial. Added to this, counsel should always implore his client never to plead guilty if he is innocent. Thirdly, one important safeguard comes from the accused himself. Guilty persons often provide information that is known only, and could only be known to the guilty. Prosecution counsel and judges will be able to screen out plausible claims from implausible ones on this basis. Fourthly, before a guilty plea is accepted, it should be incumbent upon the judge to review the papers in detail, and if he or she is dissatisfied with the guilty plea, to inform counsel of this. If the case were then to go to trial, where the accused's guilt was shown beyond reasonable doubt, then the judge would be obliged to accept that he himself was responsible for the loss to the accused of the 'sentencing discount' and would have to have regard to this fact in deciding sentence.

It is sometimes argued that the size of the 'sentence discount' leads to inequality between the person who exercises his right to a jury trial and he who pleads guilty. In response to this argument, Sir Robin Auld[11] stated;

> "this argument only gets off the ground, and then not very far, if one equates the presumption of innocence with a right of a man subsequently found to be guilty to have put the prosecution to proof of his guilt. In my view, it is an incident of the presumption of innocence and criminal burden of proof that a defendant facing a criminal charge can require the prosecution to prove it, but that falls far short of saying that, once guilt has been established in one manner or other, that his sentence should be the same regardless. Neither our domestic law before the advent of the European Human Rights, nor the Convention itself, in particular Article 6(2), in terms or in spirit goes that far."

Indication of Sentence

The propriety of a practice whereby a judge gives an indication to counsel for the defence of the likely sentence that he will impose if the accused were to plead guilty at that stage, has been discussed by the Supreme Court in *D.P.P. v Heeney*[12]. One of the certified questions was whether the Court of Criminal Appeal should have had regard to the fact that, in a particular case, discussions had taken place in chambers prior to the trial between trial judge and counsel for the prosecution and the defence, following which the accused has changed his plea to one of guilty. Keane CJ., described the sequence of events which involved counsel for the defence and prosecution meeting with a Circuit Court judge in chambers. The judge firstly indicated the level of sentence that he would have been minded to impose in the event of a guilty plea. Counsel for the prosecution indicated that she would have been unhappy with such a proposal. The judge then indicated the level of sentence which he ultimately imposed and at this point there was conflict as to whether counsel for the prosecution dissented from, or agreed with this proposal. Keane CJ, referred to a general direction issued by the D.P.P. in 1998 indicating that such a practice should be discontinued and acknowledged that while applied in the Circuits, this had not reached the Four Courts.

Keane CJ. commented, that once information concerning 'a projected sentence' had passed to defence counsel, he was the under a duty to relay this to his client. Keane CJ continued;

> While the form of procedure adopted in this and other cases has been described as "plea bargaining", that appears to me to be a misnomer. Thus, any indication that a trial judge might give as to what sentence he might impose in the event of a plea of guilty would have to be subject to the proviso, express or implied, that he or she might reach a different view depending on the evidence which he or she subsequently heard in open court. As for counsel for the prosecution, while his or her presence is obviously essential if any discussions are going to take place

6 Ashworth and Redmayne, *The Criminal Process*, 3rd Ed. (2005, Oxford university Press)

7 The Report of the Working Group on the Jurisdiction of the Courts (2003) reported a 60% acquittal rate in contested trials in the Circuit Criminal Court.

8 Sanders and R. Young, Criminal Justice 2nd Ed (2002 Butterworths) pp474-482

9 A study by Zander and Henderson reported that 6% of defence barristers were worried that their clients had pleaded guilty to crimes of which they were innocent.

10 Easterbrook, Plea Bargaining as Compromise, (1992) 101 Yale L.J. 1969.

11 The Auld Review (October 2001)

12 [2001] IESC 39

> with the judge before the trial, it would not be part of his or her function to enter into any form of "bargain" with counsel for the defence as to the appropriate sentence. It must also be emphasised that, while discussions in chambers between judge and counsel are occasionally desirable in the interests of justice, in general, under Article 34.1 of the Constitution, justice must be administered in public. There can thus be no question, in my view, of any form of bargain being entered into in private which would determine in advance the sentence to be imposed by the court. Accordingly, I would agree with the view of the Court of Criminal Appeal that the procedure adopted in this case and in other cases, although it obviously did not amount to any form of "plea bargain" and was doubtless, as in other cases, prompted by the best motives, is undesirable and has properly been discontinued by the DPP."

Keane CJ, then went on to endorse the English law of the time to the effect that plea bargaining has no place in the law. It is submitted that Keane CJ's statements do not close the door entirely to an acceptance of a practice of indicating sentence. Indeed, he acknowledged that it might be done in certain circumstances where it was occasionally desirable in the interests of justice. Also, Keane CJ's allusion to Article 34.1 was not without qualification, conceding that the administration of justice in public could, in the correct circumstances, be countermanded by requirements of justice.

English civil and criminal procedure has, in recent years, been the subject of a massive legislative overhaul in a drive towards certainty, economy and efficiency. These changes have been principally introduced by the combined innovations of the Civil Procedure Rules and the Criminal Justice Act 2003. Coupled with this parliamentary reform, the system has been peppered by examples of a changing judicial attitude, which promotes these same aims. Recently, the judiciary saw fit to depart from precedent and to formalise the practice of indicating sentence, providing greater clarity and transparency for all the players involved in the criminal justice system. The case of ***R v Goodyear***[13] is a prime example of judicial legislation. However, this does not detract from its utility and in any event, it can be argued that it is more appropriate for the judiciary rather than Parliament to formulate rules regulating a practice with which it is intimately involved on a daily basis.

The case itself was spurred by a recognition that an indication of sentence can greatly assist the accused by letting him know where he stands and boasts the benefits, listed above, such as the saving of public expense and private anxiety. The case departs from the rules set down in ***R v Turner,***[14] which held that whereas counsel may give advice, which includes information about the likely sentence on a guilty plea, such information coming from the court itself was impermissible. The new law as reflected in ***Goodyear***, mirrors many of the recommendations made by Sir Robin Auld,[15] those of the Bar Council, and also the Runciman Royal Commission[16] all of which encourage the practice of diversion from trial. A panel of five judges in the Court of Appeal speaking through Woolf L.J., seemed resigned to the fact that the practice of indicating sentence to the accused's counsel continues to take place notwithstanding the jurisprudence of the court which sought to proscribe it. The inevitability of sentence indications had been pointed out in ***Attorney General's Reference No.44 of 2000 (Robin Peverrett)***[17] a case in which Rose L.J. held that sentence indication should only be tolerated in wholly exceptional cases such as where the defendant is dying but he does not know he is dying. To restrict the practice to such cases proved to be somewhat over ambitious and was ousted in ***Goodyear*** in favour of the scheme that now follows.

"Goodyear Principles"

At the outset, the court insisted that sentence indication could only be given to an accused who has deliberately chosen to seek it from the judge, where all the judge was doing was acceding to the defendant's wish to be fully informed before making his own decision on whether to plead guilty or not. The court was at pains to emphasise that the defendant's plea must be voluntary and free from improper pressure. In an extremely helpful exposition of the roles of the various actors, the court gave instructions to each, as to how best to conduct themselves when an indication of sentence is sought, and it is these that merit wholehearted adoption by the Irish courts. This course, it is submitted, would prevent situations akin to that which occurred in ***D.P.P. v Heeney***[18] above from being repeated. Given that instances of sentence indication are documented in judgments of courts at the highest level in Ireland, and given the far fewer and more tempered judicial comments opposed to the practice that exist in this jurisdiction, there are very few grounds for asserting that the Irish bench and bar are not open to such a practice. In any sentence indication to the accused, the following rules should be observed.

Instructions for the Judge

The judge should not give an indication unless one is sought. He may exercise the power to indicate that the sentence or type of sentence on the defendant would be the same, whether the case proceeded as a plea of guilty or went to trial, with a resulting conviction. The judge can, in an appropriate case, remind defence counsel that the defendant can seek an advance indication of sentence. If an advance indication is sought, the judge still retains the unfettered discretion to refuse it. It may be inappropriate to give an advance indication of sentence where for example the accused is already under pressure from a co-accused, or if the judge suspects that the defendant does not know that he should only plead guilty if he is in fact guilty. If a judge thinks that a co-accused is asking for a sentence indication as a tactic, then he should say nothing and if a guilty plea is rendered at a later stage, then the judge should penalise him for not coming forth earlier by reduction of the sentence discount for a guilty plea. A judge should also think twice about giving a sentence where he would not be able to judge the true culpability of the defendant at that stage. Also, where there are multiple defendants, a judge may think that to give a sentence indication to one might have the effect of unduly pressurising the others, and in such circumstances a sentence indication may be inappropriate. The judge may justifiably decline to give a sentence indication where it is likely that psychiatric or other reports will provide him with a valuable insight into the level of risk posed by the defendant. The judge may reserve his position or defer an indication. Once an indication has been given, it is binding and remains binding on the judge who has given it and it also binds any other judge who becomes responsible for the case. The judge should normally deal with it immediately but in circumstances where it gets listed before another judge, the principle of comity and the expectation aroused in the

13 [2005] 3 All ER 117

14 [1970] QB 321

15 Review of the Criminal Courts of England and Wales (October 2001)

16 Report of the Runciman Royal Commission (1993)

17 [2001] 1 Cr App R 416

18 [2001] IESC 39

defendant require the later sentencing judge not to exceed the earlier indication. If after reasonable opportunity to consider his position, the accused then decides not to avail of the indicated sentence, the sentence will cease to have effect and the judge must cast the sentence indication out of his mind and disregard it in any subsequent sentencing of the accused.

Instructions for defence counsel

Subject to the judge's right to give a reminder, the process of seeking a sentence indication should normally be started by the defendant. Defence counsel should not seek an indication without written authority signed by his client. There are certain things that the advocate is responsible for in relation to his client and these are making sure he understands that: (i) he should not plead guilty unless he is guilty – this should be conveyed to him in the firmest terms. (ii) any indication given reflects the situation at the time it was given and if he does not wish to put forward a guilty plea in light of the indication, then the indication disappears and has no remaining effects. (iii) Counsel should make it clear that the indication relates only to the matters about which an indication is sought and that for example, confiscation proceedings cannot be dispensed with by the judge. The judge should never be asked to give an indication on the basis of a plea bargain. The judge is not to be asked to indicate levels of sentence which he may have in mind depending on possible different pleas.

Instructions to Prosecution Counsel

The prosecution should not initiate the process. If there is uncertainty as to the basis of the plea to the indictment, and the defence nevertheless proceeds to seek an indication which it appears that the judge will give, then prosecution counsel should remind him that normally speaking, an indication of sentence should not be given until the basis of the plea has been agreed, or the judge has concluded that he can properly deal with the case without the need for a Newton hearing.[19] Prosecution counsel should always draw the judge's attention to any minimum or mandatory statutory sentencing requirements and should offer assistance to the judge by directing him to guideline case law if such is requested. Prosecution counsel should not do anything to create an impression that the sentence indication has the support of the D.P.P.

If these guidelines are observed, then the practice of indicating sentence to an accused will lead to a better informed decision taken by him. One possible criticism of the scheme is that it creates a fiction by insisting that the accused be the one to initiate the sentence indication when in reality, his counsel will be responsible for such. This criticism is weak when one considers that the only reason for insistence on initiation by the defendant is that it demonstrates that any subsequent guilty plea is voluntary. It is submitted that voluntariness is adequately safeguarded by the requirement that counsel for the accused informs him firmly that he must not plead guilty if he is innocent and also the instruction to judge's not to accept a plea where, despite perfunctory appearances, it seems the accused is not accepting of his guilt. A second fiction exists in that the judge is restrained from indicating the sentence that he would be inclined to give if the case were to proceed to trial and the accused were to be convicted. However, counsel for the accused will likely be able to estimate the likely sentence that would be given by the judge in such a scenario and this will provide the reference point by which the accused will assess whether or not it is worthwhile to plead guilty in light of the sentence indication.

Conclusion

The retention of plea bargaining subject to the additional procedural safeguards outlined above is recommended. The dual effect of this change and an unreserved acceptance of the principles laid down by the English Court of Appeal in *R v Goodyear*[20] would halve caseloads and lead to a system of administering justice that would boast greater transparency, as well as better informed accused with more autonomy. Added to this, the principles behind plea bargaining and indication of sentence could come into the open, no longer forced to skulk in the shadows in order to promote the interests of justice. ●

19 *R v Newton* (1982) 77 Cr App Rep R 13

20 [2005] 3 All ER 117

Book review

Lies in a mirror: An essay on Evil and Deceit By Peter Charleton.

Reviewed by Patrick Marrinan SC

In the aftermath of the brutal extermination of the Jews in the Holocaust, serious questions were asked concerning mans inner nature and his capacity for evil doing. It was thought, perhaps hoped, that genocide needed special conditions to occur, that the holocaust was an aberration born out of unique circumstances and unlikely to be repeated. Then, as the world looked on in horror, the Rwandan majority slaughtered over a million of the Tutsi minority during a few months in 1994.

Is the instinct to kill within all of us? If it is, does it emerge from the conscious or subconscious mind? And what are the factors that allow it to flourish?

Charleton, in an ambitious and thoughtful text, tackles the very core of the destructive force that lurks within us all. On a fascinating journey through time and place, he draws on dramatic personal accounts, from victims and perpetrators alike, to demonstrate how acts of violence lessen both. From the Nazi concentration camps, to the bloody killing plains of Rwanda, from the Gulags of Stalinist Russia, to the slaughter of over one million Armenians, Charleton has plotted a well-researched and fascinating course as he explores the roots of evil.

The questions he raises along the way are fascinating because the answers have eluded us for so long. In a well-written and engaging text, the depth of his insight into the subject matter shines from every page.

However, what sets this book apart from many of its ilk is that Charleton has drawn on his considerable experience as a criminal lawyer and peppered the text with vignettes drawn from his own experiences and observations. The child abuser, the rapist, the murderer and the gang leader all make appearances, and all share a common trait, deceit. Charleton observes:

> "Whether in folk tales or symphonies, the fundamental answer to the problems of life does not seem to be accessible through deceit. Truthfulness does not characterise the approach of the violent people whom I have encountered. Instead, the necessity to be affirmed in the false way in which they saw themselves became the core of their being. In the word of one psychologist, their egos 'hung from a balloon'. They responded with rage when it was shattered." .

Lies corrupt the mind and create a breeding ground for hatred and violence. Whether it is the fantasy world created by the paedophile, or the hatred whipped up by the propaganda machines of brutal regimes, all have a common denominator, the creation of dominance by one party or side through deception, to the exclusion of the rights of others.

> "Evil is a real force with real energy. It is just not the absence of good. The absence of truth from the human personality, however, helps it to flourish."

Charleton argues that lies and self-deceit are the catalyst for violence. To this end, he quotes intelligently from Jung and Solzhenitsyn. But much of the anecdotal evidence from the victims and perpetrators best supports his thesis. Captain Hosenfeld, a member of the German army, who spared the composer Wlaydyslav Szpilman from a certain death when he was captured in Warsaw, wrote in his personal diary.

> "Lying is the worst of all evils. Everything else that is diabolical comes from it. And we have been lied to; public opinion is constantly deceived. Not a page of a newspaper is free of lies, whether it deals with political, economic, historical, social or cultural affairs. Truth is under pressure everywhere; the facts are distorted, twisted and made into their opposite. Can this turn out well."

This is a thought-provoking book that gives considerable insight into the vulnerability of the human mind and demonstrates how it may become twisted by lies. The result is that evil is unleashed and with it the most destructive force of all, hatred. It matters little whether the lies are those told by the child sexual abuser to a limited audience of family and friends, or those recounted through the propaganda of tyrannical leaders. Inevitably, violence is the end product and with it comes the diminution of the self. Readers of this fascinating book will be enriched by the author's considerable insight into the dark side of the unconscious mind and may well be prompted to look deeper into their own lives. ●

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