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***Choice in Context:  
A Relational Perspective on  
Coercion in the Law of  
Contract and the Law of Marriage***

by

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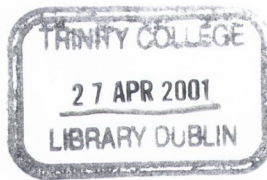
**Supervisors: Professor William Duncan and Mr. Eoin O'Dell**

**A thesis presented to the University of Dublin (Trinity College)  
for the Degree of Doctor of Philosophy (Ph.D.)**

**Presented in Two Volumes**

**Volume I**

**October, 2000**



*Thesis  
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## DECLARATION

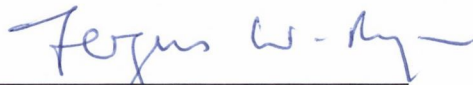
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**October 25, 2000**

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## Summary of Thesis

The rhetoric of freedom is sometimes too readily accepted. It has infected, in particular, the discourses and doctrines of law, especially in the field of so-called 'private ordering'. Thus it is regularly considered self-evident in this context that the parties to a contract (whatever form that that contract takes), be free of external coercion or compulsion. The reality is that many factors - physical, social and interpersonal - usually beyond the control of one individual, shape, structure and sometimes even compel individuals to action (or inaction as the case may be). The dominant conceit of contractualism - that the individual be left to order his own destiny - may thus be largely an unrealisable ideal or one that can be achieved in part only.

In fact the law generally deals only with a subset of the total incidence of coercion and compulsion. The several doctrines that purport to treat of coercive incidents are generally qualified heavily by requirements of impropriety or illegitimacy that in practice contain and limit legal relief where there is coercion or compulsion. The suggestion that such doctrines be based on the fact of impaired consent alone, however, has proved especially persuasive in the field of contract and seems to have been accepted as the dominant criterion in relation to the validity of marriage in Ireland.

Yet, this trend, it is suggested, is underpinned by a discourse that unduly fetishes the spoils of freedom. Freely assumed obligations and duties are but a small portion of the sum total of contingencies that the individual encounters in his daily life. Expectations and obligations - legal or otherwise - arise from a complex of relationships to which the individual, with varying degrees of choice, is bound. From these relations - which include the family, the community, religious and social groupings, joint business ventures - spring attributes of value and worth of which liberal-individualism is largely dismissive or even ignorant.

An analysis of contractual or familial incidents of coercion, it is submitted, cannot proceed without reference to these relational contingencies. Throughout this thesis it is suggested that the law always be vigilant of and sensitive to these relations, both to the value and worth to which they give rise but also to the coercive practices which they may foster. It is suggested, with respect, that while the law in certain of its aspects gives credence to these concerns, it is by-and-large still dominated in this field at root by concerns of an essentially liberal-individualistic nature. This can be seen most especially in the context of Irish family law, where the well-worn checks on legal relief for coercion have all but been abandoned in favour of a de-contextualised, absolutist concept of free consent.

This departure is criticised on a variety of grounds, doctrinal, logical and ideological. Besides the inherent uncertainty to which it gives rise, it is suggested that at root the modern concept of consent as applied to contracts and marriages symbolically negates the worth of enduring relations, contractual and familial, and the value of the collective generally. In its distilled form, it asserts an undue emphasis upon the individualisation and atomisation of society and social groupings, an agenda that is ultimately to the benefit of neither the individual nor that of society as a whole.

## Acknowledgements

Very special thanks and appreciation are due to Mr. Eoin O'Dell, my present tutor, and Professor William Duncan, my former tutor. Before his departure for the Permanent Bureau attached to the Hague Convention on Private International Law, Professor Duncan steered me very ably through the first few years of this endeavour. I greatly appreciate his guidance and patience, and in particular his encouraging me to write on a regular basis. Mr. O'Dell's guidance and support have been equally invaluable, but I especially appreciate his encouragement of, and confidence in my work. His many constructive suggestions and comments have been particularly helpful. I am greatly indebted to them both. As ever, of course, responsibility for all errors, misinterpretations and opinions lies solely with the writer.

I must also thank my colleagues at the Dublin Institute of Technology, but particularly Mr. Bruce Carolan, Head of the Department of Legal Studies and Dr. Ellen Hazelkorn, Director of the Faculty of Applied Arts. Mr. Carolan has been especially supportive, affording me the time and space to engage in research at the D.I.T. this year.

My colleagues in the School of Social and Legal Studies, D.I.T., especially Geoffrey Shannon (presently of the Law Society), and in the School of Accounting and Finance have given much support and encouragement. Ms. Estelle Feldman (Trinity College Law School) has been an invaluable source of very many stimulating news media articles that I otherwise would have missed. Special thanks are also due to the staff of D.I.T., Aungier St. and Adelaide Rd., the Library of Trinity College, Dublin University and the Library of the Dublin Institute of Technology, Aungier St.

Finally, I thank my family and friends, especially my parents, Raymund and Catherine Ryan, my brothers, sisters and sister-in-law, and most of all to Christopher Roufs, for their patience and for the immense general support and encouragement given to me by them during this endeavour. *Morán bhuíochais díobh uile go léir.*



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<sup>1</sup> Cases are categorised by reference to the jurisdiction or (in the case of Australia, Canada, and the United States) the federal union or commonwealth from which they emanate. For these purposes, cases decided prior to 1922 in respect of Ireland, including before the House of Lords, are listed under 'Ireland'. In respect of cases decided after 1922, Ireland includes the Irish Free State and the State of Ireland as territorially defined by Article 3 of the Constitution. Apart from Ireland, other jurisdictions are listed in alphabetical order. Cases decided before the Judicial Committee of the Privy Council, the European Court of Justice and the European Court of Human Rights are listed separately.

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European Convention on Human rights and Fundamental Freedoms

## Table of commonly used abbreviations

A.C.	Appeal Cases
A.G.	Attorney General
All E.R.	All England Reports
C.A.	Court of Appeal (England and Wales)
Ch.	Chancery Reports
C.L.J.	Cambridge Law Journal
C.L.R.	Commonwealth Law Reports (Australia)
Crim. L.R.	Criminal Law Reports
D.L.R.	Dominion Law Reports (Canada)
D.U.L.J.	Dublin University Law Journal
E.C.R.	European Community Reports
E.L.R.	Employment Law Reports
E.R.	English Reports
F.L.R.	Family Law Reports (England and Wales)
H.L.	House of Lords
I.C.L.J.	Irish Criminal Law Journal
I.J.F.L.	Irish Journal of Family Law
I.J.L.F./I.J.L.P.F	International Journal of Law and the Family, International Journal of Law and Policy of the Family
I.L.R.M.	Irish Law Reports Monthly
I.L.T.	Irish Law Times
I.L.T.R.	Irish Law Times Reports
I.L.T. & S.J.	Irish Law Times and Solicitors' Journal
I.R.	Irish Reports
Ir. Ch. R.	Irish Chancery Reports
Ir. Eq. R.	Irish Equity Reports
Ir. Jur.	Irish Jurist
K.B./Q.B.	King's Bench/Queen's Bench
L.Q.R.	Law Quarterly Review

L.T.	Law Times
M.L.R.	Modern Law Review
N.I.	Northern Irish (Reports)
N.I.L.Q.	Northern Ireland Law Quarterly
N.L.J.	New Law Journal
N.S.W.L.R.	New South Wales Law Reports
N.Z.L.R.	New Zealand Law Reports
P.	Probate, Admiralty and Divorce cases or President of the High Court
P.C.	(Judicial Committee of the) Privy Council
S.C.	Scottish Cases
S.L.T.	Scots Law Times
T.L.R.	Times Law Reports
V.R.	Victoria Reports (Australia)
W.A.R.	Western Australia Reports
W.L.R.	Weekly Law Reports

### Style Note

For the purpose of brevity of expression, certain conventions as regards gender are observed herein. The terms 'he', 'his' or 'him' are thus used in this text in their generic sense, and shall, unless the contrary intention clearly appears, be taken to denote the feminine as well as the masculine gender.

# Chapter One

## Freedom in Legal Discourses

It may fairly be said that the true motivations of the creators of legal instruments is often betrayed not so much by what is said therein as by *how* it is said.<sup>1</sup> Some words and phrases, at least, are “best known by the company that they keep”.<sup>2</sup> In this regard the preamble to the Constitution of the United States (agreed between the States in 1787 - passed in 1789)<sup>3</sup> is most instructive. Having some 10 years previously liberated themselves from the grasp of King George III, the newly emancipated states on the eastern seaboard of what is now the United States made moves to bind themselves as part of a new order. In doing so, they sought to form ‘a more perfect union’ building on the rather loose Confederation previously established in 1781 (by the Articles of Confederation). At that point in time the constitutional rights and freedoms of the individual were not directly under scrutiny<sup>4</sup> - the primary concern at that stage being to strengthen the powers of the central federal government of the Union. The Preamble, however, outlines amongst the aims of the Constitution the desire to “secure the blessings of liberty to ourselves and our posterity”. What is most revealing about this aspiration is the inherent assumption of the manifest virtues of freedom - perhaps not surprising considering some of the abuses wrought by the

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<sup>1</sup> On the issue of narrative in judicial pronouncements see, for instance, Backer, “Tweaking Facts, Speaking judgment: Judicial Transmogrification of cases narrative as jurisprudence in the U.S. and Britain”, 6 *S. Cal. Interdisciplinary L.J.* (1997).

<sup>2</sup> *Per* Henchy J. in *Minister for Industry and Commerce v. Hales* [1967] I.R. 50: “I must determine the meaning of [the legislation] by the words used in it. But I must not look at these words in isolation; I must judge them by the company they keep. In other words, I must read them in the context of the Act as a whole, so as to determine what meaning and effect should be given to them for the purpose of carrying into force the general purpose of the Act”. Cf. the maxim ‘*noscitur a sociis*’; see for instance *per* Stamp J. in *Bourne (Inspector of Taxes) v. Norwich Crematorium* [1967] 1 W.L.R. 691 at p. 696 noting that “English words derive colour from those which surround them”. For a similarly contextual approach to the construction of legal terms see Henchy J. in *Nestor v. Murphy*, [1979] I.R. 326.

<sup>3</sup> See generally Currie, *The Constitution of the United States: A Primer for the People*, (Chicago and London: University of Chicago Press, 1988).

<sup>4</sup> That came later in the form of the Bill of Rights proposed by Congress in 1789 and finally ratified in 1791. See Currie, *The Constitution of the United States: A Primer for the People*, (Chicago and London: University of Chicago Press, 1988) at p. 48.

former imperial regime. To be free, it inescapably implies, is self-evidently good, a desirable and desired state of being.

This is not an isolated instance of such an assertion. Since the Enlightenment, the virtues of personal freedom over state intervention have gradually but certainly come to dominate political and constitutional rhetoric and, to a large measure, legal discourses. The 1600s saw the inception of constitutionalism, with its twin ideals of (a) limiting state power by reference to individual rights and (b) the separation of the powers of government, as a potent force in English political life.<sup>5</sup> Gone are the days, then, when a sovereign could assert a divine right to impose its will upon its subjects.<sup>6</sup> Most modern constitutions (even some of those that retain the institution of a monarchy) are predicated upon the worthy ideal that the State may only fetter the freedom of the individual in reliance upon genuine countervailing reasons justifying its intrusion.<sup>7</sup> Lurking behind the explicit wording is the assumption that freedom, even as an abstract concept, is self-evidently a good thing, to be curtailed only when the necessity of so doing is clearly demonstrated.

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<sup>5</sup> See the discussion of Lane, *Constitutions and Political Theory*, (Manchester University Press, 1996) at chapter 1. At p. 25 he notes that “[t]wo ideas are basic to constitutionalism: (a) the limitation of the State versus society in the form of respect for a set of human rights...and (b) the implementation of separation of powers within the state”.

<sup>6</sup> Though there are some exceptions, even in modern day Western Europe. The Queen of England for instance, may still veto legislation passed by the Tynwald, the Parliament of the Isle of Man (a ‘dependency’ of the U.K.). There is no constitutional convention, as there is in the U.K., to the effect that she should invariably refrain from so doing. See the observations of Jacobs, Adv. Gen. In C-355/89 *D.H.S.S. (Isle of Man) v. Barr* [1991] 3 C.M.L.R. 325 at pp. 330-332. In practice however, the Queen would be well advised not to exercise her powers. A similar exercise of monarchic sovereignty in Canada in 1926 precipitated a Constitutional crisis that ultimately led to reform in relation to that jurisdiction. The then Governor-General Byng had refused to dissolve Parliament on Prime Minister King’s request. The ensuing controversy helped spur King to victory in the following election and to demand a reduction in Byng’s powers. At the Imperial Conference of 1930 it was agreed that the Governor Generals of the various dominions would be precluded from using their powers so as to overrule the dominions’ elected rulers. See Hogg, *Constitutional Law of Canada*, 4<sup>th</sup> ed. (Toronto: Carswell, 1997) at pp. 50ff. and pp. 261ff.

<sup>7</sup> *Murray v. Ireland* [1985] I.R. 533 and [1991] I.L.R.M. 465 and *People (D.P.P.) v. Shaw* [1982] I.R. 1. Cf. Dworkin who argues, in *Taking Rights Seriously*, that certain rights are entrenched in such a manner that their curtailment cannot be justified by the simple assertion that it would be better for the collective interest that they be curtailed.



As a political concept freedom is, if not perhaps unproblematised, then underproblematised. On closer inquiry of course, even liberal writers have discovered that the landscape of freedom is strewn with complexities. Not least are those regarding the proper limits that may be placed on personal freedom, and more importantly, the method by which one determines those limits. Mill's classical theory of liberty<sup>8</sup> - that one should be free to do that which does not cause harm to others - immediately provokes difficult questions concerning the precise meaning of 'harm'. Is 'harm' restricted to the tangible realm of physical injury - damage to persons or property?<sup>9</sup> Or does it extend to include psychological and psychic harm - offence to the sensibilities of others for instance?<sup>10</sup> Nor is it by any means clear that there is widespread agreement on when a relevant harm has been caused. In this regard the debate on whether prostitution is socially harmful is instructive.<sup>11</sup>

Despite these seemingly insoluble dilemmas, the underlying assumption still remains that freedom is self-evidently good until proven otherwise. This thesis, by contrast, begins from a rather different standpoint, one that eschews the automatic assumption that, until the contrary is demonstrated, freedom from external fetters and constraints

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<sup>8</sup> Mill, *On Liberty*, (1859), see Collini (ed.), *On Liberty and Other Writings*, (Cambridge: Cambridge University Press, 1989). See also Feinberg, who has written three volumes treating of the notion of 'harm' - *The Moral Limits of Criminal Law: Vol. I, Harm to Others, Vol. II, Offense to Others, Vol. III: Harm to Self*, (New York-Oxford: Oxford University Press, 1985). Trebilcock too examines the workings of the Millian harm theory (and the problems to which it gives rise) in Trebilcock, *The Limits of Freedom of Contract*, (Mass.: Harvard University Press, 1993) at pp. 61-77.

<sup>9</sup> Of course there is the related question - what if the 'victim' of such harm consented thereto? See *R. v. Brown* [1993] 2 All E.R. 75 - should an individual be allowed to cause harm to himself or to allow others to cause harm to him with his consent? See the discussion in Bacik, "Striking a Blow for Reform?" (1997) 7 *I.C.L.J.* 48 at 55-57. Cf. *In Re a Ward of Court (withholding medical treatment)* (No. 2) [1996] 2 I.R. 79 where the Supreme Court considered (*obiter*) that there was a right to refuse medical treatment even where such refusal would lead to a natural death. A patient, however, has no right to seek an acceleration of death by artificial means. For any person to assist in the taking of another's life, even with their consent, is a criminal offence: Criminal Law (Suicide) Act, 1993. See also Feinberg, *The Moral Limits of Criminal Law: Vol. III: Harm to Self*, (New York-Oxford: Oxford University Press, 1985).

<sup>10</sup> Feinberg reviews these matters in the second volume of his extensive treatise on the Millian principle of 'harm'. Feinberg, *The Moral Limits of Criminal Law: Vol. II: Offense to Others*, (New York-Oxford: Oxford University Press, 1985).

<sup>11</sup> See also Trebilcock's discussion of the implications of the Millian theory of harm in the context of the community responses to pornography. Trebilcock, *The Limits of Freedom of Contract*, (Mass.: Harvard University Press, 1993) at pp. 64ff.

should be regarded as an obvious good, as in essence beneficial for the individual.<sup>12</sup> The reality, it is suggested, is that liberty - that is the freedom to do as one pleases - however ostensibly desirable or widely desired, is not always of unqualified benefit even to the individual who enjoys it. Individuals in society, despite the rhetoric, do not always want, still less need, to be free *per se*. Individuals living in a society, however atomised and fragmented it may be, are subject to a variety of social rules and social expectations. Even in the absence of 'laws' properly so-called, which, it might tentatively be suggested, are social rules formally enacted with the sanction of the sovereign power in a State,<sup>13</sup> these models of behaviour prove surprisingly influential of social behaviour. The reason for this perhaps is that far from rejecting these rules as an attack on liberty, individuals often value these rules and expectations as a touchstone of certainty and dependability.

The often subtle rules of fashion, for instance, though no doubt dynamic (and even fickle) do not generally excite a clamour of dissent from those who might otherwise claim that they will dress as they like. On the contrary, as evidenced by the proliferation of magazines and supplements devoted to fashion, the public is all too eager to be told what to wear. Social expectations and rules help to structure behaviour that enable persons to act by reference to criteria that help predict with relative accuracy the consequences of their conduct.<sup>14</sup> The very fact that meaning and structure is provided thereby, however arbitrary or nonsensical it may be in terms of substantive content, is in itself of value to the individual.

This desire for certainty, predictability and security are most notable as the main impetus behind the burgeoning market in 'risks' - insurance agreements, futures contracts - not to mention the mainstay of common law legal systems in the form of

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<sup>12</sup> Drawing again on the origins of the U.S. one is reminded of the fate of many of the 'Pilgrim fathers' who having escaped the blight of religious persecution in England, subsequently starved on the shores of New England. See Bryson, *Made in America*, (London: Minerva, 1995) at p. 32.

<sup>13</sup> Cf. Collins, *The Law of Contract*, (London: Butterworth's) 2<sup>nd</sup> ed., 1993 at pp. 1-2 and 3<sup>rd</sup> ed., 1997 at p. 2, who suggests that laws are rules that may ultimately be enforced, if necessary, by state sanctioned violence.

precedent.<sup>15</sup> A case in point is *Fitzleet Estates v. Cherry*<sup>16</sup>. There, the House of Lords had to consider whether to overrule a prior decision of long standing concerning the interpretation of a tax statute.<sup>17</sup> Despite arguments that the precedent should be reversed, the House nonetheless refused to overrule the prior decision. The fact that the precedent may have been incorrect<sup>18</sup> did not unduly trouble the House. Indeed, the House noted that even if the earlier decision could be shown to be wrong, this alone would not justify its being overruled. The inconvenience and uncertainty that would be engendered by an alteration far outweighed any benefit that would derive from asserting what, it was alleged, was the correct law.<sup>19</sup> In particular, it might be noted, standard accountancy practices had been built around the former interpretation, the alteration of which would cause great upheaval and inconvenience to the accountancy profession with little corresponding reward. In Lord Wilberforce's words then<sup>20</sup> "it requires much more than doubts as to the correctness of such opinion to justify departure from it".<sup>21</sup>

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<sup>14</sup> Becker, *Outsiders: Studies in the Sociology of Deviance*, published in 1963 and again in 1973 with a new tenth chapter (New-York-London: Free Press, 1966 and 1974).

<sup>15</sup> The doctrine has gradually declined in significance especially since the decision in *State (Quinn) v. Ryan* [1965] I.R. 70, though it is still a significant force in judicial practice. (See especially Mee, "Taking Precedent Seriously", (1993) 11 *I.L.T.* 254-255 who criticises the lack of rigour on the part of some judges in maintaining the doctrine).

<sup>16</sup> [1977] 3 All E.R. 996.

<sup>17</sup> *Chancery Lane Safe Deposits Ltd. v. I.R.C.* [1966] A.C. 85.

<sup>18</sup> It is interesting to note that Lord Wilberforce chose not to express any opinion as to the correctness of the earlier decision, noting that he would "say nothing as to its correctness or as to the validity of the reasoning by which it was supported". [1977] 3 All E.R. 996 at p. 999.

<sup>19</sup> In the words of Lord Wilberforce, [1977] 3 All E.R. 996 at p. 999: "[n]othing could be more undesirable ...than to permit litigants, after a decision has been given by this House, with all appearance of finality, to return to this House in the hope that a differently constituted committee might be persuaded to take the view which its predecessors rejected...". To allow the appeal would, *per* Viscount Dilhorne at 1000 and *per* Lord Edmund-Davies at p. 1003 impair reasonable certainty.

<sup>20</sup> [1977] 3 All E.R. 996 at p. 999.

<sup>21</sup> It would, *per* Viscount Dilhorne at p. 1000, have to be so wrong as to "produce injustice". See also the arguments made by Hart and Sacks, *The Legal Process*, (1958) pp. 587-588 cited in Zander, *The Law Making Process*, 4th edition, (London: Butterworth's, 1994) and Stone, "The Ratio of the *Ratio Decidendi*", (1959) 22 *M.L.R.* 597-598. Both stress the elements of stability and certainty engendered by the rule. Indeed the practice statement of the House of Lords, [1966] 3 All E.R. 77, which first allowed the modern House to reverse its own decisions, nonetheless (*per* Viscount Dilhorne in *Fitzleet Estates v. Cherry* [1977] 3 All E.R. 996 at p. 1000) "...stresses the importance of the use of precedent as providing a degree of certainty on which individuals can rely in the conduct of their affairs, as well as a basis for the orderly development of legal rules".

The heady rhetoric of freedom often obscures the benefits flowing to individuals from social groups and networks. Families, small communities (whether constituted by physical proximity or by common concerns or interests<sup>22</sup>), religious communities, ethnic and other groups defined by ethnicity<sup>23</sup> or by other shared inherent characteristics, professional and vocational bodies rank amongst the most significant of such groups, although this is by no means an exhaustive list. Membership of some of these groups, at least, is not easily characterised as either consensual (in the sense of being a proposition freely agreed to before the fact) or voluntary (in the sense of being 'willed' *a priori* by the self). An individual, for example, joins his family of origin - whether it be by design or surprise - regardless of his own will or consent. Whatever consent may be implied is almost by definition *ex post facto*. Although many such groups ostensibly fetter the freedom of the individual it is nonetheless asserted that there is value in their existence. The value of such social groups and networks lies in the support, meaning and structure that they provide to otherwise abstract individuals. The demise in the influence of these institutions has heralded, it is argued, a corresponding demise in the presence of meaning, security and structure - social and psychological - in the life of the individual.

The central jurisprudential argument of this thesis is a rather simple proposition - albeit one with complex and sometimes controversial ramifications. It is argued that the discourses of law and society often place undue emphasis upon the freedom of the individual as an abstract quality. This is at the expense of a more contextual analysis of the individual viewed as a part of social groups and communities, and in society at large. This is not to suggest that society (and by implication the social rules that simultaneously shape and are shaped by society) should not value freedom or indeed that in practice it always does - the ostensible purpose of a law and its results do not

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<sup>22</sup> With the growing influence and availability of the internet, communities of interest no longer depend on physical proximity to thrive.

<sup>23</sup> This is not to suggest that fixed concepts of ethnic identity are well-grounded in objective fact. In the present writer's opinion, ethnic identities owe their origin as much to historical, social and political factors as to physiological factors.

always coincide.<sup>24</sup> It is simply to say that the elevation of freedom to the status of an article of faith in social and legal discourses ignores the often valuable effects of social networks and institutions that ostensibly fetter the freedom of the individual - the family being chief among them. This thesis is founded on the argument that laws and legal discourses require greater sensitivity to the values of the social and support networks that provide individuals with security, stability and predictability, even at the expense of a certain measure of freedom.

A regularly ignored feature in the debate about freedom is the related and highly significant dilemma about the distribution of resources. The value of freedom, it is suggested, increases in direct proportion to the resources - financial, physical or intellectual - that a person possesses. How often, it might be asked, are the advocates of the under-resourced - be they the sick, the poor, the elderly, the homeless or the disabled - heard to demand that government or society 'leave them be'?<sup>25</sup> Freedom from external restraint is of most value to the well-resourced.<sup>26</sup> Unfettered liberty is arguably likely to compound rather than remedy the unjust distribution of resources especially where there is a gross inequality of opportunity. The irony is that liberty and equality are often juxtaposed as tandem aims. The reality is, by contrast, that the achievement of equality demands the curtailment of liberty. Equality measures after all, often result in rules that preclude persons making decisions based on certain attributes or characteristics of an individual, be they racial, social, cultural or

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<sup>24</sup> See for instance the suggestion of Peltzman that ordinances making it compulsory to wear a seat-belt while driving a car may have increased the level of car accidents, drivers having been lulled into a false sense of security by the new restraints. Peltzman, "The Effects of Automobile Safety Regulation", (1975) 83 *Journal of Law and Economics*, no. 4, pp. 677-725.

<sup>25</sup> Even at the height of the era of supposed legislative laissez-faire, calls for government intervention to protect the underprivileged were regularly made and often heeded, in the form, for instance, of the Factories Act, the Passengers Acts. See Atiyah, *Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979) especially at pp. 509ff.

<sup>26</sup> A point well-illustrated by the fact scenario in the ill-fated *O'Reilly v. Limerick Corporation* case [1989] I.L.R.M. 181. Members of the travelling community situated at the time in Limerick complained that as a result of the State's inaction, they were left living in "conditions of great poverty and deprivation, ... totally unacceptable conditions, without basic facilities". (*Ibid.* at p. 182). They had, specifically, no running water, sanitation or refuse collection. The essence of their argument, ultimately rejected by Costello J., was that the State had breached their rights by *failing to act* so as to secure to them a minimum standard of living. See also Olsen, "The Myth of State Intervention in the

economic. Far from presupposing freedom then, the demands of equality may necessitate restraints.<sup>27</sup>

The dilemma posed by such a perspective of course is that such institutions and networks (as evidenced *inter alia* by the cases cited below concerning undue influence)<sup>28</sup> are frequently the source of the very worst forms of oppression and coercion. Legal discourses may be desensitised to the value of support networks but they are perhaps as often underwhelmed by the dangers posed and the abuses wrought by such bodies. It is not, thus, self-evident to say that the demise of such institutions comes without qualified benefits. The growing prevalence of marital breakdown, for instance, though seen generally in negative terms (as evidenced by the debate surrounding the introduction of divorce)<sup>29</sup> is arguably evidence in part of healthy trends in society. Dominian<sup>30</sup> attributes rising divorce rates in Britain in part to the success of female emancipation<sup>31</sup>, a conclusion underlined by recent statistics showing that just under two-thirds of applicants for divorce in Ireland in 1999 were women.<sup>32</sup> The growing financial independence of women, not to mention the

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Family”, 18 *Uni. of Michigan Jo. of Law Reform* 835 (1985) and Minow, “Words and the Door to the Land of Change: Language and Family Violence”, (1990) 43 *Vanderbilt Law Review* 1665.

<sup>27</sup> See for instance, in Ireland, the Employment Equality Act, 1998 and the Equal Status Act, 2000. Both prevent parties from using race, religion and a variety of other personal characteristics, inherent or otherwise, as criteria for employment, or in the supply of goods or services or for differentiation between employees or customers. See also the Prohibition of Incitement to Hatred Act, 1989 which restricts the publication (orally or otherwise) of opinions likely to incite members of the public to hate a person or class of person on specified grounds such as race, religion or sexual orientation. Another example, this time where persons are forced to act in a particular way, are affirmative or positive action requirements, usually found in the form of racial (mainly in the U.S.) or gender quotas (in Ireland.)

<sup>28</sup> See below in Vol. II, Chapter Four at pp. 9ff.

<sup>29</sup> The key concern being whether the introduction of divorce would in itself result in further marital breakdown. See the arguments set out in Binchy, *Is Divorce the Answer?* (Dublin: Irish Academic Press, 1984), Duncan, *The Case for Divorce in the Irish Republic*, (Dublin: I.C.C.L., 1979) and Irish Council for Civil Liberties, *The Case for Divorce in the 1990s*, (Dublin: I.C.C.L., 1995).

<sup>30</sup> Dominian, *Marital Breakdown*, (Harmondsworth: Penguin, 1968) at pp. 10-11 ranks this as the “most important single event” contributing to the growth of marital breakdown.

<sup>31</sup> See also Krum, “Has feminism killed the American marriage?” *The Guardian* (G2), February 24, 2000 at p. 6.

<sup>32</sup> Coulter, “Women outnumber men two to one in seeking divorce”, *Irish Times* February 28, 2000, p. 1 (Leader) and p. 8 (analysis). Out of a total of 2475 applications, 1611 (65%) were made by women, 864 (35%) by men.

extension of maintenance rights<sup>33</sup> and financial provision<sup>34</sup> on marital breakdown, has allowed more women, who might once have felt compelled through lack of alternative opportunities to remain in unhappy and even violent marriages, to walk out. The very substantial abuses wrought from within - intra-family (domestic) violence, sexual and emotional abuse, child abuse - were for a great length of time either ignored entirely by legal practitioners and law enforcers or alternatively, defined away as welfare problems.<sup>35</sup>

At the risk of being branded a marital heretic it is suggested that in a minority of cases at least, the separation of spouses<sup>36</sup> is a decidedly healthy outcome.<sup>37</sup> In *D.C. v. A.C.*<sup>38</sup> Carroll J. had to consider whether a barring order should be granted against a husband, the father of two children. In determining whether this would be conducive to the children's welfare, Carroll J. noted the remarkable improvements in the home life of the family once the husband had departed. The elder child in particular, once considered profoundly disturbed, had settled considerably under the new arrangement.<sup>39</sup>

The effects of emancipation should not of course be overstated.<sup>40</sup> Social groups perform important support functions, though on closer examination the division of

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<sup>33</sup> Family Law (Maintenance of Spouses and Children) Act, 1976 and the Family Law Act, 1995.

<sup>34</sup> First introduced by the Judicial Separation and Family Law Reform Act, 1989 now incorporated mainly in the Family Law Act, 1995 and Family Law (Divorce) Act, 1996.

<sup>35</sup> See also Nils Christie, "Conflicts as Property", (1977) 17 *British Journal of Criminology* 1.

<sup>36</sup> The question of whether a subsequent divorce is also of benefit is left open.

<sup>37</sup> Bates, "The Family and Society: Reality and Myth", (1980) 15 *Ir. Jur.* (n.s.) 195 at p. 210, argues that "it is in the interests of some individuals that the families of which they are victims (and that is probably not too strong a word) be dissolved, but it may well be that it is in the interest of the family as a social institution and society at large for that to be done".

<sup>38</sup> [1981] 1 I.L.R.M. 357 (H.C.).

<sup>39</sup> See also the comments of O'Hanlon J. in *F.M. v. J.M.*, unreported, High Court, O'Hanlon J., November, 1983, a custody case, but one in which it seems that O'Hanlon J. was in favour of the couple involved living apart. But see *contra C. v. C.*, unreported, High Court, O'Hanlon J., December 16, 1982, where the same judge declined to accept the proposition that it is always less beneficial for the children when parents between whom there is considerable acrimony, live together.

<sup>40</sup> Betty Freidan in the 1960s wrote of the oppression and control of women by means of the 'Feminine Mystique', an unrelenting, though subtle, socio-cultural force that constructed the ideal woman as a person devoted to family and home at the expense of her own personal development. Friedan, *The Feminine Mystique*, (orig. publ. 1963) (Harmondsworth: Penguin, 1965). Despite great social change, the oppression of women continues in altogether more subtle guises. Naomi Wolf, almost 30 years

labour often reveals gross inequities. It is fair to say that, even in jurisdictions that ostensibly promote gender equality, the bulk of support duties (care for children and the elderly in particular) performed by families has tended (and even now still tends) to fall disproportionately on women.<sup>41</sup> The care element of service to ‘community’ generally remains quite feminised.

There is obviously much scope, in an argument propounding the value of the collective, for misinterpretation. At this early juncture it is important to discount certain misperceptions. The first perhaps may be that the collective is viewed as more important than the individual. On the contrary, (and this is admittedly paradoxical), the individual is in fact the central concern of this thesis. It is integral to this argument that healthy social networks enhance the meaningful existence of the individual. The dichotomisation of individual rights and collective interests suggests that each is necessarily the antithesis of the other. This, it is argued, is not always accurate. It is possible, to have a ‘win-win’ situation. What is good for the collective, it is argued, can in certain circumstances also be good for the individual.

*Murray v. Ireland*<sup>42</sup> might typically be seen as a triumph of collective over individual rights. There the Supreme Court refused to order the prison in which the plaintiffs, a married couple, were housed to permit the couple to engage in conjugal relations with a view to procreating. The Court concluded that the requirements of prison security superseded the individual rights of the parties. The ‘common good’ approach may be taken, thus, that the State’s interests took precedence over those of the individual. The alternative view is that conflicting individual rights were ultimately at stake. If it is

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later describes in *The Beauty Myth: How Images of Beauty are Used against Women*, (Vintage, 1991), how women in society are still subject to social and cultural forces that shape and dominate their lives.

<sup>41</sup> A review of the 1996 Census of Population (Dublin: Central Statistics Office, 1998) underlines this phenomenon. (Vol. 7 - *Occupations*, Table 8). Of those who inhabit the traditional caring professions, an overwhelming proportion is female. 79% of primary school and nursery school teachers are female, 82% of care assistants and attendants, 80% of childminders, nursery nurses and playgroup leaders, 70% of social workers and 92% of nurses and midwives. Cf. Afshar who notes how kin relationships in the Asian community in Britain are sometimes used as a cheap source of labour, women bearing the brunt of what she calls this ‘moral economy of kin’. Afshar, “Gender Roles and the ‘Moral Economy of Kin’ amongst Pakistani women in West Workshire”, (1989) 15 *New Community* 211.

<sup>42</sup> [1985] I.L.R.M. 533 (HC) and [1991] I.L.R.M. 465 (SC).



accepted that every person has a personal interest in seeing that the law is upheld and enforced<sup>43</sup> it is harder to see this case in terms of a straightforward collectivist-individualist dichotomy. If one considers further the interests of the child, not yet conceived,<sup>44</sup> who might result from the contemplated union, the apparent conflict between collective and individual interests might be further blurred.

The second misperception may be that the promotion of the collective necessarily requires the avoidance of laudable social reform. Advocates of the collective interest tend, it may be true to say, to be conservative on issues of social (and particularly socio-sexual) reform. It is far from self-evident, however, that a collectivist stance necessarily negates the adoption of a progressive stance on issues of a more sectoral interest such as gender and racial equality, and even the promotion of pluralist values. The adoption of a collectivist stance should not presuppose the necessary subjugation of any group of persons to another. A pro-family stance for instance, does not necessarily imply that women should forego career prospects for the sake of a family.<sup>45</sup> Nor should it necessitate a heterosexist stance on matters of sexuality and relationships.<sup>46</sup>

A third danger in promoting the value of pre-existing social networks is the inherent exclusivity of such units. There is always the risk, then, that when one invokes the worth of one's family, community or Nation that this necessarily will be taken to

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<sup>43</sup> An analogous argument was made by Walsh J. in *S.P.U.C. v. Coogan* [1989] I.R. 734 at p. 743, where he suggested that every citizen has an individual right to see that the "the fundamental law of the State is not defeated".

<sup>44</sup> Though this is arguably beyond the contemplation of the Constitution - Article 40.3.3 looks to the interests of the child who, though not yet born, has clearly been conceived.

<sup>45</sup> There is some evidence that more men are adopting a homemaking role. Attitudes too, seem to suggest a change of perspective amongst males. According to, more men (especially younger men) "are beginning to view themselves as fathers first and workers second...". Grimsley, "Survey: Family is priority for younger male workers", *Washington Post/Minnesota Star-Tribune* May 5, 2000. Drawing on a recent survey, Grimsley notes how an overwhelming majority of men under 40 in the U.S. would be willing to forego a portion of their salary in exchange for more time with their families.

<sup>46</sup> See Ryan, "Sexuality, Ideology and the Legal Construction of 'Family': *Fitzpatrick v. Sterling Housing Association*", [2000] 3 *I.J.F.L.* 2. In *Canada (Attorney General) v. Mossop*, (1993) 100 D.L.R. (4<sup>th</sup>) 658 at p. 712, L'Heureux-Dubé J. (dissenting) noted that "...[i]t is possible to be pro-family without rejecting less traditional family forms. It is not anti-family to support protection for non-traditional families".

imply a distrust and consequent avoidance of all that is external to these entities. In fact, such sentiments, at their most extreme as racism and ethnocentrism, do not typically exhibit a sense of cultural security but quite the opposite. Rampant assertions of ethnic difference tend to be reactive in nature. They reflect not a sense of cultural identity and security but very much the reverse, a loss of identity or purpose, a deeper sense of uncertainty and confusion.

It is not to be inferred either that this thesis is suggesting that the *status quo* should be preserved at all costs. Change, however unsettling, is inevitable and necessary. Valuable social institutions can undermine social progress when they stand in the way of individual endeavour. Durkheim,<sup>47</sup> in this vein, underlined the functionality of individual deviance, pointing in particular to characters who promoted valuable human progress by breaking the social mould - one nowadays may exemplify Socrates, Jesus, Gandhi or Martin Luther King. Innovation and change, by definition, require rebellion from accepted norms. "To make progress", Durkheim said, "individual originality must be able to express itself".<sup>48</sup> Drawing on Durkheim's maxim that 'Crime is the price society pays for the possibility of progress' the collectivist might say that 'liberty is the price to be paid for progress.'

What this thesis is not saying is that freedom, as a corollary of the above, is necessarily bad. To borrow from Howard Becker<sup>49</sup> it may be said that the perspective upon which this thesis is based is a sensitising perspective rather than an article of faith. This thesis seeks to counterbalance what is, it is argued, the influence that liberal<sup>50</sup> individualist thinking has had, first on the contours of contract law, and more

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<sup>47</sup> Durkheim, *The Rules of the Sociological Method*, (Catlin, (ed.)), (New York: Free Press, 1965) at pp. 67ff.

<sup>48</sup> *Ibid.* at p. 71. "In order", he continues, "that the originality of the idealist whose dreams transcend his century may find expression, it is necessary that the originality of the criminal, who is below the level of his rime, shall also be possible. One does not occur without the other".

<sup>49</sup> Becker, *Outsiders: Studies in the Sociology of Deviance*, 2<sup>nd</sup> ed., (New York: Free Press, 1973), Chapter 10 at p. 181. Becker discounts the term 'theory' as a description of symbolic interactionist thought, noting that it is, rather, "a perspective whose value will appear, if at all, in increased understanding of things formerly obscure". (*Ibid.* at p. 181).

<sup>50</sup> When the term 'liberal' is used here, it is used strictly in its classical sense, of precluding outside (especially state) interference (and correspondingly support) in the lives of individuals. Sullivan,

gradually in the field of family law. It is proposed that this be done by focussing on the treatment of 'coercive practices' in these fields.

The discussion herein primarily concerns two ostensibly distinct fields of law - contract and family (predominantly marriage) law. Both concern promises or the exchange thereof which give rise to fresh obligations. The apparent dissimilarities will be dealt with later. At the outset however, an important structural similarity cannot escape notice. In contract and family law alike, various doctrines and rules purport to prevent the legal validity (or enforceability<sup>51</sup>) of agreements entered into under force or pressure.

Of course not every such agreement will be thus vitiated. Human existence, as Hale<sup>52</sup> so ably demonstrates, is dogged at every turn by constraining and compelling factors that ultimately shape actions taken and decisions made. If the law was to acknowledge every such factor as excusatory there could no longer, for instance, be a

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*Virtually Normal: An argument about homosexuality*, (London: Picador Books, 1997), argues that the word has been stripped of any coherent meaning. One good example of the confusion is given in *Minnesota Star-Tribune's* report on the U.S. Democratic Party's Convention. Von Sternberg, "Sayles Belton presents platform at convention", August 16, 2000. Party members who advocated large government programmes to combat disadvantage and promote educational endeavour are described as 'liberal' (here perhaps in the sense of the word that suggests generosity or abundance). "It's a largely centrist document, closely hewing to Gore's policy positions and following the lead of stands long taken by the DLC. Liberals in the party were unable to insert planks that would have entailed big new government programs or spending". The confusion over the meaning of the term is exemplified by Mallet, "Liberal becomes a dirty word in the new South Africa", *Financial Times*, August 24, 1999. There, liberals have been demonised as "rightwing, white and probably racist". In Ireland, by contrast, liberal is taken to mean left-wing: in *Irish Times*, August 24, 2000, the leader of the Labour Party, Ruairi Quinn, identifies his centre-left party, which generally tends to be pro-state regulation, as one of the leading advocates of the 'liberal agenda'.

<sup>51</sup> The dual concepts of legal validity and legal enforceability, though perhaps in logic amounting to the same thing, are nonetheless well-established as distinct in law and legal discourses. See for instance the Statute of Frauds, 1695, section 4 of which renders unenforceable (but not invalid) contracts for the sale of land that are not evidenced in writing. See Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 2000) at pp. 149-154. See also *Shelley v. Kraemer* 334 U.S. 1 (1948) discussed in Kauper, *Civil Liberties and the Constitution*, (Westport, Conn.: Greenwood Press, 1962) at pp. 146-148. There, the U.S. Supreme Court ruled that a zoning ordinance that precluded the sale to or occupancy of land by the African-American purchaser could not be enforced by a state court of law. Though valid (this was prior to the enactment of the (Federal) Civil Rights Act 1964), the constitutional provisions on equality precluded the court from being a party to its enforcement.

<sup>52</sup> Hale, "Bargaining, Duress and Economic Liberty", 43 *Columbia Law Review* 603, (1943) especially at pp. 603-606.

meaningful law of contracts.<sup>53</sup> Of necessity then, legal concepts such as duress must embrace only a portion of that which in fact propels and constrains the individual actor. The category of 'coercive' in law (and the corresponding exclusion therefrom) thus implies a construction of freedom in law, one that is as much about the policy of the law and society as it is about the true meaning of freedom. By inquiring into this construction, it is possible to discern the intellectual underpinnings of the law regarding the value of certain practices and institutions. Does this construction adequately acknowledge the existence and value of the social networks mentioned above? If not (as ultimately argued herein) what potential implications does this have for the integrity, symbolic or otherwise, of such networks?

### **Law as a Coercive force? An alternative view**

Of course, any discussion of coercion in law must acknowledge the potentially coercive nature of law itself. As Collins observes, "the law acts as the principal vehicle for state power. Its interpretation of the world achieves eminence amongst systems of thought because it can rely in the last resort upon a legitimate claim to the monopoly of violence in order to insist upon behaviour according to its vision".<sup>54</sup> The intended social response to laws is admittedly many faceted. Sometimes laws are intended to be hortatory, "to steer behaviour in a particular way"<sup>55</sup> - others merely as 'default' rules designed to step in where parties have failed to provide for certain

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<sup>53</sup> The Criminal law too depends in part on the assumption that most persons in most cases act freely and must bear responsibility for their conduct. There is a presumption that persons are responsible for their acts; everyone is thus, for instance, presumed sane until the contrary is established: *McNaghten's Case* (1843) 10 Cl. & Fin. 200.

<sup>54</sup> Collins, *The Law of Contract*, 2<sup>nd</sup> ed. (London: Butterworth's, 1993) at pp. 1-2. In the third edition of the same text, (1997) Collins modifies this pronouncement somewhat, in favour of somewhat more nuanced response: "Since the law can rely in the last resort upon a legitimate claim to the monopoly of violence in order to insist upon behaviour according to its vision, it becomes a principal site of disputes about the justice of the market order. The law's links to state powers requires that its doctrines conform to shifts in the claims for legitimacy on which effective state power rests". (3<sup>rd</sup> ed., 1997 at p. 2).

<sup>55</sup> Dewar, "The Normal Chaos of Family Law", (1998) 61 *M.L.R.* 467 at p. 483.

contingencies.<sup>56</sup> In certain cases, however, laws are ultimately designed to compel, constrain or coerce a party. Here Feinberg posits an interesting distinction.<sup>57</sup> Where there is coercion, the alternative illegal action is not thereby rendered impossible but certain consequences (e.g. punishment) will flow if the law is disobeyed.<sup>58</sup> There are also, however, examples of legal compulsion (or, one might add, constraint), where a person is in fact forced to do, or restrained from doing x. For instance, a bailiff, by court order, may physically remove the intransigent occupants of a house upon which a mortgage has been foreclosed.<sup>59</sup> A prisoner may be physically restrained from moving beyond the jailhouse walls.

This conception of law as coercive, though certainly accurate when applied to *certain* legal phenomena, once enjoyed undue dominance in legal discourses. In 1832, the eminent jurist, John Austin defined law (in all-embracing terms) as a species of "...command which obliges a person or persons...and obliges generally to acts or forbearances as a class".<sup>60</sup> A command, he noted, is an indication of desire directed to another but differs from all other such intimations in that if disregarded it is within "...the power and purpose of the party commanding to inflict an evil or pain". "If," he asserts, "you cannot or will not harm me in case I comply with your wish the expression of your wish is not a command although you utter your wish in imperative phrase". If, on the other hand, the commanding party is "able and willing" to harm

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<sup>56</sup> See the discussion in Ayres and Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", 99 *Yale Law Journal* 87 (1989). See also Trebilcock, *The Limits of Freedom of Contract*, (Mass.: Harvard University Press, 1993) at p. 17.

<sup>57</sup> Feinberg, *The Moral Limits of Criminal Law: Vol III: Harm to Self*, (Oxford University Press, 1986), at pp. 189-195.

<sup>58</sup> See Hale, "Bargaining, Duress, and Economic Liberty", 43 *Columbia Law Review* 603 (1943) at p. 606: "government has the power to compel one to choose obedience, since it can threaten disobedience with death, imprisonment or seizure of property".

<sup>59</sup> See the aftermath of the *National Irish Bank v. Graham* [1994] 2 I.L.R.M. 109, where the occupants were physically removed from their premises in a highly publicised move by bailiffs after their attempts to stave off foreclosure were finally lost. See O'Connor, "TV drama misses the full story", Fanning "Masked bailiffs turn history on its head", and Drennan, "Bitter cost of an impossible dream", in *Sunday Independent*, August 18, 1996 and McCafferty, "The grapes of wrath" in the *Sunday Tribune* of the same day.

<sup>60</sup> John Austin, *The Province of Jurisprudence Determined*, (Cambridge: Cambridge University Press, 1995), at p. 29.

the party commanded, this “amounts to a command, although you are prompted by a spirit of courtesy to utter it in the shape of a request”.<sup>61</sup>

On closer examination, however, it is evident that a great many phenomena that are typically called ‘law’ fit uneasily, if at all into Austin’s scheme of things.<sup>62</sup> As Hart noted in a cogent refutation of Austin’s argument, “[t]he theory of law as coercive orders meets at the outset with the objection that there are varieties of law found in all systems which...do not fit this description”.<sup>63</sup> Several species of law exist, he argued, which rather than require persons to act or refrain from acting in a particular manner, confer “legal powers upon them to create, by certain specified procedures, and subject to certain conditions, structures of rights and duties”<sup>64</sup>...They do not impose duties but offer facilities for the free creation of legal rights and duties within the coercive framework of the law”.<sup>65</sup>

Contract and Marriage are two such ‘facilities’ that the law provides for the voluntary conferral and assumption of rights and duties. In neither case is it appropriate to speak of being ‘commanded’ at least not before a contract is entered into or nuptials exchanged. To activate either, a mutually consensual collective conferral of rights and assumption of duties is required on the part of the parties. The use of the word ‘collective’ is deliberate. Unlike testamentary dispositions, which are given legal force, subject to certain formalities, by the informed consent of the testator alone

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<sup>61</sup> *Ibid.* at p. 21.

<sup>62</sup> At this stage the concern is mainly with the role of law as a ‘facilitative’ agent. It is arguable, however, that Austin’s definition of law also ignores other aspects, for instance the symbolic and hortatory roles of law and the part it plays in the legitimation of social, cultural and political orders. Law too can act as a repository of the aspirational, a statement of what Society aspires to: see for instance the comments of Costello J. in *A.G. v. Paperlink* [1984] I.L.R.M. 373 at p. 385. Arguing that semantic differences in the text of the Constitution should not be overemphasised he notes that “...the Constitution is a political as well as a legal document” and thus should be read in a teleological rather than a literal fashion.

<sup>63</sup> H.L.A. Hart, *The Concept of Law*, 2nd Ed., (Oxford: Clarendon Press, 1994) at p. 48.

<sup>64</sup> *Ibid.* at pp. 27-28.

<sup>65</sup> *Ibid.* at p. 48. See also Hunt and Wickham, *Foucault and Law*, (London and Colorado: Pluto Press, 1994) at p. 60: “an imperative conception of law simply omits too much”.

manifested in the form of a will or codicil,<sup>66</sup> a valid contract or marriage only comes into being where there is mutual consent. It is the joint will of the parties, manifested as a promise made by one party and accepted by the other (in the case of contract) or by an exchange of promises (in the case of marriage) that bestows upon the arrangement thereby constituted, the force of law. With regard to the law of contracts, the term 'private ordering' is sometimes used to describe the process whereby obligations are assumed. The parties are bound not by external imposition but by their own hand and act.<sup>67</sup> It can indeed be said (admittedly more readily in the context of contract than marriage)<sup>68</sup> that the parties have created their own law - perhaps adding a new angle to the term 'private law' - exclusively to govern their conduct in the specified sphere. While the breach of a contract may result in the imposition of a legal sanction, this does not in any real sense dilute the voluntariness of the parties' actions. In fact, it is quite the contrary. "The enforcement of promises freely undertaken," Stewart observes, "is actually a recognition of freedom even if it appears as coercion to the party now trying to renege".<sup>69</sup>

There are certainly exceptional cases in which a person may be forced by law to contract with another against the former's will. For instance, a company providing health insurance is prohibited from refusing to enter into a contract to provide the same where requested by a potential customer or to discriminate between persons in the terms or conditions laid down.<sup>70</sup> Similarly, there are a number of examples of situations where a person (usually a tradesman or supplier of services acting in the

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<sup>66</sup> Although the donee is certainly at liberty to disclaim the inheritance, (see Capital Acquisitions Act, 1976, section 13), which he may well do for tax purposes, this does not make the will any less valid.

<sup>67</sup> This is reflected in Fried's characterisation of Contract by reference to the "promise-principle" whereby "persons may impose on themselves obligations where none existed before". Fried, *Contract as Promise*, (Mass: Harvard University Press, 1981), at p. 1. See generally Chapters 1 and 2 thereof.

<sup>68</sup> This point is treated in more detail at a later juncture. For the moment, however let it suffice to say that the formal terms of the marriage bond are by-and-large set by the State rather than by the parties. In this sense the marital contract is more akin to a contract of adhesion or a standard form contract in that the terms are non-negotiable and are offered on a take-it-or-leave-it basis.

<sup>69</sup> Stewart, "A Formal Approach to Contractual Duress", (1997) 47 *Uni. Toronto Law Jo.* 176 at p. 202.

<sup>70</sup> Health Insurance Act, 1994, sections 7-8. A company may of course set whatever premium it thinks fit and may demand that a potential customer accept this as a condition of entry into an insurance

course of his/her trade,) is forbidden by law from refusing to contract with another on certain grounds or for certain stipulated reasons, for instance race, or gender.<sup>71</sup> By their exceptional existence however such provisions tend to underscore the general principle that contract and marriage are in the nature of facilities called into aid by a joint exercise of the free wills of the parties thereto.<sup>72</sup>

To say that each is a facility however is not to suggest that either is trivially regarded. Nor should the use of the term 'private ordering' serve to mislead. The intensely public interest in private ordering cannot be underestimated. In their respective spheres - commerce in the case of contract, and family relations in the case of marriage - each is considered fundamental to stability and order. Contract is the cornerstone of the market, particularly, in an increasingly commercial world where, as Roscoe Pound put it, "...[w]ealth...is made up largely of promises".<sup>73</sup> Without the enforcement of contracts, expectations founded upon another's actions or words are relied upon at one's peril.<sup>74</sup>

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contract. However, in so doing no differentiation may be made between different customers regardless of age or present health status or other factors.

<sup>71</sup> A good example is the Employment Equality Act, 1998, which penalises an employer who refuses to employ a person purely on ten specified grounds including gender, religion and race. See also the Race Relations Act 1977 (UK). Section 5 of the Competition Act, 1991 may have a similar effect where a person with a monopoly in a particular item refuses, without good reason, to supply it to a particular person. Section 5 renders unlawful "any abuse of a dominant position in trade for any goods in the State". See also Article 81EC. For an example of greater vintage one may look to the old common law which obliged 'common carriers' of goods by land to accept carriage of all goods where requested, on condition that a 'proper and reasonable charge' was paid. A refusal to do so could incur legal sanction. See P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979) at p. 556.

<sup>72</sup> See further Waddams who observes that "with some exceptions (mainly in monopoly situations) the law does not compel the making of contracts". Stephen Waddams, "Comments on Welfarism in Contract Law" in Brownsword, Howells, and Wilhelmsson, *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994) pp. 248-252 at p. 249.

<sup>73</sup> Pound, *An Introduction to the Philosophy of Law*, rev. ed. (New Haven: Yale University Press, 1954) at p. 133.

<sup>74</sup> As in *Rose & Frank v. Crompton* [1923] 2 K.B. 261, 132 L.T. 641; [1925] A.C. 445 (H.L.), where the terms of an agreement were deemed not to be enforceable due to a clause in the contract clearly stipulating that the agreement was not to be invoked in a court of law. The parties were to rely on honour alone. When honour failed (as happened here where the defendants had repudiated the agreement) the above-mentioned clause prevented redress from being granted.



Marriage has, at least in the past, been viewed in a similar vein. Indeed the Irish Constitution of 1937 readily assumes that without marriage there is no family. Article 41.3.1 speaks of "...Marriage, on which the Family is based..." and is more especially emphatic in the Irish text "Ós ar an bPósadh atá an Teaghlach bunaithe..." which might best be translated as follows: 'As it is upon Marriage that the Family is based...'. That marriage occupies even still so dominant a position in the realm of family law is attested to by the stark fact that, except for certain limited purposes,<sup>75</sup> a couple living together and, although not married, treating each other as husband and wife, are regarded in law as virtual strangers.<sup>76</sup> Outside the confines of marriage, at least in Ireland, the private ordering of intimate relations is fraught with legal peril. In *Ennis v. Butterly*<sup>77</sup> Kelly J. refused to enforce an agreement to cohabit made by parties not married to each other arguing that to give this arrangement legal force would be contrary to the public policy of the State.<sup>78</sup> Otherwise, he asserted "the pledge on the part of the State...to guard with special care the institution of

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<sup>75</sup> For instance, in relation to the granting of barring and safety orders: Domestic Violence Act, 1996. The extent of legal protection available under that Act, however, does differ depending on marital status and sexual orientation: See the Criticisms of Ryan, "'Queering' the Criminal Law: Some thoughts on the Aftermath of Homosexual Decriminalisation", (1997) 7 *I.C.L.J.* 38 at p. 42. See also the very wide definition of 'family' in the Non-Fatal Offences against the Person Act, 1997. The category of person eligible to claim damages for wrongful death has also been widened to include a non-marital partner of the deceased "who had been living with the deceased as husband or wife for a continuous period of not less than three years". Civil Liability (Amendment) Act, 1996, section 1. The concept of 'dependency' for social welfare purposes is also sufficiently expansive to include non-marital heterosexual partners as well as spouses: see Whyte, "Social Welfare - the Cohabitation Rule", (1989) 11 *D.U.L.J.* (n.s.) 187.

<sup>76</sup> This, it is suggested, is an unduly formalistic approach to relationships. The question, surely, should be posed in terms that are more functional. In other words, the criterion of recognition for these purposes should be not what a family is in form but what it does and is in substance: see the comments of Ward L.J. in *Fitzpatrick v. Sterling Housing Association* [1998] Ch. 304 at 338. In determining whether a homosexual couple was "living together as husband and wife" the enquiry should centre on "how the couple functioned, not what they were". On which, see Ryan, "Sexuality, Ideology and the Legal Construction of 'Family'", [2000] 3 *I.J.F.L.* 2.

<sup>77</sup> [1996] 1 *I.R.* 426.

<sup>78</sup> See the largely critical analyses of Mee, "Public Policy for the New Millennium", (1997) 19 *D.U.L.J.* 149 and O'Dell, "Contract Law" in Byrne and Binchy, *Annual Review of Irish Law, 1996*, (Dublin: Round Hall, 1997) at pp. 184-195. Mee for instance suggests that it infringes Ireland's international obligations, in particular an undertaking by the Committee of Ministers of the Council of Europe not to object to the enforcement of cohabitation contracts. (Rec. R.88(3)).

marriage...” - an undertaking contained in no less an authority than the Constitution itself - “...would be much diluted”.<sup>79</sup>

The facilities discussed herein, of course, are not open-ended. Considering the important role that each plays in its respective sphere, it is not surprising that Contract and Marriage are hedged around with conditions as regards, for instance, formalities of the agreement, capacity of the parties, the nature and propriety of the agreement<sup>80</sup> and so on. These conditions are many and varied. Despite attempts to explain all of these conditions by reference to unifying principles,<sup>81</sup> they reflect many different concerns that are not always easily reconciled. Of this, more will be said throughout this thesis. At this juncture, however, one matter is worth addressing, being the ‘facilitative nature’ of contract and marriage noted above.

The breach of some of the conditions precedent to validity or enforceability may well in themselves constitute a legal wrong, criminal or civil. A contract to commit a crime may in itself amount to or at least evidence a criminal conspiracy. A marriage between two persons one of whom is already married to a third party (the earlier marriage subsisting) would be bigamous; not only would this result in the invalidity of the second purported marriage, the attempt is in itself a crime.<sup>82</sup> This if anything however is incidental to the underlying dynamics of Contract and Marriage law. What marks each out as a facilitative institution is that the breach of a condition precedent to the formation of either will result not in a penalty being imposed but in the

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<sup>79</sup> *Ibid* at 438. A similar approach is taken in England: see *Windeler v. Whitehall* [1990] 2 F.L.R. 505. Some U.S. States, however, do indeed enforce cohabitation contracts. See for instance the decision of the Supreme Court of California in *Marvin v. Marvin* 18 Cal. 3d. 660 (1976). But not all states have been willing to follow this lead: see *Morone v. Morone* 429 N.Y.S. 2d 592 (1980).

<sup>80</sup> For instance a contract contemplating that which is illegal at law, or contrary to public policy cannot be enforced: see generally Friel, *The Law of Contract*, 2<sup>nd</sup> ed, (Dublin: Round Hall, 2000), chapters 20 and 21.

<sup>81</sup> See for instance in relation to marriage, *Hyde v. Hyde and Woodmansee* (1886) L.R. 1 P. & D. 130 at p. 133 and *B. v. R.* [1996] 3 I.R. 549, *per Costello J.* at p. 554. The attempt to supply unifying principles in contract law has been more systematic: see Pothier, *Traité des Obligations* (1761) and the commentary of Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979) at pp. 398ff.

arrangements made thereunder being regarded as having no legal effect. It may be suggested that this non-enforceability is a sanction of sorts. While superficially appealing this argument fails on two counts:

(1) The imposition of a penalty puts the penalised party in a worse position relative to the status quo prevailing directly before the prohibited act was carried out. Therefore even presuming zero transaction costs, a loss has been incurred. A declaration of nullity or a refusal to enforce a promise could hardly be said to be of the same nature. The parties are effectively restored to the same position they were in prior to contracting, or as near as possible thereto, (a function which the law of restitution often performs.) Presuming zero transaction costs, therefore, there is no loss in tangible terms - simply the frustration of an expectation unfounded in law.

(2) The objective existence of a breach of the law, in the sense that Austin speaks of a law, is not conditional upon a sanction being imposed (whatever Austin may have said himself). In other words, the penalty does not make the offence. Hobbes, for instance, distinguishes between "...aspects of laws that guide the subject and those that set penalties; the former provide the existence of law, the latter their efficacy".<sup>83</sup> A rule the breach of which results in the non-enforceability of arrangements can hardly logically be said to exist independent of this result. As Hart notes: "the provision for nullity is *part* of this type of rule itself in a way in which punishment attached to a rule imposing duties is not".<sup>84</sup> He illustrates this by using an apt football analogy: "If failure to get the ball between the posts did not result in the nullity of not scoring, [a double negative] the scoring rules could not be said to

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<sup>82</sup> *Peo. (A.G.) v. Ballins* (1964) Ir. Jur. Rep. 14 and *Peo. (A.G.) v. Hunt* 80 I.L.T. & S.J. (note) 19. Clear proof of the first marriage, however, is strictly required: see *Kelly v. Ireland* [1996] 2 I.L.R.M. 364.

<sup>83</sup> M. Goldsmith, "Hobbes on Law" in T. Sorrell (ed.), *The Cambridge Companion to Hobbes*, (Cambridge: Cambridge University Press, 1996) at p. 27.

<sup>84</sup> H.L.A. Hart, *The Concept of Law*, 2nd Ed., (Oxford: Clarendon Press, 1994) at p. 35 (emphasis in original text).

exist”.<sup>85</sup> In other words it is the nullity that constitutes the rule. Independent of its consequences there is no rule.

### **The Public Face of Private Law**

Framing the discourse of agreements in terms of non-enforceability is not merely an academic exercise. It serves to underscore the point made above that Contract and Marriage law are facilitative rather than coercive in nature. This is not however to suggest that the State is in any sense disinterested in or merely permissive of the activity that is the subject of a contract or marriage. Precisely what the State chooses to facilitate will have important implications not only for the welfare of privy participants but for the social order generally.

The particular condition with which this thesis is most deeply concerned is a deceptively simple one. Broadly speaking (and ignoring for the moment the many qualifications and caveats to which it is subject) it is that the parties to the contract or marriage have by so contracting or marrying acted as free agents. As noted above, Contract and Marriage law do not, in contrast with the rules of testation, facilitate individuals in their own right but rather in the collective. Thus both contract and family law have developed a variety of doctrines and remedies designed to counteract certain instances of coercion, compulsion and exploitation that may undermine the freedom enjoyed by any or all of the parties.

The stark implications of enforcing a contract engineered by means of a coercive act are rarely addressed but cannot be underestimated. The rhetoric and narrative of the doctrine of ‘freedom of contract’ - the idea that the parties should to the greatest extent possible, be able to agree without external interference - often serves to obscure the fact that by its enforcement of private agreements, contract gives legal force and hence *public* sanction to the arrangements made thereunder. It cannot hence

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<sup>85</sup> *Ibid.*

be argued that contract is or ever can be value-neutral. Where an agreement obtained by means of coercion or compulsion is given the force of law, the State is not in any real sense 'leaving the parties to their own devices': it is endorsing and moreover compounding the coercion suffered. Compelling a party to comply with an agreement made by that party under a threat of harm is effectively to give legal force to that threat. In short there is a 'command' in the Austinian sense: this is no less a command backed by a threat than any mandatory order emanating directly from the State. It is as if the threat came directly from the mouth of the State itself. By so lending its aid, then, the State inevitably renders itself complicit in the oppressive act complained of. As Collins notes "unless coercion is prevented, then the law of contract would cease to be a legal institution for augmenting individual autonomy; it would become a cloak for oppression".<sup>86</sup>

### **Setting the Boundaries of Coercion**

The discussion above presupposes that Coercion is readily identifiable and definable and indeed, easily distinguishable from a state of freedom. This is not so. Coercion comes in many guises and forms. It may be quite overt and violent such as a threat of injury to life or limb.<sup>87</sup> More often than not, however, it dons a more subtle mantle, perhaps no less efficacious but nonetheless more elusive.

Humankind is subject to a great many constraints and coercive forces. It is evident however that the law does not and probably could not feasibly demand an absolute absence of coercion or constraint as a prerequisite to enforcement. The mere fact of psychological coercion alone is not enough. If it were there are possibly few contracts that would survive judicial scrutiny, for as Collins points out "to some extent every contract is the product of constrained choice".<sup>88</sup> Indeed it is probably the very fact of

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<sup>86</sup> Collins, *The Law of Contract* 3<sup>rd</sup> Ed., (London: Butterworths, 1997) at p. 129. See also the somewhat more restrained comments of Stewart, "A Formal Approach to Contractual Duress", (1997) 47 *Uni. Toronto Law Jo.* 176 at p. 183.

<sup>87</sup> See for instance *Barton v. Armstrong* [1976] A.C. 104 and *Lee v. Lee* (1928) 3 SW 2d. 672.

<sup>88</sup> Collins, *The Law of Contract*, *op. cit.*, at p. 128.

constraint itself which drives persons to contract with others in the first place. In a society of the kind typical in the modern western world, where the tasks performed by each individual tend to be quite specialised,<sup>89</sup> there will exist few if any individuals capable of providing entirely for all their personal needs without resort to others. Faced with limited personal resources and pressing needs (not to mention desires and wants), and ruling out the possibility of violent force, the individual is effectively propelled to bargain with a view to exchange.<sup>90</sup> Thus, as Bigwood comments “constraint abounds naturally in our social and economic existences...[it is] an endemic and doubtless a necessary feature of human existence”.<sup>91</sup>

That said, there are certain social and political imperatives that render it essential that at least the possibility of a free act be acknowledged; without that possibility concepts such as responsibility and fault, on which most of the criminal law and a good deal of the law of tort are based, are rendered meaningless.<sup>92</sup> Absolute freedom as a legal ideal, however, whether a physical possibility or not (and there are some who doubt this)<sup>93</sup> is nonetheless advocated by few of even the most libertarian commentators. Herbert Spencer perhaps is the closest one might find to an exception in this regard. In 1851 he proposed<sup>94</sup> the abandonment of all legal and social fetters upon free contracting. The market in other words would be subject to no regulation save that

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<sup>89</sup> See generally on this point Émile Durkheim, *The Division of Labour in Society*, (*De la Division du Travail*, 1893), (Ill.: Glencoe, 1964). Durkheim argues that modern industrial (or, as he terms it ‘organic’) societies are characterised by a diversity and specialisation of tasks not experienced to the same degree in more agrarian ‘mechanistic’-type societies.

<sup>90</sup> This assumes the absence of a centrally controlled economy, one where the means of production are collectively owned and apportioned to all by a central authority.

<sup>91</sup> Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress”, (1996) 46 *Uni. of Toronto Law Jo.* 201 at p. 201.

<sup>92</sup> Witness also the anxiety of many theological commentators to reconcile the paradox of an all-knowing, all-powerful deity while simultaneously propounding the existence of individual free will. See for instance W.S. Anglin, *Free Will and the Christian Faith*, (Oxford: Clarendon Press & New York: Oxford University Press, 1990) especially Chapter 1. Anglin argues the existence of free will by means of a *reductio ad absurdum* - if there were no free will a great deal of human existence would be stripped of sense and meaning. Without individual free will there is no sin, at least in a meaningful sense, and without sin the prospect of redemption, which most churches offer as a reward for virtue, is rendered nugatory.

<sup>93</sup> See the essays in Hook (ed.), *Determinism and Freedom in the Age of Modern Science*, (1957), (London: Collier, 1974).

<sup>94</sup> Herbert Spencer, *Social Statics*, (London, 1851.)

necessary to enforce the bargains made by individuals. Spencer drew on the then popular Social Darwinist<sup>95</sup> strands of thought, thus argued that personal strength and intellect would determine who prospers and who falls, leading to the evolution of humanity to a higher plane of existence. By contrast, in 1651 Thomas Hobbes,<sup>96</sup> foreshadowing the type of argument that Spencer was to make exactly 200 years later, asserted that far from elevating humanity, the abandonment of all curtailments upon liberty would lead to a 'state of nature' wherein human life would be rendered "solitary, poore, nasty, brutish and short".<sup>97</sup> The Hobbesian Paradox – that the liberty of all is best preserved where a portion of that liberty is surrendered – is best illustrated, in an economic context, by Hale.<sup>98</sup> Rejecting the feasibility of a state of absolute freedom, Hale instead proposes that "the most we can attain is a relative degree of freedom, with the restrictions on each person's liberty as tolerable as we can make them".<sup>99</sup> Unrestricted freedom in a world where resources are limited would ultimately lead to anarchy. "If some exercised a freedom to take all the goods they desired, the freedom of others to consume those goods would be gone...[there being]...no freedom to consume what does not exist or what other consumers have already appropriated".<sup>100</sup>

Indeed, by virtue of the collective nature of the paradigmatic contract - in other words the fact that it represents a bargain or agreement between two or more persons, a meeting of minds rather than the assertion of the will of one party alone - it is

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<sup>95</sup> Charles Darwin (1809-1882) argued that, in the animal kingdom, species evolved by means of natural selection. The strongest or most adaptive and ingenious of the species would survive to procreate whilst the weakest would perish. Over time, then, the species as a collective would gradually become better equipped to deal with the world around it. See Darwin, *On the Origin of Species by means of Natural Selection*, (Murray, 1859) and ed. Burrow, (Penguin, 1968). Commentators such as Spencer, *op. cit.*, attempted, rather crudely, to apply a similar logic to social progress, arguing that by allowing persons to use their natural wits and skills, humankind would ultimately evolve to greatness.

<sup>96</sup> T. Hobbes, *Leviathan*, (1651), MacPherson (ed.) (Harmondsworth: Penguin, 1968) at Chapter 13, p. 186.

<sup>97</sup> Camille Paglia makes a strikingly similar argument in Chapter 1 of Camille Paglia, *Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson*, (London: Penguin Books, 1990). Without the taming influences of civilisation and Society, she argues, humankind is doomed to suffer brutal anarchy. In keeping with the sexual theme, however, she credits the infamous Marquis de Sade rather than Hobbes as the originator of this strand of thought.

<sup>98</sup> Robert L. Hale, "Bargaining, Duress, and Economic Liberty", 43 *Columbia Law Review* 603 (1943).

<sup>99</sup> *Ibid* at p. 626.

unlikely (short of coercion) that a contract will ever reflect categorically the unadulterated preference of each party viewed separately. Macneil for instance<sup>101</sup> in the context of commercial contracting, speaks of a 'sliding scale of consent'. A businessperson engaged in contractual negotiation will, Macneil envisages, react with varying degrees of enthusiasm to the various constituents of a contractual offer made by the other party. It may be the case (it arguably is almost always the case) that a contract will be accepted in its totality despite some reservations as to its specific contents.<sup>102</sup> Indeed most contractual agreements (barring extreme circumstances) to a greater or lesser degree involve compromise. The vendor wants IR£100 for his product with no strings attached; the purchaser offers IR£80 and demands guarantees as to merchantable quality;<sup>103</sup> both parties agree on IR£90 with the requested guarantee. The agreement reflects the preferred result of both collectively yet of neither individually. Ironically it may be said that the more completely a particular arrangement reflects the preference of one party alone the more compelling the inference that it is the product of force rather than consent.

How then is it decided that an act or situation is coercive for the purposes of law? The overriding impression garnered from even a cursory review of the law is that there is no one universal definition of what amounts to a coercive situation for legal purposes.

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<sup>100</sup> *Ibid.*

<sup>101</sup> Macneil, I., *The New Social Contract* (New Haven: Yale University, 1973) at p. 73.

<sup>102</sup> Where reservations are made known to the other negotiating party before agreement is reached in a manner that makes clear that they are stipulated as conditions of entry into the contract, there occurs what is known in contract law as the 'Battle of the Forms'. Apparent acceptance subject to conditions is no acceptance in law. It is, and is seen as, a new offer. See *Butler Machine Tool Co. v. Ex-cell-O Corporation (England)* [1979] 1 All E.R. 965. There, an order was made subject to new terms; this was deemed not to be an acceptance but rather "a counter-offer which destroyed the original offer made by the sellers...". See also *Swan v. Miller* [1919] 1 I.R. 151. The U.S. Uniform Commercial Code takes a less rigid approach to acceptance: see UCC 2-207(I) where an acceptance is deemed to "...operate...as an acceptance even though it states terms additional to or different from those offered..." provided it nonetheless constitutes "a definite and seasonable expression of acceptance". See generally Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 2000), at p. 44ff. and at pp. 174-175.

<sup>103</sup> If the purchaser is not trading in the course of his business and the vendor is, such guarantee, by virtue of section 14(2) of the Sale of Goods Act 1893, as amended by section 10 of the Sale of Goods and Supply of Services Act, 1980 is deemed an automatic term of the contract, which term cannot be removed even by agreement of the parties. For present purposes then let us assume that the purchaser is acting in the capacity of retail trader and that the omission of a term as to merchantable quality would nonetheless be 'fair and reasonable' within the meaning of the Act.



Contract and Criminal Law for instance share in common a defence or remedy called 'duress'. Yet each takes a substantively different stand on the meaning of the term, in particular as regards whether pressures of a purely economic nature will amount to duress.<sup>104</sup> This, of course, is hardly surprising considering the widely divergent subject-matter, nature and consequences of the decisions taken in each respective field although it is worth noting that even where there is room for doctrinal consistency it is found to be lacking. In the *D.P.P. for Northern Ireland v. Lynch*,<sup>105</sup> a case of great significance for the concept of duress in criminal law, Lord Wilberforce comments that an act might be voluntary (in the sense of being intentional, a product of the will) and yet be deemed to have been carried out under duress. Yet in *Pao On v. Lau Yiu Long*,<sup>106</sup> the Privy Council, despite the presence of Lord Wilberforce in its ranks,<sup>107</sup> persisted in typifying duress as involving the negation of a voluntary act.<sup>108</sup> Indeed, *Lynch* was neither cited by the judges themselves nor by counsel.<sup>109</sup> Such doctrinal autonomy, as will be discussed in Chapter Five below, is more marked still in the case of Family law.

Some generally accepted points can however be made. It is possible for instance to begin by noting the distinctions made first, between a threat and a warning and

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<sup>104</sup> While private law now recognises the possibility of 'economic duress' the criminal law has steadfastly refused to bend. The threat "must be of death or serious bodily harm" (Card, Cross and Jones, *Criminal Law*, (London: Butterworth's, 1995) at p. 532). See also *R. v. Singh* [1972] 1 W.L.R. 1600. In that case, a threat to expose marital infidelity was deemed insufficient to constitute duress for the purposes of criminal law, the Court noting (*per* Lawton L.J. at p. 1604) that "[d]uress arises from threats of violence not exposure". It is clear that a threat to damage property will not suffice either: see *R. v. M'Growther* (1746) Fost. 13 and *D.P.P. v. Milcoy* (1993) C.O.D. 200. See also *R. v. Hudson and Taylor* [1971] 2 Q.B. 202, *D.P.P. for Northern Ireland v. Lynch* [1975] A.C. 653 and *R. v. Williamson and Allerton* [1977] Cr. App. Rep. 63.

<sup>105</sup> [1975] A.C. 653.

<sup>106</sup> [1983] A.C. 614.

<sup>107</sup> Though this was a decision of the Privy Council, (where generally only one opinion is handed down, that of the majority), it has been possible since 1966 for a dissenting opinion to be read in such cases. (Judicial Committee (Dissenting Opinions) Order 1966, (S.I. 1966, Part I, 1100). It must thus be assumed that Lord Wilberforce agreed with the majority on this point.

<sup>108</sup> See Atiyah, (1982) 98 *L.Q.R.* 197, who generally criticises the failure of the Privy Council to refer in particular to the *dicta* in the *D.P.P. for Northern Ireland v. Lynch* [1975] A.C. 653.

<sup>109</sup> In its judgment, 12 cases were cited by the Privy Council; an additional 15 cases were referred to by counsel alone. Of these none were criminal cases.

second, between a threat and an offer. The first is easily explained.<sup>110</sup> Both a threat and a warning share in common the assertion (which may be implicit as well as explicitly stated<sup>111</sup>) that an undesired consequence will occur. Either may be stated to be contingent - that is, that the undesired consequence can be avoided by taking a certain course of action - although this is not a necessary prerequisite. Where the party has the power to prevent this consequence from being brought about, the assertion may (depending on the second distinction outlined below) amount to a threat. Otherwise it is a warning.

The second distinction is more complex in its ramifications. Hale<sup>112</sup> points out that even the most enticing offer may equally be framed in language that seems to pose a threat. For instance an offer made by John to Mary to the effect that he will give her his computer in exchange for IR£500 may equally be posed as a threat to withhold delivery of the computer unless the requested sum is paid over. Into every conditional offer there may be read an implicit threat to withhold. By the same token, the most violent of threats may be issued in terms more becoming an offer. The gun-wielding robber who threatens to shoot his victim unless his demands are met might equally be heard to say “if you do all that I say, I will spare your life”.

As in many areas of the law, the concern herein is less with form and more with substance.<sup>113</sup> Nozick<sup>114</sup> suggests that the real distinction between a threat and an offer

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<sup>110</sup> Although in practice the distinction is not always easy to apply. See *Chitty on Contracts*, 28<sup>th</sup> ed., (London: Sweet & Maxwell, 1999), at §7-036, p. 429, where it is noted that the “dividing line is not so easy to draw”. The afore-mentioned text contrasts the case of *Biffin v. Bignell* (1862) 7 H. & N. 877 with that of *Cumming v. Ince* (1847) 11 Q.B. 112. A substantially similar statement amounted to a warning in the former case, a threat in the latter.

<sup>111</sup> *B. & S. Contracts v. Green* [1984] I.C.R. 416.

<sup>112</sup> Robert L. Hale, “Bargaining, Duress, and Economic Liberty”, 43 *Columbia Law Review* 603 (1943).

<sup>113</sup> See for instance C-41-4/70 *International Fruit Co. v. Commission* [1971] E.C.R. 411 at p. 433 where Advocate General Roemer points out that it is not “the official description” of a piece of legislation that determines what it is but rather “its subject matter and content”. See also the observations of the European Court of Justice in C-16 & 17/62 *Confédération Nationale des Producteurs des Fruits et Légumes & Ors. v. Council* [1962] E.C.R. 471 at pp. 478-9. See also Carroll J. in *Waterford Glass (Group Services) Ltd. v. Revenue Commissioners*, [1990] 1 I.R. 334 at p. 337, noting that a “court is entitled to look at the reality of what has been done. Just because the parties put

lies in the extent to which a proposition, if carried out, would represent an increase or decrease in the opportunities available to the proposee prior to the proposition being made. Whereas an offer expands the range of opportunities open to an individual, a threat reduces it. The determination of whether a proposition is coercive, then, depends in part at least on a prior ascertainment of the respective entitlements of the parties. Nozick distinguished between the acceptance of an offer and the submission to a threat on the basis of the extent to which the consequences of each impacted on the options available to the party accepting or submitting, as the case may be. This in turn centres on the issue of entitlement. If Q is already entitled to do x then a representation made by B with a view to stopping Q from doing x unless he gives B £50, would constitute a threat. If however Q was not already entitled to do x, the representation ‘I won’t let you do x unless you pay me £50’ amounts to an offer, in the sense that it increases the options available to Q. Thus, in Nozick’s own words:

“[w]hether something makes a threat against Q’s doing an action or an offer to Q to do the action depends on *how the consequence he says he will bring about changes the consequences of Q’s action from what they would have been in the normal or natural or expected course of events*. If it makes the consequences worse than they would have been in the normal or expected course of events, it is a threat; if it makes the consequences better, it is an offer”.<sup>115</sup>

Take the following example: Farmer Green makes Farmer Brown a proposition: “If you pay me £1000 a year, I will allow you to graze your cattle on ‘Happy Acres’. Otherwise I will fence off the field so that you will have no access to it”. Assuming that Farmer Brown has no pre-existing right to graze on Happy Acres (and let it be assumed also no other rights in respect of the particular plot of land such as a right of easement,) the proposition increases the opportunities available to him: it is thus an offer. If on the other hand the denial of access were to amount to an infringement of a subsisting entitlement, which Farmer Brown enjoys, to graze on Happy Acres, then it

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a particular label on a transaction the court is not obliged to accept that label blindly”. See further the comments of Murphy J. in the Supreme Court in the same case at [1997] 3 I.R. 300 at pp. 305-306.

<sup>114</sup> Nozick, “Coercion”, in Morgenbesser, Suppes & White (eds.), *Philosophy, Science and Method: Essays in Honour of Ernest Nagel*, (New York: St. Martin’s Press, 1969), at p. 440.

would be a threat. The opportunities available to Brown would be diminished if the proposition were actualised. He would, in that situation, be required to pay extra for that which he already enjoys.

In other words, while an offer promotes an opportunity not heretofore available, a threat involves a proposal to divest one of an already existing opportunity. A good example of this methodology may be found in the Australian case of *Smith v. William Charlick*.<sup>116</sup> There, a flour miller rendered a payment demanded by the Wheat Harvest Board of South Australia following on a representation by the latter that it would not otherwise supply wheat to the former. The Board held a monopoly of supply but it was (strangely) under no corresponding legal obligation to supply.<sup>117</sup> The money was, per Knox C.J.<sup>118</sup> “paid not to have that done which the Board was legally bound to do, but in order to induce the Board to do that which it was under no legal obligation to do”. And Isaacs J.<sup>119</sup> noted that “a mere abstention from selling goods to a man except on condition of his making a stated payment [which surely is just another way of describing a contractual offer], cannot, in the absence of some special relation, answer the description of ‘compulsion’”.

This, however, presupposes an additional enquiry to determine the criteria by which it is to be decided that a party is or is not entitled to act in a particular way. This will depend, Wertheimer<sup>120</sup> suggests, on the choice of baseline - statistical, phenomenological or moral - against which a proposition is to be judged. Fried<sup>121</sup>

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<sup>115</sup> *Ibid.* at p. 447.

<sup>116</sup> (1924) 34 C.L.R. 38.

<sup>117</sup> In Irish law a party holding a monopoly or ‘dominant position’ in the market generally or in a particular market can be found to have abused that monopoly by, for instance, failing to supply another party without good reason. See Section 5 of the Competition Act, 1991 and Article 81EC. But see *C.T.N. Cash and Carry v. Gallaher Ltd.*, [1994] 4 All E.R. 714, and *Smith v. Charlick* (1924) 34 C.L.R. 38 where monopolies in supply (in the latter case a legal monopoly, in the former, an effective monopoly), were used with impunity as leverage in agreements.

<sup>118</sup> *Smith v. Charlick*, *ibid.* at p. 51.

<sup>119</sup> *Ibid.* at p. 56.

<sup>120</sup> Alan Wertheimer, *Coercion*, (Princeton University Press, 1987), at p. 207ff.

<sup>121</sup> Fried, *Contract as Promise*, (Mass: Harvard University Press, 1981,) at pp. 96-97. See also Michael Trebilcock, *The Limits of Freedom of Contract*, (Cambridge, Mass. & London: Harvard University Press, 1993,) Ch.4. at pp. 79-81

puts forward the example of a student pianist who, having voluntarily performed free annual recitals in the parish church for some number of years, now demands a fee for the service. If the baseline taken is a statistical one, it must be determined whether an average musician can generally expect to be paid for services rendered. A phenomenological baseline, by contrast, takes the experience not of persons in general but of a particular protagonist. Here the pianist, on the basis of prior experience, might well expect not to receive a fee while the congregation correspondingly might reasonably assume that one will not have to be paid. Whether the pianist should be paid may also be determined, however, by reference to a moral baseline: here the concern is not with whether a particular result is usual, either generally or in a specific context, but rather whether it is, by reference to pre-conceived notions of right and wrong, something that ought or ought not to be done.

### **The ‘Autonomy’ of Law: Debunking the Myth.**

Stewart, however, suggests that for legal purposes “the natural baseline for a theory based on rights is a legal one:  $\alpha$ ’s proposal is a threat if it worsens  $\beta$ ’s opportunities with respect to  $\beta$ ’s legal rights”.<sup>122</sup> Superficially, at least, this suggestion is an attractive one. It holds out the prospect of a readily determined criterion of entitlement: one that eschews the cumbersome nature of a statistical enquiry with its attendant demands on resources and need for forensic expertise while simultaneously avoiding the need to exercise personal judgment, with all the attendant uncertainties and subjectivities to which this would give rise.

Stewart’s invocation of the law as a ‘natural’ baseline is however, misguided. It relies, it is suggested, on a conceit not uncommon in classical legal discourses, namely that law is the product of a logical reasoning alone, divorced from material or ideological interests. This ‘formalist’ perspective assumes that the law may be developed, at least in the courts, independent of wider policy concerns of the State or

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<sup>122</sup> Hamish Stewart, “A Formal Approach to Contractual Duress” (1997) 47 *Uni. of Toronto Law Jo.* 176 at p. 183.

of any sectional interests within the State. In this sense it is said that law is 'autonomous.' Collins describes this perspective, in its most extreme form, as one that approximates law "to a transcendental reasoned collection of principles of correct behaviour...the embodiment of right".<sup>123</sup> By this process, formalist jurisprudence claims that legal reasoning is a "discrete and non-instrumental"<sup>124</sup> process which "claims to be able to reveal through pure reason a picture of an unchanging and universal unity beneath...laws, legal institutions and practices and thus to establish a foundation in reason for actual legal rights".<sup>125</sup>

While this claim is rarely feasibly made in reference to the law-making functions of legislatures, it is often asserted that it is possible and normal for the judiciary to proceed without determining policy but by reference to principle alone. From 1850 onwards and particularly between the first and second World Wars, this mechanistic view of the law took hold on the British benches on an unprecedented level.<sup>126</sup> Even as late as 1983 its influence could still be gauged. In *McLoughlin v. O'Brian*<sup>127</sup> a case concerning liability in tort for nervous shock, Lord Scarman posits that the judiciary "starts from a baseline of principle and seeks a solution consistent with or analogous to a principle or principles already recognised".<sup>128</sup> In focussing on principle alone, he continues, the court "can keep the legal system clear of policy problems".<sup>129</sup> This is in keeping with Dworkin's distinction between rights based on 'principle' and collective goals or 'policies'.<sup>130</sup> Dworkin too asserts that where no clear rules have been laid down by the legislature or the common law the judiciary should (and by implication can feasibly) proceed by reference to general principle alone. The claim here is a claim of judicial independence, not merely from the political class which inhabits the

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<sup>123</sup> Hugh Collins, *Marxism and Law*, (Oxford: Clarendon Press, 1982) at p. 61.

<sup>124</sup> *Ibid.* at p. 62

<sup>125</sup> Thompson "Critical Approaches to Law: Who needs Legal Theory" in Gregg-Spell and Ireland (eds.), *The Critical Lawyers' Handbook*, (London & Concord, Mass.: Pluto Press, 1992) at p. 2.

<sup>126</sup> See Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979), Chapter 20 at pp. 660-671.

<sup>127</sup> [1983] 1 A.C. 410.

<sup>128</sup> *Ibid.* at p. 429.

<sup>129</sup> *Ibid.* at p. 430.

<sup>130</sup> Ronald Dworkin, *Taking Rights Seriously*, (1977), rev. Ed., (London: Duckworth, 1981), Chapter 4, especially at pp. 90-100.

legislative and executive realm, but also from the realm of politics - or policy making itself.

This assertion of judicial autonomy from policy considerations is integral to the legitimation of legal processes. It suggests that law is and can be divorced from the ideological preferences of those who shape and fashion the law. Social, economic and cultural interests are deemed 'out-of-bounds'.<sup>131</sup> The instrumentalism of law is denied. Law is depicted as anti-consequentialist - however untoward the result of legal determination is thought to be, the result must stand.<sup>132</sup>

This view was challenged, though with differing emphases, first by Marxism and later by the influential critical legal studies movement, which came to the fore in the 1970s. Each rejects the assertion of autonomy in favour of analyses that expose and critique the manner in which dominant ideologies ultimately determine the overall shape of law and legal processes. Classical Marxist thought, for instance, sees law as a reflection of the economic interest of the dominant class and thus rejects the proposition that legal reasoning is a "purely intellectual exercise taking place entirely in the mind of the individual".<sup>133</sup> To understand fully why this is so, the Marxist theory of ideology must first be explained.

Marxist thinkers suggest that the solution to understanding social phenomena lies in the individual's relationship with the material resources necessary for his surviving and flourishing. Ideas and perceptions do not drop out of the air or form in a vacuum.

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<sup>131</sup> Indeed every Irish judge, on appointment, pledges to execute his or her office "without fear or favour, affection or ill-will towards any man". (Article 34.5, Irish Constitution). The term 'man' is used, it seems, in its generic sense. The Irish text uses the much more satisfactory term '*duine*' meaning 'person'. A note of realism is entered by Lord Radcliffe, however, who notes the "inescapable personal element" that is involved in all judicial decision-making. See Radcliffe, *Not in Feather Beds*, (Hamish Hamilton, 1968) at p. 212. See also Cardozo, *The Nature of the Judicial Process*, (New Haven: Yale University Press, 1921) at pp. 12-13: "we may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own".

<sup>132</sup> See for instance the trenchant dissent of Lord Hobhouse in *Fitzpatrick v. Sterling Housing Association* [1999] 3 W.L.R. 1113 at p. 1152, accusing Ward L.J. in the Court of Appeal in the same case of having given "effect to his own views". The function of a judge, he noted later (at p. 1156D), does not permit "choosing what social policy to support".

They are conceived and shaped in one's daily experience of the material conditions of life. The *relations of production* - that is the arrangements and structures in place in a community perceived best and most efficiently to exploit the means of production - are structurally determined by the *forces of production* - that is, the nature of the resources at hand and the technology available at any one time to exploit it. Marx, according to Collins,<sup>134</sup> "introduced a modern style of sociological explanation of the origins of knowledge by arguing that ideas were constructed through practical activities and social interaction as men conducted their daily lives", encapsulated in the soundbite "social being...determines...consciousness".<sup>135</sup>

If this is so, ideas and concepts developed in the judicial arena cannot be dissociated from the material interests of the dominant class of whom the judiciary generally tend to be representative.<sup>136</sup> This is not to say that judges *consciously* conspire to further the ends of their class.<sup>137</sup> Collins rejects the criticism often levelled at Marxism of 'crude class instrumentalism' by drawing further on Marxist understandings of the mediating role of ideology. "Since the class of owners of the means of production share similar experiences and perform approximately the same role in the relations of production, there emerges a dominant ideology which permeates their perception of interest".<sup>138</sup> This dominant ideology "being confirmed by everyday experience" is internalised such that it begins to "appear to be the natural order of things". In other

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<sup>133</sup> Hugh Collins, *Marxism and Law*, (Oxford: Clarendon Press, 1982) at p. 70.

<sup>134</sup> *Ibid.* at p. 37.

<sup>135</sup> Karl Marx, "Preface to a Contribution to the Critique of Political Economy" in L. Colletti, (ed.), *Early Writings*, (Penguin/NLR, 1975) at p. 424.

<sup>136</sup> As Zander comments "most judges in most countries and certainly in England are drawn from a relatively narrow social class". Zander, *The Law-Making Process*, 5<sup>th</sup> ed. (London: Weidenfeld and Nicolson, 1999), at p. 303. Bartholomew confirms, in relation to the Irish judiciary in 1971, that the picture was largely similar in this jurisdiction. Bartholomew, *The Irish Judiciary*, (Dublin: Institute of Public Administration, 1971). Of the Irish judges that he had surveyed "none...has been of humble family origin. On the contrary, almost two-thirds come from admittedly upper-middle class social and economic backgrounds and almost all the remainder from [the] middle class". (*Ibid.* at pp. 41-42). Most were, it may be added, of urban rather than rural origin. (*Ibid.* at p. 32).

<sup>137</sup> Griffith, *The Politics of the Judiciary*, 1<sup>st</sup> ed., (London: Fontana, 1977), at p. 214, expressly discounts the suspicion that judicial bias is deliberate: "The incorruptibility of the English Bench and its independence are great virtues. All this is not in issue". Indeed Kairys notes in his introduction to Kairys (ed.), *The Politics of Law: A Progressive Critique*, (New York: Pantheon Books, 1990) at p. 6 that judges are "encouraged to see the roles and express themselves as neutral and objective agents".

<sup>138</sup> Collins, *Marxism and Law*, (Oxford: Clarendon Press, 1982) at p. 43.



words, the dominant ideology, being the means by which the dominant class understands and explains its experience of the material, comes to be seen as the very embodiment of common sense. Thus “laws enacted according to the dictates of a dominant ideology will appear to the members of that society as rules designed to preserve the natural social and economic order”. This allows the judiciary genuinely to protest its *bona fides* while simultaneously perpetuating the interests of the dominant class.<sup>139</sup> Nevertheless, according to Griffiths, judges do ultimately tend to “define the public interest, inevitably, from the viewpoint of their own class”.<sup>140</sup> The ‘natural’ result then is that the public interest is defined in terms reflecting “the interests of others in authority, whether in government, in the City or in the church”.

A key flaw in this analysis is its assumption of a homogeneity of interest among those considered to inhabit the dominant class. In an industrial society in particular specialisation of tasks spawns a diversity of experience, not a good foundation for the flourishing of large classes having interests in common.<sup>141</sup> Marxist thought is justly criticised for its ‘class reductionism’, the assumption that a complete explanation of social relations can be founded on one facet of social existence alone: class. This is obviously too limited - Rawls for instance, in his development of a pre-political

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<sup>139</sup> It cannot readily be asserted, however, that a clear class bias pervades judicial decisions. O’Higgins and Partington, “Industrial Conflict: Judicial Attitudes”, (1969) 32 *M.L.R.* 53 demonstrate that the evidence is at best equivocal. Griffith posits a somewhat different thesis, that judges are indeed biased but not necessarily on account of their social background. (Griffith, *The Politics of the Judiciary*, 5<sup>th</sup> ed. (London: Fontana, 1997)). He suggests that the very nature of the judicial role is to uphold the *status quo*, to reflect the concerns and interests of the dominant political order. This being so, it matters not, he suggests, whether the judiciary is primarily from one social class or not. See Griffith, *The Politics of the Judiciary*, 1<sup>st</sup> ed., (London: Fontana, 1977) at p. 214, where Griffith outlines his thesis “that the judiciary in any modern industrial society, however composed, under whatever economic system, is an essential part of the system of government and that its function may be described as underpinning the stability of that system and as protecting that system from attack by resisting attempts to change it”. Griffith argues that this point was equally applicable in capitalist and communist states.

<sup>140</sup> Griffiths, *The Politics of the Judiciary*, 4<sup>th</sup> ed. (London: Fontana, 1991) at p. 329. See also the 5<sup>th</sup> ed. (1997) at p. 336, where Griffith remarks that judges’ “interpretation of what is in the public interest and therefore politically desirable, is determined by the kind of people they are and the interests of their own class”. It is inevitable, he suggests that the judiciary will thus “reflect the interests of its own class”. (*Ibid.*)

<sup>141</sup> See Durkheim who argued that as society progressed from the agrarian to the industrial model social and economic functions would become more highly specialized and in turn social attitudes

methodology for determining rights,<sup>142</sup> identified several<sup>143</sup> diverse determinants of political consciousness, economic status being but one. According to McCoubrey, “[t]o concentrate solely upon economics as the base factor is severely to limit the analysis and to interpret all other factors in its light actually involves a distortion”.<sup>144</sup> Early Marxist thought fails, in particular, to account for the manner in which different experiences of gender<sup>145</sup> and race shape dominant ideologies although later analyses, with mixed success, have endeavoured to incorporate these concerns.

The Marxist critique of autonomy has also been the subject of challenge. With some modifications, however, it is suggested that it retains its validity. Although it may be difficult to explain its relevance in relation to certain legal phenomena, it remains a forceful and compelling critique of legal processes in general and one which was revived with the advent of the Critical Legal Studies movement<sup>146</sup> in the 1970s. The critical perspective, while avoiding the economic determinism of Marxism, shared the latter’s concern to debunk the autonomy claims of liberal legal discourses. “The majority” Kairys comments, “claims for its social and political judgment not only the status of law...but also that its judgment is the product of distinctly legal reasoning, of a neutral objective application of legal expertise”.<sup>147</sup> Critical legal scholarship, in asserting the falsehood of this proposition, posits instead that it is only possible ultimately to explain judicial determinations in terms of “judicial values and choices

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would diversify considerably. Durkheim, *The Division of Labour in Society*, (1893) (Ill.: Glencoe, 1964).

<sup>142</sup> John Rawls, *A Theory of Justice*, (London: Oxford University Press, 1973), at p. 137.

<sup>143</sup> It is arguable that even Rawls’s criteria are not exhaustive: gender is, strangely, absent from Rawls’s list.

<sup>144</sup> Hilaire McCoubrey, *The Development of Naturalist Legal Theory*, (London: Croom Helm, 1987), at 109.

<sup>145</sup> Catherine MacKinnon, for instance, notes the “indistinguishability between Marxism and Liberalism on questions of sexual politics” such that “the idealism of liberalism and the materialism of the left have come to much the same for women”. Catherine MacKinnon, “Feminism, Marxism, Method and the State: Towards Feminist Jurisprudence” in *Signs: Journal of Women in Culture and Society* 8 (1983), 635-658 at p. 658.

<sup>146</sup> On which generally see Kelman, *A Guide to Critical Legal Studies*, (Cambridge, MA: Harvard University Press, 1987), Gregg-Spell and Ireland (eds.), *The Critical Lawyers’ Handbook*, (London & Concord, Mass.: Pluto Press, 1992).

<sup>147</sup> Kairys, “Legal Reasoning”, in Kairys (ed.), *The Politics of Law: A Progressive Critique*, (New York: Pantheon Books, 1982). In the revised edition of that collection of essays (New York: Pantheon Books, 1990) see Kairys’s “Introduction” making largely similar points at pp. 6-7.

of a political nature”. It maintains that the attempt to secure a ‘universal foundation for law through pure reason’ is a front serving to legitimate legal processes that in fact effectively perpetuate the main target of Critical Legal scholarship ire - the liberal order.<sup>148</sup> McCoubrey and White typify this perspective in terms that closely mirror some strands of Marxist thought noted above: “Judges,” they say, “share social and political assumptions, in other words they share an ideology which, because of their background, leads them to make consistent decisions that reinforce the liberal order in which they operate”.<sup>149</sup> The purpose of Critical Legal studies, it is said, is to expose through deconstruction “the dominant intellectual paradigm” lurking behind law and legal processes.

This is not to say, however, that Critical Legal studies espouses the Marxian conception of class hierarchy. The “dominant intellectual paradigm” with which it is concerned is rather the product of a combination of diffuse and complex set of hierarchies. This may account for the many internal contradictions that the proponents of Critical Legal theories expose in the fabric of the law. Law, it says, is riven with underlying contradictions and conflicts that the law, in pursuance of its assertion of legitimacy through reasoned thought, seeks either to harmonise or suppress. Far from being a consistent reasoned whole, the law contains many dichotomies of thought competing for attention – some of these, such as the public/private dichotomy in family law, will be examined in greater detail later in this thesis.<sup>150</sup>

The supposed autonomy of the law is thus exposed. Legal discourses are inherently political in nature and content, although they may reflect not one but rather many, even conflicting, political concerns. Returning to the issue of coercion, then, it can be

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<sup>148</sup> See also Kairys, “Introduction” to Kairys (ed.), *The Politics of Law: A Progressive Critique*, (New York: Pantheon Books, 1990) at p. 6. The great source of the law’s power is that it “enforces, reflects, constitutes and legitimizes dominant social and power relations without a need for or the appearance of control from outside and by means of social actors who largely believe in their own neutrality and in the myth of non-political, legally determined results”.

<sup>149</sup> Hilaire McCoubrey and Nigel White, *Textbook on Jurisprudence*, 2nd Ed. (London: Blackstone Press, 1993) at p. 220.

seen that the invocation of law as a baseline of entitlement is not nearly as objective and neutral - or despite the claims of Stewart not by any means as 'natural' - a determinant as suggested earlier. It is evident that the criteria against which entitlement is judged may in many cases be themselves fashioned from an ideology that perpetuates the (sometimes conflicting) interests of dominant groupings in society. Kelman then observes that attempts "to distinguish illegitimate threats from legitimate offers..." like that of Nozick<sup>151</sup> outlined above "founder in their obvious inability to ground a politically uncharged theory of each party's initial entitlements".<sup>152</sup> A pre-political definition of entitlement (defined by means such as those outlined by Rawls<sup>153</sup>) might resolve this dilemma although Kelman doubts whether it is really possible to discern a definition that "will embed universally acceptable propositions about the ideal form of human organisation".

Attempts to shape, for legal purposes, an objective, value-free definition of coercion are doomed to failure. The conceptual boundaries of 'duress' 'undue influence' and 'consent' inevitably reflect social, cultural, economic and political values whether shared generally or, as suggested above, reflecting the priorities of the dominant groupings in society. In this sense the various doctrines of coercion dealt with herein both reflect and constitute a conception of freedom that is at root instrumental - a product of social, cultural, economic and political priorities. Indeed the fortunes of the doctrine of duress in particular have closely paralleled those of liberalism in general - a favourite target of Critical Legal scholarship - and in particular the liberal concept of the 'free market' and the closely allied doctrine of 'freedom of contract'. Because of the importance of these concepts to an understanding of the shape and

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<sup>150</sup> See below in Volume II, Chapter Five, at pp. 113-122.

<sup>151</sup> See above pp. 28-30.

<sup>152</sup> Kelman, *A Guide to Critical Legal Studies*, (Cambridge, Mass.: Harvard University Press, 1987) at p. 22.

<sup>153</sup> John Rawls, *A Theory of Justice*, (London: Oxford University Press, 1973). Rawls suggests a methodology of determining rights rather than a comprehensive scheme of rights. A hypothetical group of people - the original actors - whose place and position in society is not yet determined or known to them, would, from behind this 'veil of ignorance' determine the constitution of an optimally just society. This determination would, he suggests, be objectively fair.

development of theories of coercion it is proposed at this juncture that they be examined in closer detail.

### **The Free Market and Freedom of Contract**

The confines of liberalism have in modern times been subject to considerable blurring.<sup>154</sup> ‘Liberal’ as a term is, in these times, used as often to describe measures that are prescriptive and coercive as it is in the classical sense to describe a stance which is permissive. Thus, Paglia comments, “[m]odern liberalism suffers unresolved contradictions”.<sup>155</sup> While, on the one hand, espousing individual endeavour and the freedom to attain it and correspondingly “condemn[ing] social orders as oppressive” it “on the other hand expects government to provide materially for all”. “[I]n other words”, Paglia remarks, “liberalism defines government as tyrant father but demands it behave as nurturant mother”.<sup>156</sup>

Classical Liberalism, at least, is rather more consistent. This approach saw its heyday in the period beginning in the late 1700s and ending in the early 1900s but has roots of greater vintage in earlier developments in philosophy and political economy.<sup>157</sup> It broadly espouses maximum autonomy being reserved to individuals with minimal imposition of externally determined values and norms. At the heart of its economic agenda is the idea of the free market - an arena wherein goods and services are freely exchanged with minimal collective control or regulation. In jurisprudential terms the cornerstone of liberal thought is undoubtedly the closely allied principle of ‘freedom of contract’ under which it is envisaged that the state will give virtually automatic

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<sup>154</sup> See the comments of Andrew Sullivan in *Virtually Normal: An Argument About Homosexuality*, (London: Picador, 1996). He makes the point that modern ‘liberalism’ lacks coherence in that it represents a perspective that alternately demands preventive measures (on behalf of the poor and minorities) and yet also condemns the State for its heavy-handed intervention. See also the comments, at fn. 50 above, regarding the modern distortion of the term.

<sup>155</sup> Camille Paglia, *Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson*, (London: Penguin Books, 1990) at p. 2.

<sup>156</sup> *Ibid.* at pp. 2-3.

<sup>157</sup> See Gordley, *The Philosophical Origins of Contract Doctrine*, (Oxford: Clarendon Press, 1991).

facilitation to the arrangements of the parties to a decision with a minimum of conditions and safeguards.

The roots of this perspective are more sophisticated than might at first seem apparent. The rise of liberalism can be traced back to developments starting in the 1600s, in particular with the inception of the 'Age of Enlightenment' or the 'Age of Reason'. The predominant philosophies of this time espoused the central importance of reason as a means of determining universal truths.<sup>158</sup> Spurred on by contemporaneous scientific and cultural advances, philosophers such as Diderot, Descartes, Spinoza, Rousseau and Voltaire saw human reason as the touchstone of knowledge and the key to the advance of humanity. Through the use of human reason, it was believed, humankind could surmount most of the fetters that constrained it. Progress was viewed as inevitable. This new found faith in humanity prompted some loosening even in the absolutist perspectives of European monarchs in favour of some degree of religious toleration, the promotion of agricultural and technical innovation, of education and (under the undoubted influence of Italian penologist Cesare Beccaria),<sup>159</sup> some elementary penal reform. Frederick II of Prussia, Joseph II of Austria and the Russian Empress Catherine the Great alike proved enthusiastic proponents of rationalism,<sup>160</sup> a fact attested to by the regular correspondence between both Catherine and Frederick and the French philosopher Voltaire.<sup>161</sup> Indeed the last two monarchs were thought to have subscribed privately to a form of agnosticism known as Deism known to have been popular among rationalists which rejected much of the dogma and doctrine of the Christian religions. Deism propounded that while God had indeed initially created the universe, He no longer intervened in its operations, but allowed instead that it be ordered and regulated by Nature alone.

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<sup>158</sup> See generally the discussion in Pound, "The End of Law in Juristic Thought (II)" 30 *Harv. L. Rev.* 201 at pp. 201ff.

<sup>159</sup> Cesare Beccaria, *Dei Delitti e delle Pene*, see: *On Crimes and Punishments and Other Writings*, (Cambridge & New York: Cambridge University Press, 1995).

<sup>160</sup> See generally A. Lentin, *Enlightened Absolutism, 1760-1790*, (Newcastle-upon-Tyne: Averro, 1985).

<sup>161</sup> With Catherine the Great see A. Lentin, *Voltaire and Catherine the Great: Selected Correspondence*, (Cambridge: 1974). With Frederick see T. Batterman (ed.), *Voltaire's Correspondence*, Vols. I-CVII, (Geneva: 1953-65).

There is a curious irony in this monarchic espousal of divine impartiality. These monarchs, after all, claimed to rule by divine right,<sup>162</sup> by what other means was their continued reign to be deemed legitimate? Certainly the monarchs noted above, however enlightened, had no intention of ceding ultimate power. In fact many monarchs of the eighteenth century were busy consolidating power over the territories in which they ruled and beyond. The 1700s marked the embryonic stages of the growth of the 'nation-state'. Monarchs throughout Europe were concerned to wrest power and influence from disparate regions and territories of their respective realms with a view to the ultimate centralisation of authority and control. Joseph II of Austria for instance, "sought to weld together a far-flung multi-national and polyglot collection of provinces, with varying degrees of autonomy, into a unitary state".<sup>163</sup> This he did by a variety of means, the abolition of local government and the imposition of German as a common official language among them, though the most notable of means was perhaps the creation of an internal free trade area within and between the various parts of his empire. The instrumentality of freedom was evident even then.

Nevertheless, partly as a result of rationalist thought, a growing level of circumspection about the regulatory role of the state had taken root and was proving popular both on the continent and across the English Channel. On the continent the circumspection manifested itself most particularly in the writings of Rousseau<sup>164</sup> and Voltaire.<sup>165</sup> Indeed, the former saw civilisation in general and society in particular as corrupting influences which constrained the free endeavour of humankind and hence fettered progress: "Man is born free but is everywhere in chains".<sup>166</sup> Correspondingly

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<sup>162</sup> See the comments of Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform", (1983) 96 *Harvard Law Rev.* 1497 at pp. 1513-4.

<sup>163</sup> A. Lentin, "Introduction" to A. Lentin, *Enlightened Absolutism* (*op. cit.*, fn. 84) at p. xii.

<sup>164</sup> See the discussion in Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.*, at pp. 57-59.

<sup>165</sup> See generally the correspondence between Voltaire and the 'enlightened monarchs' in Lentin's *Enlightened Absolutism, 1760-1790*, (Newcastle-upon-Tyne: Averro, 1985).

<sup>166</sup> "L'homme est né libre et partout il est dans les fers". Jean-Jacques Rousseau, *Du Contrat Social*, (1762) (published as *The Social Contract* (Harmondsworth: Penguin, 1968)).

the function of a good law, it followed, was to “unshackl[e]...individual energy” so as to insure “the maximum of individual self-assertion”.<sup>167</sup>

In Britain, though the emphasis was somewhat less philosophically abstract, the underlying message was very much the same. Thomas Hobbes, most particularly in *Leviathan* published in 1651, sought to justify the imposition of government (with varying degrees of success),<sup>168</sup> by positing that it flowed from the implicit consent of the governed.<sup>169</sup> Though Hobbes’s understanding of consent is, at best, highly artificial, the very fact that it was seen to be necessary to ‘justify’ government conveyed clearly that the precepts upon which the old order had been built were no longer to be taken for granted. Implicit in Hobbes’s analysis is the notion that the imposition of sovereign power must be legitimated not by reference to divine right but, rather, on reasoned grounds. His concern, at a turbulent time in England’s history, was to outline a theoretical justification for the curtailment of the absolute personal liberty which, Hobbes posited, a hypothetical individual would possess in a ‘state of nature’. The paradox posed by Hobbes was that the effective enjoyment of personal liberty actually necessitated a mutual abandonment of a portion of personal liberty. Peace and order were only possible where individuals agreed to subordinate a part of their liberty in exchange for the security and defence which was to be guaranteed by the Sovereign. Locke, almost a generation later in 1690,<sup>170</sup> followed in this social-contractarian vein, although with rather different concerns in mind. Writing in the aftermath of the ‘Glorious Revolution’ of 1688, when King William III and Queen Mary II secured the throne of England, Locke was anxious to emphasise that the vesting of power in a Sovereign was neither absolute nor irrevocable. It was,

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<sup>167</sup> Pound, “The End of Law in Juristic Thought (II)” 30 *Harv. L. Rev.* 201 at p. 203.

<sup>168</sup> Hobbes was particularly unconvincing on this point. “Hobbes tended to equate free choice with what we would call free will. If a man did something otherwise than under actual physical compulsion (i.e. not voluntarily) he did it freely”. Atiyah, P., *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979) at p. 43.

<sup>169</sup> Blackstone also endorses this social compact idea in 1 *Bl. Comm.*, 140 at pp. 158-159. Pound links this tendency to intellectual developments precedent to and consequent upon the Protestant Reformation. Pound, “The End of Law in Juristic Thought (II)” 30 *Harv. L. Rev.* 201 at p. 203. The predominant tendency of Reformation thinkers he said, was to deny “the authority of any rule which could not be referred to the will of the individual to be bound”.

<sup>170</sup> J. Locke, *Two Treatises on Government*, (London: Dent, 1924).



rather, contingent on the maintenance of the duty placed on the Sovereign to guard the liberties and 'natural rights' of his or her subjects. If breached, "the people...have a right to resume their original liberty".<sup>171</sup> Locke sought by his words primarily to confer constitutional legitimacy on the replacement of James II as monarch by William and Mary but the principle is of wider significance: the Sovereign governs not by right but rather by the will of the people and, moreover, (as evidenced by experiences in the United States in 1776 and France in 1789) could be replaced. Indeed in practical terms Britain was already experiencing the political fallout of these ideas. The enactment of the Bill of Rights in 1688 and the resultant increment in Parliament's powers and privileges, paved the way for the growth of Constitutional Democracy and the consolidation of the Rule of Law in Britain.

***Developments in Economic Thought.*** In practical terms, however, this newfound concern with freedom perhaps made its most emphatic mark in Britain in the sphere of political economy. This economic current was most strongly felt in Scotland, where writers such as David Hume and Adam Smith challenged the then prevailing economic policy of Britain that favoured tight regulation of micro-economic affairs. While Hume<sup>172</sup> in particular rejected the social contractarian theories as fictitious nonsense - arguing that it is neither possible nor realistic to view the social order as being one upon which persons even generally have been consulted - a similar circumspection concerning external imposition is in evidence. Up until the late eighteenth century it was still widely believed that profit or gain to one individual necessarily entailed loss to another. Usury was viewed with considerable suspicion even after partial legalisation.<sup>173</sup> The proscription of certain marketing offences effectively ruled out the existence of middlemen in the sale of agricultural produce.<sup>174</sup> Cornering products to profiteer or speculate was forbidden. The Chancery Court frequently refused to order specific performance of bargains which it considered

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<sup>171</sup> *Ibid.*, Book 2, Chapter 19 at p. 229.

<sup>172</sup> David Hume, *A Treatise of Human Nature*, (1739-40), Selby-Bigge and Nidditch, (eds.) (Oxford: Oxford University Press, 1978), Norton & Norton (eds.), (Oxford: Oxford University Press, 2000).

<sup>173</sup> P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979) at pp. 65-67.

substantively unfair and common law juries often ignored the price freely agreed by the parties to a suit for breach of obligation in favour of such sum in damages as they considered reflected a 'just price.'<sup>175</sup>

In contrast, Hume and Smith considered that the social welfare generally was best promoted, paradoxically, when individual choice was facilitated (by means of free contracting) to the maximum extent feasible. The pursuit of personal self-interest far from heralding a rapid regression into a Hobbesian 'state of nature' could promote the social good provided individuals were sufficiently enlightened to see that "...it was in their own interests not to pursue short term advantage at the expense of longer-term interests".<sup>176</sup> Commercial integrity and probity enhanced trust and confidence in market processes, a particularly important factor in any dynamic economy where promises and future entitlements constitute the bulk of realisable wealth.

Self-interest itself then, or as Hume preferred "*enlightened* self-interest"<sup>177</sup> could in and of itself prove *socially* efficient. "It is not from the benevolence of the butcher, the brewer or the baker..." Smith remarks, "...that we expect our dinner but from their regard to their own interest. We address ourselves not to their humanity but to their self-love".<sup>178</sup> It is as though, Smith continues, a mystical force is in operation that transforms the merchant's self-interest into a social good:

"...the study of [the individual's] own advantage naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to society. he is in this...led by an invisible hand to promote an end which was no part of his intention, nor is it always the worse for society that it was not part of it. By pursuing his own self-

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<sup>174</sup> *Ibid.* pp. 128-130 and pp. 363-365.

<sup>175</sup> *Ibid.* at pp. 61-65, 146-149 and 167-180.

<sup>176</sup> *Ibid.* at p. 80.

<sup>177</sup> David Hume, *A Treatise of Human Nature*, (1739-40) *op. cit.* See also the discussion in Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.*, at pp. 52-57

<sup>178</sup> Adam Smith, *The Wealth of Nations*, (1776) (1937 ed.) at p.14.

interest he frequently promotes that of society more effectively than when he really intends to promote it".<sup>179</sup>

In effect, Smith argues, the best means of maximising social utility lies in allowing for the maximisation of personal utility. Where two individuals voluntarily contract *inter se* it is to be presumed that each regards the arrangement as being in his or her personal interest. So far from necessarily involving gain *and* loss, an arrangement may be mutually beneficial, that is, that it may give rise to an elevation of utility on both sides. Market freedom furthermore promotes allocative efficiency - those who most need or want the produce or expertise in question are those who are willing to pay most for it and as a result are likely to make the most efficient use thereof.<sup>180</sup> Frequency in market dealings, furthermore, enhances in its own right the potential for fair dealings and hence for stability in the market. Atiyah notes how Smith believed that it was "...increased commercial dealings which lead to greater respect for commercial engagements. This is because it is self-interest which controls and regulates man's actions and the more dealings they have the more does self-interest demand that they honour their engagements".<sup>181</sup> In short, frequent, honest dealings paid.

***The Principle of Utility.*** This elevation of self-interest is reflected in Utilitarianism, a strand of philosophy that is closely allied to liberal thought. Utilitarianism is founded on the principle of utility, which John Stuart Mill describes as "that principle which approves or disapproves of every action according to the tendency which it appears to have to augment or diminish the happiness of the party whose interest is in question".<sup>182</sup> It doubts the feasibility of ascribing to an item or action an objective value. Subjective perception alone is possible - "the only proof that a thing is visible", Mill observes, "is that people actually see it. The only proof that a sound is audible is that people hear it; and so of the other sources of our experience. In like manner, I

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<sup>179</sup> *ibid.* at pp. 421-423.

<sup>180</sup> This of course assumes an equal distribution of resources. See M. Trebilcock, *The Limits of Freedom of Contract*, (Cambridge, Mass. & London: Harvard University Press, 1993) at p. 30.

<sup>181</sup> Atiyah, *op. cit.*, fn. 93 at p. 81.

<sup>182</sup> J.S. Mill, *Utilitarianism* (London: Everyman, 1948) at p. 34.

apprehend, the sole evidence it is possible to produce that anything is desirable is that people do actually desire it”.<sup>183</sup>

Thus Utilitarianism posits that the only measure of good is “...the Utility or the Greatest Happiness Principle, [which] holds that actions are right in proportion as they tend to promote happiness, wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure”.<sup>184</sup>

While Mill readily acknowledged that the attainment of the greatest happiness of one person might well entail the destruction of that of another, (in particular in his espousal of the harm principle), he was quick to dismiss frameworks of morality directed solely to the common or collective good. The community, he argued, was no more than the sum of its parts. The collective good then equates to “the sum of the interests of the several members”<sup>185</sup> making up the community in question. The person best placed to determine the interests of the actor was, it was argued, the actor himself. Bentham comments that, in general, “there is no one who knows what is for your interest so well as yourself – no one who is disposed with so much ardour or constancy to pursue it”.<sup>186</sup> Though the Utilitarians speak little of contract law specifically,<sup>187</sup> it is easy to extrapolate from their general comments a perspective of the law of contract that would be value-free, in other words which generally respects the intentions of contractors without enquiring into the benefit personal, collective or otherwise, of the end-results. It reflects a belief shared right across the liberal-individualistic<sup>188</sup> spectrum that society in general would be the better for allowing

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<sup>183</sup> *Ibid.* at p. 32.

<sup>184</sup> *Ibid.*

<sup>185</sup> *Ibid.* at p. 35

<sup>186</sup> Jeremy Bentham, *Works*, (ed. Bowring) iii. at p. 33. See also Dicey, *The Law and Public Opinion in England*, 2<sup>nd</sup> ed., (London: Macmillan, 1962), at p. 146 where he opines that “[e]very person is in the main and as a general rule the best judge of his own happiness”.

<sup>187</sup> See the comments of Atiyah, (*op. cit.*, fn. 173), at p. 325.

<sup>188</sup> Though Utilitarianism can look to the social as well individual wellbeing, it seems that Bentham, according to Pound, assumed that the latter would generally flow from the form. Pound, “The End of Law in Juristic Thought (II)” 30 *Harv. L. Rev.* 201 at p. 207. Bentham simply took for granted then

each individual member, within certain limits, be the master of his own interests. The function of law, in such a scheme, would then be largely directed at securing such freedom, in the words of Pound, “a purely negative [function] of removing or preventing obstacles to such individual self-assertion, not a positive one of directly furthering social progress”.<sup>189</sup>

The law of contracts which springs from this current of thought is one which is essentially amoral: a result is considered self-evidently to be good simply because the parties desired that it come to pass. Moore,<sup>190</sup> amongst others, slams this philosophy as essentially tautological because of what he terms ‘the naturalistic fallacy’. “Mill tells us that we ought to desire something (an ethical proposition) because we actually do desire it; but if his contention that ‘I ought to desire’ means nothing but ‘I do desire’ were true, then he is only entitled to say ‘We do desire so and so, because we do desire it’ and that is not an ethical proposition at all...”. To say that something is good simply because it is desired is to place an inordinate faith in the judgment of humanity.<sup>191</sup>

*The Rise of the ‘Will Theory’.* Whatever criticisms were made of liberal-individualistic philosophies fell largely on deaf ears. The period beginning at the end of the eighteenth century and lasting until the start of the twentieth proved to be the golden era of liberal thought in practice. Freedom of contract became the watchword of legal discourses. Persons, it said, should be free within minimal limits to bargain

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that “the greatest general happiness was to be procured through the greatest individual self-assertion”. (*Ibid.*)

<sup>189</sup> Pound, *op. cit.*, at p. 203.

<sup>190</sup> G.E. Moore, *Principia Ethica* (Cambridge, 1948) at p. 47. See also the commentary in Daly, (Cardinal), “Morality and Law” in *Law and Morals* (Dublin: Four Courts Press, 1993) especially at pp. 14-17. None other than Charles Dickens also took the opportunity, in his book *Hard Times*, (Harmondsworth: Penguin, 1969), to criticise through satire the philosophy and methodology of Utilitarianism and the practices it spawned: see David Craig, “Introduction” in *ibid.* at pp. 20ff.

<sup>191</sup> It ignores in particular the limits of human capacity and knowledge. In this connection, one might have regard to the problem of ‘bounded rationality’ alluded to by Williamson, “Contract Analysis: The Transaction Cost Approach”, in Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth’s, 1981) at p. 45. ‘Bounded rationality’ refers to the fact that an economic actor can act only with limited knowledge and limited capacity therefor. He is “able to receive, store and retrieve and process only a limited amount of information”.

for what they desire and correspondingly (a point often ignored in analyses of laissez-faire economics) free of all obligation and duty save that which is assumed through contract. This 'contractualism' posited that obligation, to the greatest extent possible should be the product of individual will rather than external imposition. The broad intention was that law would eventually evolve to a stage where all "rights, duties and liabilities flow from voluntary action and are consequences of exertion of the human will".<sup>192</sup>

Prior to the developments treated above, contract law preoccupied itself much less with the 'will' than is the case in modern jurisprudence. As late as the 1770s, a promise or the manifest intention of the parties did not 'make' a contract as such. "Duties", Atiyah observed, "arose out of relationships or transactions even where the relationship or transaction was itself a consensual one, such as a simple sale". The obligations arising then "were, in a sense, the consequence of the law, not simply of the parties' intention".<sup>193</sup> A promise, then, did not *in itself* bind. It might serve to evidence the inception of an obligation created by law in response to conduct.<sup>194</sup> At best a promise might be put in evidence to found a claim of reasonable reliance giving rise to obligations *inter partes* arising in law. Where a benefit had passed or reasonable reliance (probably detrimental) induced, an obligation to perform arose but this was implied not from the supposed intentions of the parties but from the moral understandings, customs and conventions as to what ought be done in such circumstances.<sup>195</sup> Though a promise, from the sixteenth century at least, constituted good consideration in law<sup>196</sup> and a wholly executory contract - where only promises have been exchanged and no performance had yet occurred - could be the subject of

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<sup>192</sup> Pound, "The End of Law as Developed in Juristic Thought (II)" 30 *Harvard Law Rev.* 201 (1917) at p. 210.

<sup>193</sup> P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979) at p. 141.

<sup>194</sup> *Ibid.* at pp. 143ff and at pp. 154ff.

<sup>195</sup> *Ibid.* at pp. 181ff.

<sup>196</sup> *West v. Stowel*, (1577) 2 Leon 154, *Strangeborough v. Warner*, (1589) 4 Leon 3, Simpson, *A History of the Common Law of Contract*, (Oxford: Clarendon Press, 1975) at p. 459ff.

an order for specific performance in the Court of Chancery, damages for loss of expectation *per se* would not issue in the case of breach of such a contract.<sup>197</sup>

Nowadays where a breach of contract occurs, the aggrieved party<sup>198</sup> may claim the net amount he would have received had the contract been performed, that is the value of the defendant's performance less the cost of the plaintiff's performance if not yet incurred, the expected profit from the transaction. Up to the end of the eighteenth century however while the aggrieved party would be entitled to the full value of the defendant's performance the plaintiff remained liable to perform his reciprocal obligation.

In theory the net outcome seems rather similar to that now prevailing. Any true comparison, however must take into account the then widespread practice of juries interposing what they considered to be a 'just price' in giving damages for breach not to mention the Court of Chancery's residual discretion in deciding whether or not to enforce an obligation.<sup>199</sup> Moreover the *modus operandi* by which the contractual obligation was enforced resembled significantly that of specific performance. Where damages were given they were for the *full* value of the defendant's performance and the plaintiff was still obliged to perform his or her side of the bargain. To the denizens of early-eighteenth century Britain, giving the plaintiff damages based on expectation, absent a requirement as to performance of the plaintiff's side of the bargain, "generally seemed...a very strange idea".<sup>200</sup> It seemed in particular to

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<sup>197</sup> Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.* at pp. 200ff.

<sup>198</sup> Who may or may not be excused from his obligation, depending on whether the breach is sufficient to warrant the contract being set aside in Equity. Today, where there is a breach of contract, the innocent party generally would still be obliged to perform but could sue for damages or specific performance. A sufficiently serious breach, however, might give the innocent party the option to terminate the contract, provided this is done within a reasonable time. Unless so terminated the obligation to perform stands. This right to terminate in sufficiently serious cases is, however, largely a modern development. It was certainly not a feature of pre-eighteenth century private law.

<sup>199</sup> Atiyah, *op. cit.*, at pp. 167ff. See for instance *Baldwin and Alder v. Rochford* (1748) 1 Wils. KB 229.

<sup>200</sup> Atiyah, *op. cit.*, at p. 195. For a similar contemporary example of this attitude to 'expectation damages' see *Flureau v. Thornhill* (1775) 2 W. Bl. 1078, 96 E.R. 635, more commonly known as the Rule in *Bain v. Fothergill*.

infringe the then prevalent suspicion of usury.<sup>201</sup> Atiyah encapsulates the sentiment of the times as follows:

“Was the plaintiff to get damages for doing nothing? Was he entitled to have his mere expectations protected? Was the defendant to be liable without any consideration passing? How could the plaintiff’s promise be treated as consideration if the plaintiff was discharged from performing it?”<sup>202</sup>

It could well be argued that it was, in the case of wholly executory contracts, the promises of the parties that gave rise to the liability implied by law. Therefore in some sense the intentions of the parties were being fulfilled.<sup>203</sup> But if this was the outcome it was certainly not the prime motivating factor it became in modern contractual practice. Obligations in the then prevailing understanding of contract arose independently of the parties’ intentions, owing their inception more to the moral sensibilities of judge and jury and to the widely observed customs, conventions and mores of the time. Historically, it was personal status and not inter-personal agreements that was the prime determinant of entitlement and obligation. Duties and rights traditionally arose from the position one occupied in society. The ‘assumed’ obligation, by contrast, was largely unknown.<sup>204</sup>

Thus while it was certainly given some attention, the ‘will theory’ (or theories?) of contract - in Atiyah’s words “...the tendency to attribute all the consequences of a contract to the will of the parties who made it...”<sup>205</sup> - was not accorded the overriding prominence to which it subsequently aspired. By the nineteenth century, however, it seemed that the ‘will’ had become the touchstone of contract, the “*Grundnorm* from which as many rules of contract law as possible were to be

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<sup>201</sup> On which see the comments of Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.* at pp. 61-67. See also Simpson, *A History of the Common Law of Contract*, (Oxford: Clarendon Press, 1975) at p. 114 and pp. 510-518.

<sup>202</sup> *Ibid.* at p. 195.

<sup>203</sup> Although one might feasibly argue that the promise constituted a ‘benefit’ giving rise to legal obligation.

<sup>204</sup> See further the comments in Chapter 2 below at pp. 82ff.

<sup>205</sup> P.S. Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979) at p. 405.



inferred”.<sup>206</sup> There is some dispute as to how precisely this came to pass. Gordley claims that “...[legal] doctrines which, in modified form, now govern most of the world...” are founded on philosophical ideas that date back to Aristotle and Thomas Aquinas, “...ideas that fell from favour centuries ago”.<sup>207</sup> Despite consistent attacks on the latter philosophers’ worldview, various jurists attempted to use their philosophical method to establish universally applicable legal doctrines.

With contract this involved the formulation of rules (or more to the point, an explanation of pre-existing rules) based on a preconceived definition of contract determined by reference to what was seen as the essential purpose or ‘end’ of contract. From this definition certain rules would naturally flow. The mainly Spanish late scholastic movement of the 1500s-1600s and the northern natural law school which followed it in the 1600s and 1700s, working from “Aristotelian and Thomistic moral conceptions about virtue and metaphysical conceptions about the nature or essence of things”<sup>208</sup> posited as fundamental the principle that contracts are entered into by means of the will or consent of the parties thereto. From this the above-mentioned scholars “had formulated general doctrines of mistake, fraud and duress by considering how these influences affected the will”.<sup>209</sup> This, however, was attended by an important caveat: contract was seen by the adherents of Thomism as the exercise of a moral virtue, one either of “liberality, by which one enriched another, [in modern parlance a ‘gift’] or ...of commutative justice by which one exchanged things of equal value”.<sup>210</sup> The overriding emphasis on the will then was counterbalanced by principles designed to ensure a just price for goods or services.

What marked out the nineteenth century approach to contract was not so much the emphasis on the will as the jettisoning of the conception of contract in terms of the virtues of liberality and commutative justice which it was supposed to serve. The

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<sup>206</sup> John Gordley, *The Philosophical Origins of Modern Contract Doctrine*, (Oxford: Clarendon Press, 1991) at pp. 7-8.

<sup>207</sup> *Ibid.* at p. 6.

<sup>208</sup> *Ibid.* at p. 7.

<sup>209</sup> *Ibid.* at p. 8.

essential attributes of contract then had been whittled down to one, namely the free exercise of the will. The precise purpose of that exercise was no longer of any concern. "Making a contract", Gordley observes came to be "...regarded simply as an act of the will, not as the exercise of a moral virtue".<sup>211</sup>

Atiyah too charts the development of will theories of contract, thus purged of the element of fair result, but in contrast with Gordley<sup>212</sup> roots his analysis firmly in economic context. Ideas certainly may arise independently of material circumstances but the likelihood of their gaining currency in such circumstances is small.<sup>213</sup> Will theories came to prominence precisely because the material circumstances, the concrete experience from which most ideas about the world spring, were conducive, if not ripe, for their acceptance. The *nouveaux riches*, the factory owners and merchants of the industrial revolution, favoured a robust competitive market to the protectionist model that so suited the landed classes and the preservation of the *status quo*. Freedom of alienation and freedom of contract were thus the lifeblood of the industrial revolution. Without ease of transfer the growth of industry and trades would be stifled. For Atiyah then the popularity of the will theory "...arose as much in response to the ideological demands of the market as in response to intellectual history".<sup>214</sup>

'*Contractualism*'. By the early nineteenth century contract had assumed pride of place in the wider legal scheme as the prime determinant of the presence of obligations.<sup>215</sup> 'General' duties of care, such as those contained in the law of torts,

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<sup>210</sup> *Ibid.* at p. 7.

<sup>211</sup> *Ibid.* at p. 8.

<sup>212</sup> Gordley denied that economic factors had any bearing on the fortunes of will theory. See *ibid.* at p. 4.

<sup>213</sup> In this regard, Atiyah seems to have adopted a strategy of historical materialism as favoured by the Marx. See the comments above at pp. 33-36.

<sup>214</sup> Commentary of Wheeler and Shaw, *Contract Law: Cases, Materials and Commentary*, (Oxford: Clarendon Press, 1994) at p. 66.

<sup>215</sup> See for instance the much-recited *dictum* of Jessel M.R. in *Printing Co. v. Sampson* (1875) 19 Eq. 462 at p. 465. "If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting and that their contract shall be enforced by courts of justice".

were limited in scope and application to quite specific relationships and dangers.<sup>216</sup> In short judges were wary of supplanting the assumed obligations of contract with those imposed by the common law. Even where a claim in tort was made out, several legal devices served to free a defendant of tortious liability. The very smallest amount of contributory negligence, for instance, was formerly deemed sufficient to foreclose entirely any prospect of obtaining damages for a negligent breach of duty of care causing injury.<sup>217</sup> By the doctrine of ‘common employment’,<sup>218</sup> described by Fleming as “the most nefarious judicial ploy for reducing the charges on industry”,<sup>219</sup> employers were frequently relieved of vicarious liability for injuries sustained by employees due to the negligence of other employees. Similarly, voluntary assumption of risk was often implied so as to free employers of liability where employees had apparently ‘accepted’ employment of a hazardous nature.

In so doing the judges of the early nineteenth century perceived themselves to be acting in the social interest. Laissez-faire policies encouraged the individual to look to his own safety and thus to promote greater personal responsibility and care. Doubtless, however, the protection of economic interests was a crucial determinant of the shape of judicial policy. These restrictions on liability, according to Malone:

“subsidized the growth of industrial and business enterprise by lightening the burden of compensation losses for accidents inevitably

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<sup>216</sup> Before the acceptance of the neighbour principle, first suggested by Lord Atkin in *Donoghue v. Stevenson* [1932] A.C. 562, liability in tort for negligence tended to be confined to situations in which there was a special relationship between the parties. Pound, writing in 1917, noted how in torts the existence of such a relationship was then “often decisive of liability” in U.S. tort law, a point that could equally validly be made in relation to British and Irish law. Pound, “The End of Law in Juristic Thought (II)”, 30 *Harv. L. Rev.* 201 (1917) at p. 214.

<sup>217</sup> See *Butterfield v. Forrester* 11 East 60, 103 E.R. 926 (1809). The harshness of this rule was slowly diluted over subsequent years in particular with the introduction of the ‘last clear chance’ or ‘ultimate negligence’ rule first posited in *Davies v. Mann* 10 M. & W. 547, 152 E.R. 588 (1842). See now the Civil Liability Act, 1961, section 34, which allows blame to be apportioned such that damages may be reduced but not denied entirely where there is contributory negligence on the part of the plaintiff.

<sup>218</sup> See *Priestly v. Fowler* 3 M. & W. 1, 150 E.R. 1030 (1837) and *Hutchinson v. York, Newcastle and Bewick Railway Co.* 5 Ex. 343, 155 E.R. 150 (1850). This doctrine has now been abolished by the Law Reform (Personal Injuries) Act, 1958, section 1(2). Any provision in a contract of service or employment purporting to divest the employer of responsibility for the actions of his employees in the course of employment is, by virtue of s. 1(3) thereof, null and void.

<sup>219</sup> J.G. Fleming, *The Law of Torts*, (Sydney: LBC Information Services, 1998).

associated with a rapidly expanding economy and the faster and greater volume of transport’.<sup>220</sup>

Ironically, the proponents of laissez-faire economics drew heavily upon the principle of equality to justify their stance. State ‘neutrality’ *vis-à-vis* the private ordering of individuals’ affairs was seen as a necessary concomitant to the notion that all persons are equal in the State’s eyes. To intervene and alter a private arrangement in favour of one party rather than the other would be to breach this bond. Laissez-faire economics did not entirely deny the existence of inequalities. Where inequalities existed however it considers them to be “private matters that do not implicate the political state”.<sup>221</sup>

One of the enduring ironies of this period then is that while freedom of contract held an almost mystical currency, the maintenance of freedom *in* contract was very much held in abeyance. Relief for duress was granted only on restricted grounds. Economic pressure was not enough; there had to be a threat to ‘life, limb or liberty’. In fact in many cases, as Weber noted, the former may prove the antithesis of the latter. Free of these legal constraints, Weber argued,<sup>222</sup> those possessed of economically superior means are enabled to make use of that superiority to attain power over others. Though there may “formally” be a “decrease in coercion”, inequalities coupled with freedom from legal restraint, allow the powerful to exploit the weak. “A legal order”, Weber continues, “which contains ever so few mandatory and prohibitory norms and ever so many ‘freedoms’ and ‘empowerments’ can nonetheless in its practical effects facilitate a quantitative and qualitative increase” in the incidence of coercion.<sup>223</sup> Freedom of contract in short didn’t necessarily lead to freedom *in* contract.

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<sup>220</sup> Malone, “The Formative Era of Contributory Negligence” 41 *Ill. L.Rev.* 151 (1946).

<sup>221</sup> Olsen, *Family and Market*, *op. cit.* at p. 1502.

<sup>222</sup> Max Weber, *Economy and Society*, (New York: 1968), at pp. 729-731.

<sup>223</sup> See also Pound, “The End of Law in Juristic Thought (II)”, 30 *Harv. L. Rev.* 201 at pp. 204-205. Describing the metaphysical jurisprudence of the late eighteenth century, Pound notes its conception of the function of law in defending the true liberty of those without bargaining power. “The justification of law was that there is not true liberty except where there is law to restrain the strong

Thus, in its zeal to counter the supposedly detrimental effects of state power, nineteenth century jurists ignored the large potential for the *interpersonal* abuse of the freedom which freedom of contract often facilitated. The discrete approach to contracting, most favoured by liberal analyses, views the parties as abstract players divorced from the wider circumstances in which they find themselves. This strongly promoted the assumption of the formal equality of the parties, an assumption that in many cases quite simply could not be borne out in real terms. Thus, as Lloyd<sup>224</sup> notes,

“...[i]t was usually overlooked by those that regarded freedom of contract as the foundation of a free society that without equality of bargaining position such freedom was likely to be entirely one-sided. To say for instance that the factory workers of mid-Victorian England were free to accept or decline the terms or conditions of work offered to them by the employers, and therefore should be left to make their own bargain, was to ignore completely the underlying economic realities”.

With the decline of feudal structures, concepts of simple hierarchy no longer adequately explain social relations<sup>225</sup> but this should not be taken to mean that inequalities have been swept away. Paglia asserts the inevitability of hierarchy: it is “self-generated on every occasion by any group,”<sup>226</sup> a part of every social order, however democratic. In concealing these power imbalances the assumption of equality allows them more effectively to thrive. Despite the demise of feudalism then, hierarchies still remained and indeed (however well concealed by the rhetoric of equality) still subsist even today. The attendant inequalities thus survive in abundance. Notwithstanding its appeal to equal rights, freedom of contract served merely to buttress and perpetuate these inequalities, most notably in its assumption that these inequalities did not exist. Those in the ascendancy were thus given the freedom to exploit the superior bargaining position that their privileged social status

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who interfere with the freedom of action of the weak, the organized many who interfere with the free individual self assertion of the few”.

<sup>224</sup> Dennis Lloyd, *The Idea of Law*, 2nd ed. (Harmondsworth: Penguin, 1981) at p. 145.

<sup>225</sup> Cf. Foucault, *Power/Knowledge*, (Brighton: Harvester, 1980) who argued that with the decline of feudal structures of power, the location of power was dispersed so that simple hierarchies can no longer fully explain the exercise of power in society.

afforded them. The invocation of a formal equality served only to disguise and allow the perpetuation of this phenomenon.

## The Decline of Freedom of Contract

While Family Law and Contract are often juxtaposed as opposites,<sup>227</sup> liberal thought suggests that they do share in common an important trait. Each in its classical form at least assumes that the institution with which it is concerned is a ‘natural’ one, capable of existing independently of collective social or legal regulation. By the terms of the Constitution for instance, the family is ‘recognised’ as the “natural and primary unit group of society”.<sup>228</sup> The family of which it speaks, however, is by definition incapable of existing independently of some baseline of social rules: the family is said to be ‘founded on’ the institution of marriage,<sup>229</sup> itself, in this context a legal entity. Indeed without this limitation it is argued that there is some difficulty (though perhaps not insurmountable) as the Committee on the Constitution found recently, in determining the precise boundaries of ‘family’. Etymologically the term means no more than that which is familiar or commonplace; attempts to confine its meaning inevitably involve social value judgments.<sup>230</sup>

The market too is often spoken of in terms suggesting an existence prior to social and legal regulation. “Laissez-faire theory” Olsen observes, “posits that the market is ‘natural’ in that it reflects actual supply and demand and ‘autonomous’ in that it was

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<sup>226</sup> Camille Paglia, “A Spiritual Sickness,” *Guardian (Weekend)*, April 10, 1999 at p. 3.

<sup>227</sup> See the comments at the beginning of Chapter Two below.

<sup>228</sup> Article 41.1.1, Constitution of Ireland, 1937.

<sup>229</sup> Article 41.3.1, Constitution of Ireland, 1937; see also *State (Nicolaou) v. An Bord Úchtála* [1966] I.R. 567, *J.K.v. V.W.* [1990] 2 I.R. 437 and *W.O’R. v. E.H.* [1996] 2 I.R. 248.

<sup>230</sup> See for instance section 28 of the (English) Local Government Act 1988: “(1) A local authority shall not...(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship”. This provision marks a definitive, if largely symbolic, attempt to put certain types of family beyond the pale so far as the law was concerned. The language used is of particular note for its avoidance of any pretence of neutrality. It stems from a discourse intent on underlining what it (wrongly) sees as the inauthenticity of gay relationships as a family form. See Carl Stychin, *Law’s Desire*, (London & New York: Routledge, 1995) chapter 2, especially pp. 38-49. See also Ryan, “Sexuality, Ideology and the Legal Construction of Family”, [2000] 3 *I.J.F.L.* 2 at p. 8.

not created by the State and can function independent of the State”.<sup>231</sup> Inequalities, where acknowledged, were correspondingly said to exist independently of social or legal regulation, a product of natural market forces in which the State should not intervene. The reality, of course, is that every market presupposes set, shared rules first as to ownership and then as to the transfer of ownership.<sup>232</sup> Contrary to the claims of some commentators - including early Marxists who considered law to be superstructural, a mere reflection of the economic or material base rather than a constituent part - the free market does not in any meaningful sense precede social regulation.<sup>233</sup> It depends for its effective operation on a law of property - to determine who owns what - and a law of contracts - to outline agreed rules for the exchange of such property. In other words law is constitutive as well as reflective of the economic order.<sup>234</sup> It is, in the words of Kairys, “not simply an armed receptacle for values and priorities determined elsewhere: it is part of a complex social totality in which it constitutes as well as is constituted, shapes as well as is shaped”.<sup>235</sup>

This invocation of the supposedly ‘natural’ characteristics of the family and the free market, however misleading, is nonetheless useful in sustaining what Olsen calls the liberal “myth of state intervention”.<sup>236</sup> By constructing each as ‘natural’, liberal theory correspondingly allows itself to paint the conduct of a State in refusing to endorse an agreement (by enforcement of its results) as an *unnatural* ‘intervention’ in the private affairs of the parties. The assumption implicit in this claim is in itself fallacious. In seeking to equate what is natural with what is good liberalism commits

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<sup>231</sup> Frances Olsen, “The Family and the Market: A Study of Ideology and Legal Reform” (1983) 96 *Harvard Law Review* 1497 at p. 1502.

<sup>232</sup> See generally the discussion of Collins, *The Law of Contract*, 3<sup>rd</sup> ed., (London: Butterworth’s, 1997) at pp. 10ff.

<sup>233</sup> Cf. the discussion in Collins, *Marxism and Law*, (Oxford: Clarendon Press, 1982) at pp. 19-22, 23-24, 28-29.

<sup>234</sup> See the comments of Collins, *ibid.*, at pp. 77ff. asserting that the law is not merely dependent on economic factors but can also help in shaping them. Law is, in other words, not merely ‘superstructural’.

<sup>235</sup> D. Kairys, “Legal Reasoning”, in D. Kairys (ed.), *The Politics of Law: A Progressive Critique*, (New York: Pantheon Books, 1982) at p. 6

<sup>236</sup> Frances Olsen, “The Myth of State Intervention in the Family”, (1985) 18 *University of Michigan Journal of Law Reform* 835 at p. 837. See also Martha Minow, “Words and the Door to the Land of Change: Law, Language and Family Violence”, (1990) 43 *Vanderbilt Law Review* 1665-1700.

the classic error, noted by Hume,<sup>237</sup> of conflating the descriptive and the normative, in other words of assuming that because a thing 'is' it self-evidently ought to be so. Despite the Rationalists' (especially Rousseau's) intimations to the contrary, nature is not necessarily either 'kind' or ordered.<sup>238</sup>

This point aside, the very idealisation of the market as a natural phenomenon ignores the constitutive role of contract and property law, that by the very enforcement of those arrangements, each serves to constitute the phenomena mentioned above. Without either the market would not function. Even laissez-faire theory presupposes the enforcement of contracts and laws of property. It nevertheless seeks to characterise the attachment of conditions to such enforcement as an example of state intervention. Unless kept in check, it asserts, these interventions will undermine the ('natural') stability of the market and family. Some protective intervention may be needed but it must be strictly demonstrated to be necessary and go no further than is needed to achieve the required aim. This is however a narrative device designed to disguise the fact that by its enforcement of property and contract laws, law is not merely upholding a pre-ordained, pre-political or natural order. "The enforcement of property, tort and contract law," Olsen observes, "requires constant political choices that may benefit one economic actor usually at the expense of another". Thus "neither 'intervention' nor 'non-intervention' is an accurate description of any set of policies, and the terms obscure rather than clarify the policy choices that society makes".<sup>239</sup>

The key to the intellectual demise of liberal economics lies in the exposure of these politically determined choices. The fortunes of liberalism, however, foundered as much for practical as for intellectual reasons. Indeed it is suggested that liberal theory

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<sup>237</sup> David Hume, *A Treatise of Human Nature*, Selby-Bigge and Nidditch, (eds.), (Oxford: Oxford University Press, 1978), at §3.1.1.

<sup>238</sup> See Camille Paglia's crushing deconstruction of Rousseauist thought in Chapter 1 of Camille Paglia, *Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson*, (London: Penguin Books, 1990). Paglia argues that Nature (and especially sex, the expression of nature in man) is a often a force of cruelty and ill. Civilisation is Humankind's (though ultimately feeble) defence against the ravages of Nature.

<sup>239</sup> Olsen "The Myth of State Intervention in the Family", (1985) 18 *University of Michigan Journal of Law Reform* 835 at p. 837



thrived in practice in the nineteenth century partly because the state apparatus necessary to contain rampant individualism simply could not yet be put in place. The State which previously concerned itself, primarily with securing the defence of the realm and the establishment of internal order, was ill-equipped to cope with the rapid growth in population and the parallel trend towards urbanisation that accompanied the industrial revolution in Europe. As it was information gathering techniques were poor not least in the United Kingdom where the first full national census (in England) was not taken until 1801. Administrative government on the scale experienced today was unheard of. Even if full information were available, governments lacked the expertise and resources, human and financial to resolve the pressing problems that afflicted society. Population increments vastly outstripped the pace of administrative reform and growth necessary to cope with the complexities of the new industrial societies that had sprung up throughout Europe. Late Nineteenth Century developments saw these deficiencies abate and by the turn of the following century the gap between industrial and administrative development had narrowed considerably. Indeed, it may fairly be said that the growth of centralised regulation in the twentieth century owes as much to the vast growth in administrative expertise and resources as it does to any change in economic philosophy.<sup>240</sup>

Yet even considering the deficiencies of central government and the dominance of liberal economics, welfarist reform was not entirely absent from the minds of contemporary legislators. Even at the height of laissez-faire's reign, Westminster was often alive to the plight of the weaker segments of society. The Truck Acts 1818-1831, (banning the payment of wages otherwise than in currency),<sup>241</sup> the Factories Acts 1819-1844, (requiring health and safety standards to be upheld in the workplace),<sup>242</sup> the Ten Hours Act 1847, (precluding employers from requiring their workers to perform more than ten hours of work per day), the Passenger Acts 1828-

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<sup>240</sup> Weber also charted the growth of the bureaucracy and the administrative state in the nineteenth century: Weber, *Economy and Society*, (New York: 1968) at p. 975ff.

<sup>241</sup> See generally Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.*, at pp. 533ff.

<sup>242</sup> *Ibid.* at pp. 537ff.

1855 (requiring minimum standards on board mainly emigrant ships)<sup>243</sup> attest to the fact that freedom of contract did not in practice always hold the sway that it is often assumed to have held.<sup>244</sup>

These measures may have been the exception rather than the rule yet whatever favour it may have held in the nineteenth century, by the beginning of the twentieth, freedom of contract was beginning to lose its lustre. The State that had formerly cast itself as ‘public enemy number one’ had acquired through its improved information-gathering resources, a rather more sophisticated view of the dynamics of power. One could say that they had little choice but to look again. The industrial revolution and the rapid urbanisation consequent thereupon resulted in the creation of large pockets of socially disadvantaged persons. The congregation of such large groups of similarly placed individuals inevitably led to a greater appreciation of class or group consciousness manifesting itself in pressure for the inception of trade unions and combines on an unprecedented scale. Previously trade unions and guilds largely facilitated skilled workers and craftsmen, but towards the end of the nineteenth century the potential for the organisation of casual labour became a reality. The “startling abuses” to which freedom of contract lent its aid could no longer be ignored.

The consequent growth in the popularity of Marxist and socialist thought prompted some to act early. The Vatican no less developed its social theology of work in the document *Rerum Novarum* (1893) with the rights of worker well to the fore. Practical reform came earliest to Germany. Anxious to diffuse the rising fortunes of the left, Bismarck introduced in the 1870s a series of welfare reforms including old age and sickness insurance, modest in modern terms but for then quite revolutionary.<sup>245</sup> While other European States took some time to follow Germany’s lead, it was clear that modern legislatures were becoming increasingly willing to tinker with the supposedly ‘natural order’ of the market. Ironically in Britain it was the Liberals<sup>246</sup> who laid the

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<sup>243</sup> *Ibid.* at pp. 553ff.

<sup>244</sup> See generally Atiyah, *ibid.* at pp. 509ff. and pp. 533ff.

<sup>245</sup> Bowle, *A History of Europe*, (London: Pan Books, 1979), at p. 557.

<sup>246</sup> Cf. the comments made by Andrew Sullivan noted at fn. 154 above.

foundations of welfarist policy in the run-up to the First World War, developments which ultimately culminated after the Second World War in the reforms creating what is often termed ‘the Welfare State’.

Generally, Aubert observes, “the emphasis in [the twentieth] century has shifted to a more directive one, where the State plays a more active role through subvention, subsidies, loans and advice”.<sup>247</sup> Even the U.S. did not remain impervious to these currents. The New Deal set in train by the Roosevelt Administration of the 1930s, saw increased government control of economic affairs designed to counter the effects of the Depression.<sup>248</sup> Freedom of Contract, nonetheless, was still being pressed into service by a judiciary who proved more resistant to change than their legislative contemporaries. The latter still regarded the principle of freedom of contract with some degree of sanctity, and railed against attempts to undermine it through the enactment of social legislation.

Indeed in the United States freedom of contract had acquired constitutional status as evidenced in *Lochner v. New York*.<sup>249</sup> In that case the U.S. Supreme Court struck down maximum working time legislation for bakery staff<sup>250</sup> as an undue fetter on the supposed freedom of employer and employee to contract on terms agreed between them.<sup>251</sup> This was despite the compelling evidence cited by Justice Harlan (dissenting) that owing to constant subjection to heat and dust bakers “...seldom live over their fiftieth year”.<sup>252</sup> And Justice Holmes (also a dissident) hardly needed to

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<sup>247</sup> Wilhelm Aubert, “On Methods of Legal Influence”, Chapter 3 in Burman and Harrell-Bond (eds.), *The Imposition of Law*, (London and New York: Academic Press, 1979) 27-43 at p. 41.

<sup>248</sup> See the reference to the ‘New Deal’ in Hale, “Bargaining, Duress and Economic Liberty”, 43 *Columbia Law Review* 603, (1943) at p. 603.

<sup>249</sup> 198 U.S. 45 (1905).

<sup>250</sup> N.Y. Laws, 1897, Ch. 415, Art. 8, §110. The law required that a baker in the State of New York work no more than 10 hours a day and a total of 60 hours *per week*.

<sup>251</sup> A similar argument underpinned the hostility shown in the British Courts towards legislation securing trade union immunities, the import of which was often narrowed so much in judicial interpretations as to render it significantly less effective than was intended by Parliament. See the commentary of Lord Webberburn, *The Worker and the Law*, 3<sup>rd</sup> ed., (London: Sweet & Maxwell, 1986), at pp. 16ff.

<sup>252</sup> 198 U.S. 45 at p. 70. In the course of his excellent judgment, Justice Harlan outlined the many maladies brought on by the appalling conditions in some bakeries. The inhalation of flour dust led to

point out that the measures might be considered “by a perfectly reasonable man...[to be]... proper on the scope of health”.<sup>253</sup> Holmes staunchly rejected the attempt to graft *any* economic theory, be it paternalism or *laissez-faire*, onto the U.S. Constitution, rather succinctly noting that “[t]he 14<sup>th</sup> Amendment<sup>254</sup> does not enact Mr. Herbert Spencer’s *Social Statics*”.<sup>255</sup> There were, he noted, plenty of contemporary examples of more stringent interventions in less pressing circumstances, Sunday trading laws, prohibitions on usury and gambling for instance. Indeed, he observed, an 8-hour law for miners had previously been upheld as constitutional by the Court.<sup>256</sup> Considering the circumstances in which bakers performed their job, it could hardly be denied that they badly “needed protection against the superior bargaining power of their employers”.<sup>257</sup>

As the twentieth century progressed however, the judiciary both in the United States and across the Atlantic in Britain, began to recoil from their previously individualist stance. Rights and privileges, as Dworkin in particular avers, are rarely absolute in nature, they simply differ in the extent to which they can be trumped by other competing rights and privileges. The more fundamental or ‘entrenched’ a right is the more compelling the reasons needed to justify overriding it. The U.S. Supreme Court, unconvinced by the compelling evidence of harm to the bakery workers who were the subject of the legislation impugned in *Lochner*,<sup>258</sup> gradually came to accept more frequently the reasons given by legislatures in justifying the interventions made by

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regular inflammations of the lungs and bronchial tubes. Running eyes were a constant feature of the baker’s life and rheumatism, cramps and swollen legs were also more common amongst their number than in the population as a whole. The extraordinary heat also took its toll so much so that the average baker, being generally more susceptible to disease, tended to die between the ages of 40 and 50.

<sup>253</sup> 198 U.S. 45 (1905) at p. 76.

<sup>254</sup> The relevant part of which reads as follows: “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law”. The overriding purpose of the 14<sup>th</sup> Amendment was the principle of racial equality.

<sup>255</sup> *Lochner*, 198 U.S. 45 (1905), at p. 75.

<sup>256</sup> *Holden v. Hardy*, 169 U.S. 366.

<sup>257</sup> Currie, David P., *The Constitution of the United States: A Primer for the People*, (Chicago and London: University of Chicago Press, 1988) at p. 48.

<sup>258</sup> The present writer can see no justification for their stance therein. *Lochner* must surely rank as one of the most appalling decisions of the U.S. Supreme Court. That apparently good men of high status

them. In effect they regarded ‘freedom of contract’ as less fundamentally entrenched a privilege than it had theretofore been treated and thus proved more willing to accept as valid its setting aside when a rational basis for so doing was in evidence. As early as 1917 the decision in *Lochner* was set aside.<sup>259</sup> In 1937 the Court went further to uphold minimum wage legislation,<sup>260</sup> measures that would have been firmly rebuffed by the *Lochner* Court. By the 1940s then “the Supreme Court had come to recognise that freedom of contract was no longer the pillar of the community that it had once been thought to be”.<sup>261</sup> As the Court commented in *Ferguson v Skrupa*<sup>262</sup> “[i]t is now settled that States have the power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as they do not run afoul of some specific constitutional prohibitions...” In Currie’s<sup>263</sup> words “[l]egislation affecting economic interests would be upheld if the legislature had a ‘rational basis’ for adopting it”, the Court itself, in *West Virginia Board of Education v. Barnette*,<sup>264</sup> acknowledging implicitly that, often, only ‘slender grounds’ were required.

As with freedom of contract these welfarist reforms mirrored much of the change then being experienced in the wider contemporary philosophical and economic sphere. Commentators such as Max Weber and Émile Durkheim challenged the individualist conception of contract upon which the *laissez-faire* approach of the late eighteenth and nineteenth centuries was based. Contract, according to Durkheim, is at its root a social phenomenon. “...A contract is not sufficient unto itself but is possible only thanks to the regulation of contract which is originally social”.<sup>265</sup> Macneil<sup>266</sup>

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could to such a degree ignore the plight of these workers, and stymie the efforts of the New York legislature in their behalf, is cause for some concern.

<sup>259</sup> See *Bunting v. Oregon* 243 U.S. 426 (1917).

<sup>260</sup> See *West Coast Hotel v. Parrish* 300 U.S. 379 (1937).

<sup>261</sup> Dennis Lloyd, *The Idea Of Law*, 2nd ed. (Harmondsworth: Penguin, 1981),

<sup>262</sup> 372 U.S. 726 (1963).

<sup>263</sup> David Currie, *The Constitution of the United States: A Primer for the People*, (Chicago and London: University of Chicago Press, 1988) at p. 49.

<sup>264</sup> 319 U.S. 625 (1943)

<sup>265</sup> Émile Durkheim, *De la Division du Travail*, (1893), published as *The Division of Labour in Society*, (New York: The Free Press, 1964) at p. 215. See generally A. Hunt, *The Sociological Movement in Law*, (London: Macmillan, 1978) and Lukes and Scull (eds.), *Durkheim and the Law*, (Oxford: Robertson, 1983) especially Chapter 1 on Contracts.

elaborates: “contract without the common needs and tastes created only by society is inconceivable; contract between totally isolated, utility-maximizing individuals is not contract, but war; contract without social structures and stability...is rationally unthinkable...The fundamental root, the base of contract is society”. Therefore returning to Durkheim “...if contract has the power to bind it is society which gives this power to it”.<sup>267</sup> It is, as noted above, through the latter’s intervention that contract acquires its enforceability.

If this is so, and if, as Durkheim propounds, society ought be concerned with promoting cumulative social order and welfare, Durkheim believed that the law therefore “...lend its obligatory force only to contracts which have in themselves a social value”.<sup>268</sup> Stephen Smith,<sup>269</sup> in examining Mill’s assertion that the individual ought not be permitted to enter a contract of self-enslavement, follows through on this theme. He first notes that the law may refuse to enforce an “unreasonable autonomy-endangering agreement” on the ground that enforcement would otherwise support by means of the enforcement of contract, “non-valuable ways of living and thus hinder[ ], rather than help[ ] individuals in achieving well-being”.<sup>270</sup>

Smith argues that the State in the pursuance of its “‘perfectionist’ role of helping individuals to lead good lives and thereby to achieve well-being” should refuse to support (*via* the law of contracts) activities that are considered non-valuable.<sup>271</sup> As a corollary the refusal to enforce a contract is justified on the ground that the law should not support non-valuable contracts. “Contract law”, Smith remarks,

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<sup>266</sup> Macneil, *The New Social Contract*, (New Haven and London: Yale University Press, 1980) at pp. 1-2.

<sup>267</sup> Durkheim, *The Division of Labour in Society*, *op. cit.* fn. 152, at p. 114.

<sup>268</sup> *Ibid.* at p. 114.

<sup>269</sup> Smith (Stephen), “Future Freedom and Freedom of Contract”, (1996) 59 *M.L.R.* 167.

<sup>270</sup> *Ibid.* at p. 175.

<sup>271</sup> Indeed contract law arguably already does so in refusing to enforce contracts that are illegal in themselves, (see *Cope v. Rowlands* (1836) 2 M. & W. 149) or that involve or implicate an illegal act: (see *Everet v. Williams* (1725)); or void as being against public policy, as with a contract for sexual services: see *Pearce v. Brooks* (1866) [1861-1873] All E.R. 102.

“is, in Hart’s<sup>272</sup> terminology, a ‘power-conferring’ doctrine and thus refusing to enforce a contract does not amount to coercive state interference with individual autonomy. Non-enforcement is merely a refusal to help. The state therefore can and should refuse to support contracts to do non-valuable things”.<sup>273</sup>

In terms of language alone, Durkheim and Smith’s comments mark a significant departure from liberal intellectual perspectives. Both implicitly resurrect the possibility of externally-imposed conceptions of value supposedly banished by *laissez-faire* economics. Increasingly collective values supplanted personal values as a determinant of the value of contractual terms. Indeed throughout the twentieth century (in particular in its latter half) legislation has made significant inroads into the notion of the sanctity of private ordering by replacing the parties’ ostensible view of their best interests with terms determined by law.<sup>274</sup> Judges once concerned primarily with historicist enquiries - that is, the examination of the fairness of contractual processes as opposed to the results thereof - are now charged increasingly with examining and, in appropriate cases, striking down, the end-results of those processes.<sup>275</sup> In other words the actual terms of agreed contracts are regularly reviewed and sometimes set aside, an approach anathema to classic liberalism.

In some cases this took the form of optional implied terms, contractual results which would be assumed to have been intended by the parties unless the contrary were clearly stated.<sup>276</sup> ‘Mandatory’ terms, which apply regardless of the parties’ respective intentions, have also been widely introduced, most notably in employment law where

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<sup>272</sup> Smith presumably is referring to Hart’s refutation of Austin’s theory of law as a solely ‘coercive’ entity. Hart, *The Concept of Law*, 2nd Ed., (Oxford: Clarendon Press, 1994) discussed above at p. 15-21.

<sup>273</sup> Smith, *op. cit.*, at pp. 176-7.

<sup>274</sup> One contemporary example in contract, and there are many more, is the Unfair Contract Terms Regulations, 1995 (S.I. No. 27 of 1995).

<sup>275</sup> See also in family law the increasing discretion given to judges in cases involving marital breakdown. Judges are entitled, on granting a divorce or order for judicial separation, to make a wide variety of ancillary orders. The relevant judge, thus, as he or she sees fit can reassign any property, real or personal, of either spouse to the other spouse, or for the benefit of the parties’ children. See Family Law Act, 1995 sections 6-15A and the Family Law (Divorce) Act, 1996 sections 11-19. See generally Martin, “Judicial Discretion in Family Law”, (1998) 16 *I.L.T.* (n.s.) 168, who argues that there is too much discretion and not enough doctrinal coherence in the field of family law.

the terms of the employment contract are now heavily determined by rules outlined in legislation. Often the determination of fairness or 'value' of terms is left to the discretion of the judiciary, as in the Sale of Goods and Supply of Services Act. In the case of consumer contracts most of the terms laid down therein are mandatory but in the case of some terms in other contracts judges must determine whether, in all the circumstances, they are 'fair and reasonable.'<sup>277</sup> In a similar vein the Unfair Contract Terms Regulations, 1995<sup>278</sup> leaves the determination of the fairness of all terms in non-negotiable (standard form) consumer contracts to the judiciary.<sup>279</sup>

*Towards Welfarism and Distributive Justice in Contracts?* Some jurists,<sup>280</sup> drawing upon the current of thought propounded by Durkheim, have posited a radical new perspective on contracts, one which could broadly be termed the 'welfarist' or 'solidarist' theory of contract. At its most idealistic, this perspective advocates a contracting process in which the parties are asked not only to look to their own

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<sup>276</sup> Ayres and Gertner, "Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules", 99 *Yale Law Journal* 87 (1989). See also Trebilcock, *The Limits of Freedom of Contract*, (Cambridge, Mass.: Harvard University Press, 1993), at p. 17.

<sup>277</sup> Section 55(4) of the Sale of Goods Act, 1893, inserted by section 22, Sale of Goods and Supply of Services Act, 1980. In deciding whether the terms are 'fair and reasonable' the Schedule to the 1980 Act lays down a series of guidelines for judges. The term must have been one that, in the context, was "or ought reasonably to have been known to or in contemplation of the parties when the contract was made". The judge should also have regard to the following factors:

- (i.) the relative bargaining power of the parties;
- (ii.) the availability of alternative methods of acquiring the good or securing the service;
- (iii.) whether a party was induced to enter the contract;
- (iv.) whether the customer, having regard to a custom of trade or a course of dealing had knowledge, actual or constructive, of the term or the extent thereof;
- (v.) whether compliance with an obligation placed on the customer was practicable;
- (vi.) whether the goods in question were made to the customer's order.

<sup>278</sup> S.I. No. 27, 1995. On which see Brownsword, Howells, and Wilhelmsson, "The E.C. Unfair Contract Terms Directive and Welfarism", in Brownsword, Howells, and Wilhelmsson, (eds.), *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), pp. 275-301 especially at pp. 294ff..

<sup>279</sup> That said, various stipulated considerations must be taken into account. The Schedule to those Regulations also contains a broad, non-exhaustive list of examples of terms that might be deemed unfair.

<sup>280</sup> See generally Kennedy, "Form and Substance in Private Law Adjudication", 89 *Harvard Law Review* 1685 (1976); Kronman, "Contract Law and Distributive Justice", 89 *Yale L.J.* 472 (1980). See also Brownsword, Howells, and Wilhelmsson, *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994).



interests but also to take a proactive interest in securing those of the other party.<sup>281</sup> In this sense contract is seen as an exercise of solidarity rather than as a competitive bargain. In essence what is envisaged is a transposition of the values that inform “a general programme of governmental intervention in the form of the Welfare State”<sup>282</sup> into the ‘private’ legal realm. Bargains would be enforced, then, depending on their being considered ‘*distributively* just’ as opposed to being simply *commutatively* just.<sup>283</sup> It is not enough to preserve the *status quo* or demand rough equivalence in exchange in contracting; this alone would be an innovation for classical contract theory ‘though it was considered a core function of contract by the later scholastics and natural law school.’<sup>284</sup> The balance is actively tipped in favour of the less advantaged party on the basis of distributive fairness rather than legal entitlement.

There is some evidence that such an approach might even prove market-rational. The economic theories of John Maynard Keynes<sup>285</sup> posit that measures which seek to redistribute wealth to the financially less well-off may prove economically efficient in that they tend also to promote the more efficient allocation of resources. He bases his approach on the principle of diminishing marginal utility, which states that the more one has of a particular item, the less the acquisition of an additional unit thereof will be worth in real terms than the unit acquired immediately before it.<sup>286</sup> In practical

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<sup>281</sup> There are shades of this perspective in the equitable jurisdiction relating to unconscionable bargains. See the discussion below in Chapter Four at pp. 78ff.

<sup>282</sup> Brownsword, “A Philosophy of Welfarism and its Emergence in the Modern Law of Contract” pp. 21-62 in Brownsword, Howells, and Wilhelmsson, *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994).

<sup>283</sup> On this distinction see Costello J. in *O’Reilly v. Limerick Corporation* [1989] I.L.R.M. 181. Commutative justice relates to the restoration and restitution of previously determined entitlements, Distributive justice, by contrast, looks not to prior legal entitlement, but to the rightness or otherwise of the distribution of wealth and resources. In this respect it is the fairness of the pre-ordained entitlements that is implicated. See further Whyte, “Public Interest Litigation in Ireland – The Emergence of the Affirmative Decree?” (1998) 20 *D.U.L.J.* (n.s.) 198.

<sup>284</sup> See the discussion above at pp. 51-52.

<sup>285</sup> Keynes, *The End of Laissez-Faire*, (London, 1926) and *General Theory*, (London, 1936). See the discussion in Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.*, at p. 626.

<sup>286</sup> This theory is perhaps best reflected in the Christian biblical parable of the Widow’s Mite. Luke 21:1-4, Mark 12:41-44. Christ noted that the small contribution of a poor widow was worth more in God’s eye than the generous donations of wealthier donors. The reasoning, it would appear, is that the smaller sum is worth more to the poorer widow than the larger sum is to the richer individual. “I tell you truly, this poor widow has put in more than any of them; for these have all contributed money they

terms, wealthy individuals were seen as more likely to hoard or invest money than spend it immediately on hard goods. Such practices tended to be capital- rather than labour-intensive in nature and hence were less likely in the short term to yield economic growth. A distribution to the less advantaged would result in additional spending in the short term on items the production of which tended to be labour intensive.<sup>287</sup>

The attainment of distributive justice through contract, nonetheless, is probably neither practical nor feasible. Judges are often wary of determining questions of distributive justice, arguing that even if they had the forensic expertise needed to make such decisions, they are decisions which, in accordance with the doctrine of the separation of powers, are properly and best decided by the legislature.<sup>288</sup> Waddams<sup>289</sup> poses several further reasons “why contract law cannot be a primary tool for the distribution of wealth”.<sup>290</sup> In private litigation relief tends to be “specific to the parties”.<sup>291</sup> It is far from self-evident that the granting of relief to one party will benefit all persons in the class from which he hails.<sup>292</sup> Those most likely to seek relief, moreover, are not necessarily those most in need thereof. The less resources a party possesses the less likely it is that, unaided, that party will be able to appeal to the courts. In fact, as Waddams points out, the most frequent recipients of judicial

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had over, but she from the little she had has put in all she had to live on”. (Luke 21:1-4, *Jerusalem Bible*, (London: Darton, Longman and Todd, 1966)).

<sup>287</sup> Thus it was suggested that the key to breaking a depression or recession was for the relevant government to spend its way out of the dilemma. High unemployment, he said, spawned further unemployment by depressing further the average level of spending power and consumption. Government initiative to combat unemployment (as with Teddy Roosevelt’s ‘New Deal’ of the 1930s) could thus spur the further creation of new employment and the consequent end of recession. (See Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.*, at p. 626). Cf. the argument of Hale, “Bargaining, Duress and Economic Liberty”, 43 *Columbia Law Review* 603, (1943) at p. 628.

<sup>288</sup> See Costello J. in *O’Reilly v. Limerick Corporation* [1989] I.L.R.M. 181. This case concerned the need to provide adequate accommodation and other essential to members of the travelling community. It might be argued that the principle did not apply here, that the case went beyond a question of the distribution of wealth and involved instead the fundamental right to accommodation (noted by Kenny J. in *Ryan v. A.G.* [1965] I.R. 294 at pp. 313-314). See further Whyte, “Public Interest Litigation in Ireland – The Emergence of the Affirmative Decree?” (1998) 20 *D.U.L.J. (n.s.)* 198.

<sup>289</sup> Waddams, “Comments on Welfarism and Contract Law” in Brownsword, Howells, and Wilhelmsson, *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), at pp. 248-252. See also Fried, *Contract as Promise*, (Mass: Harvard University Press, 1981).

<sup>290</sup> Waddams, *ibid.* at p. 249.

<sup>291</sup> *Ibid.* at p. 250.

relief are those “with something to lose and with the means and energy to try to get it back”.<sup>293</sup> Even where relief is granted, as in the case of striking down unconscionable bargains,<sup>294</sup> this simply serves to return the parties to the prior states of relative inequality that spawned the initial predicament requiring relief. The imposition of welfarist values would serve merely to discourage wealthier contractors from doing business with their poorer counterparts, the law generally not compelling the making of contracts.

The extent of the incursion of welfarism into contract law itself is possibly overstated. The general trend in contract law is arguably better described as reflecting a consumerist rather than as a wider welfarist tendency.<sup>295</sup> Indeed welfarism has made its mark largely outside the confines of contract, most notably in the expanded duty of care posited by tort law and the immeasurable strides made in social welfare. The general obligations introduced in these spheres (owed in each respective case by persons in general and the State in particular) underline that the obligation towards others (and in particular towards the weaker segments of society) is shared by all.

Indeed, several legislative attempts to impose social responsibility on a few, and not necessarily the most wealthy, members of society have faltered at the hands of the Irish Supreme Court. Recent judicial pronouncements here in Ireland have rejected various attempts to impose the burden of certain policies regarded as socially beneficial on particular economic actors. In this regard, *Blake v. A.G.*,<sup>296</sup> *In the matter of Article 26 and the Employment Equality Bill 1996*,<sup>297</sup> and *In the matter of Article 26*

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<sup>292</sup> See *ibid.* at p. 251.

<sup>293</sup> *Ibid.* p. 252.

<sup>294</sup> Of which, see the commentary in Vol. II, Chapter 4, pp. 80ff. below.

<sup>295</sup> See the remarks of Brownsword, Howells and Wilhelmsson regarding the relevance of the Unfair Contract Terms Directive to their ‘welfarist thesis’. Brownsword, Howells and Wilhelmsson, “The E.C. Unfair Contract Terms Directive and Welfarism”, in Brownsword, Howells and Wilhelmsson, *Welfarism in Contract Law, op. cit.*, at pp. 275-301 especially at pp. 294ff. They warn against confounding welfarist and consumerist tendencies, there being no condition that the consumer be a ‘weaker’ party in the negotiating process.

<sup>296</sup> [1982] I.R. 117.

<sup>297</sup> [1997] 2 I.R. 321.

and the *Equal Status Bill 1996*<sup>298</sup> are each worthy of note. These cases cumulatively provide authority for the proposition that legislative measures designed with the welfare of a particular class of persons in mind may nevertheless be deemed unconstitutional if they discriminate unfairly between similarly placed persons in the imposition of the burdens required to achieve the desired end. The last two cases mentioned are particularly instructive. Each laudably attempted to ameliorate the opportunities available (amongst others) to people with disabilities. In each case, however, the burden of doing so was placed solely on the employer or service provider respectively. While it might be argued that costs borne by the former and the latter alike might be defrayed by passing them on to the consumer, the Supreme Court ruled in each of the three cases that the impugned measures placed an arbitrary and unfairly discriminatory burden of achieving socially desired ends on the specific economic actors concerned.<sup>299</sup> As Trebilcock observes:

“It is not clear what defensible ethical basis might be invoked to justify imposing the entire redistribution burden on the parties to the transactions, simply because they happen to engage in exchange relations with poor people.”

Collective or State support will thus be the more appropriate avenue for welfarist reforms.

***The Demise of Contractualism.*** While welfarist reforms have made their mark most heavily outside the realm of contracts, this is not to say that contract has remained unaffected by these currents. As is noted further in Chapter Two, the sphere of contract's dominance consistently diminished as the twentieth century progressed

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<sup>298</sup> [1997] 2 I.R. 387.

<sup>299</sup> See however, the recent decision of the Supreme Court in *The Matter of Article 26 of the Constitution and in the Matter of Part V of the Planning and Development Bill, 1999*, unreported, Supreme Court, August 28, 2000. In that case, the Supreme Court advised the President that measures allowing the State to order that up to 20% of land purchased for development be set aside for social housing were not repugnant to the Constitution. The legislation in question stood notwithstanding the fact that it purports to affect the manner in which private land developers deal with their property. Whether this reflects a change of heart on the Court's part is uncertain. It may simply be, considering the severe shortage in housing presently being experienced, that the Supreme Court were loath to apply the precedent authority with full rigour.

such that it concerns, it will be suggested, a shrinking residue of contractual experience.<sup>300</sup> The past century has seen a shift away from the contractualist tendencies noted earlier. Obligations are increasingly imposed independent of the parties' wishes and sometimes without their knowledge. Indeed, in an era where standard form contracts make up an increasing proportion of formal agreements,<sup>301</sup> it is no longer completely valid, even in the sphere of contracts, to argue that all obligations are or can be assumed in a strictly voluntary sense. "In short" Adams observes, "such documents do not usually represent in any meaningful way exercise in term freedom and there is an obvious contradiction between the theory that a contract requires a meeting of minds and the incorporation of the terms of a standard form".<sup>302</sup> The image, thus, of the parties negotiating their obligations line by line is unrealistic.

It is now acknowledged more readily that the line between 'assumed' and 'imposed' obligations (once supposed to demarcate the boundaries between contract, on the one hand, and tort and restitution on the other,) is finer than might first be presumed.<sup>303</sup> In contract, terms of which the parties may have had no knowledge let alone an intention to be bound by, are implied by the courts, *inter alia*, to promote business efficacy,<sup>304</sup> or in accordance with custom<sup>305</sup> trade usage<sup>306</sup> or past practice.<sup>307</sup> Thus, a contract may sometimes be interpreted by judges to give it a meaning that the parties may not actually have intended.<sup>308</sup> According to the principle of objectivity in contract, it is the manifest intention - the intention of the parties as expressed in the terms of the

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<sup>300</sup> See further below in Chapter 2 at p. 88ff. and the discussion in Gilmore, *The Death of Contract*, (Ohio State University Press, 1974).

<sup>301</sup> See Adams "Unconscionability and the Standard Form Contract" in Brownsword, Howells, and Wilhelmsson, *Welfarism in Contract Law*, (Aldershot: Dartmouth, 1994), at pp. 230-247.

<sup>302</sup> *Ibid.* at p. 230.

<sup>303</sup> See Atiyah, "Contracts, Promises and the Law of Obligations", in *Essays on Contract* (Oxford: Clarendon Press, 1986), and R. Dias and B.S. Markensis, *Tort Law*, 2<sup>nd</sup> ed. (Oxford: Oxford University Press, 1989) at pp. 7-11.

<sup>304</sup> See '*The Moorcock*' (1899) 14 P.D. 64, approved in Ireland in *Butler v. McAlpine* [1904] 2 I.R. 445; see also *Alpha Trading v. Dunshaw Patten Ltd.* [1981] 1 All E.R. 482.

<sup>305</sup> *Smith v. Wilson* (1832) 3 B. & Ad. 728.

<sup>306</sup> *British Crane Hire Corp. Ltd. v. Ipswich Plant Hire Ltd.* [1975] 1 All E.R. 1059.

<sup>307</sup> *Hillas v. Arcos* (1932) 147 L.T. 503.

contract - and not any inner understanding which is conclusive.<sup>309</sup> It was Hume no less who first observed that it is the *expression* of will and not the will alone that gives rise to a self-assumed obligation. Though a promisor may harbour a secret intention to do otherwise, he will nonetheless be held to his intention as manifested.<sup>310</sup>

The parties may intend broadly to achieve a particular aim or enter into a particular type of relationship but complete control over the means to achieve those ends may not be in the possession of either party. An analogy may be drawn with a person desiring to travel from A to a destination at E. Ultimately the person may choose to travel, say by train. In this sense the decision is voluntary although various imposed means (or 'rules') upon which his travel is contingent must be accepted. He must take a train of a type and at a time designated by the railway company, stopping at B and C and possibly even changing at D to travel onwards to another destination. The contract entered into is subject to terms (generally in standard form) that could hardly be said to be of the passenger's making. Various rules and regulations must be adhered to, which terms may be too difficult to access, too detailed or cast in language too complex easily to grasp to be worthy of examination on the part of a traveller anxious to reach his destination. However legally useful it may be, the fiction of 'contractualism' - that by his agreement he 'accepted' these terms - is nonetheless a misconception.

### **The Survival of Contractualist rules**

This intellectual shift from contractualism did not however, eliminate all aspects of contractualist influence from the law of contracts. Despite its relative marginalisation

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<sup>308</sup> See 1 Williston, *Contracts*, 3d. ed. (1957) at §95: "A contract may be formed which is in accordance with the intention of neither party".

<sup>309</sup> See generally O.W. Holmes, "The Theory of Legal Interpretation", 12 *Harvard Law Review* 417 (1899) and Clare Dalton, "An Essay in the Deconstruction of Contract Doctrine", (1985) 94 *Yale Law Journal* 997 at 1039-1044. On objectivity as generally encountered in the law see Greenawalt, *Law and Objectivity*, (N.Y. & Oxford: Oxford University Press, 1992).

<sup>310</sup> David Hume, *A Treatise of Human Nature*, Book III, Part III, Sect.V.

in practical terms, the law of contracts retains a significance in legal consciousness far outweighing that of fields of equal (if not greater) practical importance. Despite the declining reign of liberal-individualist thought in the law of contracts, it continues to retain a foothold in the shape of the rules and doctrines that survive even today in contract law.<sup>311</sup>

That this should be so seems strange. If after all the theories upon which contractualism was based have now largely been discounted how is it that the law of contracts (as demonstrated below) continues to feature rules and doctrines that largely reflect liberal individualist concerns? The answer, it is suggested, may be as follows. The modern law of contract was heavily influenced by the work of the continental lawyer Pothier. His *Traité des Obligations*, first published in 1761, was an instant hit, once translated, in a Britain eager for a treatise outlining universal principles on which all contracts are based.<sup>312</sup> Around the ideas and principles outlined in this treatise (which in turn heavily reflected the influence of the ‘will theory’ described above) were developed the explanations and justifications for a diversity of contract rules that then existed. These explanations and justifications survive<sup>313</sup> and are propagated even today by the teaching and learning of these rules in contract law courses. Presented as such, it is perhaps no surprise that the influence of contractualism remains in evidence in the *minutiae* of the law, long after the intellectual wells from which they were drawn have run dry. Contract’s position as a core subject of legal education grants it a privileged place in legal discourses: “Like the reality constructed in our primary socialisation as children,” Thompson observes,

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<sup>311</sup> Indeed Fried, in *Contract as Promise*, (Mass: Harvard University Press, 1981), staged something of a mini-revival for liberal-individualism. See the Comments of Ewan McKendrick, *Contract Law*, 2d. ed. (London: Macmillan, 1994), at p. 3.

<sup>312</sup> See Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.*, at pp. 398ff.

<sup>313</sup> Cf. Collins’s discussion of rules that long survive the economic and social forces that gave rise to them. Collins, *Marxism and Law*, (Oxford: Clarendon Press, 1982) at pp. 52ff. especially at pp. 58-59. Collins’s immediate concern was to explain why certain rules existed that did not reflect current economic conditions and the priorities of the then ruling class. His explanation largely draws on the need to preserve a sense of tradition in the law. “One way to obscure the purpose of law”, he asserts, “is to insist upon law’s traditional origins and stable content”. Rooting law in tradition then, he suggests, serves to mask its ultimate instrumental nature. It may be said, with respect, that this implies a level of calculation and guile that in practice is probably not borne out.

“the reality of law which the law of contract first constructs tends to retain forever its massive power over us”.<sup>314</sup> As will be seen in the following chapter, the mark of *laissez-faire* economic principles remains embedded in various features of the common law of contract.

## Conclusion

Despite the demise of the intellectual ideal of *laissez-faire*, the results of the social and economic currents upon which it fed remain deeply embedded in modern contract law. In the following chapters the mark of liberal-individualist thinking will be traced first in the on law response to contractual duress law and then in the responses in equity. While the influence of twentieth century welfarist and consumerist developments cannot easily be discounted in such a discussion, it cannot be assumed that the demise of contractualist thought in social discourses has entirely dislodged contractualist rules in practice. The wheels of law often move slowly, and contract law is nothing if not steadfast in its traditions.

The next chapter will examine a particular aspect of this resilience, in the form of the ‘discrete’ paradigm of contracting. In particular, it will be argued, that contract law, in cleaving to liberal-individualistic conceptions of inter-personal dealings, ignores the more profound, ‘relational’ aspects of contracting. This it does at the expense of a more contextual and thus deeper understanding of the dynamics of coercion and compulsion. The continued insistence that contract be viewed as a discrete, self-contained, brief and impersonal event belies the fact that contractual relationships can be profound, enduring, flexible and dynamic. In fact, it might be argued, real contracts are a lot closer in form and substance to a ‘marriage’ - the subject of Chapter Five of this thesis - than the discrete paradigm might suggest. A great body of twentieth century writing suggests that there may be more to this comparison than

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<sup>314</sup> Thompson, “The Law of Contract” in Gregg-Spell and Ireland (eds.), *The Critical Lawyers’ Handbook*, (London & Concord, Mass.: Pluto Press, 1992), pp. 69ff. Cited in McCoubrey and White, *Introduction to Jurisprudence*, 2<sup>nd</sup> ed., (London: Blackstone, 1992) at p. 226.



first meets the eye. Far from being a subject of marginal concern, an examination of the paradigm of marriage displays the potential for a new way of looking at contracts.

## Chapter 2

# Discrete and Relational Perspectives

In the chapters to follow it is proposed that legal responses to instances of pressure and influence or, alternatively, absence of consent, in two spheres will be examined - that of contract law and that of the Irish law of marriage. Perhaps the most remarkable revelation flowing from this enquiry, as one will see, has been the extent to which these respective areas of law have parted company on the conceptual boundaries of 'coercion'. This divergence is all the more notable considering that up to at least 30 years ago, both shared a roughly analogous definition of the relevant concepts and adopted a similar test in ascertaining liability.<sup>1</sup>

In the intervening period, however, Irish Family law has not merely altered its view of duress and undue influence but has, instead, largely abandoned these reference points altogether in favour of a unified test of impaired consent. Contract's stubborn (and so far successful) insistence on the maintenance of these traditional concepts in the face of proposals of merger<sup>2</sup> or abandonment<sup>3</sup>, contrasts sharply with the ease with which Irish Family law cast aside the doctrinal mantle, most notably in *N. v. K.*<sup>4</sup> and *D.B. v. O'R.*<sup>5</sup> In Irish marriage law, in particular, one cannot but note the shift of focus from an approach based on a narrowly defined set of illicit causal factors to a broad-textured perspective focussed on effects or results alone. The results of this

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<sup>1</sup> Compare the test laid down in *Singh v. Singh* [1971] 2 W.L.R. 963 with concepts employed by the contract law of duress.

<sup>2</sup> Malcolm Cope, for instance, suggests that all cases of duress be treated as instances of undue influence (Cope, "Duress, Undue Influence and Unconscientious Bargains" (1985).) Birks and Chin on the other hand suggest that all forms of pressure be categorised as duress. See "On the Nature of Undue Influence", in Beatson and Friedmann (eds.) *Good Faith and Fault in Contract Law*, (Oxford: Clarendon Press, 1995) at p. 63.

<sup>3</sup> *Lloyd's Bank v. Bundy* [1975] 1 Q.B. 326 per Lord Denning (inequality of bargaining power) but see *contra*, *National Westminster Bank v. Morgan* [1985] A.C. 686. Lord Denning suggested the abandonment of contract's traditional classification of duress, undue influence and unconscionability in favour of an overarching doctrine. The basis of this doctrine, he argued, should be the fact of unequal bargaining power. In *Morgan*, the House of Lords rejected this approach.

<sup>4</sup> [1985] I.R. 733, [1986] I.L.R.M. 75. See below in Volume II, Chapter Five, at pp. 150ff.

shift, though no doubt logical, have been (for reasons that will be outlined further below) largely unsatisfactory, with several sacred cows of standard doctrine being abandoned in the process. Nozick's insistence on the distinction between interpersonal and circumstantial sources of coercion<sup>6</sup> (the former legally actionable, the latter not) has effectively been set aside by the Supreme Court in *D.B. v. O'R.*<sup>7</sup> In Ireland at least, a similar fate (as *N. v. K.* strongly suggests) has befallen the requirement of illegitimacy, as, for instance, posited in the second limb<sup>8</sup> of Lord Scarman's test in *Universe Sentinel*.<sup>9</sup> This is again merely a logical conclusion from the premise that it is the absence of consent rather than the cause of that absence which is at issue. It is nonetheless a remarkable development, not least considering that a significant proportion, maybe even the lion's share, of learned comment on duress in contract law centres on legitimacy.<sup>10</sup>

The standard response is a rather simple one: Contract and Family Law differ in content because they deal with radically different subject-matter. This is indeed undeniable: the present author does not wish for a moment to argue otherwise. Family Law and Contract differ quite fundamentally as regards their immediate character and purpose.<sup>11</sup> Thus, the juxtaposition between contract and marriage proposed herein

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<sup>5</sup> [1991] I.L.R.M. 160. See below in Volume II, Chapter Five at p. 155ff.

<sup>6</sup> Nozick, *Anarchy, State and Utopia*, (Oxford: Blackwell, 1975) at p. 262. "Whether a person's actions are voluntary depends on what it is that limits his alternatives. If facts of nature do so, the actions are voluntary...Other people's actions place limits on one's available opportunities. Whether this makes one's resulting action non-voluntary depends upon whether these others had the right to act as they did". Here Nozick seems to be using the term 'voluntary' in a prescriptive sense, that is, to describe what society regards as voluntary as opposed to what is truly so. See also Bigwood "Coercion in Contract: The Theoretical Constructs of Duress", (1996) 46 *Uni. of Toronto Law Journal* 201 at p. 21.

<sup>7</sup> *Op. Cit.*, at fn. 5 above.

<sup>8</sup> Although cf. Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress", (1996) 46 *Uni. of Toronto Law Journal* 201, 208, 213-4 suggesting that the "proper order of analysis" should be reversed so that legitimacy would become the first 'prong' of Lord Scarman's test.

<sup>9</sup> See also Wertheimer, *Coercion*, (Princeton University Press, 1987) at p. 172.

<sup>10</sup> See for instance Bigwood, *op. cit.*, at p. 210, who notes the comparatively sparse attention paid to issues of causation and choice in comparison with the attention paid to the issue of legitimacy. "Lord Scarman, for example, merely paid 'lip-service' to the choice prong in *Universe Tankships*, concentrating his attention instead on the issue of 'legitimacy' of the pressure exerted". Bigwood is referring in the preceding paragraph to *Universe Tankships of Monrovia v. I.T.W.F.* [1983] A.C. 366.

<sup>11</sup> What is disputed however is the *extent* to which the sphere of Family Law is commonly characterised as being different from that of contracts, particularly as regards its ultimate societal relevance, and the relevance of these distinctions in formulating general principles in each field. As

may seem odd, even otiose. The argument for the comparative approach is, indeed, a difficult one to make. In popular and legal consciousness alike, the contractual and familial legal fields are the proverbial chalk and cheese: so unlike in content and subject-matter as almost to defy comparison.<sup>12</sup> This impression cannot be lightly dismissed. Family law has long maintained an identity distinct and independent from Contract law. This is partly explicable on the basis of the former's being largely the preserve of the Ecclesiastical Courts until 1870.<sup>13</sup> Thus the law of marriage in particular developed largely without reference to the standard doctrine applicable to contracts in general.<sup>14</sup> Concepts such as offer and acceptance, the intention to create legal relations and the requirement of consideration find no place and indeed, little analogue, in the law governing the formation of marriage. By the same token who could imagine the law of contract which would recognise only contracts solemnized in a stipulated place,<sup>15</sup> in the presence of a stipulated official<sup>16</sup> between parties not being of the same sex<sup>17</sup> or already bound by another contract,<sup>18</sup> as is the case with marriage?

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argued below (at p. 91ff.) contractual and familial discourses overlap in many more ways than one might assume.

<sup>12</sup> See Olsen's description (and ultimate dismissal) of this argument in Olsen, "The Family and the Market: A Study of Ideology and Legal Reform", (1983) 96 *Harv. L. Rev.* 497.

<sup>13</sup> The Matrimonial Causes and Matters (Ireland) Act 1870, section 5, transferred jurisdiction in family affairs to the civil Courts subject to the caveat that in determining such cases, the courts were to apply, principles as similar as possible to those developed by the (Official/Church of Ireland) Ecclesiastical Courts. Section 13 of the Act, however, requires the High Court to act by reference to principles and rules that as nearly as possible equate with those applicable in the former ecclesiastical tribunals.

<sup>14</sup> The position is quite different in France: although the civil code deals with marriage in a separate book of the code, some of the general rules of contractual formation do indeed apply to marriage.

<sup>15</sup> In Ireland a marriage may only be contracted in a designated church (which may need to be duly licensed for such purposes) or in a registry office. But see Marriage Act (England and Wales) 1994, which allows buildings to be designated, with the approval of the local authority, as venues for the solemnisation of marriage. Similar proposals are contained in the (Irish) Family Law Bill, 1998 (No. 7, 1998, published February 5, 1998. Introduced in the *Seanad* by Senator Kathleen O'Meara).

<sup>16</sup> Marriage may only be contracted in the presence of a priest, minister or other designated religious official (see *Ussher v. Ussher* [1912] 2 I.R. 445 at p. 482) or the Registrar of Marriages.

<sup>17</sup> Marriage may only be contracted between two persons of the opposite sex: In Britain see: *Corbett v. Corbett* [1971] P. 83; *Talbot (or se. Poyntz) v. Talbot* 111 Sol. J. 213 (1967, PDA). U.S. cases on the point include *Baker v. Nelson* 291 Minn. 310, 191 NW2d 185 (Minn. 1971), appeal to USSC dismissed 409 U.S. 810 (1971); *Singer v. Hara* 11 Wash. App. 247, 522 P2d 1187 (Wash. 1974); *Jones v. Hallahan* 501 SW2d 588 (Ky. 1973); *Frances B. v. Mark B.* 78 Misc. 2d 112, 355 NYS2d 712 (N.Y. Sup. Ct. 1974).

<sup>18</sup> A person may only be married to one other person at any one time: *Hyde v. Hyde and Woodmansee* (1866) L.R. 1 P. & D. 130, *Conlan v. Mohamed* [1987] I.L.R.M. 172 and *Kelly v. Ireland* [1996] 3 I.R. 537 at 541-542. A person may however, marry the same person as many times as he wishes, *per Costello P.* in *B. v. R.* [1996] 3 I.R. 549 at 553.

Differences in content, however, cannot be put down merely to a difference in personnel. Indeed the very fact that family cases were dealt with by the Courts spiritual rather than the Courts temporal is probably symptomatic rather than causative. Marriage and the social rules and understandings which surround it is still treated, even in our western, post-christian society as a sacred institution at a distinct remove from the institutions and practices which are normally the subject of legal discourses. The elaborate rituals that accompanied many contractual and conveyancing events in the past (such as the feoffment and livery of seisin) have now largely been replaced by simpler and more pragmatic formalities, based upon more practical considerations such as necessity and efficiency.

By contrast, marriage has stood firm in the face of the de-sacrilisation processes and secularisation of society predicted by both Weber and Durkheim in the nineteenth century and charted by Becker in the twentieth. Ritual and tradition still form an integral part of the modern marriage ceremony. This ritual significance remains, even in the face of falling religious practices, as a result partly of the continuing input and influence of the churches. Most marriages, in Ireland at least, take place in churches or other designated religious venues. Indeed despite proposals for reform<sup>19</sup> these venues remain the only legally acceptable location (besides the small number of civil registry offices) where marriage may validly be contracted according to State law. Not surprising then that much confusion exists where parties attempt to regularise their legal status on marital breakdown. A failure to appreciate the distinction between the legal and religious aspects of the marriage ceremony led many persons who had obtained a church annulment<sup>20</sup> to assume, probably innocently, that this entitled them to remarry. On a number of occasions, even in this century, parties to such 'second marriages' have been prosecuted for bigamy, the clear fact being that

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<sup>19</sup> See the proposal contained in Family Law Bill 1998 (No. 7, 1998, published February 5, 1998. Introduced in the *Seanad* by Senator Kathleen O'Meara). This would have allowed the owners of buildings considered suitable for the purpose to obtain licenses to permit marriages to be solemnised upon their premises. Cf. fn. 15 above.

they have attempted to contract a marriage with one party while being still legally married to another.<sup>21</sup> Arguably this difficulty in establishing in the public consciousness a clear distinction between the legal and religious incidents of marriage underlines the fact that marriage is still regarded as a union with sacred, as well as secular, aspects.<sup>22</sup>

It might, of course, be thought that with religious values in decline, at least in Western Europe, marriage would correspondingly lose its lustre. There is certainly some evidence of marriage waning in influence, with alternative family forms gradually making their mark in social and even legal discourses. It is arguable, nevertheless that marriage retains a sacred character<sup>23</sup> - best described as a 'mystique' perhaps - independent of its religious flavour. Indeed there is some merit in the proposition that in this as in other respects, the churches are reflecting and buttressing rather than leading social sentiment.<sup>24</sup> Marriage is still viewed as the pinnacle of

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<sup>20</sup> It has long been the case that the number of ecclesiastical annulments far outweighs the number of legal declarations of nullity. This is partly a product of comparative expense of each procedure: church annulments are considerably cheaper than their state equivalent.

<sup>21</sup> See *People (AG) v. Ballins (orse. Kenny)* [1964] Ir. Jur. Rep. 14. See also *People v. Hunt* noted at 80 I.L.T. & S.J. 19. The penalties meted out in such cases reflect, however, a judicial appreciation of the confusion noted in the text. In both *Ballins* and *Hunt* relatively stiff sentences of imprisonment were mooted but ultimately rejected. In *Ballins* Judge Ó Briain noted that "if a sentence was to be imposed for this offence, nothing less than a sentence of eighteen months would meet the case". Nevertheless he agreed to discharge the defendant provided that two bonds of £50 each were agreed, one on the part of the defendant, one independent, "to keep the peace and be of good behaviour" for two years. The defendant in *Hunt* was similarly spared a custodial sentence on the condition that he paid £75 towards costs and kept the peace for twelve months. This predicament and several possible solutions to it are considered by Duncan, "Second Marriages after Church Annulments - A Problem of Legal Policy", (1978) 72 *I.L.S.I. Gazette* 203. One possible suggestion is to follow the French lead. Since the Revolution of 1789, marriages are only legally recognised if contracted by means of civil ceremony, a rule that led to the enactment of s.2 of the (Irish) Marriages Act, 1972. Several persons who had been married before a priest in Lourdes found that their marriages were not recognized because of the failure to comply with the *lex loci celebrationes*.

<sup>22</sup> See Duncan, "Second Marriages after Church Annulments - A problem of Legal Policy", (1978) 72 *ILSI Gazette* 203. Duncan surveys four possible responses to the problem of 'second marriages', opting for one that would accord certain rights to couples regardless of marital status.

<sup>23</sup> See O'Donovan, *Family Law Matters*, (London: Pluto Books, 1993) at p. 22.

<sup>24</sup> In a similar vein see Norris, "Homosexuality and Law: The Irish Situation", (1976-7) *Dublin University Law Review* 18. Norris suggests that Judaeo-Christian tenets may stem more from social than religious sources. He argues that early biblical proscriptions of homosexuality were not inevitable from a religious perspective but were rather, rooted in discourses of identity. By rejecting the homosexual ritualism of Egypt, the newly liberated Israelites sought to establish for themselves a national identity distinct and separate from that of their captors. Religious doctrine served to buttress this national aim.

social relationships, a profound and life-altering step into the world of responsible adulthood. The parties are invested not merely with new rights and responsibilities but with an entirely new and elevated status, legally and socially. As Herma Hill Kay notes in the context of the debate about same-sex marriages “Even while we resist the regimentation that marriage entails we accept it as a sort of ‘gold standard’ that signifies the desire for deep and permanent commitment”.<sup>25</sup> In mainstream social discourses, Marriage is regarded as a profound, life-altering arrangement with consequences far beyond the simple alteration of rights and obligations.<sup>26</sup> The marriage ceremony is seen as the ultimate coming-of age rite: it imparts upon the parties thereto the status of adulthood. Thus, Claude Levi-Strauss<sup>27</sup> describes how even the aging bachelor in certain parts of France is sometimes referred to as “*un jeune garçon*” or even paradoxically as “*un vieux jeune homme*”. The diminutive appellation implicitly denotes not only the lesser responsibilities but also the inferior social status of the *célibataire*: the bachelor ‘plays second fiddle’ to his married counterpart, whose status is elevated still further on his becoming a father.<sup>28</sup>

### From Status to Contract

The latter comment reveals just how transformative the contract of marriage may be. It involves not merely the acquisition of new rights and responsibilities but of an entirely new status, a new position relative to others.<sup>29</sup> Many sociologists and

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<sup>25</sup> “Private Choices and Public policy: Confronting the Limitations of Marriage”, (1991) 5 *Austral. Jo. of Family Law* 69 at p. 85.

<sup>26</sup> See Ryan, “The Fundamentals of Marriage”, in Shannon (ed.), *Family Law Practitioner (Looseleaf)*, (forthcoming), (Dublin: Round Hall, 2000) where the present author, at A-001 describes marriage as “...an institution of great antiquity, an association of persons encountered in almost every society in almost every age. It presupposes a union unlike any other, a coming together of persons in a relationship of some considerable intimacy and profundity”. In law too, Ryan continues, marriage is “...an event that imparts an entirely new legal status on the parties thereto”. From the resulting status “flow a whole host of legal rights, privileges and duties from which persons not married are generally precluded”.

<sup>27</sup> Levi-Strauss, “The Family”, from Levi-Strauss, *The View From Afar*, (transl. Neugroschel and Hoss) (London: Penguin, 1987) at pp. 39-62

<sup>28</sup> *Ibid.* at p. 46.

<sup>29</sup> Marriage is thus regarded in law not merely as a contract, but rather as the beginning of “a unique and very special life-long relationship”, (*per* Costello J. in *Murray v. Ireland* [1985] I.L.R.M. 542 at p. 545) It imparts an entirely new legal status on the parties thereto. See also *Sottomayer v. deBarros*

philosophers have used models based on this class of ‘status contract’<sup>30</sup> to describe events giving rise to a deep and profound transformation in social arrangements.<sup>31</sup> In almost every case however, these commentators use this model not as a free-standing entity but rather by means of contrast with what they saw as its polar opposite, its nemesis. Weber<sup>32</sup> for instance contrasts the Status contract with the purposive contract, or *zweck-kontrakt*. This latter ‘ideal-type’ of contract is characterised by relations of more limited bent - the contract is envisaged as a tool designed to achieve a specifically delimited set of objectives in a clearly delineated context and time-frame. The relations to which it gives rise eschew the vague but profound notions of the status contract in favour of solutions that are “specific, quantitatively delimited, quality-less, abstract and usually economically conditioned”.<sup>33</sup>

The *zweck-kontrakt* (Sorokin called it the ‘contractual relation’) is primarily characterised by its specificity of purpose and range. By contrast with the status contract, the purposive contract is seen as the product of rational self-interest. Tönnies in his unfairly neglected text *Gemeinschaft ünd Gesellschaft* distinguishes between integral or natural will (*Wesenwille*) and rational will (*Kürwille*).<sup>34</sup> Depending upon which form of will predominates, relations forged between parties will be more or less distinguished by the extent to which the relations and the objectives thereof can be differentiated from each other. The more natural will prevails the more means and ends are fused so that the relationships *per se* are seen as worthy ends in themselves;

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(1879) 5 P.D. 94 at p. 101, *per* Finlay C.J. in *N. (orse. K.) v. K.* [1986] I.L.R.M. 75 at p. 82 and *per* Hamilton C.J. in *T.F. v. Ireland*, [1995] 1 I.R. 321 at p. 372.

<sup>30</sup> See also the discussion of the work of Georges Davy by MacCormack, “Georges Davy and the Origin of Contract”, (1980) 15 *Ir. Jur.* (n.s.) 166.

<sup>31</sup> For a good summary see Loomis, and McKinney, “The Application of *Gemeinschaft ünd Gesellschaft* as related to other Typologies”, pp. 12-29 in Tönnies, *Community and Society*, (New York: Harper & Row, 1963), (Transl. Loomis).

<sup>32</sup> Weber, *Economy and Society*, (Roth and Wittich, eds.) (New York: Bedminister Press, 1968) at pp. 671ff.

<sup>33</sup> Weber, *op. cit.*, at p. 674.

<sup>34</sup> Tönnies, *Community and Society*, (New York: Harper & Row, 1963) (Transl. Loomis, C.P) Part 2, pp. 103-170.



the more that rational will predominates, the more sharply will means and ends differ.<sup>35</sup>

This characterisation of course involves some necessary stereotyping. These are ideal-types used as sociological models to assess trends and facets in real societies: they are not meant to be either descriptive or indeed normative. The purpose of many of these commentators in outlining these models was to trace the gradual shift from a society where relations and interaction are largely based on status to one where the purposive contract became the main focus of interaction. Weber for instance, maintained that with the onset of the industrialised society the status contract would gradually give way to the *zweck-kontrakt* as relations became less profound and more fragmented. Henry Maine<sup>36</sup> also believed that in modern society relations founded on ascribed<sup>37</sup> status would gradually give way to those based on contract.<sup>38</sup> This for him was a ‘law of progress’. Henceforth interpersonal relations would be more specific, more self-directed, a means to an end rather than an end in themselves but primarily they would be based on the free agreement of the parties rather than on traditional duties and expectations arising from one’s ascribed status.

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<sup>35</sup> Tönnies’ view is based on the assumption that man is naturally inclined towards community of relations and that ratiom is in some sense the enemy of Family and Home. The present author, with respect, prefers Durkheim’s more complex and less dogmatic characterisation of the human individual’s nature. For Durkheim man was *homo duplex* - a creature torn between the instinct for social sentiment, (the Soul) and self-directed instinct that drives man to act in his own self-interest. “Our inner life has something of a double centre of gravity. On the one hand is individuality - and more particularly the body in which it is based; on the other is everything in us that expresses something other than ourselves”.

<sup>36</sup> Maine, Henry Sumner, *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*, (10<sup>th</sup> Ed., 1885) at p. 170. See the excellent and learned discussion of Maine’s theories in Pound, “The End of Law in Juristic Thought (II)” 30 *Harv. L. Rev.* 201 (1917) at pp. 210ff.

<sup>37</sup> Childres and Spitz maintain that a distinction should be made between ascribed status – where the party’s status arises largely independent of his own conduct – and achieved status – where the subject has attained his or her status position through active endeavour. Maine’s failure to take account of this distinction, they claim, “undercuts [his] idea”. See Childres and Spitz, “Status in the Law of Contract”, 47 *N.Y.U.L.R.* 1 (1972) at pp. 2-3, fn. 5. On ascribed as opposed to achieved status (in this case regarding one’s status as a deviant) see Mankoff, “Societal Reaction and Career Deviance: A Critical Analysis”, *The Sociological Quarterly*, 12, Spring 1971 pp. 204-18 cited with approval in Taylor, Walton and Young, *The New Criminology*, (London: Routledge, 1973) at pp. 162-164.

<sup>38</sup> Maine thus, according to Pound, saw “jural progress as progress from institutions where rights, duties and liabilities are annexed to status or relation to institutions where rights, duties and liabilities flow from voluntary action and are consequences of exertion of human will”. Pound, “The End of Law in Juristic Thought (II)”, 30 *Harv. L. Rev.* 201 (1917) at 210.

## Marriage as a status-based institution

Marriage has remained largely impervious to these trends. In Cotterell's words it remains "a late-comer to 'contractualisation' among areas of western legal doctrine".<sup>39</sup> While many of the privileges of Marriage have been eroded in this century<sup>40</sup> the rules applying to marriage remain governed largely by imposition of law rather than by agreement of the parties. Weitzman<sup>41</sup> argues for a somewhat more subtle analysis, noting that a partial contractualisation of marriage has shifted the institution from status to what she dubs a status-contract. Nevertheless, she also observes that "while individuals who enter marriage have the same freedom of choice that governs entry into other contractual relations, once they make the decision to enter the contract analogy fails because the terms and conditions of the relationship are dictated by the State".<sup>42</sup>

It is no surprise then that marriage has often been described as quintessential<sup>43</sup> of the status contract which Weber describes in his treatise on *Economy and Society*. The Status contract effects not simply an alteration in the rights and obligations of the parties but results in a transformation of the 'total legal situation' or 'universal position' of the parties. It is, in Weber's own words "oriented toward the total status of the individual and his integration into an association comprehending his total

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<sup>39</sup> Cotterell, *The Sociology of Law*, 2<sup>nd</sup> ed., (London: Butterworth's, 1992) at p. 122.

<sup>40</sup> See for instance the arguments of Glendon in, *The New Family and the New Property*, (Toronto: Butterworth's, 1982), in "Marriage and the State: The Withering Away of Marriage", 62 *Virg. L.R.* 663 (1976) and in *State, Law and Family* (New York: North-Holland, 1977). See also Weitzman, *The Marriage Contract: Spouses, Lovers and the Law*, (New York: The Free Press, 1981) at p. xix.

<sup>41</sup> Weitzman, *The Marriage Contract: Spouses, Lovers and the Law*, *op. cit.* Weitzman herself argues for a move towards the contractualisation of marriage, espousing greater freedom to set and better enforcement of various marital and cohabiting agreements containing terms tailored to reflect the needs and outlooks of the parties.

<sup>42</sup> *Ibid.*, "Introduction" at p. xix. How effectively those terms are enforced by the State is entirely a different matter. It is arguably the case that the privacy and autonomy accorded to married couples by the law itself allows *de facto* private arrangements to supersede legal rules, at least while the marriage remains intact.

<sup>43</sup> See, for instance, Cotterell, *The Sociology of Law*, *op. cit.* at p.122 (cited above in text to fn. 39) and Wheeler and Shaw, *Contract Law, Cases and Materials*, (Oxford: Clarendon Press, 1995) at p. 41, note 1.

personality”.<sup>44</sup> The individual, in other words, ‘becomes’ somebody substantively different.

Sorokin<sup>45</sup> regarded the merging of personalities and interests to which marriage gives rise as typical of what he dubbed the familistic relation. For him:

“familistic relationships are permeated by mutual love, sacrifice and devotion...[They]...represent a fusion of the ego into ‘we’. Both joys and sorrows are shared in common and those involved need one another, seek one another, sacrifice for one another and love one another. The norms of such relations require that the participation be all-embracing, all-forgiving, all-bestowing and unlimited”.<sup>46</sup>

In fact in former times, marriage was regarded not merely as fusing the respective interests of the parties but also as merging their formerly distinct legal personalities into one,<sup>47</sup> although with consequences rather less appealing than those outlined by Sorokin. A wife's debts became those of her husband. A man could legally force his wife to have sexual intercourse with him, partly on the rationale that a wife by marrying gave her blanket consent to all sexual intercourse within marriage, but also occasionally justified on the ground that the husband being legally one with his wife could not be deemed to have committed rape.<sup>48</sup>

### **The Law of Contracts: Maine’s Thesis Examined**

Legal-analytical frameworks on the contractual side, however, have largely succumbed to Maine’s thesis. Neo-classical contract law casts the modern contract in the role of *Zweck-kontrakt*. The modern contract is characteristically seen as a

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<sup>44</sup> Cited in Wheeler and Shaw, *Contract Law, Cases and Materials*, (Oxford: Clarendon Press, 1995) at p. 39.

<sup>45</sup> Sorokin, *The Crisis of Our Age*, (New York, 1942), especially Chapter 5.

<sup>46</sup> Loomis, and McKinney, “The Application of *Gemeinschaft ünd Gesellschaft* as related to other Typologies” in Tönnies, *Community and Society*, (1963) (Transl. Loomis, C.P.) at p.18.

<sup>47</sup> Usually that of the husband.

<sup>48</sup> Since the enactment of the section 5 of the Criminal Law (Rape) (Amendment) Act 1990 this is no longer the case. On the historical perspective, see the discussion in Chapter Five below at pp. 118-119. See O’Donovan, *Family Law Matters*, (London: Pluto Books, 1993) at p. 47 and p. 57.

discrete and isolated event, giving rise to an arrangement of specific and delimited purpose.<sup>49</sup> This ‘discrete’ contract as it came to be known, came to be the paradigm of classical and neo-classical contractual discourses and has, as such, played a predominant part in the shaping of modern contract law. Rules requiring the specificity of contracts provide a good example of its influence. A contract should not be vague or uncertain and will often be struck down on the ground that its terms cannot be readily ascertained.<sup>50</sup> In this sphere rights and obligations do not arise by virtue of status but as a result of specific agreement on a relevant point.

On closer examination, however, Maine’s thesis is probably not an entirely accurate assessment of trends in modern contractual relations.<sup>51</sup> A primary and perhaps the most damning criticism of Maine is that his thesis is not reflected in the history of the common law. According to Pound, Maine’s thesis is accurate only insofar as it relates to the Roman law of contracts.<sup>52</sup> In common law, by contrast, Pound maintains, “the central idea is...relation”.<sup>53</sup> Pound illustrates how the common law was founded upon (and indeed in some respects continued to look to) status or the ‘relation’ as a determinant of legal rules.<sup>54</sup> Maine’s mistake then was to confound developments in Roman Law with those in the very distinct Common law of England and Ireland.

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<sup>49</sup> See Goldberg, “Towards an Expanded Economic Theory of Contract”, (1976) 10 *Jo. of Economic Issues*, 45 at p. 49: “The Paradigmatic contract of neo-classical economics...is a discrete transaction in which no duties exist between the parties prior to the contract formation and in which the duties of the parties are determined at the formation stage”.

<sup>50</sup> See further the discussion below at pp. 98ff. See also *Lofus v. Roberts* (1902) 18 T.L.R. 532 (C.A.), the *dictum* of Viscount Dunedin in *May and Butcher v. R.* [1934] 2 K.B. 17 (note) at 21 and *Scammell v. Ouston* [1941] 1 All E.R. 14. On uncertainty of terms see further the Irish case of *Mackey v. Wilde* [1998] 2 I.L.R.M. 449.

<sup>51</sup> See the probing criticisms of Maine in Pound, “The End of Law in Juristic Thought (II)” 30 *Harv. L. Rev.* 201 (1917) at pp. 210ff. See also Professor Rehbinder’s critique of Maine’s thesis in “Status, Contract and the Welfare State”, 23 *Stan. L. Rev.* 941 (1971) where he reveals several flaws in Maine’s analysis. See also Childres and Spitz, “Status in the Law of Contract”, (1972) 47 *N.Y.U.L.R.* 1.

<sup>52</sup> Pound, *op. cit.*, at p. 211: “Maine’s famous generalization is drawn from Roman law only”. Thus at 219 he notes that Maine’s thesis “has no basis in Anglo-American legal history...The whole course of English and American law is belying it unless, indeed, we are progressing backwards”.

<sup>53</sup> *Ibid.* at p. 212.

<sup>54</sup> *Ibid.* at pp. 213ff.

It was Maine's thesis, however, that predominated, perhaps because of the influence of Continental law on the nineteenth century English law of Contracts.<sup>55</sup> It complemented and buttressed the then dominant theory of *laissez-faire*, that individuals should negotiate for their own prosperity, that individual freedom was a surer guarantee of progress than state regulation. It may be said that it even accords with social trends in the twentieth century, that predominantly tended to stress the importance of individual happiness and fulfillment. The individuation of society is, indeed, a common theme of this age, one that has prompted much comment both academic and otherwise.

Yet, while classical thinking has tended to dominate modern contractual discourses, the application of contractual law properly so called has occupied a narrower and narrower space in modern relations.<sup>56</sup> Contract law properly so called has seen its province of influence decline in size and significance. "The Law of Contract" Childres and Spitz claim<sup>57</sup> "has come apart at the seams. No one can seriously maintain that there is a general law applicable to all kinds of contracts". The laws regarding the relationship of employment and tenancy agreements, thus, have gradually been dislocated from the main corpus of contractual law to form separate spheres of law governed by largely independent codes of law. Admiralty law has developed norms in the field of merchant shipping often quite distinct from those generally applicable to contracts.<sup>58</sup> With the advent of modern consumer protection legislation,<sup>59</sup> consumer contracts have largely gone the same way.

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<sup>55</sup> The Continental author Pothier's renowned *Traité des Obligations*, (1761), was published in English in 1806. It proved especially influential in England in that it offered a unified set of principles explaining the law of Contracts, something that was then being sought by English jurists. For Pothier contract was "primarily an agreement based on the intention of the parties" (Atiyah, *The Rise and Fall of Freedom of Contract*, (Oxford: Clarendon Press, 1979) at pp. 399-400. Contractual liability, he thus posits, is the product of the will of the parties and not the 'status' thereof.

<sup>56</sup> See, for instance, Gilmore, *The Death of Contract* (Ohio State University Press, 1974)

<sup>57</sup> Childres and Spitz, "Status in the Law of Contract", (1972) 47 *N.Y.U.L.R.* 1 at p.1.

<sup>58</sup> See for instance the cases discussed in Chapter Three below at pp. 196ff.

<sup>59</sup> See for instance the Consumer Information Act, 1978, Sale of Goods and Supply of Services Act, 1980, Council Directive 85/374/EEC on Product Liability, [1985] O.J. L210/29, The European Communities (Cancellation of Contracts Negotiated Away from Business Premises (S.I. No. 224 of 1989), Consumer Credit Act, 1995, The Unfair Contract Terms Regulations, 1995, Package Holidays and Trade Act, 1995, Directive 94/47/E.C. on Timeshare Accommodation, [1994] O.J. L280/83 (see

Each of these breakaways centres itself not on discrete transactions but rather on relationships of an ongoing nature, either between specific parties or between different sectors of society (employers and employees, manufacturers and consumers, landlords and tenants). While such relations do admit of some degree of freedom in the negotiation of terms and conditions, modern law reform has seen to it that much of the content of these relations is imposed rather than agreed. Collective agreements and social partnership models,<sup>60</sup> similarly curtail much of the leverage employers and employees, for example, might otherwise have demanding set terms and conditions. Childres and Spitz suggest, moreover, that the status of the parties is a factor that often determines the courts' approach to the interpretation and enforcement of contracts.<sup>61</sup> Far from being swept away on the tide of contractualisation, each of these fields has become if not status-based than increasingly status-inclined.<sup>62</sup>

Recognition of these trends has, however, been slow. The unitary law of contracts continues to hold sway in contractual discourses despite its increasing marginality from the reality of modern contracting.<sup>63</sup> Yet while this unitary law of contract may remain largely intact, it finds itself operating in a smaller and smaller sphere of influence. Remaining in its grasp is perhaps the runt of modern contracting, a residue

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S.I. No. 204 of 1997), Council Directive 97/7/EC on Distance Selling, [1997] O.J. L144/19,. In the U.K, see Unfair Contract Terms Act 1978.

<sup>60</sup> The model of social partnership as practiced in Ireland, envisages co-operation between distinct sectors of economic, social and cultural life in Ireland. The partners comprise the Government, the trade unions, private employers' representatives, farmers' organisations and groups from the voluntary and community sector. The social partnership agreements currently in force in Ireland are *The Programme for Competitiveness at Work* (PCW) and the more recent *Programme for Prosperity and Fairness* (PPF).

<sup>61</sup> Childres and Spitz, "Status in the Law of Contract", (1972) 47 *N.Y.U.L.R.* 1 at pp. 30-31. "An analysis based upon status," they claim "is much more descriptive of contemporary court decisions than is analysis based upon a unitary parol evidence rule" adding that it logically follows that such analysis will be "more predictive of prospective decisions.

<sup>62</sup> See further Childres and Spitz: "Status in the Law of Contract", (1972) 47 *N.Y.U.L.R.* 1 especially at p. 2 where they comment that "[a]ll of us have come to recognize differences in contracts along transactional lines. Employment contracts, construction contracts, manufacturing contracts, suretyship contracts, government contracts, residential leases, commercial leases, insurance contracts, franchise contracts - all of these and many others have, to some extent, *their own contract law*". (Present writer's emphasis.)

of miscellaneous cases not falling under any of the more specific categories. In one sense this is no more than a reversion to how matters were perceived prior to the 1800s. While many respected commentators implicitly suggest that contract doctrine preceded this specialisation of tasks,<sup>64</sup> Gilmore argues that the ‘specialties’, as he calls them, are simply reasserting the independence that they possessed prior to the development of modern contract doctrine. The formulation of a unified contract doctrine, which began in the late 1700s,<sup>65</sup> drew from many disparate strands of law that, much like modern tort doctrine,<sup>66</sup> had developed largely independently of each other. Generally applicable principles were drawn from cases that previously had been regarded as *sui generis*. As Gilmore himself observes “we have tended to assume that contract came first and then in time the various specialties – negotiable instruments, sales, insurance and so on - split off from the main trunk”. In fact, he continues, “the truth seems to be the other way around. The specialties were fully developed...long before the need for a general theory of contract ever occurred to anyone”.<sup>67</sup> Friedman,<sup>68</sup> in a similar vein, comments that “[c]ontract law expanded and narrowed its applicability to human affairs primarily through a process of inclusion and exclusion. The rules themselves changed less than the areas covered by them”. Thus just as the heyday of *laissez-faire* saw contract law “gr[o]w fat with the spoils of other fields”,<sup>69</sup> the advance of modernity heralded contract’s demise as

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<sup>63</sup> There is still some truth in the comments of Childres and Spitz, made nearly 28 years ago *ibid.* at pp. 1-2: “Despite this significant disintegration, we have only begun to reject the idea of a unitary law of contracts and construct several law of contracts to respond to obvious social needs”.

<sup>64</sup> See for instance 1 Williston, *Contracts*, p. xi. Williston contrasts the law of contract with the then emerging law of torts. Whereas the latter “grew up piecemeal and with limitations varying in different forms of action”, the Law of Contracts, by contrast “after starting with some degree of unity now tends from its very size to fall apart”.

<sup>65</sup> Gilmore credits Christopher Langdell, Dean of Harvard from 1890-1913, with the formulation of modern contract doctrine culminating in the publication of his book on *Contracts* in 1871, a rather insular assumption and one that ignores developments over half a century earlier on the other side of the Atlantic. Arguably Pothier (in France) and Pollock (in England) were busy drawing up a unified doctrine of contract some time before Langdell was born. Even Chitty, a comparative latecomer, published his first edition on *Contracts* in 1826. See generally Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.* at pp. 398ff.

<sup>66</sup> Where the corresponding attempt at a unified test for negligence came in the 20<sup>th</sup> century, in the form of Lord Atkin’s ‘neighbour principle’: see *Donoghue v. Stevenson* [1932] A.C. 562.

<sup>67</sup> Gilmore, *The Death of Contract* (Ohio State University Press, 1974) at pp. 11-12.

<sup>68</sup> Friedman, Lawrence, *Contract Law in America*, (Madison: University of Wisconsin, 1965).

<sup>69</sup> *Ibid.*

“developments in public policy systematically robbed contract of its subject-matter”.<sup>70</sup>

### **The Challenge to the Discrete Paradigm: Relational Contract Theory and Empirical Studies**

A number of commentators have, however, gone further, disputing the appropriateness or relevance of the discrete contract to even that residue which makes up modern contract law. As a paradigm of contract law, it was argued, the discrete contract is neither particularly descriptive nor helpful. In particular it was argued that the unwitting preoccupation with the neo-classical fairy-tale of discrete-contracting has blunted the law’s effectiveness in regulating and ordering modern contractual relations.

The discrete contractual paradigm took as its subject the individual almost entirely abstracted from context. It is no small coincidence that it first gained currency as a model of social interaction at a time when economic liberalism and *laissez-faire* were to the forefront of economic thought. Both are predicated on the construction of the individual as an atomised unit acting independently of greater authority, free from all but the most inevitable of fetters and restrictions. Both treat the parties to a contract as individuals free from all duty and expectations save those created by the contract itself. This abstraction, Friedman notes “is a deliberate renunciation of the particular, a deliberate relinquishment of the temptation to restrict untrammelled individual autonomy or the completely free market in the name of autonomy”.<sup>71</sup> There is, obviously, a certain attraction in this image for the commentator who wishes to ignore the infinite complexities of social relations in favour of a tidy, predictable model of contracting practice. The discrete paradigm may certainly possess what Goldberg termed an “elegance” of sorts, though this is arguably at the expense of a comprehensive model rooted in the reality of modern contracting.

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<sup>70</sup> *Ibid.*

<sup>71</sup> *Ibid.*



Two U.S. academics, Ian Macneil<sup>72</sup> and Stewart Macauley,<sup>73</sup> spearheaded an influential challenge to the stranglehold that the discrete contractual paradigm had over modern contract doctrine. They argued (albeit with differing emphases) that as a model it was neither realistic nor useful in describing and analysing modern contractual relations. At the centre of their thesis is the proposition that the paradigm thrives on the false premise that the vast bulk of contracting practices could realistically be critiqued as discrete events divorced from context. In fact, as both commentators stress, the discrete transaction is in fact a rarity, a marginal phenomenon. Instead most contracts, much like marriage, are struck and operate within the context of, or at the very least as a prelude to, an ongoing relationship, commercial or otherwise, between the parties. Classical and Neo-classical contract doctrine alike have ignored these 'relational aspects' of contracting in favour of tidy, abstract conception of social intercourse ill-befitting our complex post-industrial society.<sup>74</sup> In ring-fencing the contractual event the discrete perspective displaces explanations and analyses of contracting that view the event in its wider context and seek to explain it in terms that acknowledge the relations which gave rise to and

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<sup>72</sup> See: Macneil, *Contract, Exchange Transactions and Relations*, 2d Ed. (Mineola N.Y.: Foundation Press, 1978); Macneil, "The Many Futures of Contracts", (1974) 47 *S. Cal. Law Rev.* 691; Macneil, "Contracts: Adjustment of Long-term Economic Relations under Classical, Neo-classical and Relational Contract Law", (1978) 72 *Northwestern Uni. Law Rvw.*, no. 6., pp. 854-905; Macneil, *The New Social Contract* (1979); Macneil, "Economic Analysis of Contractual Relations" in Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth's, 1981) at pp. 61-92; Macneil, "Economic Analysis of Contractual Relations: Its Shortfalls and the need for a 'Rich Classificatory Apparatus'", (1981) 75 *N.W.U. L. Rev.* 1018. On relationalism generally see also Goetz and Scott, "Principles of Relational Contracts", (1981) *Va. L. Rev.* 1089, Eisenberg, "Relational Contracts" and McKendrick, "The Regulation of Long-Term Contracts in English Law", Chapters 11 and 12 respectively of Beatson and Friedmann (eds.), *Good Faith and Fault in Contract Law*, (Oxford: Clarendon Press, 1995) and Williamson, "Transaction Cost Economics: The Governance of Contractual Relations", (1981) 22 *J.L. & Econ.* 233. See also Pound, "The End of Law in Juristic Thought (II)", 30 *Harv. L. Rev.* 201 (1917) at 212 who maintains that the relation was and remained in 1917 a central concept in the common law.

<sup>73</sup> Macauley, "Non-Contractual Relations in Business: A Preliminary Study", (1963) 28 *Am. Sociological Review*, 55, Macauley, "The Use and Non-use of Contracts" (1963) 9 *Practical Lawyer* 13, and Macauley, "An Empirical View of Contract" [1985] *Wisc. L. Rev.* 465.

<sup>74</sup> See Goldberg, "Towards an Expanded Economic Theory of Contract", (1976) 10 *Jo. of Economic Issues*, 45 at p. 49: "the elegance...of analytical models based on choice has led economists to suppress the relational aspects of contracts".

shaped the event's progress. This would have been objectionable, Eisenberg<sup>75</sup> argues, "even if most contracts were discrete". Even more disturbing was the fact that the "tacit empirical premise" underlying classical contract law "was entirely incorrect. It is discrete contracts that are unusual not relational contracts".

No contract is, of course, entirely devoid of relational aspects. Contract is quintessentially relational. It presupposes the existence of social relations. Few contracts could ever be made without a language common to both parties, absent a shared understanding of the words and gestures used and a minimal consensus as to their meaning. "[T]he process of communication of the content of that exchange" Elliot<sup>76</sup> notes "...cannot be discrete to it but must be expressed in terms (language) derived from social formations exogenous to it". The proponents of relationalism, however, intended their analysis to cut far deeper. In doing so they serve to illustrate perhaps unintentionally that the frames of analyses once deemed appropriate only to marriage could in fact usefully be applied, with the relevant modifications, outside the familial sphere. Contracts thus might not be so dissimilar from marriage after all.

This is appropriately underlined by a rather colourful quotation from Gordon.<sup>77</sup> "In the 'relational' view of Macauley and Macneil," he comments "parties treat their contracts more like marriages than like one-night stands".<sup>78</sup> Like marriage the long-term contractual relationship acts more as a framework for engagement than as a strict agenda of terms and conditions. As a result, the relational perspective displaces the possibility of what economists term 'contingency-claims' contracting, where all relevant and possible future events are encompassed by the terms of the agreement itself. Contingency claims contracting assumes full 'presentation',<sup>79</sup> that is, that all

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<sup>75</sup> Eisenberg, "Relational Contracts" Chapter 11 of Beatson and Friedmann (eds.), *Good Faith and Fault in Contract Law*, *op. cit.*, pp. 291-304 at p. 297.

<sup>76</sup> Elliott, "The Frontiersmen", reviewing *The New Social Contract* at (1981) 44 *M.L.R.* 345 at p. 346.

<sup>77</sup> Gordon, "Macauley, Macneil and the Discovery of Solidarity and Power in Contract Law", [1985] *Wisc. L. Rev.* 565. Quoted in Wheeler and Shaw, *Contract Law, Cases and Materials*, (Oxford: Clarendon Press, 1994) at p. 83.

<sup>78</sup> *Ibid.*

<sup>79</sup> Made present in time, anticipated. See Goldberg, "Towards an Expanded Economic Theory of Contract", (1976) 10 *Jo. of Economic Issues*, 45 at p. 51 and Macneil, "Economic Analysis of

possible opportunities and avenues, risks and pitfalls which the future may throw up are 'made present' in the contract and provided for as the parties desire. The contract is taken to provide comprehensively for all future contingencies. Absent the allocation of a particular risk it is assumed that the parties intend the risk, if realised, to lie where it falls.

Even if such 'full presentation' were possible in a discrete context (the high transaction costs of providing for each possible contingency probably render such foresight disproportionate not to mention prohibitively expensive in most cases) it is certainly neither feasible nor helpful as a means of governance of long-term relationships. Instead such arrangements tend (regardless of the actual terms of the initial contract upon which the relation is based) to be open-ended in nature. "The participants" Macneil observes, "never intend or expect to see the whole future of the relation as presentiated at any single time, but view the relation as an ongoing integration of behaviour to grow and vary with events in a largely unforeseeable future (e.g. a marriage, a family business)".<sup>80</sup>

The relational contract, far from strictly delineating the content of the contractual relationship, acts as a broad framework within which the parties act to their mutual benefit. The norms and understandings governing the relation tend to be dynamic rather than static, developing in tandem with and by reference to the relation itself, adjusting to new situations and opportunities as they arise. Disputes are typically resolved by compromise rather than conflict. Indeed dogged reliance on one's strict legal rights is seen as potentially inimical to the survival of the relation in the long run.<sup>81</sup> Instead the parties act to their mutual benefit with a view to sustaining good relations with their co-contractors. The prospect of the long-term benefits of maintaining the relationship often influence parties to forego short-term gain in

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Contractual Relations" in Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth's, 1981) at pp. 64-67.

<sup>80</sup> Macneil, *Contract, Exchange Transactions and Relations*, 2d Ed. Foundation Press, N.Y., 1978 at p. 13.

discrete transactions or to make ostensibly altruistic yet calculated concessions with a view to long term gain. In Macauley's words "the value of these relations means that all must work to satisfy each other". Thus, "[p]otential disputes are suppressed, ignored or compromised in the services of keeping the relationship alive".<sup>82</sup>

Mutual trust is the touchstone of relational contracting. Like marriage, no long-term contract can survive healthily in an environment of mistrust and suspicion. Equity recognises this fact in refusing as a general principle to order specific performance of contracts<sup>83</sup> (or indirectly achieving the same result by means of the enforcement of a negative covenant) involving the rendering of a service or the re-instatement of an employment.<sup>84</sup> In *Page Records v. Britton*<sup>85</sup>, for instance, Stamp J. outlined the detrimental effects of "put[ting] pressure upon" the members of a then famous rock-band, "to continue to employ as a manager and agent in a fiduciary capacity one...who has duties of a personal and fiduciary nature to perform and in whom [they]...have lost confidence".<sup>86</sup> Co-operation, good faith, trust and discretion are, likewise, essential to the success of the contractual relation. Relations are expected to engender what Macneil termed 'organic solidarity'. Thus it is expected that "the benefits and burdens of the relation are to be shared rather than entirely divided and allocated...".<sup>87</sup> Each party is expected to take the rough with the smooth, to accept in

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<sup>81</sup> See Hedley, "Contracts as Promises" (1993) 44 *N.I.L.Q.* 12 at p. 13 who notes that a party who insists on asserting the strict letter of his legal rights against another may expect never to do business with the latter again.

<sup>82</sup> Macauley, "An Empirical View of Contract", [1985] *Wisc. L. Rev.* 465 at p. 470.

<sup>83</sup> *Ryan v. Mutual Tontine Association* [1893] 1 Ch. 116; *Posner v. Scott-Lewis* [1987] Ch. 25. See Jones, "Specific Performance of a Contract for Services" (1987) 47 *C.L.J.* 21.

<sup>84</sup> *Page One Records v. Britton* [1968] 1 W.L.R. 157. See also *DeFrancesco v. Barnum*, per Fry L.J. "Courts are bound to be jealous lest they should turn contracts of service into contracts of slavery". But see *Lumley v. Wagner* (1852) 1 De G.M. & G. 604 and *Warner v. Nelson* [1937] 1 K.B. 209 where negative covenants were enforced precluding entertainers from working other than for a specific employer. The courts argued, not convincingly in the latter case, that such enforcement was not equivalent in effect to specific performance of an agreement to provide personal services. See also *Irani v. Southampton and S.W. Hampshire Area Health Authority* [1985] I.C.R. 590 where an injunction was imposed, there being no breach of trust between the parties to the employment in question. See further Madden "Specific Performance of Contracts of Employment", (1985) *I.L.T.* 135.

<sup>85</sup> [1968] 1 W.L.R. 157.

<sup>86</sup> *Ibid.* at p. 167.

<sup>87</sup> Macneil, *Contract, Exchange Transactions and Relations*, 2d Ed. (Mineola N.Y.: Foundation Press, 1978). See also Macneil in Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth's, 1981) at pp. 69-70.

particular that it may be required, as a prerequisite to the maintenance of the relation, to forego its own advantage with a view to supporting a co-contractor in difficulty. One is reminded, in particular, of Macauley's observation that "[p]eople often renegotiate deals that have turned out badly for one or both sides. They recognize a range of excuses much broader than those accepted in most legal systems".<sup>88</sup>

Recognition of these characteristic features, Macneil argues, is a necessary prerequisite to the establishment of "intellectually coherent principles" of contract law, tailored to the effective critique of modern contractual relations. If relational contracting makes up the bulk of modern contracting practices, then, it follows that legal discourses should be sufficiently open-textured to cater to relational perspectives. Eisenberg<sup>89</sup> proceeds an explicit step further. He rejects the assertion that the relational contract should be the subject of special rules, arguing instead that principles of contract modelled on the relational perspective would and should be sufficiently broad-textured to cater *even* to discrete contracts. The latter being, he maintains, the exception rather than the rule, it is the relational contract that should provide the model around which modern contract rules are framed.

For the moment however, recognition of these factors have two important consequences. First it should transform our perceptions about the dynamic of power relations. Acknowledgement of the relational aspects of contracting opens up the possibility of examining coercive forces that exist as a result of situations of dependence engendered by the relation itself. Scrutiny of the most appropriate legal responses to coercion will be tailored accordingly. Second, such recognition serves to undercut to a significant degree arguments in favour of ring-fencing marriage from the mainstream of contract (as outlined at the beginning of this Chapter). This is not to say that marriage should be treated as just another contract. Nor should it suggest that the policy considerations upon which the legislature and judiciary act in these respective fields are not diverse in nature and purpose. Rather, it is asserted that in

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<sup>88</sup> Macauley, "An Empirical View of Contract", [1985] *Wisc. L.Rev.*465 at pp. 467-468.

exposing the relational aspects of contracts certain structural similarities between marriage and contract are brought to the surface. This in turn raises the prospect of constructing cross-disciplinary frameworks of analysis essential to a fuller understanding the dynamics of power as experienced in relations, be they marital, commercial or otherwise. Even if Eisenberg's suggestion (that what is suitable for relations is good for all) is rejected, the relational perspective poses a counter to the hegemony of the discrete transaction, allowing the scrutiny of contracting along a discrete-relational spectrum.<sup>90</sup>

### **The mark of the discrete paradigm in Contract Law**

The mark of the discrete paradigm in contract law is subtle yet pervading. Despite the waning influence of liberal thought in this field, certain aspects of classical doctrine survive in the fabric of modern contract law.<sup>91</sup> Indeed several of the well-established principles and concepts in contract reveal a strong tendency towards the paradigm of the contract that is short and specific, with certain ramifications for the more expansive relational contract. This is related very much to the history of the development of a unified doctrine of Contract law. The early nineteenth century witnessed a growing zeal for such a unified doctrine.<sup>92</sup> Thus legal discourses were ripe for the transition of the continental law principles outlined in Pothier's *Traité des Obligations*, (1761), first published in English in 1806. Pothier's text proved remarkably influential and inspired many similar texts in England. Being based predominantly on will theories of contract,<sup>93</sup> and coming at the beginning of the

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<sup>89</sup> Eisenberg, "Relational Contracts", Chapter 11 of Beatson and Friedmann (eds.), *Good Faith and Fault in Contract Law* *op. cit.* at pp. 291-304.

<sup>90</sup> In a colourful feminist analysis of contracting Peter Goodrich suggests that these alternate poles represent, respectively the paradigms of masculine-type and feminine-type contracting. "Gender and Contracts", Chapter 2 of Bottomley, *Feminist Perspectives on the Foundational Subjects of Law*, pp. 17-46. While commending this article highly, it is submitted that this analysis ignores other feminist and queer theoretical perspectives. These propound the dangers inherent in assuming that certain characteristics or personality traits can be assumed to be the sole preserve of one gender rather than the other. Goodrich arguably does his own gender a disservice in typecasting it as the equivalent of a decontextualised, rather brutish paradigm of contracting.

<sup>91</sup> See the discussion at the conclusion of Chapter One above at pp. 72-74.

<sup>92</sup> See generally the discussion in Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.*, at pp. 398ff.

<sup>93</sup> See Atiyah, *ibid.*, at pp. 399-400.

heyday of *laissez-faire*, it is no surprise that it prompted the English text-writers to conceive of contract law in terms that predominantly focussed on the discrete model of contracting.

The first of these principles noted above concerns the matter of certainty. Lack of specificity, often the hallmark of the contractual relation, can be fatal to the validity of a contract.<sup>94</sup> Viscount Dunedin's remarks in *May and Butcher v. R.*<sup>95</sup> underline the assumption that "[t]o be a good contract there must be a concluded bargain, and a concluded contract is one that settled everything that is to be settled and leaves nothing to be settled by agreement between the parties".<sup>96</sup> The classical model of the complete contingent contract looms large here. While the parties may stipulate alternative methods of content determination, especially in case of dispute, the contract cannot be predicated upon an open-ended expectation of future agreement.

Vagueness and ambiguity, then, are discouraged. In *Loftus v. Roberts*<sup>97</sup> a contract between an actress and a theatre manager was struck down for being too vague as it stipulated for only "a west end salary to be mutually arranged between us". In *Scammell v. Ouston*<sup>98</sup> an agreement to sell a van on "hire-purchase terms" without specifying what this entailed, was likewise deemed invalid for lack of clarity. The Courts have gradually tempered this doctrine, where there is, for instance, agreement as to the method of clarifying certain matters<sup>99</sup>, for instance by arbitration, or by reference to statutorily implied terms. In a rare nod to relationalism the courts will also take account of a prior course of dealing<sup>100</sup> between the parties and the custom in the relevant trade. The very fact, however, that the Court will seek to garner such specificity endorses the view that it seeks to avoid, in so far as possible, the spectre of

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<sup>94</sup> In Ireland see *Central Meat Products v. Carney* (1944) 10 Ir. Jur Rep. 34, *E.S.B. v. Newman* (1933) 67 I.L.T.R. 124.

<sup>95</sup> [1934] 2 K.B. 17 (note).

<sup>96</sup> *Ibid.* at 21.

<sup>97</sup> (1902) 18 T.L.R. 532 (C.A.)

<sup>98</sup> [1941] A.C. 251 (H.L.)

<sup>99</sup> See *Foley v. Classique Coaches* [1934] 2 K.B. 1.

<sup>100</sup> *Hillas v. Arcos* (1932) 147 L.T. 503.

the unpresentiated contract, even if this means impliedly constructing the terms of an otherwise open contract itself.

The doctrine of consideration too implies an adherence to the discrete paradigm. It stipulates that an agreement, to be enforceable, must be supported by valuable<sup>101</sup> consideration, that is, a benefit must flow from the promisee<sup>102</sup> (though not necessarily to the promisor). Contract doctrine has traditionally assumed that the consideration and the promise in exchange for which it is given must necessarily coincide and that consideration must precede performance.<sup>103</sup> Past consideration thus is no consideration. In *Roscorla v. Thomas*<sup>104</sup> for instance, the defendant, having sold the plaintiff a horse, stated that the horse was “sound and free from vice”. When it turned out that the horse was anything but, the plaintiff sued upon this apparent warranty only to find that, having been stipulated subsequent to the sale, it was not supported by consideration and could thus not be relied upon.<sup>105</sup>

In a relational contract, of course, this model of simultaneous exchange is quite alien. In the course of a long-term contractual relationship, with multiple contractual events, the actions of the respective parties may temporally be spaced out such that consideration might not be present in a distinct transaction. A contractor, for instance, may request a modification in contract terms (for example, a temporary reduction in

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<sup>101</sup> Although the presence of value in some cases at least, is highly illusory. In *Haigh v. Brooks* (1839) 10 Ad. & El. 309, an agreement, the consideration for which was, *per* Friel, “a worthless piece of paper”, was nonetheless considered enforceable. Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 2000) at 97. See also *Chappell & Co. v. Nestlé* [1960] A.C. 87 where chocolate bar wrappers received by Nestlé were deemed to constitute consideration, despite the fact that the defendant had no use of, and indeed ultimately disposed of the wrappers. See also *Esso Petroleum v. Customs and Excise* [1976] 1 All E.R. 117.

<sup>102</sup> *McCoubrey v. Thompson* (1868) I.R. 2 C.L. 226.

<sup>103</sup> See *Morgan v. Rainsford* (1845) 8 Ir. Eq. R. 299 (improvements to property made prior to a contract not consideration therefor) and *Provincial Bank or Ireland v. O'Donnell* (1932) 67 I.L.T.R. 142 (past monies loaned by bank not consideration for subsequent contract).

<sup>104</sup> (1842) 3 Q.B. 234.

<sup>105</sup> Today, such a term would be implied into every consumer contract unless the defect was brought to the attention of the buyer. Section 14 of the Sale of Goods Act 1893 would imply statutory conditions that the horse was first., of merchantable quality and second, fit for the purpose for which it was purchased. These terms cannot validly be excluded from a contract between a dealer and a consumer. (See section 10 of the Sale of Goods and Supply of Services Act, 1980).



price) in response to temporary difficulties.<sup>106</sup> His counterpart may grant this request, expecting no immediate return but rather, anticipating that this will strengthen the relation, in particular enhancing the trust and goodwill between the parties. Such amorphous affective benefits will not generally be recognised as giving rise to consideration, although it is possible, as in *Williams v. Roffey*,<sup>107</sup> to divine consideration by other, sometimes rather artificial, means. The consideration must, however, be of some economic value, (although the value need not equate to that received in return - it may be merely nominal.<sup>108</sup>) Affective benefits, such as those arising where a person, out of 'natural love and affection', bestows a benefit upon a close relative, do not amount to consideration.<sup>109</sup> Thus in *Thomas v. Thomas*<sup>110</sup> a court held that satisfying a deceased's father's wishes was no part of the legal consideration for an agreement to house the defendant's mother (although her agreement to pay a sum towards ground rents and to see to the maintenance of the house was.)<sup>111</sup> The fact that a chocolate wrapper (thrown out on receipt) should amount to consideration,<sup>112</sup> but not the enduring love of a loved one, speaks volumes about the materialism of contract law.<sup>113</sup> Contract generally presupposes economic exchange - hence its reticence to enforce gratuitous promises. It underlines also the

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<sup>106</sup> Cf. *Williams v. Roffey Bros.* [1991] 1 Q.B. 1.

<sup>107</sup> *Ibid.*

<sup>108</sup> See for instance *Chappell & Co. Ltd. v. Nestlé* [1960] A.C. 87

<sup>109</sup> See *Bret v. J.S.* (1600) Cro. Eliz. 756 where it was noted that "natural affection of itself is not a sufficient consideration". The court in that case had to consider whether a mother's agreement to discharge the costs of lodgings for her son was enforceable. The whole court agreed that the stipulation that the son should remain in lodgings with the plaintiff amounted to sufficient consideration (although it is arguable that this was of little detriment to the son) for the mother's promise. Her natural affection to the son however formed no part of the consideration, "for although it be sufficient to raise an use, yet it is not sufficient to ground an action without a *quid pro quo*". See also *Mansukhani v. Sharkey* [1992] E.G.L.R. 105. It seems that a promise to say prayers, too, cannot amount to consideration for these purposes; see *O'Neill v. Murphy* [1936] N.I. 16, discussed below, in Chapter Four, at p. 33.

<sup>110</sup> (1842) 2 Q.B. 851, 114 E.R. 330.

<sup>111</sup> Likewise in *White v. Bluett*, (1853) 23 L.J. Ex. 36, a father had agreed to write off his son's debt to him, in exchange for the latter agreeing not to pester his father with complaints. While Pollock C.B. noted that the son had no legal duty not to bore his father (at p. 37), the court concluded that there had been no consideration for the making of the promise, and thus that the father could rely on a promissory note proffered by the son.

<sup>112</sup> *Chappell & Co. v. Nestlé*, *op. cit.*

<sup>113</sup> Cf. *O'Neill v. Murphy* [1936] N.I. 16 where Andrews L.J. seems to have discounted, in a similar spirit, the possibility of a promise to pray amounting to consideration. The prospect of spiritual benefit may be unproved and unprovable; the sense of spiritual well-being inspired by the promise is not so easy to discount. *O'Neill* again underlines the fetishisation of economic conceptions of value and the corresponding ignorance of the more intangible affective benefits that may arise from a contract.

failure to grapple with the complex dynamics of the relation where consideration does not necessarily precede performance and where long-term, sometimes intangible benefits are often preferred to short-term material gains.

The doctrine of privity is a third hallmark of discretion.<sup>114</sup> This posits that only the parties to a contract may rely upon its terms, or, for that matter, be sued upon its terms.<sup>115</sup> While there are a great many exceptions to this rule, in principle it remains intact, with the result that, absent a direct contractual relationship, an aggrieved party may rely solely on the obligations flowing from the law of tort.<sup>116</sup> Arguably the principle offends even liberal tenets. A party who stipulates for a benefit to be bestowed on a third party may see this intention frustrated in cases where the third party cannot sue for this benefit<sup>117</sup> (although arguably the party to the contract may plead the breach of contract instead).

It is also arguable, however, that the doctrine fails to account for the externalities that flow from a contract. The resultant 'ring-fencing' of the parties assumes a relatively isolated pattern of contracting, one that arguably ignores the reality of modern

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<sup>114</sup> On which generally see Clark, *Contract Law in Ireland*, 4<sup>th</sup> ed., (Dublin: Round Hall, 1998), Chapter 17 and Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 2000), Chapter 9.

<sup>115</sup> See *Murphy v. Bower*, (1866) I.R. 2 C.L. 506, *Clitheroe v. Simpson* (1879) 4 L.R. Ir. 59, and *Mackey v. Jones* (1959) 93 I.L.T.R. 177. The doctrine is most notably illustrated, however, by the decision in *Tweddle v. Atkinson* (1861) 1 B. & S. 393. A and B agreed to pay C, B's son, an amount of money on C's marriage to A's daughter. C later sued A's estate for the promised sum. The Court refused to order payment, partly on the ground that consideration did not flow from C, but additionally because C was not a party to the contract and could not, therefore, assert its terms. See also *Dunlop v. Selfridge* [1915] A.C. 847. Corbin argued strenuously against this result (see Corbin, "Contracts for the Benefit of Third Parties", (1930) 46 L.Q.R. 12) an approach that nonetheless seems to have prompted English jurists at least initially to assert with even more vigour the validity of the doctrine (see the subsequent decision of the Privy Council in *Vandepitte v. Preferred Accident Assurance Co. of New York* [1933] A.C. 70, and the commentary of Karsten "The Discovery by Law by English and American Jurists in the Seventeenth, Eighteenth and Nineteenth centuries: Third-party beneficiary Contracts as a Test Case", (1991) 9 *Law and Hist. Rev.* 327.) The rule has, by contrast, been diluted considerably in some parts of the U.S., for instance in N.Y. (*Lawrence v. Fox* (1859) 20 NY 268) and Massachusetts (*Choate et al. v. S.C.A. Services Inc.* (1979) NE (2d) 1045) and in Australia (See the decision of the majority in the Australian High Court in *Trident General Insurance v. McNiece Bros Pty. Ltd.* (1988) C.L.R. 107. Of late there seems to have been some acknowledgment if the need for change from the House of Lords (see Lords Scarman and Keith in *Woodar Investment Ltd. v. Wimpey Ltd.* [1980] 1 W.L.R. 277 and Lord Diplock in *Swain v. Law Society* [1983] 1 A.C. 598 at p. 611.

<sup>116</sup> See *Junior Books v. Veitchi* [1983] 1 A.C. 520 where the absence of a direct contractual nexus between the owner of a factory under construction and a sub-contractor laying a specialised floor led the latter to sue for economic loss caused by a breach of the tortious duty of care.

contractual relations, where multiple parties may combine to achieve a particular end. A rather straightforward example is the scenario in *Junior Books v. Veitchi*.<sup>118</sup> There the pursuers had hired contractors to build a factory. The contractors in turn, subcontracted the task of laying specialised flooring to the defenders. Despite the obvious commercial nexus between the parties, it seems to have been accepted by all involved that the defenders owed the pursuers no contractual duty whatsoever (although the House of Lords did conclude that liability lay in tort for breach of duty of care).

The many exceptions to the rule of privity in practice probably prevent its application in all but the most rare of cases. In some older cases indeed, there are hints of recognition of the relational.<sup>119</sup> Nor can it be denied that a considerable amount of judicial and academic debate surrounds each of the concepts mentioned above, dispelling the temptation to think of legal discourse in purely one-dimensional terms. A continuing dialectic is played out that often brings certain aspects of the relational to the fore in contract law. Atiyah, for instance,<sup>120</sup> points out the growing prevalence of reliance-based grounds of liability that at least rival consideration as a ground for contractual liability. The doctrine of estoppel and the new boundaries of misrepresentation represent a renewed acknowledgement that liability may arise in contract by means other than the model of bargain supported by consideration. There are also those, of course, who dispute the presence of the doctrines of consideration<sup>121</sup> and privity<sup>122</sup> on liberal grounds, for instance, by reference to will or consent

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<sup>117</sup> See Elliott and Quinn, *Contract Law*, 2<sup>nd</sup> ed., (Harlow: Pearson/Longman, 1999) at p. 187.

<sup>118</sup> [1983] 1 A.C. 520.

<sup>119</sup> In the 1677 case of *Dunton v. Poole*, 83 E.R. 523, for example, the pre-existence of relationships seems to have been a significant influence on the Court's decision. A father agreed with his son not to sell property belonging to the father in exchange for an undertaking that the son would pay his sister £1,000. The King's Bench allowed the latter-mentioned sister to recover the money notwithstanding the fact that she was not a party to the contract. The relationship between the various parties, Friel suggests, was highly influential in this regard. Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 2000) at pp. 137-138. See also *Bourne v. Mason*, (1669) 1 Vent. 6.

<sup>120</sup> Atiyah, *The Rise and Fall of Freedom of Contract*, *op. cit.*, at pp. 771ff.

<sup>121</sup> See Fried, *Contract as Promise*, (Mass.: Harvard University Press, 1981), Chapter 3.

<sup>122</sup> Elliott and Quinn pose as a possible argument against the privity rule the 'free will' argument that it upsets the intention of many contractors that a third party benefit from their agreement. Elliott and Quinn, *Contract Law*, 2<sup>nd</sup> ed., (Harlow: Pearson/Longman, 1999) at p. 187. It may be, however, that the 'free will' perspective is arguably equivocal on this point. Earlier, they pose the equally compelling

theories<sup>123</sup> of contractual liability. The discrete model, nonetheless, still has considerable influence. Wheeler and Shaw note the recent retreat towards contractualism in the law of obligations, citing in particular the decision in *Pacific Associations v. Baxter*.<sup>124</sup> “In this cases and a number of others,” they note, “the Court asserted the primacy of the contractual obligation, and rejected the option of imposing a duty of care in tort where there is an underlying contractual structure”.<sup>125</sup>

There is some evidence that the values recognised as integral to relations are beginning to find recognition in mainstream judicial thought. The decision of the Court of Appeal in *Williams v. Roffey Bros*.<sup>126</sup> exhibits, at least tentatively, partial legal acknowledgement of the importance of co-operation and compromise in the contractual realm. The plaintiff, a construction firm, entered into a subcontract with the defendant for the completion of work on a block of apartments. With the work well in progress, the former discovered that it had underestimated the cost of construction to a point where, without extra funds, it would genuinely be unable to discharge its obligations to the defendant. After discussing this problem, the parties agreed that the plaintiff would be paid extra provided the work was finished on time. The retention of “the services of the plaintiff so that the work could be completed” was cited<sup>127</sup> (*inter alia*) as a benefit accruing to the defendant such that consideration existed to establish the validity of the modification. Implicitly the Court seemed to be suggesting that the compromise – though in strict legal terms serving to diminish the defendant’s legal rights – was of real practical benefit to both parties’ interests as it

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argument that a relaxation of the privity rule might lead to obligations being imposed and rights being enjoyed by a third party against his or her will. (*Ibid.* at p. 186).

<sup>123</sup> Barnett, “Rights and Remedies in a Consent Theory of Contract”, in Frey and Morris, (eds.), *Liability and Responsibility*, (Cambridge; Cambridge University Press, 1991).

<sup>124</sup> [1989] 2 All E.R. 109. A and B agreed that B would perform certain dredging work. Meanwhile, A and C, an engineer, agreed that C would oversee this work. B claimed certain expenses from A but C refused to certify these. B successfully sued A for breach of contract and then tried to sue C, the Engineer, in tort. The Court held that as there was no contractual relationship between the Engineer and B, the Engineer could not be held responsible towards B.

<sup>125</sup> Wheeler and Shaw, (*op. cit.* at footnote 44), at p. 325.

<sup>126</sup> [1991] 1 Q.B. 1

<sup>127</sup> *Ibid. per* Russell L.J. at p. 19.

allowed the completion of work from which both would profit.<sup>128</sup> Yet “despite [such] limited concessions to relationalism” it is arguable, Gordon<sup>129</sup> asserts, that “modern contract law remains wedded to unrealistic models of the discrete transaction”.

There is, that said, a certain irony, even pointlessness, in arguing that legal doctrine should be so altered. The very dynamic to which the relation gives rise, after all, to a large part negates and displaces the influence of legal norms and rules. In eschewing strict legal rights and entitlements in favour of compromise and commitment the contractual relation gradually develops its own framework of governance, a by-product of the dynamic internal to the relation. Macauley, drawing on his empirical studies of ‘real life’ contracting observes in a similar vein that “contract planning and contract law, at best, stand at the margin of important long-term continuing business relations”.<sup>130</sup> In their stead one finds private governance frameworks shaped by the particular needs of the parties, their circumstances and ultimate business objectives. It is to this particular aspect that this Chapter now turns.

### **Transaction-Cost Economics**

Much light is cast on the characteristics of alternative governance frameworks by proponents of a school of economics closely allied to the relational perspective. Transaction-cost economics emerged in the 1960s as a counter to the dominance of ‘market-based’ analyses of economic activity.<sup>131</sup> The latter, not unlike the discrete paradigm of classical contract doctrine, presupposes a landscape of economic activity peopled by economic actors abstracted from context. Geographical location and proximity to markets is ignored. Evidence of individual idiosyncrasies and specific

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<sup>128</sup> Or perhaps more accurately in the case of the defendant, the avoidance of penalties set under another contract if the work was not completed on time.

<sup>129</sup> Gordon, “Macauley, Macneil and the Discovery of Solidarity and Power in Contract Law”, [1985] *Wisc. L. Rev.* 565.

<sup>130</sup> Macauley, “An Empirical View of Contract” [1985] *Wisc. L. Rev.* 465. Quoted in Wheeler and Shaw, *Contract Law, Cases and Materials*, (Oxford: Clarendon Press, 1994) at p. 76.

<sup>131</sup> See generally Williamson, “Contract Analysis: The Transaction-Cost Approach”, in Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth’s, 1981).

business need is largely suppressed.<sup>132</sup> It is presumed, furthermore, that buyers have perfect knowledge of the market.<sup>133</sup> Most notable, however, is the assumption that any costs over and above the (market-determined) sale price of a good or service are so negligible as to be safely ignored.

Market based economics, then, takes as its paradigm a largely hypothetical and somewhat rarefied conception of contracting. This form of economics adopts as its central assumption the presence of ‘perfect competition’ where “each economic agent acts as if prices are given, that is each acts as a price-taker; the product is homogeneous; there is free mobility of all resources including entry and exit of business firms; and all economic agents in the market possess complete and perfect knowledge”.<sup>134</sup> Thus when economic analysis of this type proceeds, it tells us *not* that if X occurs then Y will follow but that this will be the case *provided* that a series of stated conditions are present and constant. Frictionless markets with negligible transaction costs and a minimum of uncertainty are assumed to exist.

Of course, such markets don’t exist. As a tool of analysis, market-based economics may have its uses but any hint of variation from the ideal it postulates will inevitably blunt its predictive or prescriptive value. Transaction cost economics, by contrast, reject these abstract, static analyses in favour of those which acknowledge, like relationalism, the contextuality of contracting practices.<sup>135</sup> The drawback of the market-based approach lies primarily in its assumption of an absence of other than negligible transaction-costs, a consideration that constitutes the central concern of the transaction-costs<sup>136</sup> approach.

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<sup>132</sup> The closest it gets to acknowledging idiosyncrasy is in its discourses on the marginal consumer – the consumer who is most likely, should the price of a particular product rise, to forego purchase of that product.

<sup>133</sup> See Williamson, “Contract Analysis: The Transaction-Cost Approach”, in Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth’s, 1981) at p. 43.

<sup>134</sup> Ferguson and Gould, *Microeconomic Theory*, 4<sup>th</sup> ed., (Homewood, Ill.: Irwin, 1975) at p. 225.

<sup>135</sup> See the “Introduction” to Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth’s, 1981) at p. 22: Transaction-cost economics “eschews models based on the fiction of frictionless markets”.

<sup>136</sup> ‘Transaction Costs’ are in the words of Arrow, *The Organization of Economic Activity: The Analysis and Evaluation of Public Expenditure: The PBB System*, (Jt. Econ. Cttee, 91<sup>st</sup> Congress, 1<sup>st</sup>

This alternative approach, sometimes termed ‘neo-institutional economics’,<sup>137</sup> turns from the market-based economic assumption of perfect market conditions in favour of an analysis of market behaviour in circumstances where friction, change and uncertainty - and disequilibrium in general - are in evidence. It attempts to pinpoint the adaptive techniques most appropriate for the minimisation of transaction-costs in any given set of circumstances. Transaction-cost economics, while acknowledging the importance of contract law in promoting efficiency and reducing transaction costs, eschews the market-based economic assumption that commercial affairs, are solely or mainly regulated, by the market itself, or where considerations of efficiency or market failure so dictate, legal rules and forms. A pivotal theme of neo-institutional economics is that transactional governance structures - the framework under which transactions are organised - will vary in form and substance depending upon the transaction costs involved in administering each. These in turn will vary depending on the dimensions of the contractual relationship, identified by Williamson<sup>138</sup> as:

- (1) the level of market *uncertainty*,
- (2) the *frequency* of exchange,
- (3) transaction-specificity or the *idiosyncrasy* of the goods being exchanged/services being supplied.

Using these three criteria, Williamson outlines three broad paradigms of governance applicable to contracts. Each varies from the others as regards the extent to which it permits external factors to shape or dictates the contractual relation. Williamson’s central thesis is that the greater the dimensions of uncertainty, frequency and

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Sess., 1969), pp. 47-64 at p. 48, "...the costs of running an economic system..." They can usefully be contrasted with production costs.

<sup>137</sup> By, for instance, Burrows and Veljanovski, in "Introduction" to Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth's, 1981).

idiosyncrasy the more likely the contractual relation is to be governed by norms internal to the relation. He notes, in particular, how the greater the degree of each of the three dimensions mentioned the less significant become the standard market governance structures in the administration of the contractual relationships involved.

**(1) Classical Contracting; Market Governance Structures.** Transactions involving items or services of a non-specific or standard nature are most suitably dealt with under the generally applicable legal/market governance framework. Provided alternative sources of supply are available in cases of market instability even the most frequently recurring of standard purchases will best be governed by classical contract principles. Of course where contracting is frequent extra-legal norms will, to some degree, creep into the contracting process and some of the characteristics of relational contracting will become evident. Where trade is frequent and robust, contractors are encouraged to maintain the goodwill of buyers. Commercial integrity and probity promote trust, the lifeblood of a dynamic economy where promises and future entitlements constitute the bulk of realisable wealth.<sup>139</sup>

To posit that individuals fulfill their promises simply because legal sanctions will otherwise ensue simply doesn't fully reflect the reality of market and other transactions. When people make promises or formulate contracts more often than not they "*contemplate performance, not breach*".<sup>140</sup> Parties with roughly equal bargaining status negotiating at arm's length rarely enter into contracts which they believe at that time not to be to their, either immediate or ultimate, benefit. Chances are, surrounding circumstances remaining constant, that view of utility will not change between the date of execution and that of performance.

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<sup>138</sup> Williamson, "Contract Analysis: The Transaction Cost Approach" in Burrows and Veljanovski (eds.), *The Economic Approach to Law*, pp. 39ff. See also Williamson, O.: "Transaction Cost Economics: The Governance of Contractual Relations" (1981) 22 *J.L. & Econ.* 233.

<sup>139</sup> See Pound, "Wealth, in a commercial age, is made up largely of promises": *An Introduction to the Philosophy of Law*, rev. ed., (New Haven: Yale University Press, 1954) at p. 133. Indeed it may be argued that all wealth is based on promises or expectations of future behaviour. Even a cash-transaction is predicated on the expectation that others will accept cash as representative of its stated value.

<sup>140</sup> Hedley, "Contracts as Promises," (1993) 44 *N.I.L.Q.* 12 at p. 13.



Of course, in a dynamic market, surrounding circumstances may not necessarily remain static. A new offer may be made, situations may change or a different view of existing contractual arrangements taken such that the perceived utility in performing such promise may wane to the point of non-existence. Indeed on one view contract doctrine itself seems to allow for the possibility of 'efficient breach' – where a contractor may break a promise to a co-contractor in order to accept a more favourable offer from a third party.<sup>141</sup> Where a party has ordered his affairs in reliance upon a promise now not to be fulfilled, that party will most likely suffer some detriment owing to his misplaced trust and reliance.<sup>142</sup> The possibility of extra-legal normative sanction - such as general disapproval, representations of untrustworthiness to other potential clients and the consequent damage to reputation, rupture in a continuous relationship of dealing and failure to deal in the future - may be sufficient to deter breach of promise in most cases.<sup>143</sup> Adverse publicity and its effect upon promise-makers often provide an extra-legal counter to breach of contract. Macauley observes that <sup>144</sup> “[w]hile we often read that increasing bureaucratic organization has made the world impersonal, this is not always the case. Social fields cutting across formal lines exist within bureaucracies, creating rich sanction systems...Social networks serve as communication systems. People gossip and this creates reputational sanctions”. The success of future dealings with a client or the prospect of future arrangements with other potential clients, may prove sufficiently conducive to urge compliance with a promise made. As Hedley astutely notes:

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<sup>141</sup> See the discussion in Trebilcock, *The Limits of Freedom of Contract*, (Mass.: Harvard University Press, 1993) at p. 142 and pp. 172 and 186 and Macneil, “Efficient Breach of Contract: Circles in the Sky”, 68 *Virg. L. Rev.* 947 (1982).

<sup>142</sup> Although the party so aggrieved is obliged to mitigate, to as great an extent as possible, the damage caused to his business by the other party's breach.

<sup>143</sup> See the arguments of Becker, *Outsiders: Studies in the Sociology of Deviance*, (New York: Free Press, 1966 and 1974) and in Cohen, *Deviance and Control*, (New York: Prentice Hall, 1965) at Chapters Eight and Nine. Both contend that individuals may be prompted to obey social norms by the prospect of extra-legal sanctions. The extent to which a person will do so depends on the 'stake in conformity' that he possesses in respect of the group that judges him. This in turn is shaped by various contingencies, but most particularly by the extent to which his well-being, financial, social and emotional, depends on continued membership of the group.

<sup>144</sup> Macauley, “An Empirical View of Contract”, [1985] *Wisc. L. Rev.* 465.

“[o]f course there are *some* markets where the participants are happy to do business with another firm on Monday, sue them on Tuesday and do business with them again on Wednesday; though it would be surprising if they outweighed those where ‘you don’t read legalistic contract clauses if you ever want to do business again’”.<sup>145</sup>

**(2) Trilateral Contracting: Alternative Dispute Resolution Methods.** On an occasional basis, again where negligible uncertainty prevails and alternative sources of supply abound, ‘mixed’ goods, such as customised equipment (i.e. standard equipment with special transaction-specific modifications,) or highly idiosyncratic goods may be purchased. In such circumstances, the neo-classical paradigm of contract law, dubbed ‘tri-lateral governance’ by Williamson,<sup>146</sup> may prove the most appropriate framework. ‘Though frequency of exchange may not be high enough to merit vertical integration, more specialised investment will need to be made in tailoring the product or service to the buyer’s requirements. The identity of the parties takes on special relevance. Goods are less fungible - that is, it will prove more difficult to sell them on the open market than would be the case with standard goods. Thus standard market rules and remedies will be of less utility where disputes arise.

The longer the expected currency of the contract (even if there actually be only *one* exchange or handover of goods,) the more costly will be full presentation. Thus, Macneil<sup>147</sup> comments “two common characteristics of long-term contracts are the existence of gaps in their planning and the presence of a range of processes and techniques used by contract planners to create flexibility in lieu of either leaving gaps or trying to plan rigidly”. If the exchange is, however, ‘though highly idiosyncratic, a once-off, (e.g. the construction of plant on a site belonging to the buyer,) the transaction and production costs involved in vertical integration may prove prohibitive, hence making intermediate governance structures more appropriate.

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<sup>145</sup> Hedley, “Contracts as Promises”, (1993) 44 *N.I.L.Q.* 12 at 13.

<sup>146</sup> Williamson, “Contract Analysis: The Transaction-Cost Approach” in Burrows and Veljanovski, *The Economic Approach to Law*, (London: Butterworth’s, 1981) at p. 51.

<sup>147</sup> Macneil, “Contracts: Adjustment of Long-term Economic Relations under Classical, Neo-classical and Relational Contract Law”, (1978) 72 *Northwestern Uni. Law Rvw.*, no. 6., pp. 854-905 at p. 865.

Speedy but fair arbitration methods will often be preferable to ‘transaction-rupturing’ litigation, particularly considering the transaction-specific investments made by both sides and the non-fungibility of the product. The Courts seem to respect this fact. In *Doyle v. Kildare Co. Co. and Shackleton*<sup>148</sup> the Supreme Court stated that judges ought be slow to interfere with the decision of an adjudicator as “one of the cardinal principles of the law of adjudication is that the parties are taken to have abandoned their right to litigate the question in issue”.<sup>149</sup>

### ***(3) Bilateral/Relational Contracting and Unified Governance/ Vertical Integration.***

The phenomenon of ‘relational contract theory’, already addressed above, is a perspective that examines contracts not as discrete phenomena but rather as incidents in the progress of an ongoing relationship between the privy parties. It is of course the case that all independent parties contract with their legal entitlements in mind, and hence can be said to operate in the shadow of the law. Where existing legal rights, privileges, immunities or powers are foregone some compensation will usually be anticipated. Contract law, of essence, purports to observe and give life to the manifested<sup>150</sup> intentions of the parties to a contract and the promises freely exchanged therein. Even where parties do not and/or need not proceed to court to assert their contractual rights they function in the shadow of the law, a penumbra which colours their dealings, informs their mode of expression of intent, the content of their agreements and the shape of settlements and compromises of disputes arising. Where an ongoing relationship of some value to both parties exists, however, each will be more likely to forego such entitlements, with a view to securing the greater stake they

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<sup>148</sup> Irish Times Law Reports, February 5, 1996; [1996] 1 I.L.R.M. 252.

<sup>149</sup> Irish Times Law Reports, at col. 6. For evidence of similar sentiments see the judgment of McCarthy J. in *Keenan v. Shield Insurance Co. Ltd.* [1988] I.R. 89 at p. 96 and that of Finlay C.J. in *McStay v. Assicurazoni Generali S.P.* [1991] I.L.R.M. 237 at p. 242. The latter stressed the finality of arbitration decisions, noting the “reluctance of the courts to interfere with the finality of an arbitrator’s award”.

<sup>150</sup> The use of this term is deliberate. Contract looks not to any abstract intention of the parties but only that evidenced by the words of their agreements, in other words their intention as manifested. The meaning of the terms of the agreement is assessed by predominantly objective means – what the words mean in the context in which they were used rather than any meaning which either or both parties subjectively wished them to possess. See Holmes, “The Theory of Legal Interpretation”, 12 *Harv. L. Rev.* 417 (1889) and Dalton, “An Essay in the Deconstruction of Contract Doctrine”, (1985) 94 *Yale L.J.* 997 at 1042.

possess in the continuance of the relation. As Macneil<sup>151</sup> comments “participants in contractual relations rarely go for the jugular when trouble arises”.

This form of contracting is most especially typical of situations where goods of a mixed or highly idiosyncratic nature are being exchanged on a recurrent basis. Transaction-specific costs will be high - the seller will have invested heavily in plant and equipment tailored to the requirements of the buyer and trained staff with the specifically tailored product in mind. The buyer in turn will find it hard readily to tap such expertise and experience from another source. Frequency of dealing, coupled with the long-term duration of the contract, increases the need for open, governance structures which facilitate ease of adaptation. The relation is based strongly upon mutual trust, understanding and facilitation and the interests of each party are often heavily bound up in those of the other party. The parties are closer to a single maximising unit than two separate maximising units. “Interdependence” Macneil says “often generates forces tending to keep [the relation] going and to make it a reliable basis for conducting economic activities”.<sup>152</sup> Techniques for the resolution of misunderstanding are more likely to be bilateral in form - the parties ring-fence their relationship and depend largely on mutual give-and-take, foregoing rather than contesting points of disagreement for the sake of the relation as a whole.

When increasing specificity and frequency of requirements interface with market uncertainty (where, for example, business failure amongst prospective suppliers is common or prices vary considerably from time to time,) the temptation for vertical integration and the consequent inception of a *unified governance structure* (i.e. a single firm, or group of companies, with one central hierarchy of authority,) may become overwhelming. However flexible outside suppliers are, their ultimate end is the promotion of their own self-interest and while this may, in the long-term best be served through looking after the interests of long-duration clients, this constitutes simply a means to an end rather than an end *per se*. Where a buyer purchases a

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<sup>151</sup> Macneil, “The Economic Analysis of Contractual Relations”, in Burrows and Veljanovski, *The Economic Approach to Law*, (*op. cit.*), at p. 82.

standard product on an infrequent or one-off basis where there is a steady supply thereof and numerous alternative suppliers, outside procurement will usually prove most efficient. Where, however, there exists a considerable amount of uncertainty in the market, e.g. as to constancy of price or continuity of supply, a buyer of a particular product may wish to secure his position through 'vertical integration'<sup>153</sup> i.e. the buyer produces the required item himself for his own consumption.

Where supply requirements are small this will be particularly inefficient if not prohibitively expensive. If the buyer's needs, however, are sufficiently large and/or highly idiosyncratic and the production-costs of the items are no higher (or only marginally higher) than the cost of purchase by external procurement, he may find vertical integration worth his while. The investment involved will be large but more than offset by the advantages ensuing - for instance, greater control over the production of goods and increased certainty of supply. The benefits of external procurement - mainly through economies of scale - become less and less relevant a factor as a company's individual needs grow to such an extent as to render equal the production costs of internal as against external procurement. Thus, normal market governance structures, and the legal rules corresponding to them, may prove particularly inappropriate or simply inapplicable where due either to frequency of supply or the idiosyncrasy of requirements, the buyer enters a long-term, continuous relationship with the supplier or buys out the supplier. Outside procurement will no longer prove efficient where economies of scale are as readily available and as favourable to the buyer as to the seller. The considerable increment in control and reduction in negotiation costs involved in internal organisation may, under the circumstances, tip the balance in its favour.

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<sup>152</sup> *Ibid.* at p. 71

<sup>153</sup> If one can conceptualise the history of a product from the exploitation of raw materials through to the sale of the finished product, vertical integration involves the combination of two previously independent agents, operating at different stages in the process of production. Horizontal integration, on the other hand, refers to the acquisition of an independent agent or the merger of two independent agents operating at the same stage of production.

## **The displacement of Law as a framework of governance**

From a relational perspective contract law can be seen as a body of rules far from the coalface of contracting practice. The dynamics internal to a contractual relation may serve to displace the relevance and significance of legal rules to the relation. The continuation of a relation depending as it does on the maintenance of mutual trust and confidence may prompt the parties to avoid insisting on their strict legal rights in favour of compromise intended to sustain the relation. Hence the dynamic of the relation serves to displace law as a framework of governance. Specific rights and duties give way to assumptions, understandings and practices that qualify the former. The irony should not be lost on the reader. Having charted the bullish revival of interventionism, in thought and deed, we are forced to admit the marginality of law in most if not all relational contexts. If the relational model does hold true a paradigmatic of modern contracting then one must acknowledge a marked decentring of law in commercial discourses.

There is it seems a growing trend towards the privatisation in marriage law, a point that will be charted further in Chapter Five below. Marriage has always drawn over itself a veil of privacy. Legal discourses, as observed in that Chapter, are not averse to supporting such privacy claims but have in the past been torn by conflicting demands of a more public bent – namely the state interest in the integrity of marriage and the family. In modern times, however, this interest has gradually abated allowing marriage an initial if tentative glimpse of the world of private ordering. This trend of course should not be overstated. The terms of the nuptial bond are still determined primarily by the State. The conditions of entry and egress remain largely under its supervision.

There is however some evidence of seepage, manifesting itself, for example, in the guise of measures designed to promote problem-solving outside the context of the courtroom, in particular by means of mediation and other alternative dispute

resolution methods [ADR].<sup>154</sup> Both the Judicial Separation and Family Law Reform Act, 1989 and the Family Law (Divorce) Act, 1996, contain provisions tacitly encouraging parties to marital breakdown who are seeking a legal separation or divorce to explore avenues other than those of a judicial nature.<sup>155</sup> The Family Law Act 1996 of England and Wales proceeds in a similar vein. As a condition precedent to the granting of a divorce or legal separation, it requires that the petitioning party issue 'a statement of marital breakdown.'<sup>156</sup> Following its publication, however, the Act requires that the parties enter upon a 'period of reflection and consideration',<sup>157</sup> lasting a minimum of nine months.<sup>158</sup> During such time the party or parties seeking a remedy are obliged to attend an information meeting<sup>159</sup> at which they must be told (*inter alia*) about the availability of "marriage counselling and other marriage support services".<sup>160</sup> Westminster, furthermore, took the rare step of putting its money where its mouth is in making provision for the funding of marriage support services<sup>161</sup> and the extension of the civil legal aid scheme for family matters to mediation.<sup>162</sup>

The moral agenda of the Act is barely concealed. Freeman observes that "[t]his is a divorce Act which is pro-marriage: it encourages counselling, mediation, reconciliation, the promotion of good relationships".<sup>163</sup> That said, it cannot be denied the intended result, however interventionist the motive, is the dethroning of the court

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<sup>154</sup> Usefully defined by a British National Consumer Council Report from February 1993, as "any means of promoting a resolution of a dispute between two or more parties which does not involve traditional adversarial procedures". See Wilkins, "Is there Another Way", (1993) 57 *Conv.* 321-326 at p.321. On the advantages and disadvantages of ADR generally see Wilkins, *op. cit.*

<sup>155</sup> See sections 5-8, Judicial Separation and Family Law Reform Act, 1989 and sections 6-8, Family Law (Divorce) Act, 1996.

<sup>156</sup> Family Law Act (England and Wales) 1996 section 6. See generally Freeman, *The Family Law Act 1996*, (London: Sweet & Maxwell, 1996). See also Dyer, "Divorce Bill set to include talks and waiting times", *Guardian*, September 7, 1998 at p. 5. The legislation generally proved controversial, and generated some considerable debate especially amongst social conservatives who saw initial proposals as an attempt to undermine the sanctity of marriage. See Womack, "Major upset as MPs force retreat on family reform" *Irish Times*, October 28, 1995; Millar, "Reform of divorce law hangs in the balance", *London Letter, Irish Times*, November 2, 1995.

<sup>157</sup> *Ibid.* section 7.

<sup>158</sup> This period may be further extended in certain circumstances. *Ibid.* section 7(4) and 7 (13).

<sup>159</sup> *Ibid.* section 8.

<sup>160</sup> *Ibid.* section 8(9). See also sections 13-14.

<sup>161</sup> *Ibid.* sections 22-23.

<sup>162</sup> Part III, sections 26-29.

<sup>163</sup> Freeman, *The Family Law Act 1996*, (London: Sweet & Maxwell, 1996) at p. 27.

process in favour of private solutions. Indeed it is arguable that the purpose of promoting reconciliation will not, in most cases, be realised. The initiation of proceedings for divorce invariably marks the formal end of a relationship. This is underlined by the experience of those partaking of compulsory reconciliation procedures. As Bainham<sup>164</sup> asks

“How seriously...will those administering the new Divorce Law really take the injunction to push reconciliation when their experience will already have taught them the simple truth that reconciliation is, for the vast majority, a ‘dead duck’ once a public step towards divorce has been taken”.

ADR, however, is not the sole preserve of marital jurisprudence. It has also become the staple of many commercial contracts, where parties agree to put disputes as regards the meaning of contractual clauses to arbitration and in many cases to accept the decision of the arbitrator as final. The Irish judiciary has proved reluctant to usurp the adjudicator’s ascribed role by overturning decisions made by virtue of such clauses. “Arbitration”, according to McCarthy J. in *Keenan v. Shield Insurance Co. Ltd.*,<sup>165</sup> “is a significant feature of modern commercial life...It ill becomes the courts to show any readiness to interfere in such a process”. The latter’s comments are cited with approval by Hamilton C.J. in *Doyle v. Kildare Co. Co. and Shackleton*<sup>166</sup> adding that the jurisdiction to quash the decision of an adjudicator, “should only be exercised sparingly”.<sup>167</sup> The Courts have also exhibited a greater willingness to imply arbitration clauses into contracts, for instance in *Lynch Roofing Systems (Ballaghaderreen) Ltd. v. Bennett and Son*<sup>168</sup> where the practice in the trade of including such clauses was invoked in favour of reading such a clause into the parties’ contract.

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<sup>164</sup> Bainham (1998) 10 *C. & Fam. L.Q.* 1 at p. 14.

<sup>165</sup> [1988] I.R. 89 at p. 96.

<sup>166</sup> [1996] 1 I.L.R.M. 252.

<sup>167</sup> *Ibid.* at p. 265.

<sup>168</sup> Unreported, High Court, Morris P., June 26, 1998.



Indeed, the legal process generally discourages litigation in favour of private resolution. Macauley comments on how “[e]ven when contract law might offer a remedy, the legal system in operation promotes giving up or settling rights rather than adjudicating to vindicate rights”. Protracted litigation and the attendant legal costs that it spawns, deter (if not bankrupt) many from proceeding to trial. For many the gamble may not be worth the fight.<sup>169</sup> For Macauley this underlines the marginality of standard contract doctrine - it “operates” the former opines, “at the margins of the major systems of private government through institutionalized social structures and less formal social fields”.

### **The Symbolic Power of Law**

In the light of this displacement legal commentators will face some difficulty in reasserting the relevance of law to the study of contracts and other agreements. This problem is particularly acute in the case of relational contracts. During the currency of the relation, the governance frameworks springing from the relation itself serve as the primary means of ordering the behaviour of the parties. The formal invocation of legal norms usually heralds the denouement of the relation; in other words the law asserts its influence, if at all, at the point at which the relation is no longer worth saving or indeed capable of saving. Indeed, in the case of coercive practices, invocation of legal relief necessarily presupposes that the situation of dependence that led to the coercion in the first place, is over. This perhaps is where the potential symbolic and hortatory impact of laws may play a useful role. Legal rules, as Dewar suggests,<sup>170</sup> can be viewed as ‘bright-lines’ designed not so much to be rigidly enforced but to induce certain desirable behaviour. Publicly visible enforcement can play an ancillary role in propagating this message, but this is not to suggest that a law that is rarely invoked or enforced is in fact unsuccessful.

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<sup>169</sup> Macauley refers to Galanter’s observations on the dynamics of litigation. The latter notes how larger litigants weed out challenge by ‘drawing out’ the legal process. Weaker parties unable to last the pace eventually falter and settle.

<sup>170</sup> Dewar, “The Normal Chaos of Family Law”, (1996) 16 *O.J.L.S.* 725.

Despite the marginalisation spoken of above, the law of contracts continues to exert an influence upon lawyers far exceeding its relevance in practice. Its position as a core subject of legal education grants it a privileged place in legal discourses: “Like the reality constructed in our primary socialisation as children,” Thompson observes, “the reality of law which the law of contract first constructs tends to retain forever its massive power over us”.<sup>171</sup> Despite the declining reign of liberal-individualist thought in the law of contracts, it continues, as demonstrated above, to retain a foothold.<sup>172</sup> It serves even now to promote a conception of the market as a natural institution, devoid of political, social, cultural or economic colour.<sup>173</sup> Most notably for the purpose of this treatise it serves to uphold the *status quo* by concealing the inequalities and power differentials that both shape and are shaped by the dynamics of social relations. It does this, it is suggested, by means of the paradigm of discrete contracting. In accounts of the contractual process in judicial narrative, the discrete paradigm serves to divorce the contractual event from the wider context in which it takes place. In doing so, the various constraints and pressures shaping the parties’ conduct are concealed from view. Contract thus serves to “provide a cloak of legitimacy to the underlying inequalities of power in society such as those of class, gender and race”.

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It is not of course to be assumed that law reform will provide a universal panacea to these or any other ills or indeed that it is possible to eliminate inequality by means of law alone. Human nature is surprisingly resilient and resourceful in the face of legal proscription. Individuals often adapt rather than obey to directory of prohibitory laws, and not necessarily in a manner that is illegal.

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<sup>171</sup> Thompson, “The Law of Contract”, in Gregg-Spell and Ireland (eds.), *The Critical Lawyers’ Handbook*, (London & Concord, Mass.: Pluto Press, 1992) at pp. 69ff.

<sup>172</sup> Indeed Fried, in *Contract as Promise*, (Mass: Harvard University Press, 1981), staged something of a mini-revival for liberal-individualism. See the Comments of Ewan McKendrick, *Contract Law*, 2d. ed. (London: Macmillan, 1994), at p. 3.

<sup>173</sup> See Olsen, “The Family and the Market: A Study of Ideology and Legal Reform”, (1983) 96 *Harv. L. Rev.* 497.

<sup>174</sup> Thompson, *op. cit.*, quoted in McCoubrey and White, *Introduction to Jurisprudence*, 2<sup>nd</sup> ed., (London: Blackstone, 1993) at p. 226.

There is no automatic guarantee that the replacement of the State's will for that of the parties is necessarily the more conducive to social wellbeing. It may be said that in as much as growing confidence in humanity and the rationalist conviction that, left unfettered, man's progress was inevitable aided the demise of protectionist thinking in the eighteenth and nineteenth centuries, renewed doubts about the inherently 'good' nature of humankind led to its revival. And yet in a very pronounced manner, the twentieth century trend towards increased regulation and central administrative planning exhibits a faith in science and reason, a 'Victorian optimism' unsuited to its time. A strong faith in the ultimate efficacy of legal regulation underscores a regulative framework that has often failed to make any impact in real terms and in fact has not infrequently yielded precisely *the opposite* results to those intended. The assumption of straightforward obedience in the face of legal regulation is arguably misplaced. This is not to say that disobedience is rife but rather that legislative endeavours often fail adequately to account for the extent to which commercial agents *adapt* to legal forces, redeploying commercial resources in a manner most conducive to profit *within* the confines of a particular legal system.

Legislators should not lose sight of the latent and undesired consequences of legislative reform. Peltzman<sup>175</sup> for instance notes the possibly counterproductive effects of compulsory seat-belt ordinances which he found sometimes had, at least on their initial introduction, the unintended effect of lulling drivers into a false sense of security and hence inflating the potential for speeding culminating in additional road accidents. Similarly Trebilcock<sup>176</sup> notes some of the 'displacement effects' of rent control legislation for example in the inception of various hidden charges, a reduction in the quality of available accommodation or an outright decrease in availability of lodgings as buildings are (as personal utility maximisation dictates,) turned over to more profitable uses. The automatic right to a new fixed tenancy for life after a stipulated period of occupation by a tenant, (under s. 13 of the Landlord and Tenant

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<sup>175</sup> Peltzman, "The Effects of Automobile Safety Regulation" (1975) 83 *Journal of Law and Economics*, no. 4, pp. 677-725.

<sup>176</sup> Trebilcock, *The Limits of Freedom of Contract*, (Cambridge, Mass. & London: Harvard University Press, 1993), Chapter 1 at pp. 4-5.

Act 1980,) can precipitate the strategic termination of tenancies by landlords, concerned to avoid being stuck with an immovable 'super-tenant.' As Trebilcock and Dewees comment "feasible corrective policies..." may prove "...even more costly than the original problem. One must not blindly assume that the cure is preferable to the disease".

That said, legal reform, particularly when the policy underlying it is based on the concept of equality, should not be assessed solely in terms of changes in the conduct of persons or by reference to the observance of rules alone. Stoddard<sup>177</sup> for instance identifies five general goals of law reform.<sup>178</sup> The first three are well-known - "(1) to create new rights and remedies for victims, (2) to alter the conduct of government [and] (3) to alter the conduct of citizens and private entities".<sup>179</sup> Stoddard, however, goes further to assert that the law reform may through "the expression of new moral ideals and standards" serves not merely to change the rules by which society is governed but to hold out the prospect of changing "cultural attitudes and patterns" too.<sup>180</sup> This he terms the 'culture-shifting' role of law.<sup>181</sup> While acknowledging the difficulty involved in testing the impact of this 'symbolic' function of law,<sup>182</sup> Stoddard holds that where there is general public awareness of legal reform, a general sense of its legitimacy and a consistent enforcement thereof the process of social change can be buttressed by legal reforms.<sup>183</sup>

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<sup>177</sup><sup>177</sup> Stoddard, "Bleeding Heart: Reflections on Using the Law to Make Social Change", (1997) 72 *N.Y.U.L.R.* 967. See also the responses thereto in *ibid.* especially that of Feldblum, "The Moral Rhetoric of Legislation", *ibid.* at pp. 992ff. See also Whyte, "Public Interest Litigation in Ireland – The Emergence of the Affirmative Decree?" (1998) 20 *D.U.L.J. (n.s.)* 198.

<sup>178</sup> Stoddard, *ibid.* at p. 972.

<sup>179</sup> *Ibid.*

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.* at pp. 977-978.

<sup>182</sup> *Ibid.* at p. 974.

<sup>183</sup> *Ibid.* at p. 978. The present writer makes a similar point, albeit in the rather different context of criminal law, in Ryan "'Queering' the Criminal Law: Some Thoughts on the Aftermath of Homosexual Decriminalisation" (1997) 7 *I.C.L.J.* 38-47. There the point is made (see at pp. 45-47) that while legal reform on its own cannot eliminate social prejudices, it can strip away certain justificatory backdrops in reference to which prejudicial beliefs or conduct were formerly legitimated. But cf. the note of

## Power relations.

With this in mind, it may be worthwhile to turn to examine the dynamics of power as experienced in ongoing relations. The observations made above have profound implications for this analysis of coercion and the exploitation of weakness. The discrete transaction promotes analyses that view power from a static rather than dynamic perspective. Inequality of bargaining power is assumed to exist independent of and prior to the inception of the contractual relation. Relationalism countered this perception in outlining how power relations develop and are shaped by and within the relation. The interdependence engendered by the relation may give rise then to power relations of an entirely more dynamic quality than those assumed by the discrete paradigm. The particular innovation of relational theory in this regard is its eschewal of explanations based on the static analysis of the balance of powers between the parties. Macneil notes how power imbalances develop within and as a result of the relation itself. This outlook stresses the dynamic features of power relations that draw on strands of Foucauldian thought concerning the subject of power.<sup>184</sup>

Static analyses presuppose a landscape peopled by the objectively powerful and the objectively powerless. In former times it may well have been appropriate to proceed along such lines. The structures and institutions of Feudal society, for example, easily lend themselves to examination in terms of simple hierarchies. To the best of our knowledge, it was possible clearly to define superior and inferior actors. A modern critique of power however demands a more complex approach. “Simple polarities of power”<sup>185</sup> no longer adequately explain the phenomenon of coercion. Power is “not

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caution regarding the different nature and purpose of criminal law and private law, made above in Chapter 1, p. 27.

<sup>184</sup> Foucault suggests a dynamic analysis of power, one that eschew simple hierarchies and observes, rather the diffuse, circulating nature of power. See Foucault, “Two Lectures”, in Foucault, *Power/Knowledge*, (Brighton: Harvester, 1980).

<sup>185</sup> A phrase used by Hunt and Wickham in *Foucault and Law*, (London and Colorado: Pluto Press, 1994) at p. 15.

simply linear” but is rather diffuse and dispersed, being “composed of complex networks and webs”.<sup>186</sup>

Perhaps no clearer an example can be provided than the dynamics of power emerging from the contractual or familial relation. Here it is the situation of dependence engendered by the relation itself that takes centre-stage. Whatever the objective strengths and weaknesses of the parties, this situation of dependence gives rise to power relations that are shaped primarily by the relation. The ‘potential dark side’ of relational contracting, then, is the potential for such dependence to be unfairly exploited to the benefit of one party. In such circumstances, of course, the option of legal redress theoretically remains. This almost inevitably presupposes the destruction of the relation: it is unrealistic in the extreme to assume that the mutual trust integral to the relation will survive an appearance before the judiciary. For a party whose interests and fortunes are so intimately bound up in the continuance of the relation, such an option may be so unpalatable as to negate a chance of its being taken. Undue or illegitimate threats and demands may be capitulated to with a view to sustaining the relation. The economic actor by tying himself into a relation of mutual benefit risks being the subject of an especially potent form of opportunism. As Gordon<sup>187</sup> observes, the relational paradigm

“...suggests that sunk costs can matter tremendously, that the trauma of abandoning a relationship around which a company has structured all its operations, hiring, investment and planning decisions, can keep it tied into a dependence that its members experience as all the more corrupting because it is, in some sense, voluntary”.

Several commentators, nevertheless, have succumbed to the temptation to idealise the relation. Just as the family has tended to be upheld as an institution of infinite

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<sup>186</sup> Wheeler and Shaw, *Contracts: Cases, Material and Commentary*, (Oxford: Clarendon Press, 1994) at p. 265.

<sup>187</sup> Gordon, “Macaulay, Macneil and the Discovery of Solidarity and Power in Contract Law”, [1985] *Wisc. L. Rev.* 565. Quoted in Wheeler and Shaw, *op. cit.*, at p. 84.

goodness<sup>188</sup> so too the exploitative and opportunistic potential of the relation often finds itself submerged in rhetoric. Macneil, no less, eulogises the relation as a framework within which “the entangling strings of friendship, reputation, interdependence, morality and altruistic desires are integral parts...” If Macneil can be said to err in any respect, it is in his rather idealistic characterisation of the relationships described as being of a necessarily cooperative or indeed altruistic nature. His approach, however, although significantly more sophisticated than that of the rather crude classical contractual analysis which it seeks to supplant, confuses altruism with the concept of enlightened self-interest identified by Hume and further developed by Smith. Macneil strains to be descriptive of modern contractual dealing but only partly succeeds. Much of his analysis is prescriptive in character, based on a preferred model of contract, more ideal than real.

The danger in so proceeding is obvious. While a contractual relationship may well possess all the laudable characteristics noted by Macneil, it is nonetheless a relationship in which each of the parties is looking to its ultimate self-interest. Immediate gratification may be deferred, but there is no doubting the self-directed concerns of each party.<sup>189</sup> Macauley clearly envisages the possibility of relations developing from or into situations characterised by “power, exploitation, and dependence”. “Continuing relationships”, he notes<sup>190</sup> “are not necessarily nice. The value of arrangements locks some people into dependent positions. They can only take orders”. Relations of a particularly bi-lateral nature tend to render parties highly dependent on the actions of their co-contractors. Machinery and work practices tailored specifically to the needs of one party are valuable only in the context of the continuation of the relation: the more idiosyncratic the work practices the less

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<sup>188</sup> See the comments of O’Donovan on the discourse of Familialism in *Family Law Matters*, (London and Colorado: Pluto Press, 1993) at pp.21-23 and p. 39.

<sup>189</sup> Cf. the work of Hume noted above in Chapter 1. Hume identified the concept of enlightened self-interest: that the individual often acts in a manner that appears altruistic and selfless but which nevertheless serves his ultimate ends. In order to achieve the latter, the rational economic actor realises that certain sacrifices are necessary in the short term. This may take the form of concessions to others with a view to securing long-term benefits.

<sup>190</sup> Macauley, “An Empirical View of Contract”, [1985] *Wisc. L. Rev.* 465. Quoted in Wheeler and Shaw, *op. cit.*, at p. 77.

fungible they may be. With intermingled fortunes and interests, the parties are peculiarly susceptible to opportunism and exploitation. Instead of the give and take typical of the relational paradigm, parties may find themselves subject to commands they are unable to resist. “Seemingly independent actors may have little freedom in the light of the costs of offending dominant parties. Once they face sunk costs and comfortable patterns the possibility of command rather than negotiation increases”.<sup>191</sup> The dependence that facilitated the situation of coercion in the first place may, furthermore, serve to stifle any protest or invocation of available legal remedies. Ironically, to complain effectively of coercion, one must as a prerequisite be free of coercion.

The problems associated with such contract relationships are not unlike those experienced in the Family law context. The proximity of the parties one to another, while usually working to the mutual benefit and fulfilment of the parties involved, can give rise on occasion to opportunities for abuse and exploitation of the special relationship. The more closely a party's interests are bound up in the relation the greater scope exists for opportunism. One is reminded in some measure of Cesare Beccaria's comments in his book *Dei Delitte et Delle Pene* how “...baneful and authorized acts of injustice...have been approved even by the most enlightened...and practised by the freest republics, as a consequence of having considered society to be an association of families rather than of men...”.<sup>192</sup> A state made up of individuals, he argues is one in which “the republican spirit will breathe not only in the public squares and even in popular assemblies but also within the households where [people] experience a large part of their happiness and misery”.

***The Coercive Potential of Pre-existing (Ascribed)<sup>193</sup> Relations.*** That this is so underlines the utility of an analysis of contracts which draws at least in part on the experience of relations in the context of marriage. Two distinct dynamics are at work

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<sup>191</sup> *Ibid.*

<sup>192</sup> *On Crimes and Punishment*, (1764), (transl. Paolucci), (Indianapolis: Bobbs-Merrill, 1963) at p. 89.



in this context. The first is that preceding the inception of the marital relation. Here pre-existing relations may shape the decision-making processes of prospective spouses either as to, for instance, the choice of partner or the timing of the marriage. The phenomenon of arranged marriages amongst those of South-East Asian origin requires explanation in terms of the wider relationship between, on the one hand, the individual and, on the other, his family and community.<sup>194</sup> Marriage is perceived as an act with far-reaching consequences for each of the last two institutions mentioned above. Family members are deemed by custom to have a legitimate interest in the parties' marriage. Thus the potential spouse in addition to being expected to marry in the first place will be precluded from choosing his own spouse, or as is more common nowadays, given a limited choice as between candidates deemed suitable (in terms of religion, race, caste, family origins as well as personality and character) by his parents.

Yet even in the more individualist western world the parties to marriage face compelling factors shaped by the wider relations to which they are party. Fear of negative reaction on the part of parents and relatives is a potent enemy of free consent in the marital context. The choice of marriage partner, the decision to marry (as opposed to adopting alternative family forms) and the timing of such nuptials may be determined in large measure by considerations resting on the desire of the parties to sustain pre-existing relationships of value.

***The Coercive Potential of (Achieved) Relations.*** The second dynamic is that internal to the marriage relation itself, once contracted. This is most poignantly observed in the context of what is commonly termed 'domestic' or intimate violence.<sup>195</sup> While a

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<sup>193</sup> Here Mankoff's typology of status as either 'ascribed' or 'achieved' is used; see Mankoff, "Societal Reaction and Career Deviance: A Critical Analysis", *The Sociological Quarterly*, 12, Spring 1971, pp. 204-218.

<sup>194</sup> For a more extensive discussion of which see below in Volume II, Chapter Five, at pp. 174ff.

<sup>195</sup> On Domestic Violence generally see Casey, *Domestic Violence: The Women's Perspective* (Federation of Women's Refuges and Women's Aid, 1993); Home Office Research Study No. 107 *Domestic Violence*; Edwards, "The Real Risks of Violence Behind Closed Doors", [1986] *N.L.J.* 1191; Ford, "Prosecution as a Victim Power Resource", (1991) 25 *Law & Soc. Rev.* 313; Dobash and Dobash, *Violence against Wives*, (Open Books, 1980). It is suggested by some that the term domestic

person is statistically more likely to suffer violence at the hands of a partner or other family member than a stranger, she<sup>196</sup> is less likely to report such an incident. While a variety of factors are to blame for this, ultimately this paradox can only be understood in a relational context. The ongoing intimate relationship of the spouses or partners engenders a dependence of a most profound nature. The injured spouse or partner thus cannot easily abandon or otherwise endanger the relation. To do so may result in the most catastrophic of consequences, economic, emotional and psychological.

A person suffering violence at the hands of his or her cohabiting partner, for instance, may be anxious not to prosecute the latter, owing in part to fear of retaliation, but also to some degree, to the strong emotional and perhaps economic stake that he or she has in the continuity of the relationship. Her economic welfare is often bound up with that of her husband or partner; deep emotional attachment to the perpetrator may further preclude such action. Indeed the very dynamic of violence in such circumstances often entrenches the abusive relation by shifting to the victim the self-perception of blame. The typical cycle of intimate violence often culminates in a period of expression of profound regret and contrition on the part of the wrongdoer. Such statements serve, whatever their intention, to disseminate guilt leading the victim in some cases wrongly to blame her own perceived 'inadequacies' as causative.

Similar considerations apply, with less drastic effect, in the field of agreements of guarantee and surety entered into with a view to securing monies lent to the spouse or partner of the surety or guarantor. A spouse or partner<sup>197</sup> possessing substantial property rights may not be regarded as a classic 'victim' of power imbalances. In many cases however, such property rights in tandem with her interest in the

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is misleading in that it may wrongly imply that the violence suffered is trivial. This is not the sense in which the use of the term is intended.

<sup>196</sup> Throughout this discussion the feminine gender is used in reference to the victims of domestic violence. This is not to suggest that all victims are female or indeed all perpetrators male but acknowledges the fact that between 90 and 95% of reported victims of domestic violence are female.

<sup>197</sup> The parties need not be married: See *Massey v. Midland Bank plc.* [1994] 2 F.L.R. 342 where the parties were unmarried and most notably *A.I.B. v. Byrne* [1995] 2 F.L.R. 325 where the parties were divorced. In *Crédit Lyonnais v. Burch* [1994] 1 All E.R. 144 the parties were respectively employer and employee.

continuance of good marital relations conspire to render the latter susceptible to exploitation. The desire to sustain relationships of financial and emotional value may compel a spouse or partner to agree to stand surety in circumstances where they might otherwise have thought wise not to do so. This feature is often submerged in cases involving the liability of sureties that primarily focus on the ability of financial institutions to enforce securities against a coerced or misled surety or guarantor.

Fehlberg<sup>198</sup> documents some of the pressures operating on the mind of a surety in such circumstances. She uses as an example the defendant in *CIBC Mortgages v. Pitt*.<sup>199</sup> Had Mrs. Pitt “refused to co-operate her life would have become a nightmare. [Her husband] would have gone on about it and continually worn her down...” What was ultimately important to her was “freedom from being pestered”; in her own words “...I'd rather have a peaceful life than a lot of money”.<sup>200</sup> The fact that Mrs. Pitt was willing to sign over her legal rights with no real benefit to herself in exchange (despite what might have appeared on the face of the transaction) is testament to the relational aspects of contracting and the dilemmas they pose for the parties to the relation. Similar considerations apply in the contractual context. Commercial relational processes can as often as not be characterised by domination as by mutual agreement, particularly where one party has a greater stake in the relation than the other. Small companies entering into highly idiosyncratic long-term supply agreements with larger firms may have little leverage in the relationship, particularly if the product supplied is one easily obtained elsewhere.

***The Coercive Impact of Structural Relations.*** Wider socio-structural relations must also be considered. The prime drawback of the dynamic analysis of power relations is that it may be perceived as overemphasising the diffuse nature of power. While it is true to say that an individual may be both the subject of and the holder of power at different junctures in their lives, some persons and classes of persons tend to find themselves placed in a position of power more frequently than others. Progressive

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<sup>198</sup> Fehlberg, “The Husband, The Bank, The Wife and Her Signature” (1994) 57 *M.L.R.* 467.

<sup>199</sup> [1994] A.C. 200

egalitarian discourses simultaneously underline yet disguise this fact. The discourse of gender equality for instance often (paradoxically) distracts from analyses of gender as a site of coercive forces. Men as a class, despite social, legal and economic advances, still tend to wield greater economic and political influence than women. This is easily forgotten in the face of equality rhetoric that too often conflates and confuses the prescriptive and descriptive elements of the equality discourse, leading one mistakenly to assume that what should be the case (i.e. women should be afforded equal rights) is in fact the case (i.e. women do in fact enjoy equal rights.)<sup>201</sup>

In the pursuit of the ideal of equality judges and commentators alike have largely de-gendered<sup>202</sup> and de-ethnicised the discourse surrounding coercion. The law is replete with formal statements of gender equality. Such gender-neutral statements conceal the material inequalities that still remain, all the more effective in practice for their being all the more subtle in nature. Lord Browne-Wilkinson's contribution in *O'Brien* is instructive in this regard. While his Lordship's inclusion of homosexual couples as a class qualifying under the test is refreshingly enlightened it is arguably somewhat misleading in that it tends to suggest that, insofar as the dynamics of undue influence are concerned, gender is not an issue. In other words it reflects a gender-neutral perspective that negates the influence of subtle patriarchal forces on the relations between the sexes. This is not to suggest that gay and lesbian couples are necessarily less likely to deceive or unduly influence each other.<sup>203</sup> Nevertheless these comments arguably ignore the fact that in the vast majority of cases involving one spouse or intimate partner standing surety for the other, the party alleging undue influence or misrepresentation is almost invariably a woman, her partner almost always being

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<sup>200</sup> *Ibid.* at pp. 473-4

<sup>201</sup> An error noted by Hume, amongst others. He pointed out the danger of confounding the prescriptive (how things ought be) with the descriptive (how things are). One ought obey the rules of the road for instance (a moral norm) but whether members of the public in fact tend to do so is a separate issue (a statistical norm). David Hume, *A Treatise of Human Nature*, (1739-40), Selby-Bigge and Nidditch, (eds.) (Oxford: Oxford University Press, 1978), at 3.1.1.

<sup>202</sup> Fehlberg being the notable exception.

<sup>203</sup> Not being afforded legal recognition and protection for relationships, homosexual couples are possibly more likely to take added care and legal advice in relation to property dispositions. Another possible factor may be fear of exposure which may detract some gay litigants from formally alleging

male. The invocation of homosexual couples underlines a gender-neutral discourse of equitable wrong that is simply not warranted.

These problems are exacerbated in the context of ethnic minorities settled in Britain and Ireland. With one notable exception, judges have largely, undoubtedly for laudable egalitarian reasons, ignored the ethnic origin of those alleging undue influence or misrepresentation. Many recent British cases concerning constructive notice involve women who are members of ethnic minority groups.<sup>204</sup> This is indeed remarkable considering the well-documented reticence of members of certain ethnic minorities with regard to state-intervention in what are seen as intra-community matters. Such women are arguably marginalised on more than one front. Their negative experience of gender is compounded by their marginal ethnicity. While communities such as those of Indian and Pakistani origin undoubtedly transpose to the western world patterns of family and community life of great value, the patriarchal structures of some such communities are often heavily weighed against the assertion on an independent female will. Linguistic barriers sometimes contribute towards this marginalisation. A poor or inadequate grasp of English<sup>205</sup> compounds elements of dependence, particularly among first generation immigrants, which sometimes lend themselves to undue influence.

Yet most judges are silent on the topic of ethnicity. There is an obvious and justifiable concern not only to avoid but to appear to be avoiding judicial bias, and this is to be welcomed. In a rare instance where a judge was called upon to address the issue of ethnicity the response was typically neutral. *Bank of Baroda v. Rayarel*<sup>206</sup> involved a woman described as a ‘traditional Indian wife’ with a ‘very limited command of the English language’. The recorder nevertheless glossed over these factors noting that “[s]he may be a traditional Indian wife but...the picture of her as a lady who will do

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undue influence or misrepresentation on the part of a partner. But see *Tinsley v. Milligan* [1994] 1 A.C. 340.

<sup>204</sup> See for instance, *Bank of Baroda v. Shah* [1988], *B.C.C.I. v. Aboody*, [1992] 4 All E.R. 955, *Bank of Baroda v. Rayarel*, [1995] 2 F.L.R. 376, *Tufton v. Sporni*, [1952] T.L.R. 516.

<sup>205</sup> Such women being confined to the home may have less opportunities to learn and practice English.

<sup>206</sup> [1995] 2 F.L.R. 376.

as she is told at the behest of her husband is not the full picture...I think she knew where to draw the line".<sup>207</sup>

## Conclusion

Well-meaning attempts to ignore the contextual site of exploitation deny the possibility of a comprehensive and rooted explanation of coercion. Gender and ethnicity, for instance, are potent determining factors in such cases as is the dynamic of relations, both contractual and familial, to which the victim is party. Issues of gender and ethnicity arise again in some of the Chapters now following, and at that point some of these issues will be re-visited. There, the implications of a more context-sensitive paradigm of contracting will be examined in greater detail with a view to delineating more appropriate legal responses to coercion and exploitation, all the time duly mindful of the displacement of law by alternative governance frameworks noted in this Chapter.

Law is, Durkheim suggested,<sup>208</sup> "a visible symbol" of the state of social relations and in particular an index of social solidarity. While its transformative role ought not be overstated, the symbolic effect of law is almost as important as its practical effects and is worthy of some attention. The question ultimately to be addressed is whether and how the parties to such relations are affected, if at all, by the various constructions of 'coercion' in legal discourses. The answer suggested herein is that the discourses of coercion in private law are overly reliant upon a discrete paradigm of contracting that, in the final analysis, can only fail to grapple properly with the complex realities of coercion and compulsion.

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<sup>207</sup> *Ibid.* at pp. 381-2.

<sup>208</sup> Émile Durkheim, *De la Division du Travail*; See Luke and Scull (eds.), *Durkheim and the Law*, (Oxford: Robertson, 1983) at p. 33.

# Chapter Three

## Relief at Common Law for Duress

In examining the specific methods by which the law approaches instances of coercion and undue pressure, it is conventional to begin with the common law concept of 'duress'. Of the various contemporary approaches it is clearly the oldest. Indeed, the doctrine of duress is of some considerable vintage. Cases have been recorded dating back to at least the fifteenth century where deeds are challenged on the ground of duress.<sup>1</sup> The doctrine is notable, however, not so much for its longevity as for its sturdy resilience to change over that period. In England, the narrow confines<sup>2</sup> within which it rendered contracts and deeds voidable<sup>3</sup> remained substantially intact even as late as the mid 1970s although change came earlier in other commonwealth jurisdictions<sup>4</sup> and in the U.S.<sup>5</sup> Ireland, quite remarkably, still awaits a definitive statement on the modern law of duress. With minor exceptions,<sup>6</sup> little of substance

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<sup>1</sup> See for instance *Anon.* (1467) 7 Edw. IV M.F. 22 pl. 21 and Simpson, *A History of the Common Law of Contract*, (Oxford: Oxford University Press, 1975) at p. 535ff.

<sup>2</sup> Indeed at one point, *per* Blackstone, relief was restricted to cases where there was actual violence or restraint. Even a threat of such would not suffice. See 1 *Bl. Comm.* 131.

<sup>3</sup> Duress is generally understood to render a contract voidable rather than void although this is not beyond all controversy. See the discussion below at pp. 148ff., and in particular Lanham, "Duress and Void Contracts", (1966) 29 *M.L.R.* 615 and Hooper, "Larceny by Intimidation", (in two parts) [1965] *Crim L.R.* 532 (I) and 592 (II).

<sup>4</sup> See for instance in Australia *Nixon v. Furphy*, (1925) 25 N.S.W. 151, 37 C.L.R. 161, *Re Hooper & Grass' Contract* [1949] V.L.R. 269, *T.A. Sundell & Son Pty. Ltd. v. Emm Yannoulatos (Overseas) Pty. Ltd.* (1956) 56 S.R. (N.S.W.) 323.

<sup>5</sup> Possibly the earliest such decision was an 1874 Massachusetts case, *Chandler v. Sanger*, 114 Mass. 364 (1874). See also *Alaska Packers' Association v. Domenico*, 117 Fed. 99 (9<sup>th</sup> Circ., 1902). *Capps v. Georgia Pac. Corp.*, 253 Or. 248, 453 P.2d. 935 (1969).

<sup>6</sup> See for instance *Headford v. Brocket*, [1966] I.R. 227. See also the brief but helpful comments of the Employment Appeals Tribunal in *Kiely v. Leo Laboratories Ltd.*, [1997] E.L.R. 172 especially at pp. 175-176. See also *O'Donnell v. O'Donnell, ex tempore* decision of the Supreme Court, March 31, 1995 discussed by O'Dell, "Contract Law" in Byrne and Binchy, *Annual Review of Irish Law*, 1995, (Dublin: Round Hall, 1996) at pp. 195-196. The Supreme Court arguably missed a valuable opportunity therein to clarify the Irish law on duress. *Smelter Corporation v. O'Driscoll* [1977] I.R. 205 is sometimes cited as a case on duress. (It is classified as such in Clark and Clarke, *Contract Cases and Materials*, (Dublin: Gill and Macmillan, 1994) at pp. 542-545 and in Clark, *Contract Law in Ireland*, 4<sup>th</sup> Ed. (Dublin: Round Hall, 1998) at p. 277. Doolan's *A Casebook on Irish Contract Law* (Dublin: Gill and Macmillan, 1989), by contrast, cites it as a case on misrepresentation.) In the light of

has been said in this jurisdiction,<sup>7</sup> although some Irish texts seem implicitly to assume compliance with recent English developments.<sup>8</sup>

The reason for this resilience to change may be quite simple. In comparison with other grounds on which the validity of a contract was attacked, duress is and has always been comparatively rarely invoked. Simpson<sup>9</sup> bears this out in reference to developments in the formative years of the common law. While he acknowledges that “...there was in principle no reason why cases of *assumpsit* involving duress or menace should not have arisen...”<sup>10</sup> he could find no recorded example of an informal transaction being set aside for duress in his survey of the common law in the seventeenth century.

One possible factor in the comparatively slow development of the duress doctrine is perhaps the relative dominance of the doctrine of consideration.<sup>11</sup> Again according to Simpson, many litigants who may have pleaded duress tended instead to opt for a defence based on the lack of consideration. The preferred course it seems was to “...plead the general issue and give the circumstances in evidence as showing the promise was devoid of consideration...”<sup>12</sup> (though as displayed by several modern cases<sup>13</sup> the presence of consideration does not necessarily rule out a finding of

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the scarcity of guidance from the Irish courts, it is perhaps understandable that academics would rely on what little judicial comment is made. Nonetheless, it is probably more accurately classified as a case regarding the equitable remedy of specific performance to which rather idiosyncratic rules apply.

<sup>7</sup> Indeed, so sparse is the Irish case law on duress that Doolan, *op. cit.* contains no separate treatment of the issue at all.

<sup>8</sup> But see Doolan, *op. cit.* and Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall Press, 2000) who, by contrast, make little reference to contemporary English decisions.

<sup>9</sup> Simpson, *A History of the Common Law of Contract*, *op. cit.*, at p. 535ff.

<sup>10</sup> *Ibid.*

<sup>11</sup> Defined by Lord Dunedin, in *Dunlop v. Selfridge*, as “an act of forbearance of one party, or the promises thereof, is the price for which the promise of another is bought, and the promise thus given is enforceable”. [1915] A.C. 847 at p. 855 citing Pollock, *Principles of Contract Law*, 13<sup>th</sup> edn. (London: Stevens, 1950) at p. 133. See also Fried, *Contract as Promise*, (Cambridge, Mass: Harvard University Press, 1981), who notes (at p. 28) that “it is something either given or promised in exchange for a promise”.

<sup>12</sup> Simpson, *op. cit.*. A good example is the later case of *Stilk v. Myrick* (1809) 2 Camp. 317, 170 E.R. 1168.

<sup>13</sup> See the comments of Kerr J. in *The Siboen and the Sibotre* [1976] 1 Lloyd’s Rep. 293 at p. 335, col. 1 and p. 336, col. 1, and the decision in *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. Ltd. (The Atlantic Baron)* [1979] Q.B. 705.



duress). Even in more modern times, strategies based on the absence of consideration have tended to overshadow the issue of duress,<sup>14</sup> with the result that many cases where duress or pressure might feasibly have been alleged contain no reference to this defence.<sup>15</sup> Indeed, several of the key modern pronouncements on duress appear in the context of legal determinations predominantly focussed on the presence or absence of consideration.<sup>16</sup> The attraction is obvious. While sometimes technically obtuse (not to mention artificial), the doctrine of consideration largely avoids the factual complications involved in determining whether duress is present. Consideration as defined, was comparatively easier to establish from a factual viewpoint and as such afforded a relatively clear (if not exceptionally defensible<sup>17</sup>) set of criteria upon which one might challenge the validity of a contract, although as a tool against coercion it is at best rather awkward.<sup>18</sup> Indeed such was the apparent prevalence of the doctrine of consideration's invocation in these matters that Kerr J. in *The Siboen and the Sibotre*,<sup>19</sup> felt compelled to point out that duress could be established notwithstanding the presence of sufficient consideration.

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<sup>14</sup> Take for instance the judgment of the Privy Council in *Pao On v. Lau Yiu Long* [1980] A.C. 614, seven pages of which are devoted to consideration compared to one and a half treating of duress.

<sup>15</sup> *D. & C. Builders v. Rees* [1966] 2 Q.B. 617 proceeded primarily by reference to the issues of (1) consideration (and the allied issue of estoppel) and (2) accord and satisfaction. While there was some argument about intimidation, the issue of duress was largely ignored except by Lord Denning, the latter noting as an alternative ground the lack of true consent. *Williams v. Roffey* [1991] 1 Q.B. 1, was similarly decided almost entirely by reference to the doctrine of consideration, although it was at least open on the facts of both cases to argue duress. In fact counsel, despite being invited to do so, had declined to argue the duress point. On whether there was in fact duress in *Williams v. Roffey*, see Birks, "The Travails of Duress", [1990] *L.M.C.L.Q.* 342.

<sup>16</sup> In both *North Ocean Shipping v. Hyundai Construction Ltd.*, [1979] Q.B. 705, and *Pao On v. Lau Yiu Long* [1980] A.C. 614 it was unsuccessfully alleged that there was no consideration. The early Australian cases of *Nixon v. Furphy*, (1925) 25 N.S.W. 151, 37 C.L.R. 161, *Re Hooper & Grass' Contract* [1949] V.L.R. 269, *T.A. Sundell & Son Pty. Ltd. v. Emm Yannoulatos (Overseas) Pty. Ltd.* (1956) 56 S.R. (N.S.W.) 323 were all founded partly upon the argument that there was no fresh consideration for the proposed changes. See also Tucker J. in *Atlas Express v. Kafco* [1989] 1 All E.R. 641 and *Syros Shipping Co. S.A. v. Eleghill Tdg. Co. ('The Proodos C')* [1981] 3 All E. R. 189 and the discussion of Phang, (1990) 53 *M.L.R.* 107 at pp. 115-116.

<sup>17</sup> See for instance the criticisms of Fried who, in *Contract as Promise*, (Cambridge, Mass.: Harvard University Press, 1981) at p. 35, slams the doctrine as "internally inconsistent".

<sup>18</sup> See Beatson who remarks, in particular, that the 'pre-existing duty' rule of consideration "was rather a blunt weapon" for combating extortion "since it invalidated non-extortive as well as extortive renegotiations". Beatson, *The Use and Abuse of Unjust Enrichment*, (Oxford: Clarendon Press, 1991) at p. 95.

<sup>19</sup> *Siboen and the Sibotre* [1976] 1 Lloyd's Law Rep. 293 at p. 335, col. 1 and p. 336, col. 1.

For somewhat different reasons, the doctrines of equity have tended also to eclipse the significance of the common law principles regarding duress. Faced with the relative crudeness of duress doctrine, litigants often preferred to proceed by reference to the more flexible equitable concepts of undue influence<sup>20</sup> and unconscionability. For one, the remedies available in equity, prior to the enactment of the Supreme Court of Judicature Act, 1877, were less rigid and confined than their common law counterparts.<sup>21</sup> In the main, however, it was arguably the substantive qualities of equity that were its prime attraction. Equity was and remains more sensitive to the less blatant forms of influence and coercion that pervade social relations. A threat to life limb or liberty has never been required nor is it strictly necessary to establish that the influence complained of was contrary to a specific law. Most attractive however to potential litigants is probably the presumption of undue influence applicable where it can be shown that the litigants are either (a) in a class of relationships where trust and confidence is habitually reposed by one party in the other or (b) in fact in a relationship where trust and confidence is reposed by one part in the other. The advantage of establishing such a relationship is that the onus of proof is automatically shifted to the alleged perpetrator of the undue influence, a clear headstart considering the frequent difficulties involved in establishing the fact of coercion.

### **The Basic Principles of Duress Doctrine Outlined**

At this juncture, however, it is perhaps worthwhile to examine the elements that make up duress at common law. Duress is a species of coercion deemed sufficient at common law to allow a contract to be avoided. It is, as such, a 'subset'<sup>22</sup> of coercion:

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<sup>20</sup> In fact, such has been the dominance of equity that at least one commentator has suggested that the concept of duress be subsumed into the equitable category of undue influence, See Cope, *Duress, Undue Influence and Unconscientious Bargains*, (Sydney: The Law Book Co., 1985) para. [125] at p. 61. Thus, "the old common law kinds of duress such as threats to the person would constitute but an extreme example of an actual exercise of undue influence". *Ibid.*

<sup>21</sup> The main remedy available at common law was damages. Equity, by contrast, allowed the parties to seek a wider and more flexible range of remedies. See generally Delany, *Equity and the Law of Trusts in Ireland*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 1999), Chapter 1.

<sup>22</sup> Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress", (1996) 46 *Uni. of Toronto Law Journal* 201 at p. 205.

although duress necessarily involves some element of coercion or pressure, not all examples of coercion amount to duress. Nor is it accurate to characterise duress as the champion of freedom. To conceptualise duress (or any of the legal concepts similarly concerned with coercion) as an attempt generally to promote freedom is arguably one-dimensional. The doctrine of duress, successfully invoked, is ultimately asserting not only that the victim should be free from illegitimate pressure but also (and rather crucially) that the perpetrator is to be restricted from engaging in achieving its aims. The avoidance of a contract for duress involves at least one party being restrained from being aided in so doing. Ironically then, the doctrine of duress is simultaneously both liberating and constraining.<sup>23</sup> The ultimate message is not that individuals should be free to act as they will. The doctrine of duress determines who is free to do what and in what circumstances - the necessary corollary in every case is that someone will be restrained from achieving a particular goal. The doctrine in other words does not eliminate the presence of restraint but instead relocates it.

There are two prongs to the modern law of duress.<sup>24</sup> The first concerns the matter of causation. The threat must, first, be shown to have been causative, in other words it must be established that the threat or action alleged to have been coercive was in fact a cause of the making of a contract. That said, the test of causation was, at least until recently, not particularly exacting. In *Barton v. Armstrong*<sup>25</sup> the Privy Council ruled that it was enough that the threat or action impugned was *a* cause of the contract in question coming into being. It need not be the sole<sup>26</sup> cause or even the predominant

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<sup>23</sup> This puts one in mind of Cohen's assertion that "one of the principal functions of the legal system" is "to protect certain kinds of freedom and suppress other kinds". Cohen, "Freedom: Its Meaning" in *The Faith of a Liberal*, (1946) at p. 163, cited in Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress", (1996) 46 *Uni. of Toronto Law Journal* 201 at p. 201.

<sup>24</sup> *Per* Lord Scarman in *Universe Tankships of Monrovia v. I.T.W.F. (The Universe Sentinel)* [1983] A.C. 366 at 400C: there are "two elements in the wrong of duress". See also Bigwood, "Coercion in Contract: The Theoretical Constructs of Duress", (1996) 46 *Uni. of Toronto Law Journal* 201 at pp. 208ff. See also Wertheimer, *Coercion* (Princeton University Press, 1987) at p. 305.

<sup>25</sup> [1976] A.C. 104, [1975] 2 W.L.R. 1050.

<sup>26</sup> A similar rule exists in criminal law. See, for instance, *R. v. Valderrama-Vega* [1985] Crim. L.Rev. 220 where in addition to a threat to inflict serious harm or death, the defendant was threatened with exposure of his concealed sexual inclinations, and in addition laboured under severe financial pressure. Only the first mentioned threat was sufficient to excuse his activity but it need not be the sole cause.

cause. However, in the more recent House of Lords decision in *Dimskal Shipping S.A. v. International Transport Workers' Federation*,<sup>27</sup> Lord Goff noted that a threat, while wrongful, may not be the 'significant cause' of the contract having been entered into, suggesting implicitly that where this was so a court may refuse to make a finding of duress. It is not however necessary to show that 'but for' the impugned conduct of a contracting party, the contract would not have been exacted. The coeree, in the words of Lord Cross in *Barton v. Armstrong* "...is entitled to relief even 'though he might well have entered into the contract if [the defendant] had uttered no threats to induce him to do so".<sup>28</sup> If this is in fact the case it is hard to see how the impugned action can in any sense be said to have been causative.<sup>29</sup>

Birks and Chin suggest a more effect-centred approach to duress.<sup>30</sup> They suggest that at the core of the law's treatment of duress is a concern with the impact of the pressure on the decision-making capacity<sup>31</sup> of the person so pressurised.<sup>32</sup> In doing so, the latter arguably seem to gloss over a factor that is at least of equal importance and that is, it is suggested, the second prong of duress. This is the matter of illegitimate pressure. The latter is concerned, not with the effect of the pressure on the

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<sup>27</sup>[1992] 2 A.C. 152.

<sup>28</sup>Per Lord Cross in *Barton v. Armstrong* [1976] A.C. 104 at p. 119

<sup>29</sup> Cf. Birch, Commentary to *R. v. Valderrama-Vega* [1985] Crim. L.Rev. 220 who suggests that a series of factors might be allowed cumulatively to amount to duress excusing criminal activity where balancing the threatened action against the harm demanded to be done the latter is of less serious consequence. See also Alldridge, "Developments in the Defence of Duress" [1986] *Crim L. Rev.* 433, who posits a similar test of proportionality. Both writers, however, seem to regard the potential advantages of such a test as being outweighed by its shortcomings. On proportionality see also *Perka v. the Queen* (1984) 13 D.L.R. (4<sup>th</sup>) 1. But note the comments regarding the different nature and purpose, (not to mention consequences) of duress in the criminal law and contract law, made above in Chapter 1, at p. 27.

<sup>30</sup> Birks and Chin, "On the Nature of Undue Influence" chapter 3 of Beatson and Friedmann, *Good Faith and Fault in Contract Law*, (Oxford: Clarendon Press, 1995) see especially p. 62, text at fn. 20, and pp. 88-89.

<sup>31</sup> See also Friel who argues that "duress can only be judged by the impact it has on the victim". Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 2000) Chapter 19 at p. 262.

<sup>32</sup> What they term a 'plaintiff-sided' perspective. What they refer to as the 'defendant-sided' perspective by contrast looks to the propriety of the behaviour of the party who has created the coercive factor. This nomenclature assumes that a typical case of duress involves a plaintiff who is seeking to avoid a contract entered into as a result of pressure placed upon him by the defendant. In fact it is just as likely that the alleged victim of duress will be the defendant, as in a case where the fact of duress is alleged as a defence to an attempt to seek damages for a breach of contract. The terms

party alleging duress, but looks instead to the propriety of the conduct that brought about such an effect. Birks and Chin suggest that “the proof of bad behaviour is additional to and not part of the proof of duress”,<sup>33</sup> thereby seeming to indicate that the latter factor is merely a filter of cases that otherwise satisfy the duress test. It is in fact well established in law that a litigant claiming duress must show that the threat or action that coerced him or her was either in itself wrongful or made with an improper motive or purpose.<sup>34</sup> It is suggested, with respect, that without the criterion of illegitimate pressure the legal concept of duress would lack virtually any coherence or substance. This is a point that is explored further below.

The key element of this condition being illegitimacy, it is necessary to state or otherwise determine the criteria by which the illegitimacy of a threat is judged. While a definitive criterion has heretofore proved elusive, it is accurate to say that generally<sup>35</sup> the law requires that the threat in some sense amount to a breach of the law, or an infringement of legal rights, or that it be directed towards an illegal purpose. The legal criteria, thus, are largely self-referential (although as will be seen below, there are some exceptions to this general position). They rely predominantly on the preordained mores of the law that, as argued above, reflect certain priorities and perspectives. If it is correct to say that these priorities are predominantly those of a liberal-individualist nature, then it necessarily follows that the criteria for determining duress are based on a discrete - and hence misleading - paradigm of contracting.

Indeed it has generally been the narrow conception of what is ‘illegitimate pressure’ for these purposes that has constrained the development of duress until recently. The circumstances in which duress arises are, even in modern times, quite limited. At one

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‘plaintiff-’ and ‘defendant-sided’ thus tend to confuse and it is therefore suggested, with utmost respect, that this nomenclature should be avoided.

<sup>33</sup> Birks and Chin, *op. cit.*, at p. 89.

<sup>34</sup> See for instance the comment of Lords Wilberforce and Simon in *Barton v. Armstrong* [1976] A.C. 104 at 121: “Absence of choice [without more] does not negate consent in law; for this the pressure must be of a kind which the law does not regard as legitimate”.

point it was thought that only *actual* physical violence or restraint would suffice to ground an action for duress,<sup>36</sup> although it is now readily accepted that a threat will also suffice. For some considerable time, the sole common law ground upon which one might avoid a deed or contract for duress was where there was ‘duress of the person’, that is, where there was a threat physically to kill or injure<sup>37</sup> or imprison<sup>38</sup> a person and, *a fortiori*, the actual injury or imprisonment of a person. In short there had to exist “a threat to life, limb or liberty”. This threat furthermore had to relate to an action that, if carried out would be unlawful. It would of course be rare in the extreme to encounter a scenario where a person might have a legitimate right to kill another<sup>39</sup> but there is good and ancient authority to the effect that the lawful imprisonment of a person does not in itself amount to duress<sup>40</sup> (although it will be argued below that the purpose or motive for which the threat is made is relevant).<sup>41</sup>

It, is however, comparatively rare, especially in these ostensibly more civilised times<sup>42</sup> to find agreements that are the product of naked threats of violence.<sup>43</sup> It has gradually been recognised, perhaps due to the influence of equity on the common

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<sup>35</sup> Although see the discussion below at 176ff. and the decision of the Steyn L.J. in *CTN Cash and Carry v. Gallaher Ltd.* [1994] 4 All E.R. 714.

<sup>36</sup> See Blackstone who argued that “a fear of battery...is no duress...” 1 *Bl. Comm.* 131.

<sup>37</sup> See for instance *Barton v. Armstrong* [1976] A.C. 104 and *Freideburg-Seeley v. Klass* (1957) C.L.Y. 1482. See also *The Times*, February 19<sup>th</sup>, 1957 and Dixon, “Damages for Fright”, in (1957) 101 Sol. Jo. 275. Threats of violence and actual violence were alleged in *Dandaroff v. Rogozinoff* [1988] 2 N.Z.L.R. 588, *Scalio Pty. Ltd. v. Cote* [1992] 6 W.A.R. 475, *Byle v. Byle* [1990] 65 D.L.R. (4<sup>th</sup>) 641.

<sup>38</sup> See for instance *Cumming v. Ince*, (1847) 11 Q.B. 112, (1847) 116 E.R. 418, *Blackwood v. Gregg* (1831) Hayes 277.

<sup>39</sup> There are certainly circumstances in which the taking of a life is not unlawful. Killing in pursuit of a war effort or in self-defence would not attract the normal charge of murder. Article 13.6 of the Constitution of Ireland, 1937 seems implicitly to endorse at least the *possibility* of a death sentence as punishment. The Criminal Justice Act, 1990, has however, for the moment abolished this facility. Article 40.3.3 of the Constitution moreover contemplates the possibility of a legal abortion where there is a “real and substantial risk to the life of the mother of the unborn child”. (See *A.G. v. X.* [1992] 2 I.R. 1).

<sup>40</sup> See *Anon.* (1662) 1 Lev. 68, *Smith v. Monteith* (1844) 13 M. & W. 428, *Biffin v. Bignall* (1862) 7 H. & W. 877.

<sup>41</sup> See *Cumming v. Ince* (1847) 11 Q.B. 112, (1847) 116 E.R. 418 discussed below at p. 197.

<sup>42</sup> Contrary to popular impression and the theories of, *inter alia*, Durkheim, empirical research conducted by Zehr, *Crime and Development in Modern Society*, (Totowa, N.J.: Rowman and Littlefield, 1976), suggests that violent behaviour was more prevalent in pre-industrial, agrarian societies than in post-industrial society.

<sup>43</sup> Although see the cases cited above at fn. 37.

law,<sup>44</sup> that the threat of financial loss is an altogether more common, and pervading source of pressure in modern society. Gradually then the courts in the U.S., Australia, New Zealand, and ultimately in Britain have expanded the range of threats sufficient to ground a claim of duress (and thus rendering a contract voidable) to include what is popularly termed 'economic duress'. The admission of this new criterion has however, forced something of a rethink on the second prong of duress, that of illegitimacy. For while the propriety of threats to kill, maim or restrain another is usually self-evident, the wrongfulness of pressure exerted in the commercial domain is altogether less easily determined.<sup>45</sup>

Before examining this and other allied issues it is worth noting a few other attributes of duress that are, it is submitted, relevant to the analysis being undertaken in this thesis.

***The Subject of the Threat or Action.*** As a simple matter of causation, it is obvious that there cannot be duress where the party alleging coercion is not made aware of the threat said to have given rise to the duress. It is well established that a threat of action must be communicated *to* the party pleading duress or to an agent acting in his name (although this, it seems may be done indirectly, e.g. through an agent or other third party).<sup>46</sup> It is not possible, by the same token, to plead that duress was imposed upon a third party in defence of an action for breach of contract or specific performance

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<sup>44</sup> At least one jurist suggests that equity had a hand in this development - see the commentary of the Court in *Rich and Whillock v. Ashton Development*, 175 Cal. App. 3d 1154 at 1158-1159 (1984) "the [economic duress] doctrine is equitably based and represents 'but an expansion by courts of equity of the old common-law doctrine of duress'. If this was the case in the U.K., it is suggested that the influence of equity was more subtle - few if any of the leading cases in the U.K. make any direct reference to the influence of equity.

<sup>45</sup> See Phang, "Whither Economic Duress? Two recent cases", (1990) 53 *M.L.R.* 107 at pp. 112-114.

<sup>46</sup> It seems, however, that the duress may be exerted indirectly through a medium. A notable example is a British Columbia case, *Byle v. Byle* (1990) 65 D.L.R. 4th 641 (B.C.). There the defendants, the parents of A, had agreed to convey land to him. The Court ruled that this agreement was "void [sic] for duress" on the grounds that A had threatened to injure another of the defendant's sons, B, if the question of ownership of the property was not resolved in A's favour. This threat however, was made directly to B and not to the defendants, who heard about the threat only through a third son, C. Despite the fact that this threat was neither directed at nor initially uttered in the presence of the defendants, the court ruled that they had acted "without true consent". *Ibid.* at p. 653.

thereof.<sup>47</sup> A surety, for instance, cannot plead that the principal debtor for whom he is surety contracted the debt (or alternatively acknowledged the debt by deed) under duress.<sup>48</sup> This is one of the consequences of duress rendering a contract voidable only and not void *ab initio*: the contract or deed may only be avoided by the party coerced.<sup>49</sup>

The threat need not be explicitly made. Seemingly innocent words may take on sinister overtones when judged against the context in which they are made, the demeanour or gestures of the party speaking.<sup>50</sup> A threat may be implicit, as in *B. & S. Contracts v. Green*<sup>51</sup> where, notwithstanding the absence of an explicit threat, the Court concluded that there had been duress.<sup>52</sup>

It is not necessary, however, that the threat of violence be directed at the party so coerced, i.e. that the latter be the subject of the threat or action.<sup>53</sup> Indeed it is arguable that a threat to injure a loved one may in some circumstances more effectively induce the party threatened to contract than a threat made against the party himself. A person may in fact be coerced by threats concerning the prospect of harm being caused to a third party, although the category of third parties in respect of whom a person may plead duress is not certain. In medieval times it was clear that a debt could be avoided only where it was exacted by means of threats directed only against the party so

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<sup>47</sup> This accords with standard *jus tertii* rules. In *Norris v. A.G.* [1984] I.R. 36, for instance, the plaintiff alleged *inter alia* that the legislation he was challenging as unconstitutional undermined the constitutional autonomy of married people. This particular plea was struck out for lack of *locus standi*, the plaintiff not being himself a married person.

<sup>48</sup> See *Huscombe v. Standing* (1607) Cro. Jac. 187.

<sup>49</sup> On which see further below at pp. 148ff.

<sup>50</sup> The words "I'm sure we'll come to a mutually beneficial arrangement" must bear an entirely more sinister meaning when uttered by a mafia godfather flanked by minders than when uttered in other less onerous contexts.

<sup>51</sup> [1984] I.C.R. 419.

<sup>52</sup> See also *Mutual Finance Ltd. v. John Wetton & Sons Ltd.* (a case involving money paid to stifle a prosecution). *Per* Porter J.: "...it is enough if the undertaking were given owing to a desire to prevent a prosecution and that desire were known to those to whom the undertaking was given. In such a case one may imply... a term in the contract that no prosecution should take place".

<sup>53</sup> This is in line with the position in relation to marriage. A party may be coerced even where the threat proposes self-injury rather than injury to another. See *S. v. O' S.* unreported, High Court, Finlay P. November 10, 1978. Fear for another person is sufficient as the motivating factor: see also the Canadian case of *Pascuzzi v. Pascuzzi* [1955] O.W.N. 853.



coerced or his or her spouse, but not the child or other relative of the former.<sup>54</sup>

Arguably, the law has since been placed on a firmer footing. It is now possible for a person to allege duress where a threat is made against the son<sup>55</sup> or daughter of that person or the sibling thereof.<sup>56</sup> It may be further extrapolated from the Irish case of *Rourke v. Mealy*<sup>57</sup> that a “threat of prosecution of a near relative may be considered sufficient grounds for avoidance”.<sup>58</sup> In a similar vein, several criminal law cases<sup>59</sup> have recognised that a threat made to a party, the subject of which is a member of the latter’s family, will amount to duress excusing certain criminal acts.<sup>60</sup>

It is not entirely clear, however, how closely related or connected persons must be so that a threat made to one to injure or kill the other will constitute duress of the former. It is arguably not necessary however that the parties be related by blood or marriage. In the criminal law case<sup>61</sup> of *The Queen v. Hurley and Murray*<sup>62</sup> the Supreme Court of Victoria held that a threat to kill or injure the *de facto* wife of one of the defendants was sufficient to found a plea of duress. Admittedly where the legal point at issue is criminal guilt rather than contractual liability very different considerations, both theoretical and practical, may apply. That said, there seems in principle to be no

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<sup>54</sup> For an example of spousal duress see *Kaufman v. Gerson* [1903] 2 K.B. 115 where a woman, the defendant in this case, agreed to discharge the debts of her husband owing to the threat of the latter being prosecuted for fraud. But even here the concerns of the wife were not purely directed to the husband, it being noted that the defendant wished “to protect the good name of [their] children”.<sup>54</sup> This spousal concession, presumably owed its existence to the then extant legal theory of the unipersonality of husband and wife. In law, the two were one and thus in logic the injury of one was equally the injury of the other.

<sup>55</sup> See *Williams v. Bayley*, (1866) L.R. 1 H.L. 200, (a case involving the equitable doctrine of undue pressure but one that is, it is submitted, of wider import), the House of Lords held that the plaintiff could recover securities assigned to the defendant in consequence of an improper threat to prosecute the plaintiff’s son for forgery.

<sup>56</sup> In *Mutual Finance Ltd. v. John Wetton & Sons Ltd.* (1881) 45 L.T. 589, a guarantee was avoided in consequence of an implicit threat to prosecute a third party being the son and brother of the respective guarantors.

<sup>57</sup> (1879) 13 I.L.T.R. (Exch.) 32.

<sup>58</sup> See also *Seear v. Cohen* (1881) 45 L.T. 589.

<sup>59</sup> Note however, the cautionary comments regarding the different nature and purpose, (not to mention consequences) of duress in the criminal law and contract law, made above in Chapter 1, at p. 27.

<sup>60</sup> See for instance *R. v. Valderrama-Vega* [1985] Crim. L.Rev. 220, *R. v. Ortiz* (1986) 83 Crim App. R. 173, *The Queen v. Hurley and Murray* [1967] V.R. 526.

<sup>61</sup> See footnote 59 above.

cogent reason why the contractual doctrine should not apply equally to threats made against persons not related by blood or marriage to the coercee.

This is ultimately a question of fact, and as such the presence or otherwise of a legal relationship is arguably of evidential relevance only. It is submitted that the courts should look to the substance of the relationship rather than its form.<sup>63</sup> The key question is whether, considering the circumstances, the relationship between parties, A and B, is such that a threat to harm A is likely to prove coercive of B.<sup>64</sup> The greater the affinity that exists between the person to whom the threat is made and the subject of the threat, the more likely it is that a threat made against one will move another to act. (Although a humanitarian argument would support the proposition that a threat to injure *any* person, a stranger or otherwise, should be actionable in law, (subject to the overriding requirement that it be causative)).<sup>65</sup> Therefore it is arguable that where there exists a sufficient affinity between two parties, A and B, such that a threat made against A would move B to act and the party, C, alleged to be coercing exploits this affinity, no objection should be made that A and B are not related.

Current legislative policy seems to lean in favour of this wider approach. It is instructive in this regard to look to recent legislative provisions<sup>66</sup> that outline the

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<sup>62</sup> [1967] V.R. 526.

<sup>63</sup> In a similar vein, see the descriptive approach favoured by the present author in Ryan, "Sexuality, Ideology and the Legal Construction of 'Family': *Fitzpatrick v. Sterling Housing Association*", [2000] 3 *I.J.F.L.* 2.

<sup>64</sup> The allied question as to whether the threatening party should be aware of this likelihood seems otiose. It is hard to imagine a situation in which a person making a threat would threaten to injure another believing that this would not influence the party to whom the threat is made.

<sup>65</sup> An interesting ethical question, though perhaps beyond the remit of this text, is whether a threat to injure an animal or non-human sentient being would be actionable. It is arguable, for instance, that a threat to kill or injure a family pet might be at least sufficient to cause a person to submit to a demand. Certain religious perspectives, indeed, demand such an approach, e.g. Jainism.

<sup>66</sup> There is good authority for the proposition that the Courts may look to relevant legislative pronouncements in determining the appropriate response to duress or other coercive practices, even where those legislative measures are not directly applicable to the case at issue. In *the Universe Tankships of Monrovia v. International Transport Workers' Federation (The Universe Sentinel)* [1983] A.C. 366, the House of Lords referred to the then current British Trade Union legislation to help determine the legitimacy of actions taken by the defendant. In *McG. v. W.*, unreported, High Court, McGuinness J., January 14, 1999, McGuinness J. takes a similar approach, relying on legislative changes to support a significant change in the rules regarding recognition of foreign divorces.

circumstances in which a person will be deemed to have committed the criminal offence of coercion. The Non-fatal Offences Against the Person Act, 1997,<sup>67</sup> section 9, makes it an offence to use coercion (as defined) to achieve certain ends. Coercion includes for these purposes a threat directed not only at the coercee but also at a member of his “family” as defined. The term “family” in this context is specifically defined so as to include an unusually wide range of persons connected to the coercee. It is not confined for example to those related by affinity or consanguinity but posits a more functional conception of family including, for instance, a person sharing a residence with the coercee.<sup>68</sup>

***The source of the Duress.*** An allied question of some importance relates to the *source or origin* of the pressure or threat that is alleged to constitute duress. Here an initial distinction should be made between two different species of coercion - personal and circumstantial. Contract law has typically regarded duress as arising only when the pressure is caused by the actions of a person and not by the mere circumstances in which the person finds himself.<sup>69</sup> Nozick considered that, in law at least, only interpersonal threats have the potential to give rise to coercion.<sup>70</sup> Even in the face of compelling economic necessity, not being the product of interpersonal

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<sup>67</sup> On which see generally Bacik, “Striking a Blow for Reform”, (1997) 7 *I.C.L.J.* 48.

<sup>68</sup> The term ‘family’ is *per* Lord Nicholls in *Fitzpatrick v. Sterling Housing Association* [1999] 3 W.L.R. 1113, not a term of art but rather a word of ordinary and often flexible meaning. Thus see the rather less extensive definition of family in the Housing (Private Rented Dwellings) Act, 1982 (No. 6 of 1982) s. 7 (2)

<sup>69</sup> In Criminal Law, however, there has been some recognition of a defence of ‘necessity’ or of ‘duress of circumstances’. This entails the avoidance of criminal liability where a party broke the law with a view to avoiding a greater evil brought about not by another person but by mere circumstances. This defence has been recognized in English law but only in extreme circumstances. In order to avail of the defence, a person must have acted reasonably and proportionately (that is the harm inflicted must be less than the harm avoided) in order to evade death or serious injury (*R. v. Martin* [1989] 1 All E.R. 652.) See also *Perka v. The Queen* [1984] 13 D.L.R.(4<sup>th</sup>) 1, in which a cargo of marijuana entered Canadian waters having been discarded from a ship bound for Alaska. The ship’s crew had done so fearing that unless they did otherwise, bad weather would have capsized the ship. (See also *R. v. Kitson* (1955) 39 Cr. App. R. 225 and *R. v. Willer* (1986) 83 Cr. App. R. 225. See generally the discussion in McAuley and McCutcheon, *Criminal Liability*, (Dublin: Round Hall, 2000), in Chapter 17. While such authority needs to be approached with caution (note the cautionary comments made above in Chapter 1, at p. 27), it is submitted that the applicable intellectual considerations in both contract and criminal law are often quite similar.

pressure, the law assumes that a party has acted freely and voluntarily.<sup>71</sup> In *Magnacrete v. Douglas-Hill*<sup>72</sup> Perry J. noted that while the defendants in that case had little alternative but to enter into the contracts, this situation was “a product of wider circumstances of their own making which were not produced by any conduct on the part of the plaintiff”.<sup>73</sup> This underlines the fact that it is not the absence of consent alone (as in Family law cases) that constitutes duress but rather this coupled with the fact that the other party to a contract is either responsible or alternatively is seeking to take advantage from another’s wrongdoing. The contractual doctrine of duress is equally concerned with the question of the wrongfulness of the perpetrator’s conduct.

In *Alec Lobb (Garages) Ltd. v. Total Oil*<sup>74</sup> the plaintiff, a garage owner, challenged the validity of a lease and leaseback arrangement between the parties to the litigation, on the ground, *inter alia*, of economic duress. The defendant had a charge over the property that was the subject of the arrangement, attached to which was an exclusive petrol tie. At the time the agreement was entered into, the plaintiff was in considerable financial difficulty and was significantly indebted to its bank and several other creditors. It claimed that as a result of the existence of the petrol tie in favour of the defendant the company had no realistic alternative but to contract: no other oil company would fund it in such circumstances.

It was certainly possible, though ‘doubtful’ according to the presiding judge,<sup>75</sup> that the plaintiff had no realistic alternative. Nevertheless the plaintiff “certainly did not

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<sup>70</sup> See Nozick, *Anarchy, State and Utopia*, (Oxford: Basil Blackwell, 1974) at pp. 262-263. See also the discussion in Bigwood, “Coercion in Contract: The Theoretical Constructs of Duress”, (1996) 46 *Uni. of Toronto Law Journal* 201 at p. 205.

<sup>71</sup> As Bigwood, *op. cit.*, notes at 204-205 “...the capitalist philosophy upon which much of modern contract doctrine is founded characteristically assumes that market transactions are voluntary and uncoerced, even if they are made against a background of economic necessity”. See also Wertheimer, *Coercion*, (N.Y.: Princeton Uni. Press, 1987) at pp. 4-5.

<sup>72</sup> (1988) 48 S.A.S.R. 565

<sup>73</sup> See also the Canadian case of *Winfield Developments v. City of Winnipeg* [1989] 4 W.W.R. 558 (Manitoba).

<sup>74</sup> [1983] 1 W.L.R. 87.

<sup>75</sup> Deputy Judge Peter Millett Q.C., now a Law Lord. *Ibid.* at p. 93.

enter [into the contract] under any compulsion on the part of the defendants”.<sup>76</sup> The plaintiff was in great financial difficulties, the Judge acknowledged, but these were “of its own making” and there was, hence, he said, no duress.<sup>77</sup> Any other result would involve the acceptance of the proposition that “the validity of negotiations...must be determined not by the defendant’s conduct but by the plaintiff’s necessities”. Such necessity is relevant only if created by the defendant’s conduct.<sup>78</sup> “The mere stress of business conditions”, according to one U.S. judge,<sup>79</sup> “will not constitute duress where the defendant was not responsible for the conditions”.<sup>80</sup>

It is not however strictly necessary where interpersonal coercion is alleged that the duress emanate from a party to the contract. In *The Universe Tankships of Monrovia v. I.T.W.F. (The Universe Sentinel)*<sup>81</sup> the House of Lords accepted that a contract could be avoided for duress even where a third party has exerted the duress. In that case the House set aside certain aspects of a contract made between the plaintiff shipowner and its employees at the insistence of the defendant<sup>82</sup> even though there

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<sup>76</sup> See *ibid.* at p. 93. The proposal for the arrangement emanated from the plaintiff. Indeed if anyone was reluctant to sign it was the defendant, which seemed rather lukewarm about the proposal. If there was any interpersonal pressure in this case it came not from the defendant but from the bank and creditors of the plaintiff.

<sup>77</sup> *Alec Lobb op. cit.* at p. 93. Somewhat similar reasoning is in evidence in the Michigan case of *Hackley and McGordon v. Headley* 45 Mich. 569, 8 N.W. 511 (1881).

<sup>78</sup> See *Selmer v. Blakeslee-Midwest Co.* 704 F. 2d. 924 (1983) and *Capps v. Georgia Pac. Corp.* 435 P. 2d. 935 (1969).

<sup>79</sup> *Johnston, Drake and Piper Inc. v. U.S.* 531 F. 2d. 1037 at 1042 (1976). See also *Selmer v. Blakeslee-Midwest Co. op. cit.* where Posner J. remarks that “the question is starkly posed whether financial difficulty can, by itself, justify setting aside a settlement on grounds of duress. It cannot”. A particular category of cases where the Courts of Admiralty have precluded persons from taking advantage of another’s straitened circumstances. These are discussed below at pp. 189-192, where it is argued that the principle outlined therein is *sui generis* and thus not generally applicable.

<sup>80</sup> This again, underlines the fallacy of Birks and Chin’s assertion that the doctrine of duress is concerned primarily with the effect on the mind of the coerced party. Were it so there would be no such restriction.

<sup>81</sup> [1983] A.C. 367.

<sup>82</sup> The defendant had forced the plaintiff to alter certain aspects of its contracts with its employees. It was conceded that all but one of these changes was valid, all but one being connected to the employment conditions of the crew and thus relating to a valid trade dispute under then current trades union legislation. The plaintiff, however, successfully challenged the insertion into the employment contracts of a term obliging the plaintiff to contribute towards the I.T.W.F. welfare fund, a condition that was not of direct benefit to the ship’s crew and thus not related to a valid trade dispute. (See *ibid.* Lord Diplock at p. 388D-G and Lord Cross at p. 393E).

was no allegation of impropriety on the part of the employees themselves. The point appears, however, to have been conceded and there is little if no discussion of it in the judgments of their Lordships.

Certainly where a third party has, with prior knowledge of the duress, received a benefit from a contract entered into under duress, the benefit derived from the contract may be recouped. In other words, a person will not be allowed knowingly to exploit a party under duress from a third party. In *Kesarmal s/o Letchman Das v. Valliapa Chettiar*<sup>83</sup>, the respondent executed a transfer of property to the appellants. The Malay courts concluded that the transfer had been affected under duress from a third party.<sup>84</sup> The Court ruled, furthermore, that the appellants were aware of this duress at the time of the transfer. Thus, the respondent was entitled to have the transfer set aside, on the ground that parties taking property with knowledge of the duress were deemed to have been affected by that duress. Here, it is suggested, the line between equity and common law is to some degree blurred.<sup>85</sup> The implicit basis for this perspective seems to be that the appellants were, by virtue of their prior knowledge of the duress, not acting *bona fide* and therefore were affected in conscience by the duress.

In the Irish law of marital nullity, it is also well established that to found a plea of duress, the pressure that is allegedly imposed on a petitioner need not have emanated from the respondent to a suit of nullity.<sup>86</sup> This seems to have been the case even

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<sup>83</sup> [1954] 1 W.L.R. 380 (P.C.), a case before the Privy Council on appeal from the Supreme Court of the Federation of Malaya.

<sup>84</sup> In that case being no less than the wartime sultan of Malaysia. He had ordered the transfer to be made to the appellants.

<sup>85</sup> Cf. the *dictum* from the Californian case of *Rich and Whillock v. Ashton Development*, 175 Cal. App. 3d 1154 (1984) at pp. 1158-1159, where it is suggested that doctrine of economic duress “is equitably based and represents ‘but an expansion by courts of equity of the old common-law doctrine of duress’”.

<sup>86</sup> In fact the most typical form of pressure in marriage nullity cases is undoubtedly third party - usually parental. The pressure alleged in such cases almost always emanates from the parents of one or other party: See *Griffith v. Griffith* [1944] I.R. 35, *M.K. v. F.Mc.C.* [1982] I.L.R.M. 27 and *N. (orise K.) v. K* [1985] I.R. 733, [1986] I.L.R.M. 75. Cases where the pressure emanates directly from the respondent are in fact comparatively less common: see *B. v. D.* unreported, High Court, Murnaghan J.,

before family law's expansive test of consent was established in *N. v. K.*<sup>87</sup> Recent Irish authority takes a step further in suggesting that circumstantial pressure, that is pressure not arising from any particular person but simply from a set of disagreeable circumstances, may be enough to negate free consent.<sup>88</sup> The reason for the divergence with contract law is easily traced. Modern family law is solely effect-centred, in other words it focuses on the presence or absence of consent alone, ostensibly excluding considerations of propriety and legitimacy. It is therefore, the defect in consent, regardless of its origin, that is of prime concern. The cause or origin of the defect is at best, of evidential interest only. The non-recognition of circumstantial pressure in contract law, thus, underlines the fallacy of Birks and Chin's assertion that duress in contract is similarly concerned only with the state of the mind of the party alleging duress.

Here there are, perhaps, certain policy considerations at work. The fear may justly be expressed that if financial circumstances alone are allowed to amount to duress, persons will be dissuaded from contracting with those who are less economically advantaged than them. Otherwise, the test of a contract's validity would be the mere circumstances of the parties. The prospect then would be of a society where the rich deal only with their equally wealthy peers, perhaps even further compounding the levels of deprivation and isolation of the economically disadvantaged. It is arguable that responsibility for the welfare of the marginalised cannot be cast on sole actors alone but is more properly a burden to be shared equally by the community as a whole. In this regard the decisions in the Article 26 references of the *Employment Equality Bill 1996*<sup>89</sup> and the *Equal Status Bill 1997*<sup>90</sup> are instructive. These underlined the unconstitutionality of measures designed to place on individual actors in the business community an unfair burden aimed at securing improved facilities for people

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June 20, 1973, *O'S. v. O'S.*, unreported, High Court, Finlay P., November 10, 1978, *O'R. v. B.* [1995] 2 I.L.R.M. 57. See generally Chapter 5 below.

<sup>87</sup> [1985] I.R. 733, [1986] I.L.R.M. 75. See *Buckland v. Buckland* [1967] All E.R. 300, where a threat of imprisonment was made by the police and not the prospective bride.

<sup>88</sup> See *D. B. v. O'R.* [1991] I.L.R.M. 160 and the commentary below in Volume II, Chapter Five, at pp. 155ff.

<sup>89</sup> [1997] 2 I.R. 321.

with disabilities. But this perspective arguably betrays the dominance of the discrete approach in contract law. The main actors are largely ring-fenced. It is the conduct of these actors and not the wider context in which they reside that become the focus of the inquiry. The wider relational issues that shape or fetter decision-making processes are ignored, the spotlight instead falling on the immediate actors. All else is cast in darkness.

***The Effects of a Finding of Duress.*** Another important preliminary point to note is that duress renders a contract or deed voidable<sup>91</sup> and not void *ab initio*. This conclusion notably conflicts with the position relating to marriage where absence of consent renders a marriage void, of which more anon<sup>92</sup>. For the moment, it is worth identifying a number of important consequences flow from the position in contract law.

The first consequence of voidability is that the contract may only be avoided at the instance of the party coerced and within his lifetime. No other person, whether a party to the contract or not, may plead the duress of another in order to avoid liability under the contract.<sup>93</sup> A further consequence is that until such time as it is avoided, the contract is regarded as valid. Therefore presumably, the title to property being the subject of a voidable contract will pass under that contract and a third party (acting in good faith) into whose hands such property passes will take good title provided that, prior to purchase, there has been no avoidance. A third party who takes with knowledge of the wrong, however, can be in no better position than the perpetrator thereof. Thus in *Kesarmal s/o Letchman Das v. Valliapa Chettiar*<sup>94</sup>, the respondent

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<sup>90</sup> [1997] 2 I.R. 387. For a similar approach see *Blake and Madigan v. A.G.* [1982] I.R. 117.

<sup>91</sup> *Whelpdale's Case* (1605) Co. Rep. 119a and Coke, 2 *Inst.* 483. Per Porter J. in *Mutual Finance Ltd. v. John Wetton & Sons Ltd.* [1937] 2 K.B. 389 at p. 397. Contractual duress differs from the case of marital duress in this respect - lack of marital consent renders a marriage void and not simply voidable. See Volume II, Chapter Five at pp. 123-124.

<sup>92</sup> See Tolstoy, "Void and Voidable Marriages", (1964) 27 *M.L.R.* 385.

<sup>93</sup> See for instance *Huscombe v. Standing* (1607) Cro. Jac. 187: a surety may not plead that the principal debtor for whom he stands surety was subjected to duress.

<sup>94</sup> [1954] 1 W.L.R. 380 (P.C.), a case before the Privy Council on appeal from the Supreme Court of the Federation of Malaya.



executed a transfer of property to the appellants. The Malayan courts concluded that the transfer had been affected under duress from a third party. The Court ruled, furthermore, that the appellants were aware of this duress at the time of the transfer. Thus, the respondent was entitled to have the transfer set aside.

Once avoided, however, the contract is deemed, with retrospective effect, *never to have existed*. Thus a contract made in 1994 and not avoided will have been regarded as valid and subsisting in 1995. However, if avoided in 1997 a party subsequently may say that the contract did not exist in 1995. Thus, a voidable contract may be enforced until avoided but thereafter is deemed never to have been validly created in the first place. The final point is that a claim of duress may be lost through delay<sup>95</sup> or affirmed by subsequent conduct. A party who, for instance, relies on the terms of a contract in such a way as to indicate implicitly that he regards the contract to be valid and subsisting and binding upon him may be deemed thereby to have affirmed the contract and thus ceded his right to avoid. Thus in *Occidental World-wide Investment Corporation v. Skibs A.S. Avanti (The Siboen and the Sibotre)*,<sup>96</sup> Kerr J. relied on the fact that a party pleading duress had sought to proceed on the agreement in arbitration proceedings in finding that there in fact had been no duress, or at least that there had been subsequent affirmation of the contract. Similarly a party who fails, without good reason, to take action once the alleged improper pressure has been lifted may lose their right to avoid.<sup>97</sup>

Although most commentators appear to agree, the conclusion that duress renders a contract voidable rather than void is not beyond controversy. This conclusion in particular sits uneasily with the treatment of duress in family law. In that context it has long been understood that, in Ireland,<sup>98</sup> duress renders a marriage void rather than

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<sup>95</sup> See *Alec Lobb op cit.* at p. 94 and *The Atlantic Baron* [1979] Q.B. 705.

<sup>96</sup> [1976] 1 Lloyd's Rep. 293.

<sup>97</sup> See *Alec Lobb op cit.* at p. 94 and *The Atlantic Baron* [1979] Q.B. 705.

<sup>98</sup> In England and Wales, since the Nullity of Marriage Act 1971, duress renders a marriage voidable only. See Matrimonial Causes Act 1973, section 12(c).

voidable.<sup>99</sup> This undeniably gives rise to some anomalies, most notably that a marriage, though void for duress may quite curiously be ‘ratified’ by subsequent action on the part of the coerced party tending to affirm the validity of the marriage.

Lanham<sup>100</sup> argues that there is no firm precedent for the proposition that duress renders a contract voidable rather than void. He contends that the much-vaunted cases cited in support of this proposition are at best equivocal on the point. A key plank in Lanham’s argument is based on the effect of intimidation in the criminal law pertaining to larceny. Larceny by intimidation occurs where a party secures the apparent consent of another to the taking of property by means of illegitimate threats of undesired consequences. Central to this offence is the necessity to establish that in the course of the alleged intimidation, title to the property did not pass to the accused. If it did, then, in logic, there can be no offence of larceny.<sup>101</sup>

“If,” Lanham contends, “the criminal cases are right and the position in civil law is still that a transaction is voidable for duress, we have the absurd situation that a man can be guilty of larceny by intimidation on the ground that the property in question did not pass to him and yet be in a position to give a good title on the ground that he did”.<sup>102</sup> In a similar vein, Hooper<sup>103</sup> contends that unless duress is considered as rendering a contract void “those cases in which it has been held to be larceny or robbery when goods are delivered to the accused in intimidation would be wrong”. In explanation, Hooper notes that were the transaction to be voidable only “property would have passed and if property does pass it is clear that it cannot be larceny”.<sup>104</sup>

The conclusion that duress renders a contract voidable has another important consequence of some doctrinal significance. The argument that, with the fusion of the

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<sup>99</sup> Tolstoy, “Void and Voidable Marriages”, (1964) 27 *M.L.R.* 385. Although see *contra* Davies J. in *Parojcic v. Parojcic* [1959] 1 All E.R. 1. at p. 3.

<sup>100</sup> Lanham, “Duress and Void Contracts”, (1966) 29 *M.L.R.* 615.

<sup>101</sup> Assuming that it is perfectly lawful to take that to which one has title.

<sup>102</sup> Lanham, “Duress and Void Contracts”, (1966) 29 *M.L.R.* 615 at p. 618.

<sup>103</sup> Hooper, “Larceny by Intimidation” (in two parts), [1965] *Crim L.Rev.* (I) 532 and (II) 592.

<sup>104</sup> See also *R. v. Caslin* (1961) 45 *Crim. App. R.* 47

courts of law and equity<sup>105</sup> contractual duress should be subsumed into the equitable doctrine of undue influence<sup>106</sup> depends for its technical realisation upon the identity of consequences between a finding of duress and undue influence. If, as Lanham argues, duress renders a contract void rather than voidable, the future of duress as a distinct doctrinal entity is assured. In the face of such inconsistency, the proposed fusion clearly could not proceed without rampant uncertainty.

There is arguably some element of consequentialism in the proposition put forward by Lanham *et al.* Lanham's argument regarding the law of larceny by intimidation seems to invert the formalist requirement that legal argument should proceed from principle to result. A more substantive complaint is that whereas with actionable misrepresentation and mistake there is no *consensus ad idem* and hence, arguably nothing that one could call a contract, the situation with duress is different. With the latter there is indeed agreement as to the desired result, although on one side it is, to say the least, reluctant.<sup>107</sup> A contract thus arguably comes into being but, due to the circumstances of its origin, the coerced party will be allowed, if desired, to avoid it.

The difference, it is submitted, is of wider import. Voidability is self-evidently a more private solution. Only the person coerced can seek to set aside the contract that is voidable. The remedy is designed more to protect the private interests of the party so coerced. It accords with the doctrine of privity,<sup>108</sup> the rule that ring-fences the parties

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<sup>105</sup> By the Supreme Court (Judicature) (Ireland) Act, 1877.

<sup>106</sup> See Cope, *Duress, Undue Influence and Unconscientious Bargains*, (Sydney: The Law Book Co., 1985) para. §125 at p. 61.

<sup>107</sup> Nonetheless, there are at least some cases that may justify in principle the conclusion that duress renders a contract void rather than voidable. In *Friedeburg-Seeley v. Klass*, (1957) C.L.Y. 1482, an elderly woman had entered into a contract with the defendants. She had done so only as a result of serious intimidation placed upon her by the defendants. McNair J. was satisfied that such was the plaintiff's terror that her mind – far from having weighed up the alternatives available – “never went to the transaction of the sale”. The report of the judgment notes that the plaintiff's consent “*if given at all*, was obtained by duress or undue influence”. See also *The Times*, February 19, 1957 and Dixon, “Damages for Fright” in (1957) 101 Sol. Jo. 275.

<sup>108</sup> See *Murphy v. Bower*, (1866) I.R. 2 C.L. 506, *McCoubrey v. Thompson* (1868) 2 I.R.C.L. 226, *Clitheroe v. Simpson* (1879) 4 L.R. Ir. 59, and *Mackey v. Jones* (1959) 93 I.L.T.R. 177. The doctrine is most notably illustrated, however, by the decision in *Tweddle v. Atkinson* (1861) 1 B. & S. 393. A and B agreed to pay C, B's son, an amount of money on C's marriage to A's daughter. C later sued A's estate for the promised sum. The Court refused to order payment, partly on the ground that

to a contract, preventing third parties from relying upon the contract (or alternatively being found liable thereunder).<sup>109</sup> By contrast, an agreement that is void *ab initio*, in strict theory<sup>110</sup> cannot be relied upon by any party. In other words voidness asserts a more universal concern with the prevention of coercion. Any person, for instance, with *locus standi*, can obtain a declaration that a marriage is void for duress, even where the parties to the marriage are deceased.<sup>111</sup> This voidness, then, underlines the relational ramifications of the agreement in question. By declaring an agreement void as opposed to voidable, one acknowledges that interests wider than those of the parties alone are at stake.<sup>112</sup>

Voidness, in other words, pierces the veil of privity. It acknowledges the inherently

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consideration did not flow from C, but additionally because C was not a party to the contract and could not, therefore, assert its terms. See also *Dunlop v. Selfridge* [1915] A.C. 847. Corbin argued strenuously against this result (see Corbin, "Contracts for the Benefit of Third Parties", (1930) 46 *L.Q.R.* 12) an approach that nonetheless seems to have prompted English jurists at least initially to assert with even more vigour the validity of the doctrine (see the subsequent decision of the Privy Council in *Vandepitte v Preferred Accident Assurance Co. of New York* [1933] A.C. 70, and the commentary of Karsten "The Discovery by Law by English and American Jurists in the Seventeenth, Eighteenth and Nineteenth centuries: Third-party beneficiary Contracts as a Test Case" (1991) 9 *Law and Hist. Rev.* 327.) The rule has, by contrast, been diluted considerably in some parts of the U.S., for instance in N.Y. (*Lawrence v. Fox* (1859) 20 NY 268) and Massachusetts (*Choate et al. v. S.C.A. Services Inc.* (1979) NE (2d) 1045) and in Australia (See the decision of the majority in the Australian High Court in *Trident General Insurance v. McNiece Bros Pty. Ltd.* (1988) C.L.R. 107. Of late there seems to have been some acknowledgment if the need for change from the House of Lords (see Lords Scarman and Keith in *Woodar Investment Ltd. v. Wimpey Ltd.* [1980] 1 W.L.R. 277 and Lord Diplock in *Swain v. Law Society* [1983] 1 A.C. 598 at p. 611.

<sup>109</sup> Although there are certain exceptions, where, for instance one is acting as agent for a third party, or as trustee for such party. On the latter point see *Drimmie v. Davies* [1899] 1 I.R. 176. See also certain statutory provisions that allow the doctrine to be set aside for certain purposes: Bills of Exchange Act, 1882, Marine Insurance Act, 1906, Married Women's Status Act, 1957, sections 7 and 8, and the Sale of Goods and Supply of Services Act, 1980, sections 13, 14, 17, 19 and 32.

<sup>110</sup> Although there remains, paradoxically, the possibility of ratification. *Ellis v. Bowman* (1851) 17 L.T. (OS) 10. Lord O'Brien (*obiter*) in *Ussher v. Ussher* [1912] 2 I.R. 455 at p. 480 also noted this possibility although he could suggest no basis in logic for its existence. In *B. v. D.*, unreported, High Court, Murnaghan J., June 20, 1973, the possibility of ratification was raised but rejected on the facts. In *Link v. Link*, 179 S.E. Rep., 2d. 697 (N.C. 1971) at p. 706, Lake J. noted that it was "elementary that a transaction procured by either fraud, duress or undue influence may be ratified by the victim so as to preclude a subsequent suit to set the transaction aside". (See also *May v. Loomis*, 140 N.C. 350, 52 S.E. Rep. 728). He went on to note, however, that ratification would not occur unless the victim had "full knowledge of the facts and was then capable of acting freely". (*Ibid.* at pp. 706-707).

<sup>111</sup> Although again, the fact that the parties have not sought to assert its voidness (especially if they were aware of their right to do so) may be evidence of ratification.

<sup>112</sup> The voidness of a bigamous marriage is a case in point. Were such marriage merely voidable the public policy against polygamy would quickly be set at naught. The rights of first spouses (for want of a better name), in particular, would be diluted.

‘social’ aspects of contract,<sup>113</sup> the fact that, as Durkheim notes, “a contract is not sufficient unto itself but is possible only thanks to the regulation of the contract which is originally social”.<sup>114</sup> Voidability, by contrast, denies these wider social aspects. The discrete paradigm again displays the extent to which it is embedded in the doctrines of contract

### **The Rise of ‘Economic Duress’**

Without doubt, the single most important change in the common law’s arsenal against coercion is the recognition of ‘economic duress’. This entails the acknowledgement that a threat of injury to financial fortunes, wrongfully made, may be sufficient to vitiate a contract. For a considerable part of the history of the common law, however, pressure falling short of duress of the person (‘a threat to life, limb or liberty’) fell outside the ambit of duress recognised at law. There were, initially, some hints of greater leniency, as in a 1467<sup>115</sup> case noted by Simpson involving the validity of a deed acknowledging a debt. The deed was entered into in consequence of a threat to burn down the house of the complainant, three of the common law judges holding that this did in fact amount to duress. Choke J. however dissented, refusing to countenance the extension of the doctrine to embrace this ‘duress of goods’. (Where the threat is directed against property.) If this were in fact the law, he observed (invoking the spectre of ‘floodgates’ long before its heyday) “*donques vous avoides plusors obligations en Angleterre*” - ‘thus many obligations in England might be avoided’.

Despite the existence of ancient authority to the contrary,<sup>116</sup> it was Choke’s view that ultimately found favour with subsequent courts and jurists, Coke<sup>117</sup> and Blackstone<sup>118</sup>

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<sup>113</sup> See the discussion of Hunt, *The Sociological Movement in Law*, (London: Macmillan, 1978) at pp. 85-88.

<sup>114</sup> Durkheim, *De la Division du Travail*, (*On the Division of Labour in Society*), (1893), (New York: Free Press, 1964) at p. 215.

<sup>115</sup> *Anon.* (1467) 7 Edw IV M.F. 22 pl. 21.

<sup>116</sup> 1 *Roll. Abr.* 687, *Bacon’s Maxims Regula* 18.

<sup>117</sup> 2 *Coke’s Institutions* 483.

in their midst. This restrictive view was later reaffirmed, in *Skeate v. Beale*.<sup>119</sup> In that case Lord Denman C.J. attempted to contrast duress of the person with duress of goods. He noted that while the former “is a constraining force, which not only takes away the free agency but may leave no room for appeal to the law for a remedy...” the latter, that is “...the fear that goods may be taken or injured[,] does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert”.<sup>120</sup> An ordinary person could not be expected to do otherwise than submit in the face of threats to life or limb. By contrast, it was not considered reasonable to submit where the threat was otherwise, whatever the effect the duress in fact had on the party to whom it was addressed.

One of the reasons for this is implicit in the extract above: while a person may recover adequate damages to restore him to his former position where goods are destroyed or damaged, “no suitable atonement can be made for loss of life or limb”.<sup>121</sup> There were in other words, they suggest, feasible alternatives where goods are damaged or destroyed. In fact, as noted in *Astley v. Reynolds*<sup>122</sup> a party may “have such immediate want of goods” that the prospect of future remedial action (such as an action of trover), may be of little solace. Money recoverable for damages legally attributable may in many circumstances be “vastly different from that actually resulting”.<sup>123</sup> Where those goods are, for instance, used and needed for the carrying out of the complainant’s employment, the latter may suffer (in addition to loss of wages), immediate damage to his business reputation and goodwill, for which it is hard to envisage there being adequate compensation in damages. What if the goods are specially adapted to a specialised task and would be difficult to replace without

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<sup>118</sup> 1 *Blackstone’s Commentaries* 131.

<sup>119</sup> (1841) 11 Ad. & E. 983, 113 E.R. 688. See also *Duke DeCadaual v. Collins* (1836) 4 Ad. & E. 858, *Wilson v. Ray* 10 Ad. & E. 82.

<sup>120</sup> *Ibid.* at 11 Ad & E. at p. 990, 113 E.R. at p. 690.

<sup>121</sup> *Bl. Comm.*

<sup>122</sup> (1731) 2 Str. 915.

<sup>123</sup> Dalzell, John, “Duress by Economic Pressure: I”, (1942) 20 *N.C.L. Rev.* 237.

delay? What if, as in *D & C Builders v Rees*,<sup>124</sup> the complainants risked going out of business if the threat was carried out?

*Astley v. Reynolds* exposes another supposed anomaly. This early eighteenth century case established that where there was *actual payment* of money consequent upon the unlawful seizure of goods, such money could be recovered by means of an action for money had and received. Read alongside the rule in *Skeate v. Beale* this had the bizarre effect that while a *promise* to pay money induced by duress of goods<sup>125</sup> could validly be enforced,<sup>126</sup> a payment *actually made* in such circumstances<sup>127</sup> (there being no preceding contractual obligation to do so) would be repayable.<sup>128</sup>

Taking an overview of this situation, one could not but be confused. Beatson,<sup>129</sup> amongst others argued that the distinction was fallacious. Even in the most swift and discrete of exchanges, there must exist a moment in time, a *scintilla temporis*, during

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<sup>124</sup> [1960] 2 Q.B. 617. A similar claim was made, although ultimately rejected, in *Capps v. Georgia Pac. Corp.* 435 P.2d. 935 (1969).

<sup>125</sup> The latter party must either possess a legal or equitable proprietary interest (See *Close v Phipps* (1844) 7 Man. & G. 586) in, or be entitled to or in fact have possession and enjoyment of the goods in question (*Fell v Whittaker* (1871) L.R. 7 Q.B. 120).

<sup>126</sup> Although in *Valpy v. Manley*, (1845) 1 C.B. 594, a case decided only four years after *Skeate v. Beale*, *Astley* was applied in circumstances where money was applied to forestall a *threat* wrongfully to seize and sell the goods of the coerced party.

<sup>127</sup> Provided of course that the threat was unlawfully made. For instance in both *Astley* and *Maskell v. Horner* [1915] 3 K.B. 106 the payment made was made in consequence of unlawful distress. In the latter case the distress was unlawful because the distrainer was not entitled in law to the sum demanded for a vendor's entry to a market (despite his belief to the contrary.) In the former case the plaintiff had pawned a plate to the defendant who refused to return it unless a sum of money was paid as interest, such sum being would be recoverable calculated at an illegally excessive rate of interest. In both cases the court in question allowed the action for money had and received. But in the former case only to the extent that the interest claimed exceeded the amount legally recoverable at the maximum legal rate of interest. Similarly legal distress would not constitute duress of goods founding an action for money had and received.

<sup>128</sup> As Jaffey points out: "If X honestly believes that Y owes him £100 and that he is entitled to retain Y's goods until payment and Y pays X the £100 in order to get his goods back, Y can subsequently recover back the money to the extent that it was not due. Yet...if Y does not pay but promises to pay the £100, the promise is binding on him". Jaffey, "Wrongful Pressure in Making Contracts", in Lasok, D. (ed.), *Fundamental Duties*, (Oxford: Pergamon Press, 1980) at pp. 187ff. Although in *Valpy v. Manley*, (1845) 1 C.B. 594, a case decided only four years after *Skeate v. Beale*, *Astley* was applied in circumstances where money was applied to forestall a *threat* wrongfully to seize and sell the goods of the coerced party.

<sup>129</sup> Beatson, "Duress as a vitiating factor in contract", (1974) 33 *C.L.J.* 97 at p. 108. See also the comments of Mocatta J. in *North Ocean Shipping* at 719 and Kerry J., in the *Sibeon and the Sibotre* [1976] 1 Lloyd's Law Rep. 293 at p. 335.

which there is agreement but no exchange. Jaffey, by contrast, argues that this point "...is not well-founded: there is [in the case of actual payment] no promise to or agreement with the other party to pay". The distinction, he submits, "...lies precisely in the fact that in the [latter] case no question of a contract arises".<sup>130</sup> The distinction is certainly not without merit if there is in fact genuine though reluctant acquiescence in the result: the contract, although entered into under pressure, may, for instance, amount to a genuine compromise of a disputed or at least a doubtful claim. But in circumstances where there was no such acquiescence, the party coerced reserving his rights and making no move to compromise them, the distinction is indeed illogical. Jaffey's remark in these circumstances, amounts to a tautology: he seems to be saying that the contract should be recognised as valid because it is a contract. This frankly begs the question: the issue at stake is whether in fact such agreement as constitutes a valid contract does exist. If there is no acquiescence in the result then arguably there is no valid contract.

Contract law, nonetheless, stuck resolutely to its guns, confining *Astley v. Reynolds* to its restitutionary origins. Dawson's<sup>131</sup> claim that the latter case heralded the beginning of "...the extension of duress into the field of economic pressure" seems thus to have been remarkably premature, at least in so far as the law of contract was concerned.

In recent decades however the jurisprudence of the Common Law states has seen the effective resolution of this dilemma in favour of allowing the promisor to avoid a contract made under duress of goods. In fact such is the pace of reform that the issue has been virtually subsumed in a doctrine of much wider import that is known as 'Economic Duress'. By means of this approach the English, U.S, Canadian and Australian courts now recognise that certain forms of commercial or financial pressure, illegitimate in themselves or coupled with an illegitimate demand, may when imposed be such that a party may avoid a contract made in consequence

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<sup>130</sup> Jaffey, *op. cit.*

<sup>131</sup> Dawson, "Economic Duress: An Essay in Perspective", (1947) 45 *Mich. L.Rev.* 253 at p. 255.



thereof. This of course quite comfortably encompasses duress of goods but its ambit is clearly wider. In fact the classical (and perhaps the most common) form of economic duress is the threat not to perform a pre-existing duty; indeed many of the cases discussed hereafter involve the threatened breach of contract, although as will be seen, not every such threat amounts to duress.

***The Developing Caselaw.*** For the earliest origins of the principle of economic duress we must look beyond these islands. At least one early twentieth century case from the U.S. seemed to countenance the recognition of threats to refuse to perform a statutory or contractual duty as amounting to duress. In *Alaska Packers' Association v. Domenico*<sup>132</sup> the plaintiffs, who were sailors and fishermen in the defendant's employ, threatened to stop working unless their wages were increased.<sup>133</sup> The Court refused to enforce the resulting contractual modification on the ground that the plaintiffs had illegitimately exploited their monopoly position to force the increase in wages.

The decision focused in particular on two aspects of the case. The first was the defendant's lack of feasible alternatives, a recurring theme in modern duress cases. The latter, it was noted, had invested a large sum of money in the venture and had to recoup his investment within an extremely short fishing season. At the time that the threat was made the defendant's ship was, moreover, in remote waters. In the circumstances it would have been impossible to secure alternative labour without delay and thus significant losses would result.

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<sup>132</sup> 117 Fed. 99 (9th Circuit, (1902)). In an earlier Massachusetts case, *Chandler v. Sanger* 114 Mass. 364 (1874), money that had been secured through economic duress was recovered in an action in restitution. The plaintiff's ice truck was the subject of an attachment order. The latter knew that if he waited to pursue his legal rights in Court the ice in the then full ice truck would have melted and his business probably would have become insolvent. He thus agreed to pay the defendant a sum of money to recover the truck, a sum that was later recovered due to the presence of duress.

<sup>133</sup> The facts closely resemble those in *Stilk v. Myrick* (1809) 6 Esp. 129; 2 Camp 217 and *Harris v. Watson* (1791) Peake 102 both of which turned however on the absence of consideration (or on some accounts on issues of public policy).

The Court also looked to the motive of the plaintiffs. The Court seemed to suggest that had the plaintiffs acted with good reason, for instance “...in response to external conditions impairing their ability to honour the contract...”<sup>134</sup> it might have taken a different line. Instead the plaintiffs’ action was “...merely a strategic ploy designed to exploit a monopoly position which had been conferred on them by the circumstances of the contract”. The prospect of their resignation was minuscule, thus negating any argument that they had effectively threatened to resign unless they were paid extra, a threat that they may well have been legitimately entitled to make.

In *T.A. Sundell & Son Pty. Ltd. v. Emm Yannoulatos (Overseas) Pty. Ltd.*<sup>135</sup> the Supreme Court of New South Wales accepted in a similar vein that the doctrine of duress encompassed forms of economic coercion. In particular, it said, that a contract resulting from a threat “to refrain from performing merely a contractual duty” might, in the appropriate circumstances be voidable for duress. In that case X and Y had agreed a stipulated price for the sale of galvanised iron to Y. As a result of an increase in the world price of iron, however, X threatened that unless Y agreed to a corresponding increase in his liability to X the latter would refuse to deliver the iron. Y, who had entered into an agreement with a third party for the resale of the iron, saw no alternative but to accede to the threat.<sup>136</sup> In such circumstances, the Court found that Y had agreed and paid under duress and allowed him to recover the excess demanded and paid.

It was some time however before this current of reform reached the English Courts. The first suggestion of approval is generally accepted to be Kerr J.’s *obiter* comments in *Occidental Worldwide Investment Corporation v. Skibs A.S. Avanti*, more commonly known as *The Siboen and the Sibotre*.<sup>137</sup> There, a charterer had two ships on hire from their owner. The former threatened that unless the charter rates were

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<sup>134</sup> As an example of which see *Williams v. Roffey* [1991] 1 Q.B. 1

<sup>135</sup> (1956) 56 S.R. (N.S.W.) 323. See also the Australian authorities of *Nixon v. Furphy*, (1925) 25 N.S.W. 151, 37 C.L.R. 161 and *Re Hooper & Grass’ Contract* [1949] V.L.R. 269.

<sup>136</sup> The facts of this case are substantially similar to those in *The Atlantic Baron* [1979] Q.B. 705.

reduced he would go bankrupt, thus potentially jeopardising the owner's chances of payment of even a reduced amount. The charterer in fact, and to its officials' knowledge, was in no danger of bankruptcy. On this basis Kerr J. ultimately declared the contract void for lack of consideration, and would, at any rate have otherwise allowed the contract to be rescinded for fraudulent misrepresentation. By contrast, he considered that while there had been some considerable commercial pressure there had been, on the facts, no duress. He was willing however to acknowledge (*obiter*<sup>138</sup>) that where a party imposed on his counterpart such economic pressure as amounted to "...a coercion of [the] will so as to vitiate consent" a plea of economic duress might succeed. Thus, a contract concluded as a result could be rescinded.

This was confirmed in the judgment of Mocatta J. in *North Ocean Shipping Co. Ltd. v. Hyundai Construction Co. (The Atlantic Baron)*<sup>139</sup> The defendants had refused to deliver up a ship being built for the plaintiffs unless the latter agreed to a variation upwards in the contract price consequent on the devaluation of the U.S. dollar. Mocatta J. agreed that under the circumstances such pressure amounted to duress in law. He noted in particular that as the plaintiffs had subcontracted to deliver the ship to another company, and faced the prospect of litigation if it failed to do so on time, it had no alternative but to accede to the proposed variation. He nonetheless refused relief on the ground that the contract had not been avoided with due haste: there had been undue delay in proceeding with litigation. Furthermore, the plaintiffs had continued to pay subsequent instalments as they fell due at the higher rates and accepted delivery without complaint, facts that either negated an initial finding of duress or amounted to the affirmation of the contract.

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<sup>137</sup> *Occidental Worldwide Investment Corporation v. Skibs A.S. Avanti* [1976] 1 Lloyd's Law Rep. 293.

<sup>138</sup> The contract being void for lack of consideration, it was hardly necessary to consider whether it was also voidable.

<sup>139</sup> [1978] 3 All E.R. 1170.

The prospect that the new doctrine would be fully adopted in Britain moved a step closer with the Privy Council decision in *Pao On v. Lau Yiu Long*.<sup>140</sup> This was an appeal from the Hong Kong Court of Appeal involving a complex share transaction. A private company, A wished to sell, and a publicly quoted company, B wished to buy a substantial building, being the principal asset of A. The plaintiffs were the owners of the issued share capital in A and agreed to sell these shares to B, a company in which the defendants were the majority shareholders. Instead of paying in cash, however, it was agreed that the plaintiffs would take shares in B, subject to an agreement to retain 60% of these shares for 14 months. By subsidiary agreement it was resolved that the defendants would buy back these latter shares within 14 months at \$2.50 each.

Subsequently, the plaintiffs realised that in the event of an appreciation in the value of the shares, they would forego any profit therefrom. As a result, they threatened not to go ahead with the sale unless the subsidiary agreement was replaced by a guarantee of indemnity against a drop in the price of the shares under \$2.50 on their sale by the plaintiffs. Fearful that a delay in completion would precipitate a loss of public confidence in the company, the defendants reluctantly accepted. When such a shortfall materialised however the defendants refused to indemnify the plaintiffs, claiming that there had been no consideration for the modification and furthermore that they had entered the subsidiary agreement under duress.

In the judgment of the Court, Lord Scarman, alluding favourably to the aforementioned *dicta* of Kerr and Mocatta JJ., opined (albeit *obiter*) that "...there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of the will which vitiates consent".<sup>141</sup> In this latter regard he agreed with the observations of Kerr J. in *The Siboen and the Sibotre* to the effect "...that in a contractual situation commercial pressure is not enough. There must be

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<sup>140</sup> [1980] A.C. 614.

<sup>141</sup> *Ibid.* at p. 636

present some factor which could in law be regarded as coercion of the will so as to vitiate consent”.<sup>142</sup>

It was not until 1983 that the House of Lords per se finally had an opportunity to comment on the matter, in *Universe Tankships of Monrovia v. International Transport Workers' Federation (The Universe Sentinel)*.<sup>143</sup> As the existence of the new doctrine had been conceded however, it was not strictly necessary for the House to consider the matter and it was not called upon to deliberate on the validity of the new test.<sup>144</sup> All parties conceded that, unless considered legitimate, the threat did amount to duress. Nevertheless their Lordships seemed amenable to its adoption. Lord Scarman, for example, opined<sup>145</sup> that “it is, I think already established law that economic pressure can in law amount to duress”.<sup>146</sup> By 1991, Lord Goff was sufficiently confident to assert<sup>147</sup> that “it was now accepted that economic pressure may be sufficient to amount to duress..., provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the contract”.

***Factors in establishing economic duress: The Equivocal nature of Protest.*** In *Pao On*,<sup>148</sup> Lord Scarman posits four criteria as being relevant in determining whether there has been coercion as therein defined:

“It is material to inquire whether the person alleged to have been coerced: (1) did or did not protest;<sup>149</sup> (2) whether, at the time he was

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<sup>142</sup> *Ibid.* at p. 635

<sup>143</sup> [1983] A.C. 366.

<sup>144</sup> See L. Diplock, *ibid.* at p. 383.

<sup>145</sup> *Ibid.* at p. 400B

<sup>146</sup> See also *Syros Shipping Co, S.A. v. Elaghill Tdg. Co.* (‘The Proodos C’) [1981] 3 All E.R. 189 where Lloyd J. suggested that an arbitrator might wish to reconsider a plea of duress having consulted the decisions in the *Atlantic Baron*, [1979] Q.B. 705, and *Pao On*, [1980] A.C. 614, seemingly endorsing the recognition of economic duress therein. See also *B. & S. Contracts v. Green* [1984] I.C.R. 419.

<sup>147</sup> In *Dimskal Shipping Co. S.A. v. I.T.W.F. (The Evia Luck)* (No. 2) [1992] 2 A.C. 152 at 163.

<sup>148</sup> [1980] A.C. 614 at p. 635.

<sup>149</sup> See also Millett J. in *Alec Lobb (Garages) Ltd. v. Total Oil* [1983] 1 W.L.R. 87. Protest is irrelevant however, where a threat is legitimately imposed. It is not relevant, for instance, where the protest is

allegedly coerced, he did or did not have an alternative course open to him such as an adequate legal remedy; (3) whether he was independently advised; (4) and whether after entering into the contract he took steps to avoid it".<sup>150</sup>

Of these the presence of alternative remedies appears to be especially significant. As a matter of causation, the fact that feasible alternative remedies are open to the allegedly coerced party must, of necessity diminish the force of the plea of duress. The key to coercion in contract law is the absence of feasible alternatives, a point explored further below. In considering this matter, however, certain relational considerations should be heeded, not least that in an ongoing relation, legal proceedings may not, in practice, constitute a feasible alternative. At any rate, the presence of an adequate legal remedy notwithstanding, the inherent uncertainty and lengthy duration (not to mention the possibility of exorbitant costs) of legal proceedings may in fact stand as a barrier to their invocation in cases where pressure is exerted. The giving of independent advice may be similarly nugatory in relation to the presence of duress. Arguably, a person subjected to coercion is given little leverage by such advice. In fact, such advice is likely to bring even more vividly to the mind of the coercee the predicament in which he or she has been placed.

The invocation of protest as evidence of the presence (or for that matter absence) of duress is perhaps the most equivocal of these criteria. The requirement of protest possibly arises from the law's concern that it will not endeavour to seek out the unspoken thoughts of a litigant. The Court proceeds not by reference to 'secret mental reservations',<sup>151</sup> unknown and unknowable, but to the conduct of a person and the

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made in the face of a court order for payment. See *Bank of Montréal v. Canada* [1993] F.C. 279 noted at [1996] *Restit. L.R.* 149.

<sup>150</sup> Delay in taking such steps resulted in the denial of relief in the *Atlantic Baron* [1979] Q.B. 705. See also *Alec Lobb (Garages) Ltd. v. Total Oil* [1983] 1 W.L.R. 87 at p. 94 where Millett J. noted that even if he had been satisfied that there was duress, the lack of prompt action on the part of the plaintiff once the pressure was removed would have resulted in a similar affirmation of the contract.

<sup>151</sup> From *Deacon v. Transport Regulation Board* [1958] V.R. 458 at p. 460.

state of mind that the latter would suggest to an ordinary reasonable person.<sup>152</sup> Here again a relational perspective yields rather different results. The presence of protest in *The Atlantic Baron*<sup>153</sup> contributed, it seems to the initial conclusion that pressure had in fact been exerted in that case.<sup>154</sup> The plaintiffs, who, following the demands of the defendant ship-builders, had made supplementary payments to the latter, did so expressly “without prejudice to their rights”. By contrast, the plaintiffs had failed to complain on or prior to the payment of the final instalments and the delivery of the ship. “No protest of any kind was made” for some 2 years after the new arrangement, the alleged product of coercion, had been entered into.<sup>155</sup> Though “free from the duress” the plaintiffs “took no action by way of protest or otherwise” until the formal claim for the return of the excess was made.<sup>156</sup> This, according to the Court, was evidence of acquiescence in the result of the renegotiated contract.

In *Pao On*, the Privy Council also noted the relevance of lack of protest,<sup>157</sup> a factor that must at least have bolstered its conclusion that the first defendant in that case, though subject to normal commercial pressure, had not acted under duress. This lack of protest is less easily pressed into aid when more relational concerns are addressed. In *Pao On* itself the Council as good as admitted the reasons behind the first defendant’s lack of protest. Concerned to prevent a loss of confidence in his company’s shares, the latter agreed to the plaintiffs’ demands. A sustained protest on his part, the Court necessarily implies, would have jeopardised the Company’s performance on the stock market, the very thing that the agreement in that case was designed to avoid. It might have been argued that the plaintiff in the *Atlantic Baron*, likewise, may have had little room for manoeuvre although Mocatta J. quite clearly

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<sup>152</sup> On the principle of manifest intention (or objectivity) in contract law see Holmes, “The Theory of Legal Interpretation”, 12 *Harv. L.Rev.* 417 (1889), and Dalton, “An Essay in the Deconstruction of Contract Doctrine”, (1985) 94 *Yale L. Jo.* 997 at p. 1042ff.

<sup>153</sup> [1979] Q.B. 705.

<sup>154</sup> Though, strangely, Mocatta J. concluded that there had been no threat of non-delivery, a conclusion that one would have thought logically precluded the possibility of duress.

<sup>155</sup> [1979] Q.B. 705 at p. 720.

<sup>156</sup> *Ibid.*

<sup>157</sup> [1980] A.C. 614 at p. 635: “It is material to inquire whether the person alleged to have been coerced did or did not protest”.

concludes that there was no evidence that protest on the part of the plaintiff would have led to a failure to deliver.<sup>158</sup> Having altered the agreement the plaintiff was now 'free from duress'. How valid this conclusion was, in the face of the circumstances in that case, is questionable. Would the defendants really have delivered up the ship, the major source of their bargaining power, had the plaintiffs continuously noted their objection to the terms of the new arrangement? It is arguable that already unsettled by the defendant's demands, the plaintiff's primary concern was to defer further losses by securing swift possession of its ship. The plaintiff, one may speculate, would probably have been unwilling to rise its fellow contractors still further by intimations of legal challenge or suggestions that the disputed surplus would not be paid. Having threatened to breach its contract once, could the plaintiff really expect fair play at the point of delivery?

A lack of protest then, far from negating the presence of undue pressure, may in some circumstances provide firm evidence of its presence. This is especially relevant in cases where the pressure arises from an ongoing relation of some importance to the victim of the pressure. *Sibeon and the Sibotre*, the *Atlantic Baron* and *Pao On*, share one feature in common, that being the likelihood, even from that start in the last case, that the parties would never do business with each other again. The closer and more significant the relationship between the parties, the less likely it is that coercion will lead to protest. Take for instance the defendant in *CIBC Mortgages v. Pitt*<sup>159</sup> who alleged that in agreeing to stand surety for her husband she had been unduly influenced by him. Why then did she not protest? Her response (noted by Fehlbeg<sup>160</sup>) is highly instructive. At the heart of her reasoning is a concern to maintain the stability of her relationship with her husband. In the words of the judge at first

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<sup>158</sup> Which begs the question, does it not, why the court ruled that there had been duress in the first place.

<sup>159</sup> [1994] A.C. 200

<sup>160</sup> Fehlbeg, "The Husband, the Bank, the Wife, her Signature", (1994) 57 *M.L.R.* 467. See also Fehlbeg, "The Husband, the Bank, the Wife, her Signature: the Sequel", (1996) 59 *M.L.R.* 675 and Fehlbeg, "Money and Marriage: Sexually Transmitted Debt in England", (1997) 11 *I.J.L., P. & F.* 320.



instance in that case, “..if she had refused to co-operate her life would have become a nightmare...As she said, “I’d rather have a peaceful life than lots of money”.<sup>161</sup>

In many cases then, protest is only possible (and herein lies the irony) when the alleged victim has freed himself from the pressure alleged and the context that facilitated its imposition. Mrs. Pitt for instance might have complained to her heart’s delight only that her marriage is likely not to have survived the strain. Lack of protest then may be highly equivocal as an evidential factor in this field. It may certainly and quite feasibly indicate contentment with arrangements made. It is equally consistent however, with the intimation that the silent party not only entered into the impugned arrangements under compulsion but remains in that state of compulsion arising from the circumstances in which he finds himself. The irony then is that to plead duress or undue influence almost necessarily requires that the party have independently sundered the relationship that fostered the compulsion or abuse. One might make a useful cross-reference to the celebrated English case of *Allcard v. Skinner*<sup>162</sup> involving a nun who alleged that she had been unduly influenced to part with property on entering a convent. The proceedings commenced only when she left the convent. One might speculate that had it been otherwise, Ms. Allcard’s continued membership of the order would have been short-lived.

### **The Fallacy of the “Overborne Will”**

At this juncture it is necessary to deal at greater length with another aspect of Lord Scarman’s reasoning as it also exhibits an erroneous tendency that has long dogged a clear appreciation of the nature of duress. In *Pao On v. Lau Yiu Long*, he speaks of duress as “...a coercion of the will which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act”.<sup>163</sup> *In The Siboen*

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<sup>161</sup> Fehlberg, (1994) 57 *M.L.R.* 467 at p. 473

<sup>162</sup> (1887) 36 Ch. D. 145.

<sup>163</sup> [1980] A.C. 614 at p. 636.

and *The Sibotre*, moreover, Kerr J.<sup>164</sup> refers to “the consent of the...party [being] overborne by compulsion so as to deprive him of any *animus contrahendi* [intention to contract]”. Shades of this approach are widespread and to be found in several important cases considering alleged instances of duress.<sup>165</sup> Each seems to suggest, in some cases more explicitly than in others, that to found a plea of duress the will must have been overborne or usurped to such an extent that the party was (per *Astley v. Reynolds*) prevented from “exercising his will”, that is, of forming the necessary intention to contract. The implication (indeed Kerr J. in the quote above states this explicitly) is that the *animus contrahendi* is completely absent: the choice is effectively taken out of the hands of the party subjected to duress.

The possible attraction of this approach<sup>166</sup> – and no doubt, a factor explaining its resilience – is the pretence of neutrality that it affords. “The lawyer,” according to Bates,<sup>167</sup> “traditionally likes to think of his discipline as precise and value-free and indeed having a scientific inclination”.<sup>168</sup> Reference to the ‘will’ of the individual – a matter allowing the Courts to isolate their inquiries by reference to solely internal, personal criteria – offer the Court the opportunity to proceed by reference to

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<sup>164</sup> [1976] 1 Lloyd’s Law Rep. 293 at p. 336, col. 1.

<sup>165</sup> See for instance the two cases discussed by Phang, “Whither Economic Duress? Two recent cases” 53 M.L.R. 107, *Vantage Navigation v. Suhail and Saud Bahwan Building Material L.L.C. (The Alev)* [1989] 1 Lloyd’s Rep. 138 and *Atlas Express Ltd. v. Kafco* [1989] 1 All E.R. 641. Both cases seem, indeed, to make simultaneous use of both the overborne will test and the illegitimate pressure test that is widely considered to have superseded it. Even in the *Universe Sentinel* [1983] A.C. 366, which elsewhere rejects the overborne will theory, Lord Diplock refers (at p. 383E-G) to financial consequences “so catastrophic as to amount to a coercion of the shipowners’ will which vitiated their consent”. See also Lord Scarman’s reference at 400C to “pressure amounting to compulsion of the will of the victim” and his reference at one point to “the absence of choice” in a decision made under duress.

<sup>166</sup> For a defence of which see Tiplady (1983) 99 *L.Q.R.* 797 responding to Atiyah, (1982) 98 *L.Q. R.* 197 who in turn disputes Tiplady’s claims in (1983) 99 *L.Q.R.* 353. See also McCormick, *Legal Right and Social Democracy* (Oxford: Oxford University Press, 1982) at Chapter 12.

<sup>167</sup> Bates, “The Family and Society: Reality and Myth”, (1980) 15 *Ir. Jur. (n.s.)* 195 at p. 203. He cites Pollock’s appropriately named “The Science of Case Law”, in *Jurisprudence and Legal Essays* (Goodhart, 1963) at p. 169.

<sup>168</sup> Despite the scientific aspirations, the applicable principles flowing from this approach were, at best, vague. According to Carter and Harland, the use of “expressions such as ‘overborne will’, ‘voluntarily’, ‘vitiating’, ‘consent’, ‘compulsion’, ‘coercion’ and ‘intention’ are notoriously difficult and can reduce the debate to one of semantics”. Carter and Harland, *Contract Law in Australia*, 3<sup>rd</sup> ed. (Butterworth’s, Australia, 1996), at para. 1304, p. 461.

ostensibly scientific and hence neutral, value-free criteria. As Atiyah notes<sup>169</sup> “Classical theory tried to obscure the value judgments involved in using a law of duress by treating duress as a question of fact, dependent on the proof that the promisor’s will was ‘overborne’ by the promisee”. The Court may point to the absence of will as a scientific fact hence masking the reality (as will be seen below) that virtually every case involving duress must necessarily result in the invocation of value-judgments (whether by reference to legal principle or otherwise) as to the propriety or otherwise of the pressure applied in each case. The theory thus shields duress from the realm of politics and values, psychologising it to a point where questions about law and legitimacy are effectively sidelined.

This is, according to Holmes J. in *Eliza Lines*<sup>170</sup> “one of the oldest fallacies of the law”. As Carter and Harland<sup>171</sup> note “the paradigm case of duress...seems to have been allowed, without analysis, to denote a requirement of total control over the mind affected”.<sup>172</sup> In fact in even the starkest case of duress one will find an intention to contract manifesting itself in apparent consent to contract. Far from an overborne will, there is a most deliberate *exercise* of the will.<sup>173</sup> The fact that the human individual is set apart from all other creatures and things by a capacity to make reasoned and deliberate promises or choices does not necessarily imply that the human being is always a free agent. A decision is no less deliberate and no less the product of a choice because it is made under force or necessity. In fact it may be said that such decisions involve a particularly deliberate choice; the gravity of such a

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<sup>169</sup> Atiyah “The Liberal Theory of Contract”, in Atiyah, *Essays on Contract*, (Oxford: Clarendon Paperbacks, 1986) at p. 130.

<sup>170</sup> 199 U.S. 119, pp. 130-131 (1905).

<sup>171</sup> Carter and Harland, *Contract Law in Australia*, 3<sup>rd</sup> ed. (Butterworth’s, Australia, 1996), at para. 1304, p. 461.

<sup>172</sup> See also Dawson “Economic Duress: An essay in perspective”, (1947) 45 *Mich. L.R.* 253 at p. 267, Beatson, (1976) 92 *L.Q.R.* 496, Halson, “Opportunism, Economic Duress and Contractual Modifications”, (1991) 107 *L.Q.R.* 649 and Atiyah, “Economic Duress and the Overborne Will”, (1982) 98 *L.Q.R.* 197.

<sup>173</sup> Thus, as Lake J. (of the Supreme Court of North Carolina) observes in *Link v. Link*, 179 S.E. 2d. 697 (N.C. 1971) at p. 703, duress “may exist even though the victim is fully aware of all facts material to his or her decision”.

situation is likely to propel the actor to assess more assiduously than is normally the case, the various options available.

The decision is not involuntary in the sense that unintentionally colliding with another person as a result of being pushed by a third party can be said to be involuntary. Essentially in such latter circumstances one can plead “it was not of my doing - I had no hand or part in the occurrence save that my body was used to injure another”. There was no conscious decision to bring such an event about. As Lord Simon pointed out in *Lynch v. D.P.P of Northern Ireland*<sup>174</sup> duress does not deprive an individual of all choice but leaves him with a choice between evils. The will is not destroyed but rather ‘deflected’.<sup>175</sup> Chitty<sup>176</sup> gives the example of a gun-wielding attacker who “helps himself to a victim’s wallet” in which there is a total absence of intention to act - the victim can legitimately say “it was not my will or deed”. He contrasts this with the situation where an attacker threatens to kill or maim the victim if the latter does not hand over the wallet - a choice is given, the act is voluntary and results from an exercise of the will, in the sense of being his conscious act, though it is arguably not a free act. Lord Denning too, (in *Lloyd’s Bank v. Bundy*)<sup>177</sup> advises against “...any reference to the will of the one being ‘dominated’ or ‘overcome’ by the other. One who is in extreme need may knowingly consent to a most improvident bargain, solely to relieve the straits in which he finds himself”. There is a choice then between various options but the consequences of opting for several of these may be so stark as effectively to render only one feasible.

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<sup>174</sup> [1975] A.C. 653. The reasoning in this case has been accepted and the ‘overborne will’ theory thus rejected in New South Wales in respect of commercial contracts in *Crescendo Management Pty. v. Westpac Banking Corp.* (1988) 19 N.S.W.L.R. 40.

<sup>175</sup> Note the cautionary comments regarding the different nature and purpose, (not to mention consequences) of duress in the criminal law and contract law, made above in Chapter 1, at p. 27. It is asserted nonetheless, that notwithstanding the differences noted above, that the reasoning in *Lynch* is equally applicable in the contractual context.

<sup>176</sup> *Chitty on Contracts; General Principles*. 28<sup>th</sup> ed., (London: Sweet & Maxwell, 1999), §7-005 at p. 414. Chitty is rather instructive regarding the effects of this debate. A conclusion that the ‘overborne will’ test is appropriate is fundamentally inconsistent, it is noted (at §7-004), with the understanding that duress in contract law renders a contract voidable rather than void.

<sup>177</sup> [1975] Q.B. 326 at p. 339.

Feinberg<sup>178</sup> underlines this distinction by differentiating between what he calls ‘compulsion’ and what he terms, by contrast, ‘coercion’. Compulsion involves a lack of election on the part of the party compelled. Where there is compulsion proper a person has no options whatsoever. Feinberg gives the example of a person “sent reeling by a hurricane wind or an explosion”.<sup>179</sup> This occurs by external propulsion “without the co-operation, grudging or approving, of one’s own will”.<sup>180</sup> By contrast, coercion proper still presupposes the exercise of the coerced party’s will, the choice between alternatives remains although some of the options have been made more onerous by the coercive action. It, then, “does not destroy the alternative so much as destroy its appeal by increasing its costs”.<sup>181</sup>

The overborne will was equally a feature of U.S. jurisprudence but one that was put to rest at a considerably earlier juncture than on the other side of the Atlantic. In *U.S. v. Bethlehem Steel Corp*<sup>182</sup> the Court suggested that short of evidence of ‘a state of overcome will’ there could be no duress, this being a “major premise” of this ground. As early as 1887, however, Holmes J., in *Fairbanks v. Snow*<sup>183</sup> had underlined the error of this approach, noting in particular that it threatened to undermine the distinction between two rather distinct situations. The first is where the party is faced with no decision at all - the example given is where a person’s signature is applied to a contract by forcibly placing a pen in a person’s hand, physically taking the hand and moving it in a manner that would produce a signature. The second situation involves the making of a conscious choice to do what is demanded or face the consequences, where for instance a person is told that unless he sign a contract, he will be shot. The tendency, Holmes noted, was formerly to place all cases of duress in the latter category. In fact as was later pointed out in the seminal case of *Union Pacific Ry. Co.*

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<sup>178</sup> Feinberg, *The Moral Limits of the Criminal Law: Vol. III: Harm to Self*, (Oxford: Oxford University Press, 1986), chapter 23, “Failures of Consent”, especially at pp. 190-193.

<sup>179</sup> *Ibid.* at p. 190

<sup>180</sup> *Ibid.*

<sup>181</sup> *Ibid.*

<sup>182</sup> 315 U.S. 289 (1942).

<sup>183</sup> 145 Mass. 153 (1887).

*v. Public Services Commission*<sup>184</sup> that far from excluding the presence of duress, the fact that a choice was made, in fact “is the characteristic of duress properly so called”. The party under duress typically tends not to abdicate all reason but rather “to choose the lesser of two evils”.<sup>185</sup>

The distinction made is underlined by the very different consequences of each of the two situations outlined above. In the first case, where a person can legitimately say that he or she had not made a willed decision, legally the contract to which his or her signature is attached is void. It was not the act of the party whose signature is appended to the paper and thus that person cannot be held liable as against any person, however *bona fide*, for its contents. In the second case the contract is only voidable. It was indeed an exercise of the will of the party that caused his signature to be appended. Because this was preceded by pressure of an illegitimate nature the contract would be voidable but not void as against the perpetrator of the duress (or any person on whose behalf<sup>186</sup> or with whose knowledge<sup>187</sup> the duress is exercised). Thus, if not yet avoided, a *bona fide* third party without knowledge of the duress could (subject to the rule of privity of contract) successfully invoke a term of the contract.

The result of the ‘overborne will’ fallacy can most clearly be seen in the decision of the Privy Council in *Pao On*.<sup>188</sup> It was noted that far from having his will overborne, the allegedly coerced party, a controlling shareholder in the company whose shares were at stake, had exercised a deliberate choice in agreeing to the modifications. He had quite consciously determined, with full knowledge of his rights, that to insist

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<sup>184</sup> 248 U.S.67 (1918) at p. 70

<sup>185</sup> See also the comments of Posner J. in *Selmer Co. v. Blakeslee-Midwest Co.* (U.S. Court of Appeals, 7<sup>th</sup> Circuit, 1983) 704 F. 2d. 924. Carter and Harland nicely summarise the position as follows: “It should be readily accepted: (1) that it is inherent in the nature of a threat that alternative courses of action may be open to the victim, even if one may be at the cost of the victim’s life; (2) that of the alternatives, the victim chooses that of entering into the contract”. *Contract Law in Australia*, 3<sup>rd</sup> ed. (Butterworth’s, Australia, 1996).

<sup>186</sup> *Universe Tankships of Monrovia v. I.T.W.F.* [1983] A.C. 366

<sup>187</sup> *Kesarmal s/o Letchman Das v. Valliapa Chettiar* [1954] 1 W.L.R. 380 (P.C.), a case before the Privy Council on appeal from the Supreme Court of the Federation of Malaya.

<sup>188</sup> [1980] A.C. 614.

upon such rights as he had would be to the detriment of the company's long term interests as there was a strong possibility that if the contract was not fulfilled, or if legal proceedings were to ensue, the market would lose confidence in the company. His sole alternative course - legal proceedings - was in effect illusory. Clearly he had a choice. He exercised his will. He gave considerable attention to the problem. Yet in the use of what was effectively an illegitimate threat - i.e. to break a valid contract - the plaintiffs had left only one feasible option open to the defendant.

A decision made under duress, though most likely to have been conscious and deliberate, may yet in no real sense be regarded as free. Certainly there was an exercise of the will, a conscious choice between several different options. But of such options only one may be in any way feasible - the necessary consequences of the others may be such as to render any sense of choice almost illusory. A person may thus make a promise with the result of 'binding oneself' to do x. Though that promise may well have been the product of deliberate choice, factors external to the actor may have so restrained the *feasible options* open to him that it can be said that only one real option was open. The decision, thus, though the immediate result of the actor's deliberate choice, was in substance ultimately shaped by factors external to him and therefore not, in one sense at least, a 'free' decision.<sup>189</sup>

It is the lack of a *feasible* alternative, then, that is of the essence of duress. In *Chandler v. Sanger*,<sup>190</sup> for instance, the plaintiff had agreed to pay the defendant a sum of money for the return of the former's fully stocked ice truck. The defendant had obtained an order for attachment in respect of the truck. Legal proceedings would have been technically possible but were unlikely to proceed at sufficient speed to prevent the destruction of the ice. Facing this otherwise inevitable prospect, the plaintiff took the only feasible step sufficient to save his stock-in-trade, and

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<sup>189</sup> See also Atiyah, "Economic Duress and the Overborne Will", (1982) 98 *L.Q.R.* 197.

<sup>190</sup> 114 Mass. 364 (1874).

ultimately, his business.<sup>191</sup> Certain relational considerations may be relevant in determining the extent to which the alternative is feasible. Where there is significant bi-lateral integration the likelihood is that the idiosyncratic and highly context specific nature of the business arrangements between the parties may be such that each or either party has an effective monopoly over the other.

With certain reservations<sup>192</sup> then it might be said that the ‘no feasible alternative’ perspective has become a relatively settled part of English law. In the *Evia Luck* (No. 2) for instance no less an authority than Lord Goff seems succinctly to have dismissed the overborne will theory, in common with certain dicta of Lord Scarman in *The Universe Sentinel*. It seems (although one may only speculate) also that this new perspective would probably be accepted in Ireland as well. In *Kiely v. Leo Laboratories*<sup>193</sup> the Employment Appeals Tribunal referred with apparent approval to the decision in *Lynch*, noting the argument that “duress requires not the overbearing of the will but its deflection”.<sup>194</sup> Thus, it noted, “the nature of the pressure exerted is a central issue”.<sup>195</sup> Considering the forum, the judicial authority of this pronouncement is, at best, weak but it is undoubtedly indicative of the approach that the Irish courts might take in this arena.

### The ‘Illegitimate Pressure’ Test

It is submitted, then, that the pressure imposed must be such that it is a significant cause of the party’s entering into the contract in the sense that while not destroying the party’s will in the matter, the party in making his choice was left with no feasible

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<sup>191</sup> See also *D. & C. Builders v. Rees*, [1966] 2 Q.B. 617 (Plaintiff’s business would have gone bankrupt but for its acceptance of a sum less than that owed), *The Siboen and the Sibotre*, [1976] 1 Lloyd’s Rep. 293, (where if the ships were not returned on time the threatened party faced being sued by other parties wishing to hire).

<sup>192</sup> See Phang, *op. cit.* on the partial resurrection (or swansong?) of the test in *Vantage Navigation v. Sinhail and Saud Bahwa Building Material LLC (The Alev)* and *Atlas Express Ltd. v. Kafco* [1989] 1 All E.R. 641. See also *Hennessy v. Craigmyle & Co. Ltd.* [1986] I.C.R. 461 where the language of the suppressed will also thrives unabated.

<sup>193</sup> [1997] Employment Law Report 172.

<sup>194</sup> *Ibid.* at p. 175.

<sup>195</sup> *Ibid.*



option but to contract. In *Universe Tankships of Monrovia v. International Transport Workers' Federation* (hereinafter the *Universe Sentinel*) Lord Scarman underlines the real dynamic of duress:

“The classic case of duress is...not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no other practical choice open to him”.<sup>196</sup>

Of course, in reality, there are many forms of pressure and coercion that in practice diminish the range of choices available to a potential contractor. As Lord Scarman noted in the *Universe Sentinel* “in life, including the life of commerce and finance, many acts are done ‘under pressure, sometimes overwhelming pressure’ but they are not necessarily done under duress”.<sup>197</sup>

Many commercial decisions are undoubtedly made reluctantly and subject to enormous financial pressures and strains. Contractors may be subject to competing interests and concerns. The suggestion that one may look, then, solely to absence of consent<sup>198</sup> is not especially helpful in this context. In order to decide which external compelling factors amount to duress and which do not it is necessary to establish some form of cohesive differentiating principle. In determining what amounts to duress the Anglo-American and Commonwealth courts alike universally have resorted to the principle that the pressure imposed must be such that it is regarded as ‘illegitimate’.

Posner J. in *Selmer Co. v. Blakelees-Midwest Co.*<sup>199</sup> describes this approach with disarming frankness:

“The fundamental issue in a duress case is not the victim’s state of mind but whether the statement that induced the promise is the kind of offer to deal that we want to discourage, and hence that we call a

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<sup>196</sup> [1983] A.C. 366 at p. 400.

<sup>197</sup> *Ibid.* at p. 400.

<sup>198</sup> Cf. Birks and Chin, *op. cit.*

<sup>199</sup> 704 F. 2d. 924 (U.S. Court of Appeals, Seventh Circuit, 1983).

‘threat’.”

As noted above, the major attraction of the overborne will test was that it facilitated the pretence of neutrality. The key to establishing duress was purely psychological in nature. If it could be established that the will of one party had been overwhelmed by that of another, there would be duress. The legitimate pressure test, as Posner J. suggests, is unequivocally less conducive to the judicial pretence of formalism. As Atiyah comments:

“...once the language of ‘legitimacy’ comes to be used in connection with threats, it is hard to continue to proclaim that the law is being ‘neutral’. To select between legitimate and illegitimate threats means that the law is being used to favour those able to make certain kinds of threats, and to discriminate against those not permitted to make other kinds of threats”.<sup>200</sup>

Even in cases where the overborne will test seems to have predominated, legitimacy has proved subtly persuasive. Indeed in *Pao On* itself the perceived legitimacy of the plaintiffs’ and defendants’ respective conduct seemed to have been a factor of discreet influence in leading the Privy Council’s to their conclusion. Their Lordships regarded the initial subsidiary agreement as being especially advantageous to the defendants who had managed to persuade the plaintiffs to hold onto the shares, effectively deferring payment by 14 months.<sup>201</sup> The only possible additional benefit to them would ensue if there was a rise in share prices; but, as noted above, such a prospect was foreclosed by the terms of the subsidiary agreement. “It is not surprising,” in Lord Scarman’s words, “that the defendant thought he had got the better of the bargain”.<sup>202</sup> Nor was the second plaintiff’s indignance on discovery of this fact considered by their Lordships to have been unreasonable.<sup>203</sup> Lord Scarman noted the contention of the defendants that both subsidiary agreements were unenforceable, the second for duress, the first because it had been superseded by the

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<sup>200</sup> Atiyah “The Liberal Theory of Contract”, in Atiyah, *Essays on Contract*, (Oxford: Clarendon Paperbacks, 1986) at pp. 130-131.

<sup>201</sup> [1980] A.C. 614 at p. 625A-C.

<sup>202</sup> *Ibid.* at p. 625B.

second and could not be revived. The net result in his opinion would be that the plaintiffs, having at the defendants' request and for the latter's benefit agreed to hold the shares, would have been left "without any safeguards against a fall in the market, the damaging effects of which they were powerless to forestall or diminish."<sup>204</sup>

In *Universe Tankships of Monrovia v. International Transport Workers' Federation*<sup>205</sup> the House of Lords endorsed the test of illegitimate pressure and gave some useful indications as to what considerations might be relevant in determining legitimacy. The agents of the defendant prevented a ship docked in Milford Haven from leaving port until such time as the plaintiff shipowner agreed to demands relating to the improvement of wages and conditions for the ship's workers.<sup>206</sup> For fear of the disastrous financial consequences that might ensue should the ship be so prevented the owners reluctantly capitulated to the union's demands. In his judgment Lord Diplock commented that the rationale of the new ground of economic duress was "...not that the party seeking to avoid the contract...did not know the nature or the precise terms of the contract at the time when he entered it or did not understand the purpose for which the payment was demanded."<sup>207</sup> It was instead that "...his apparent consent was induced by pressure exercised upon him that the law does not regard as legitimate."<sup>208</sup> In this he mirrors the comments of Lord Wilberforce in *Barton v. Armstrong*<sup>209</sup> that "...the pressure must be one of a kind which the law does not regard as legitimate". Lord Scarman, unhelpfully reviving the spectre of the overborne will, summarises the effect of the authorities as conferring a two-tier test necessitating both: "...(1) pressure amounting to compulsion of the will of the victim and (2) the illegitimacy of the pressure exerted".

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<sup>203</sup> *Ibid.* at p. 625C.

<sup>204</sup> *Ibid.* at p. 628.

<sup>205</sup> [1983] A.C. 366.

<sup>206</sup> A practice known as 'blacking'. For other juristic examples of such conduct see *Star Sea Transport Corp. v. Slater ('The Camilla M')* [1979] 1 Lloyd's Rep.26, *N.W.L. v. Woods* [1979] 1 W.L.R. 1294 and *'The Evia Luck' (No. 2)* [1991] 3 W.L.R. 875.

<sup>207</sup> [1983] A.C. 366 at p. 384B.

<sup>208</sup> *Ibid.* at p. 384C.

<sup>209</sup> [1976] A.C. 104 at p. 121D.

It is still necessary, nevertheless, to establish that the pressure imposed is causative in the sense of being a 'significant cause' leading to the conduct in question. The effect of that cause is no longer that there is a 'coercion of the will' but that the options that would otherwise be open to the actor are effectively rendered infeasible by the pressure such that the actor is propelled to act in the manner demanded.

The non-availability of an alternative course of action, in particular, is of the essence of causation. To the extent that a party has an adequate, inexpensive alternative avenue of recourse that can be swiftly sourced, his action in accepting a proposal backed by a threat cannot be explained by reference to the pressure imposed. Where however there was no adequate legal remedy or other feasible alternative but to submit to the pressure there is obviously causation. This is the case for example where non-completion would render the party coerced liable to a third party. In the *Atlantic Baron* the plaintiff had arranged that the ship in question would be hired on time-charter to a third party once built. If there was a delay in delivery due to the inception of long drawn out legal proceedings the plaintiff risked defaulting on his subsequent obligation. The prospect of litigation may be equally unattractive where the chances of success are slim or cannot easily be gauged. For instance in the *Universe Sentinel* the plaintiffs had been advised on the basis of the decision in *N.W.L. v. Woods*<sup>210</sup> that the likelihood of obtaining an interlocutory injunction to restrain the 'blacking' of their ship was minimal.

### **The Boundaries of Illegitimacy**

It is arguable that in opening up the boundaries of duress to economic species of pressure and coercion, a great deal of uncertainty has been engendered. At least one judge has suggested that in determining what constitutes illegitimate pressure, "[e]conomic duress must be distinguished from commercial pressure which on any view is not sufficient to vitiate consent."<sup>211</sup> Lord Scarman taps a similar vein when he

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<sup>210</sup> [1979] 1 W.L.R. 1294.

<sup>211</sup> Tucker J. in *Atlas Express Ltd. v. Kafco*. [1989] 1 All E.R. 641.

notes, in *The Universe Sentinel*, how “in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, but they are not necessarily done under duress.”<sup>212</sup> The immediate problem with this formulation is that makes no attempt to distinguish the two. The invocation of ‘commercial pressure’ is especially vague. It is not immediately clear, for a start, whether the term is being used in its prescriptive or descriptive sense, that is whether one must refer to what the business person in a particular field is generally expected to do (a moral norm) or what a statistically average business person in fact does (the statistical norm). Either way the suggestion that the standards of the business community or a particular sector thereof should automatically be accepted as ‘legitimate’ is questionable. It arguably does not accord with legal policy in this jurisdiction as outlined in *Roche v. Peilow*<sup>213</sup>. In that case the Supreme Court had to consider whether a standard of behaviour or best-practice widely accepted by a profession or in a trade could amount to a breach of the duty of care. It roundly rejected the proposition<sup>214</sup> that even universal acceptance of a practice renders it acceptable in law, ruling that the fact of majority support alone does not obviate the possibility that the practice may be deemed objectively negligent. There is, in other words, no ‘safety in numbers’.<sup>215</sup>

Deciding what is normal commercial pressure, and what exceeds that norm is no mean feat. If one can look to the existing law, i.e. where ‘illegitimate’ equates with ‘illegal and tortious’ alone, one may have an objective and readily identifiable test of legitimacy. It is undeniable that moving beyond these criteria inevitably involves making moral judgments, masquerading as public policy considerations, concerning certain types of pressure. Professor Birks, in his commentary on the law of

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<sup>212</sup> [1983] A.C. 366 at pp. 400-401 citing the decision of Lords Wilberforce and Simon in *Barton v. Armstrong* [1976] A.C. 104 at p. 121D. See also Lord Diplock at p. 384.

<sup>213</sup> [1985] I.R. 232. See also per Walsh J. in *O’Donovan v. Cork. Co. Co.* [1967] I.R. 173 at p. 193: “...neglect of duty does not cease by repetition to be neglect of duty”.

<sup>214</sup> Accepted by Finlay P. in the High Court [1985] I.R. 232 at pp. 233-246. He ruled that as the defendants in the case had followed the then accepted practice for conveyancing of land, there could be no finding of negligence.

<sup>215</sup> The test the court laid down was whether the practice, however universal, was obviously negligent.

restitution,<sup>216</sup> considers that if lawful pressures can also count as duress “...the only viable basis for discriminating between acceptable and unacceptable pressures is not positive law but social morality”. For Bradney then:

“[t]he final focus is not so much on the state of mind of the parties, but on the social or moral judgments to be made about the consequences of actions which have been done in that state of mind...The problem for the court is not only what new stance should be taken on duress *but also by what right does the court select that stance*”.<sup>217</sup>

With this in mind, it is necessary outline and examine the various circumstances in which it has been suggested that the threat or demand made may or may not be illegitimate. Does the concept of illegitimacy traverse the boundaries of illegality to countenance lawful pressures? If so on what basis and in what circumstances? Or is the law still largely self-referential in this regard? In other words must a form of pressure to be illegitimate also constitute a legal wrong or breach of duty? In seeking to respond to these questions it is worth exploring a series of different scenarios in turn, starting with those that definitively involve standards of legal impropriety and proceedings to more equivocal cases, where the presence of unlawfulness is absent.

**(a) Action amounting to a Crime or Tort.** There are, as noted above, certain types of threat that may in themselves amount to a crime or tort. For instance, a threat seriously to injure another may constitute an assault for the purposes of both the criminal and civil law. It is well grounded, as a corollary, that a threat to do that which is a crime or tort will constitute illegitimate pressure at law. *A fortiori*, where actual violence or restraint is used to procure agreement, relief will lie, although in practice this rarely arises. As Friel notes, “actual force is normally dealt with by the criminal law and a convicted person is unlikely to sue on foot of such a contract.”<sup>218</sup>

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<sup>216</sup> Birks, *An Introduction to the Law of Restitution*, 2<sup>nd</sup> ed., (Oxford: Oxford University Press, 1989) at p. 77.

<sup>217</sup> Bradney, “Duress, Family Law and the Coherent Legal System”, [1994] 57 *M.L.R.* 963.at p. 970.

<sup>218</sup> Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 2000), Chapter 19, “Duress and Undue Influence” at p. 260.

Moreover, in addition to grounding a right to avoid a contract or recover money wrongly paid, duress may also be actionable as a tort, more commonly known as the tort of intimidation.<sup>219</sup> In *Rookes v. Barnard*<sup>220</sup> it was held that in principle a party who suffers loss consequent upon compulsion by a threatened breach of contract may sue for damages for intimidation. However a threatened breach of contract does not automatically give rise to relief in tort. As Lord Diplock remarked in *The Universe Sentinel*<sup>221</sup> "...[t]he use of economic duress to induce another person to part with property or money is not a tort *per se*; the form duress takes may or may not, be tortious". This is important in relation to the remedy sought: the "...remedy for economic duress..." he continues, "...is not damages but restitution of property or money exacted under such duress and avoidance of the contract induced by it".

Where the threat is to commit an act which is unlawful in the sense of being criminal or tortious it clearly amounts to illegitimate pressure. However even where the proposed action is not in itself unlawful, the threat may still come within the ambit of the criminal law. "Blackmail",<sup>222</sup> Lord Scarman points out, "is often a demand supported by a threat to do what is lawful e.g. to report criminal conduct to the police". Section 17 of the Criminal Justice (Public Order) Act, 1994<sup>223</sup> renders it an offence for a person to make an "unwarranted demand with menaces" where such is done with a view "to gain for [that person] or for another or with intent to cause loss to another".<sup>224</sup> The onus of proving that the demand was not unwarranted is placed on the defendant.<sup>225</sup> A demand shall be unwarranted unless the person making it does so

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<sup>219</sup> See Lord Scarman in *The Universe Sentinel* [1983] A.C. 366 at p. 400B: "duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss".

<sup>220</sup> [1964] A.C. 1129.

<sup>221</sup> [1983] A.C. 366 at p. 385B.

<sup>222</sup> 'Blackmail' as such is not, and never has been, an offence; see Quinn, *The Criminal Law in Ireland*, 2<sup>nd</sup> ed., (Irish Law Publishing, 1993) who remarks at p. 135 that the term is used as a colloquial reference to various forms of demanding money with menaces.

<sup>223</sup> Replacing sections 29-31 of the Larceny Act 1916.

<sup>224</sup> Section 17(1).

<sup>225</sup> Section 17(2).

in the belief both (i) that he has reasonable grounds for making the demand<sup>226</sup> and (ii) that the uses of menaces is a proper means of enforcing the demand.<sup>227</sup> The nature of the conduct demanded is deemed 'immaterial' to the enquiry as is the question whether or not the "menaces relate to action to be taken by the person making the demand".<sup>228</sup>

The term "menace" is, Lord Wright remarks in *Thorne v. Motor Trade Association*,<sup>229</sup> "...to be liberally construed", It is not, for instance, limited to threats of violence but may include "...threats of any action detrimental to or unpleasant to the person addressed". Thus both the threat and the demand, viewed separately, may be unimpeachable, but nevertheless coupled together may amount to a criminal offence. Where, however, a threat of action not unlawful in itself is made with a view to the lawful furtherance of the legitimate business interest of the person making it, such threat would not have infringed s.29(1) of the Larceny Act 1916 which prohibited the demand of menaces without reasonable and probable cause. Despite the change in legislative terminology, it seems that a similar result would ensue under the Irish Act: the latter refers in particular to the existence of a belief in reasonable grounds for making the demands, such belief being a defence to a charge of guilt. However, the "mere purpose of putting money in one's pocket" is not *per se* a legitimate business interest such that the demand would be warranted. As noted by Atkinson J in *Norreys v Zeffert*,<sup>230</sup> "the mere fact that a person may have a legal right to do something which will injure another is not sufficient for the demand of money as the price of not doing it".<sup>231</sup>

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<sup>226</sup> Section 17(2)(a)(i).

<sup>227</sup> Section 17(2)(a)(ii).

<sup>228</sup> Section 17(2)(b).

<sup>229</sup> [1937] A.C. 797.

<sup>230</sup> [1939] 2 All E.R. 187 at p. 189.

<sup>231</sup> In that case Atkinson J. stated that had there been a contract, he would have been unwilling to enforce it as it was prompted by a threat to injure or defame solely in order to induce the payment of a debt, an action that his lordship considered was not one that the plaintiffs were entitled to make. There had in fact been no contract to pay, however, only an expression of hope of being able to pay and thus the point made was technically *obiter*.



**(b) Unlawful Imprisonment** A threat to incarcerate another (or to take proceedings to achieve that result) is not in itself a threat sufficient to amount to duress. It is well established that the threat must relate to the deprivation of liberty other than by legal means.<sup>232</sup> In *Lessee of Blackwood v. Gregg*<sup>233</sup> an elderly man was unlawfully abducted by his relatives with a view to the execution of a deed in their favour. The possibility of duress in law, the Court of Exchequer concluded, was open if the facts were made out. Again such is clearly unlawful in the classical sense. The party unlawfully deprived of liberty may sue for the tort of false imprisonment and may also have grounds for proceedings in respect of malicious prosecution.

An added element of wrongfulness may be supplied where the demand, if met, would result in the stifling of a prosecution,<sup>234</sup> although it appears that the agreement to do so must be an express term of the contract.<sup>235</sup> Effectively such conduct would amount to the perversion of the legal process for private ends, a point dealt with further below at p. 187.

**(c) Duty Imposed by Law.** Where a person, in particular a public official, is obliged in law to carry out a stipulated task without fee or for a fixed sum, threatens not to do so unless a fee or an excessive fee, as the case may be, is paid or promised, it will in law amount to duress. The promise, in addition, will usually have been made without consideration as in *Collins v Godefroy*,<sup>236</sup> there being no value in promising what one is already obliged to do. In fact most of these cases proceed by reference to the requirement of consideration and as such the development of the concept of duress in

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<sup>232</sup> See *Smith v. Monteith* (1844) 13 M. & W. 427, *Cumming v. Ince* (1847) 11 Q.B.D. 112, and *Biffin v. Bignell* (1862) 7 H. & W. 877. In equity at least, the venue of such incarceration need not be a prison. In *McLarnon v. McLarnon* (1986) 112 Sol. Jo. 419, a father threatened that if his daughter did not do his bidding, she would be incarcerated in a convent. Her agreement was set aside on grounds of undue influence. There is no reason, by the same token, why at common law the venue of the incarceration should be of significance.

<sup>233</sup> (1831) Hayes 277.

<sup>234</sup> See *Williams v. Bayley* (1866) L.R. 1 H.L. 200.

<sup>235</sup> *Jones v. Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173.

<sup>236</sup> (1831) B. & Ad. 950. But note that where the promise is of an action which is more than that reasonably required by law, there will in law be consideration: see *Glasbrook Bros. Ltd. v. Glamorgan Co. Co.* [1925] A.C. 270, *Ward v. Byham* [1956] 2 All E.R. 318. (C.A.)

this area has largely deferred to the former doctrine. The demand in question is sometimes termed a demand *colore officii*<sup>237</sup> but it is clear that the demand need not have been made by someone in a public capacity. The person making the demand must, nonetheless, be in a position of monopoly such that a person cannot feasibly obtain the goods or services elsewhere.

Two additional points are worth noting. First, where a person is injured as a result of a breach of statutory duty, that breach may in itself give rise to an action in tort, but only where the duty in question is imposed for the benefit of a class of persons of whom the injured party is a member.<sup>238</sup> Second, it would seem that if a threat to do something which would amount to a breach of duty imposed by law is actionable, then *a fortiori* a threat by the State or its agents to do something which would amount to a breach of a constitutional right would also amount to illegitimate pressure.<sup>239</sup>

**(d) Threatened Breach of Contract.** Demands are often made, in the context of continuous contractual relations, that contracts be altered or modified. While the requested party may be well within his rights in ignoring these claims, it may be seen as prudent not to insist strictly upon one's legal rights, particularly in the context of Macneil's 'relational contract', a continuing sequence of commercial interaction over a long period of time. Thus Collins<sup>240</sup> considers that "the law of duress in the context of modifications must be understood to be governed by particular policy

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<sup>237</sup> A term which Glidewell L.J. in *Woolwich Equitable Building Soc. v. C.I.R (No. 2)* [1993] 1 A.C. 70 describes as "...at best vague and at worst almost meaningless at [sic] the present day". That said, there exists to this day in Irish law a category of acts done *colore officii*: see e.g. *Murphy v. A.G.* [1982] I.R. 241 (S.C.) at pp. 316-317 *per* Henchy J. Although see the argument of Burrows that this category is no more than an example of illegitimate pressure: Burrows, "Public Arbitration, *Ultra Vires* and Restitution", in Burrows (ed.), *Essays on the Law of Restitution*, (Oxford: 1991) at p. 39.

<sup>238</sup> See Stanton, *Breach of Statutory Duty in Tort*, (London: Sweet & Maxwell, 1986). An Irish example of such a breach can be found in *McKenna v. Stephens and Alexander Hull & Co. Ltd.* [1923] 2 I.R. 112.

<sup>239</sup> A breach of the Constitution may give rise to the possibility of liability in tort: see *Meskeil v. C.I.É.* [1973] I.R. 121, and *Parsons v. Kavanagh* [1990] I.L.R.M. 560. The Constitution is generally directed in its terms to the relationship between the respective organs of State and between the State and the citizen and generally not between private individuals. Although see *contra* certain *dicta* in *Hosford v. Murphy and Sons* [1988] I.L.R.M. 300 at p. 304, Costello J. remarks that "uniquely the Irish Constitution confers a right of action against persons other than the State and its officials".

<sup>240</sup> Collins, *The Law of Contract*, 3<sup>rd</sup> ed., (London: Butterworth's, 1997) at p. 134.

considerations concerning the need to promote cooperation between the parties during the performance of the contract”. As Hedley warns “ you don’t read legalistic contract clauses at each other if you ever want to do business again”.<sup>241</sup>

The distinction made in argument in *Sundell*<sup>242</sup> between breach of statutory duty and breach of contractual duty is important in the context of our examination of the limits of the concept of illegitimacy. The latter breach is not a legal wrong in the same sense as the former breach. A breach of statutory duty may well amount to a tort where it is established that the duty was imposed for the protection or welfare of a class of person, the duty was broken and a member of the particular class has been injured as a result.<sup>243</sup> By contrast, while the inducement of B by A of a breach of B’s contract with C is a tort for which A may be liable to C, the breach *per se* of a contract is not tortious.<sup>244</sup> It is arguable that a contract may be construed as an agreement that in the case of a promise being dishonoured, the promisee will be entitled, subject to conditions, to claim specific performance or damages for loss of expectation. In this scheme, a breach is regarded as triggering a condition subsequent to relief rather than being a wrong *per se* which the law will remedy. The nub of the issue is that while a statutory duty is imposed by law, a contractual duty is assumed by the parties to a contract. Conduct which amounts to a breach of a particular contract may not independently of that contract, amount to a legal wrong. Indeed if it were, arguably there would be no need to contract.

That said, it has been widely accepted that such a threat may constitute duress sufficient to render voidable a purported contract. Though commentators such as Collins<sup>245</sup> regard such a threat as representing an exception to the general rule of illegality, it is submitted that, in deciding what is illegitimate for the purposes of the law of duress, no distinction can be made between duties in tort and contractual

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<sup>241</sup> Hedley, “Contracts as Promises”, (1993) 44 *N.I.L.Q.* 12 at p. 13.

<sup>242</sup> (1956) 56 S.R. (N.S.W.) 323.

<sup>243</sup> See Stanton, *Breach of Statutory Duty in Tort*, (London: Sweet & Maxwell, 1986).

<sup>244</sup> This perhaps underlines an early concern to maintain the law of tort and the law of contract as mutually exclusive remedies in private law.

duties. Both are duties the breach of which attracts legal restraint or redress. That one set of duties is imposed by general law and the other assumed<sup>246</sup> is hardly relevant to a question of whether a breach is 'unlawful'. In *Walmsley v Christchurch City Co.*,<sup>247</sup> Hardie Boys J. remarks that a threat of such a breach of contract does indeed thus amount to a "threat of unlawful action". The illegitimacy, it is submitted, lies in the fact that a contract gives rise to rights or entitlements in law that may be judicially enforced (although the precise method of enforcement may vary). To the extent that a correlative contractual duty may be similarly judicially mandated, a threat not to perform this duty is a threat not to do what one may be legally obliged to do. The fact that the Court might not ultimately require that this duty be performed, specific performance being a rarely afforded relief,<sup>248</sup> is ultimately irrelevant to the question of legitimacy.

The context in which this issue most frequently arises is where contractual modifications or variations are proposed by one party but accompanied by a threat or warning that unless the proposal is accepted, existing contractual obligations will not or alternatively cannot be fulfilled. The party, to whom the proposal is made, has in these circumstances a choice. He may seek to obtain an injunction to mandate performance of the obligation. He may refuse to accede and, if there is a resulting breach, seek damages for the breach. He may, as a third alternative, treat the threat as an anticipatory breach of contract that would allow him to be discharged from his remaining contractual duties and to sue for damages provided he has communicated such intention to the party who has threatened to break the contract.<sup>249</sup>

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<sup>245</sup> Collins, Hugh, *The Law of Contract*, 3<sup>rd</sup> ed., (London: Butterworth's, 1997).

<sup>246</sup> Indeed this distinction, on closer examination, is sometimes blurred. Obligations that may appear to have been assumed in contract are very often the product of implied terms, or are imported by operation of law to give business efficacy to a particular contract. See Atiyah, "Contracts, Promises and the Law of Obligations" in Atiyah, *Essays on Contract*, (Oxford: Clarendon Press, 1986) at p. 10, and Dias and Marrkensis, *Tort Law*, 2<sup>nd</sup> ed., (Oxford: Oxford University Press, 1989) at pp. 7-11.

<sup>247</sup> [1990] 1 N.Z.L.R. 199.

<sup>248</sup> See the comments in Volume II, Chapter 4 below at pp. 6-9.

<sup>249</sup> See *Chitty on Contracts*, 28<sup>th</sup> ed. (London: Sweet & Maxwell, 1999), §§25-020ff. at p. 1234ff.

It is at this juncture that the discrete paradigm of contracting discussed above in Chapter Two is perhaps at its most unhelpful. Where a product or service that is the subject of the contract is not easily attainable or saleable elsewhere the party<sup>250</sup> to whom the threat is made may be anxious to maintain the relationship. This may especially be the case where the product or service is one that has been specially adapted to one party's idiosyncratic needs involving perhaps considerable capital expense to the other party. Often then, a calculated decision is made to preserve the contractual relationship by accepting the modification or variation. The party to whom the proposal is made weighs up the various options and concludes that the only feasible option under the circumstances is to accede to the request. Clearly in such cases where the party so acts, there is no 'coercion of the will' but rather a deliberate and intentional decision to submit. The question, once it is established that there is causation, is whether or not the pressure imposed to attain such a result is legitimate.

What is certain is that where a party is entitled, because of some breach of contractual condition or anticipatory breach by the other party, to treat the contract as repudiated, a threat not to fulfil a contractual obligation may be justified. In the New Zealand case of *Walmsley v. Christchurch City Council*<sup>251</sup> the defendants had threatened to cancel an agreement for the production of a programme for an airshow which they were hosting, unless the plaintiff agreed to its reprinting at his own cost. The defendants, in the opinion of Hardie Boys J., would have been justified in rejecting the programme owing to the multitude of spelling and grammatical errors therein. Thus "...there was certainly pressure, but it was legitimate and unavoidable in the circumstances, and the [plaintiff's consent] was a genuine recognition of the situation".<sup>252</sup>

In some cases, a party may be in genuine financial difficulty such that without additional resources he may be unable to complete the contract. A proposal may be

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<sup>250</sup> A fact that may give rise to an "abuse of a dominant position in the market" resulting in possible legal action under section 5 of the Competition Act, 1991 or Article 81EC.

<sup>251</sup> [1990] 1 N.Z.L.R. 199.

made for extra funding which it may be wise for the opposite party to accept: stubbornness on the latter's part may precipitate insolvency or bankruptcy proceedings in which both stand to lose. In such circumstances the proposal may indeed be said to be supported not so much by a threat as by a sincere warning.<sup>253</sup> The proposer is not suggesting he will actively breach a duty. He is simply pointing out that he may otherwise be put in a position where he will be actually unable to do anything but. The matter is out of his hands. The case usually cited as an example of this scenario is *Williams v. Roffey & Nicholls (Contractors) Ltd.*<sup>254</sup> although the issue of duress was not directly raised therein. The defendant had subcontracted work to the plaintiff, a builder, for a stipulated sum. Due to working difficulties, the latter had incurred losses and warned the defendant that he would be unable to complete unless he received additional resources. The defendant risked the activation of a penalty clause in the main contract if completion were delayed and himself proposed the payment of additional funds on the condition that the plaintiff would complete. Goff and Jones<sup>255</sup> seem to suggest in such circumstances that the subsequent variation might not be the product of illegitimate pressure. The conduct of the subcontractor was in no sense unreasonable or illegitimate considering the predicament in which he found himself.

By contrast in *B. & S. Contracts v. Victor Green Publications*<sup>256</sup> an agreement to pay extra money so that an industrial dispute to which the payer was not a party might be settled was struck down on the ground of duress. The plaintiffs had stated that unless they received such additional funds as would enable them to pay their workers' backwages, they would be unable to persuade the latter to call off their strike. The defendant, who would otherwise not have been able to fulfil a duty owed to a third party, had no feasible option but to pay. The task contemplated by the contract had to be completed within a week of the threat being made and the breach would thus have

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<sup>252</sup> *Ibid.* at p. 209.

<sup>253</sup> See the distinction made above in Chapter 1 at pp. 27-8.

<sup>254</sup> [1990] 2 W.L.R. 1153.

<sup>255</sup> Goff and Jones, *The Law of Restitution*, 5<sup>th</sup> ed., (London: Sweet and Maxwell, 1998) at p. 339

<sup>256</sup> [1984] I.C.R. 419.

caused “serious and immediate damage”. The plaintiffs had the defendant, in his own words “over a barrel”. The former moreover were found to have acted unreasonably in not, as their contract required, making every effort to avert the strike. In the circumstance their behaviour was, per Griffiths L.J, “unreasonable”.

*(e) Bona Fides and the Compromise of a Genuine Claim.* Not every proposal mooting the non-observance of a contractual term will amount to duress in law. What of the circumstance where the party imposing pressure genuinely and honestly believes that he is entitled to do what he threatens to do? In many cases a party’s precise position in law may be uncertain and the question of entitlement or otherwise to act in a particular manner may remain unresolved. In such circumstances it has been established in *Callisher v. Bischoffheim*<sup>257</sup> that a compromise of the claim (provided it is honestly made,) will be supported by consideration in the form of avoidance of litigation. The claim may in fact turn out to have been unfounded but nevertheless is good consideration, the claimant being entitled to bring the case to trial, if not to succeed therein.

By analogy it may be argued that the pressure which has propelled the parties to compromise is not illegitimate such that the resulting agreement would be voidable. “It is ...” Jaffey remarks, “...hard to see why the pressure should be held improper if the person applying it honestly believed his act, or threatened act, was lawful...”.<sup>258</sup> To what extent then can it be said that the propriety of the action may be determined by reference to the belief of the actor? In other words is legitimacy to be ascertained from an objective or a subjective standpoint? In principle a mistake as to the law should be no defence where the action is in fact unlawful. To allow otherwise might arguably discourage parties from actively ascertaining their legal rights before contracting; in other words place a premium of sorts on legal ignorance.

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<sup>257</sup> (1870) L.R. 5 Q.B. 449.

<sup>258</sup> Jaffey, “Wrongful Pressure in Making Contracts”, in Lasok, D. (ed.), *Fundamental Duties*, (Oxford: Pergamon Press, 1980) at pp. 187ff

The question of the presence of compromise is a delicate question of causation. It involves determining whether the party alleging duress has in fact agreed as part of a compromise to forego certain legal rights in the interests of obtaining other (perhaps intangible) benefits. The compromise must relate to a *bona fide* claim, in other words the party seeking to exact agreement must generally believe that he or she has the right to make the claim that he makes. In some cases the distinction is impossibly fine. In each case certain factors operate to motivate one to make a decision. The most pressing may be prospect of continuing what is, all things considered, a good and beneficial contractual relationship. Other considerations, highlighted in the case law itself, are the desire to maintain shareholder's or consumer's confidence,<sup>259</sup> the need to finish an urgent task on time<sup>260</sup> or the need to meet other obligations to a third party.<sup>261</sup> It is suggested that the failure to deal with these wider relational concerns is ultimately the root of some confusion in relation to these cases.

For example, in *T.A. Sundell & Son Pty. Ltd. v. Emm Yannoulatos (Overseas) Pty. Ltd.*<sup>262</sup> the party alleged to have imposed unlawful pressure honestly believed that as a result of an increase in the world price of iron, he was permitted to demand a corresponding increase in the contract price. In both *Sundell* and in *Maskell v. Horner*<sup>263</sup> (which involved the actual payment of money not due), the fact that the party imposing pressure honestly believed that he was entitled to what he demanded was deemed to have been irrelevant. In the latter mentioned case the defendant, who was the owner of property on which a market was located, had honestly but wrongfully demanded payment of tolls to which he believed he was entitled, supported by the actual and threatened seizure of the plaintiff's goods. The tolls were subsequently found not to have been owed<sup>264</sup> and the plaintiff on appeal for recovery of moneys paid. In the course of his judgment, Reading C.J. commented that while

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<sup>259</sup> See for instance *Pao On* [1980] A.C. 614, where the plaintiff was motivated to agree to the proposed modification in part by a desire to maintain shareholder/market confidence in its business.

<sup>260</sup> As in *the Atlantic Baron*, [1979] Q.B. 705, *Williams v Roffey* [1991] 1 Q.B. 1.

<sup>261</sup> As in *Atlas Express v. Kafco* [1989] 1 All E.R. 641.

<sup>262</sup> (1956) 56 S.R. (N.S.W.) 323. On claims made *bona fide* see also *Smelter Corporation v. O'Driscoll* [1977] I.R. 305.

<sup>263</sup> [1915] 3 K.B. 106.



the pressure did not constitute duress in the then restricted sense of the term, the plaintiff could recover "...if the payment is made for the purpose of averting a threatened evil, not with the intention of giving up a right but under immediate necessity and with the intention of preserving the right to dispute the legality of the demand" He observed, however, that where money is paid "...in circumstances implying that [it is being paid] voluntarily to close the transaction..." such payment might be treated in law "like a gift" and deemed irrecoverable.

What Lord Reading C.J. seems to have envisaged is the compromise of a genuine claim designed to foreclose any dispute that may have arisen between the parties. This is certainly in line with the public policy - Dalzell<sup>265</sup> calls it the 'policy of repose' - to encourage parties to settle their differences without resort to litigation: "it is better to have the parties settle business matters between themselves rather than resort to judicial tribunals," such latter avenue being often bitter and divisive and fraught with expense and delay.<sup>266</sup> The only drawback is that it may prove remarkably difficult to determine precisely whether a party intended, by his actions, to foreclose a transaction. In fact in *Maskell v. Horner* itself there was a difference of opinion between the Court of Appeal and the respected trial judge, Rowlatt J.. The latter could "...only conclude that the transaction was regarded as closed and the payments acquiesced to". The tolls were surrendered not merely "...for the relief of a deadlock..." but with a view to settlement with, albeit 'grumbling', acquiescence.

The reason for much of the confusion in this regard is arguably rooted in the assumption that contracts tend to follow the discrete paradigm of contracting. The cases implicitly assume that proposed actions that differ from those originally anticipated must necessarily require an alteration in the contract itself. The alteration is typically seen as exceptional. To secure its enforceability, fresh new consideration

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<sup>264</sup> *A.G. v. Horner (No. 2)* [1913] 2 Ch. 140.

<sup>265</sup> Dalzell, "Duress by Economic Pressure: I", (1942) 20 *N.C.L. Rev.* 237.

<sup>266</sup> Both the Judicial Separation and Family Law Reform Act, 1989, sections 5-7, and the Family Law (Divorce) Act, 1996, sections 6-8, for instance, posit provisions designed to encourage separated and

is required.<sup>267</sup> Where changes are made without consideration they do not take effect in law. The original contract stands absent the proposed modification. Implicit in this discourse is the assumption that contracts are discrete rather than dynamic in nature. At the inception of a contractual relation it is assumed that the parties have provided fully for all contingencies (what Macneil terms ‘full presentation’.) Thus, modification is not envisaged. Where it arises it is assumed that a fresh contractual event, complete with consideration, must occur. The relational conception of contract sees such ‘alteration’ by contrast as a natural, anticipated part of the contractual relation. Indeed it is a testament to the inappropriate nature of requirement of fresh consideration that quite so many contorted exceptions have arisen to circumnavigate the requirement for fresh consideration.<sup>268</sup>

The supposed ‘compromise’ of a contractual claim is in fact, in many cases, a mere event in the life of a contractual relation. The party who agrees to the compromise does so motivated in part by the desire to maintain the continuance of the relation for his own benefit. An added factor, however, is that of the unity of interests (the ‘organic solidarity’) involved in such relations. In the light of this unity of interests it is artificial in the extreme to view a compromise of contractual rights in terms of a loss for one party and a corresponding benefit being conferred on the other. The dynamic of the relation is such that the interests of both parties are bound up together in a manner that renders this analysis at best, misleading. The prospect of a more relational analysis in these cases is diminished by the very discrete manner in which they are approached.

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divorced parties to settle their differences by agreement rather than by judicial proceedings. See the discussion above in chapter 2, at pp. 113ff.

<sup>267</sup> See the *Siboen and the Sibotre*, [1976] 1 Lloyd’s Rep. 293, *The Atlantic Baron*, [1979] Q.B. 705, *Pao On* [1980] A.C. 614.

<sup>268</sup> See, for instance, *Williams v. Roffey* [1991] 1 Q.B. 1.

## A Threat to Do What One is Entitled to Do:

### Is there a category of Lawful Act Duress?

Generally speaking, a threat to do what one is entitled in law to do generally does not amount to illegitimate pressure. In the words of a Massachusetts court in *Silsbee v. Webber*<sup>269</sup> “ordinarily what you do without liability you may threaten to do without liability” although it did qualify these comments as discussed further below. In one of the few Irish precedents on the issue of duress, *Headford v. Brocket*,<sup>270</sup> Budd J. observed that a threat to take proceedings in assertion of a lawful right does not constitute duress in law.<sup>271</sup> “It is...in fact no duress in law to intimate that one will exercise one’s legal rights in certain events...”.<sup>272</sup>

There the threat was one of lawful eviction. In a similar vein, a party is permitted to refuse to contract other than on a ‘take it or leave it’ basis: a threat not to contract is, other than in exceptional cases,<sup>273</sup> not illegitimate. The standard assertion then is that, generally speaking (and mindful of the dicta in *CTN Cash and Carry*) in the words of Rogers J. in *Wardley Australia v. McPharlin* “it is not economic duress to threaten to exercise neither more nor less than the existing legal rights of a party”.<sup>274</sup>

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<sup>269</sup> 171 Mass. 378 (1898).

<sup>270</sup> [1966] I.R. 227.

<sup>271</sup> See also the *dictum* of a North Carolina court in *Smithwick v. Whitley* 67 S.E. 913, explicitly noting that act complained of must be unlawful: “duress exists where one, by the *unlawful* act of another, is induced to make a contract or perform or forego some act under circumstances which deprive him of the exercise of free will”.

<sup>272</sup> *Ibid.* at p. 263. See also *Board of Trustees of National Training School for Boys v. Wilson Co.*, 133 F. (2d.) 399 (App. D.C. 1943) and *Cappy’s Inc. v. Dorgan*, 46 N.E. (2d) 538. There is no duress where a person in fact entitled to litigate a question of law threatens to do so. Where one chooses to avoid litigation by submission to the threat, any resultant agreement cannot be avoided for duress.

<sup>273</sup> It is proposed, for instance, that a refusal to contract for certain stipulated reasons will be unlawful under the Equal Status Act, 2000. This Bill would prohibit suppliers of goods and services from refusing to deal with, or otherwise dealing in a discriminatory manner towards person on grounds relating to stipulated personal characteristics of that person, such as gender, race or religion.

<sup>274</sup> (1984) 3 B.P.R. 9500, *per* Rogers J. at p. 9502ff.

Some aspects of this perspective can be found reflected in the work of Nozick on the nature of coercion.<sup>275</sup> Nozick distinguished between the acceptance of an offer and the submission to a threat on the basis of the extent to which the consequences of each impacted on the options available to the party accepting or submitting, as the case may be. This in turn centres on the issue of entitlement. If Q is already entitled to do x then a representation made by B with a view to stopping Q from doing x unless he gives B £50, would constitute a threat. If however Q was not already entitled to do x, the representation ‘I won’t let you do x unless you pay me £50’ amounts to an offer in the sense that it increases the options available to Q.<sup>276</sup>

In other words an offer promotes an opportunity not available before. In the Australian case of *Smith v. William Charlick*,<sup>277</sup> for example, a flour miller rendered a payment demanded by the Wheat Harvest Board of South Australia following on a representation by the latter that it would not otherwise supply wheat to the former. The Board held a monopoly of supply but it was (strangely) under no corresponding legal obligation to supply. The money was, per Knox C.J.<sup>278</sup> “paid not to have that done which the Board was legally bound to do, but in order to induce the Board to do that which it was under no legal obligation to do”. And Isaacs J.<sup>279</sup> noted that “a mere abstention from selling goods to a man except on condition of his making a stated payment [which surely is just another way of describing a contractual offer,] cannot, in the absence of some special relation, answer the description of ‘compulsion’”.

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<sup>275</sup> Nozick, “Coercion” in Morgenbesser, Suppes & White (eds.), *Philosophy, Science and Method: Essays in Honour of Ernest Nagel*, (New York: St. Martin’s Press, 1969), at p. 440.

<sup>276</sup> See the discussion in Chapter One below at pp. 28-31. It is, nonetheless, worth reiterating Nozick’s own words at this juncture: “Whether something makes a threat against Q’s doing an action or an offer to Q to do the action depends on how the consequence he says he will bring about changes the consequences of Q’s action from what they would have been in the normal or natural or expected course of events. If it makes the consequences worse than they would have been in the normal or expected course of events, it is a threat; if it makes the consequences better, it is an offer”. Nozick, “Coercion”, *ibid.* at p. 447.

<sup>277</sup> (1924) 34 C.L.R. 38. See also the Canadian case of *Morton Construction v. City of Hamilton*, (1961) 31 D.L.R. (2d.) 323.

<sup>278</sup> (1924) 34 C.L.R. 38 at p.51.

<sup>279</sup> *Ibid.* at p.56.

Dawson, however, goes so far as to assert that “no other formula is anything like so misleading. Its vice lies in the half-truth it contains”.<sup>280</sup> There do indeed appear to be some *dicta* which suggest even mainstream contract law will countenance, in the appropriate circumstances, a finding of duress even though the threat made is of lawful action (sometimes called ‘lawful act duress’). While a *result* similar to that in *Smith v. Charlick* was reached in the English case of *C.T.N. Cash & Carry v. Gallaher Ltd.*<sup>281</sup> the judgment of Steyn L.J. nonetheless seems to suggest some prospect of the recognition of ‘lawful act duress’. The plaintiff in that case was a wholesaler that purchased cigarettes from the defendant for supply in its stores. The latter erroneously delivered a consignment to one warehouse belonging to the plaintiff rather than another and agreed to transfer it to the second warehouse. In the meantime, however, the cigarettes had been stolen from the defendant’s lorry while it was situated in the plaintiff’s first warehouse. The defendant, wrongly believing that the plaintiff bore the risk, threatened not to enter into any further arrangements with the latter and in particular to withdraw credit facilities therefrom, unless it agreed to foot the bill for the stolen cigarettes. As each sale was conducted separately, (there being no requirements contract as such), and the defendant retained an absolute discretion to withdraw credit facilities, it was clear that there was no illegitimate pressure in the threat made.

On this basis the court refused to find the contract voidable. In the course of his judgment, Steyn L.J., however, acknowledged (albeit *obiter*) that there might be circumstances in which such a threat may be deemed illegitimate if it were coupled with a “demand for payment”.<sup>282</sup> However, he further observed that “...in a purely commercial context it might be a relatively rare case in which ‘lawful act duress’ can be established”.<sup>283</sup> It would be particularly difficult, he noted, where the *bona fide* view was held by the person making the demand that he was entitled to do so. Indeed

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<sup>280</sup> Dawson, *op cit.*, at p. 287.

<sup>281</sup> [1994] 4 All E.R. 714.

<sup>282</sup> *Ibid.* at p. 718

<sup>283</sup> *Ibid.*

unless the party refusing to supply was abusing a monopoly by doing so,<sup>284</sup> the law sees nothing wrong in refusing to do business with another party for whatever reason.<sup>285</sup>

It is in fact unlikely that a failure to supply will amount to duress where there are alternative suppliers in the market, the presence of a feasible alternative necessarily negating the duress alleged. Where the supplier has a monopoly over supplies in a particular good, such that there are no feasible alternatives to dealing with the supplier, section 5 of the Competition Act, 1991 would render any abuse of that dominant position unlawful. It seems then that the circumstances in which a threat to do what is lawful will amount to duress are rare in the extreme.<sup>286</sup> In fact the circumstances in which duress is constituted by an otherwise lawful act tend to be confined to rather special circumstances.

**Ulterior Purposes.** It is possible that a person may be found to have exerted duress where he or she acts in manner that is legal but for an ulterior or otherwise improper purpose.<sup>287</sup> If a person, A, who has witnessed damage being caused by B, threatens to inform the Gardaí of this fact (an act which she would be perfectly within her right to perform) unless B pays her a sum of money, this would arguably amount to duress. This lawful act is threatened but for the purpose of achieving a result of personal benefit only. Lord Scarman in *The Universe Sentinel* opined that where certain threats *per se* lawful but which nevertheless are used to support demands which are unlawful (or somewhat more precisely, threats which may be used to support demands in an illegitimate fashion,) such conduct may constitute illegitimate pressure.<sup>288</sup> He referred with approval to remarks of Lord Atkin in *Thorne v. Motor*

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<sup>284</sup> See the Competition Act, 1991, section 5 and Article 81EC which render it unlawful to “abuse a dominant position” in a particular market or in a substantial part thereof.

<sup>285</sup> Although under the Equal Status Act, 2000, it will be unlawful to refuse to supply on the grounds listed in that measure.

<sup>286</sup> See Beatson, *op cit.* (1991) who suggests, (at p. 134), that “the scope of lawful act duress is...extremely limited”.

<sup>287</sup> See Hale, “Bargaining, Duress and Liberty”, 43 *Columbia Law Review* 603 (1943) at p. 609ff.

<sup>288</sup> [1983] A.C. 366 at p. 401.

*Trade Association*,<sup>289</sup> a case involving an alleged demand with menaces, to the effect that it was the nature of the demand and not the threat that mattered in determining whether a threat to do a lawful act amounted to a ‘menace’.

In the U.S. case of *Link v. Link*<sup>290</sup> a similar proposition was accepted. There, a husband had threatened to sue for custody of his children for the sole purpose of securing the transfer of securities from his wife. Despite the fact that the father had the right to seek custody, the transfer was set aside for duress. According to the Lake J.:

“[t]he weight of modern authority supports the rule...that the act done or threatened may be wrongful even though not unlawful *per se*; and that the threat to instigate legal proceedings, criminal or civil, which might be justifiable *per se*, becomes wrongful within the meaning of this rule, if made with the corrupt intent to coerce a transaction grossly unfair to the victim and not related to the subject of the proceedings”.<sup>291</sup>

Duress can exist, then, Lord Scarman posits, “...even if the threat is one of lawful action: whether it does so depends on the nature of the demands”.<sup>292</sup> This would occur, *per* the court in *Morse v. Woodworth* where there has been an “effort to use for private benefit processes for the protection of the public and the punishment of crime”, thus being “a perversion and abuse of laws made for another purpose”.<sup>293</sup> The purpose of these laws in other words is not to line the pockets of A.

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<sup>289</sup> [1937] A.C. 797 at p. 806.

<sup>290</sup> 179 S.E. 2d. 697 (N.C. 1971), a judgment of the Supreme Court of North Carolina on appeal from the Court of Appeals of that State: see 175 S.E.2d. 735.

<sup>291</sup> *Ibid.* at 705. Lake J. cites a series of U.S. authorities to support this proposition: *Fowler v. Mumford*, 102 A.2d. 535, *Coleman v. Crescent Insulated Wire & Cable Co*, 168 S.W. 2d. 1060, *Hochman v. Zigler's Inc.* 50 A.2d. 97, *Miller v. Eisele*, 168 A. 426 (N.J.), *Adams v. Irving National Bank*, 23 N.E. 7 (N.Y.), *Hogan v. Leeper* 133 P. 190 (Ok.), *Fox v. Piercey*, 227 P. 2d. 763 (Ut.).

<sup>292</sup> [1983] A.C. 366 at p. 401. See also Williston on Contracts, 3<sup>rd</sup>. ed. §1607, “means in themselves lawful, may be used so oppressively as to constitute an abuse of legal remedies”.

<sup>293</sup> 155 Mass. 233 (1892) at p. 251

Whether this “removes the requirement for unlawfulness”<sup>294</sup> from the doctrine of duress is doubtful. In many of these cases the threat coupled with the demand will in practice constitute an unlawful act. As noted above, a threat, even of lawful action, coupled with an ‘unwarranted demand’ will amount to an offence under section 17 of the Criminal Justice (Public Order) Act, 1994. The action of A, according to Hale “subverts the purpose for which the privilege is accorded”<sup>295</sup> and thus implicitly subverts the purpose of the legal provision. As such the *dicta* above hardly represents a marked divergence from the already established legal criteria of wrong.

**‘Bad Samaritans’ and the Admiralty Court.** The second limited category within which a threat not to contract may amount to duress absent any illegitimate pressure comprises a series of Admiralty cases, the most notable being *The Port Caledonia and the Anna*.<sup>296</sup> These seem to suggest, at first glance, that the criterion of illegitimacy has a somewhat wider remit than suggested above.

The afore-mentioned cases generally involve contracts of salvage made for a fee far exceeding a reasonable rate. In situations of extreme emergency, such as imminent shipwreck, a ship’s captain would have little option but to capitulate to such extortionate demands. In *The Port Caledonia* for instance the captain of a ship in difficulty was towed from the path of another vessel by a tug-boat. The latter has only agreed to rescue the Port Caledonia on agreement that the tug-boat owner be paid £1000. Absent such assistance, the Port Caledonia was in danger of colliding with another vessel, and probably sinking.

There was nothing unlawful in the making such a demand. This was an instance of a party threatening to refuse to enter into a contract, an action that, except in very

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<sup>294</sup> As Friel asserts in Friel, *The Law of Contract*, 2<sup>nd</sup> ed., (Dublin: Round Hall, 2000) at p. 263.

<sup>295</sup> Hale, “Bargaining, Duress and Economic Liberty”, 43 *Columbia Law Review* 603 (1943) at p. 619.

<sup>296</sup> [1903] P. 104. See also in the U.S. *Post v. Jones*, 19 How 150 (60 U.S) (1856), a case discussed by Fried in *Contract as Promise*, (Cambridge, Mass.: Harvard University Press, 1981). Cf. *Batsakis v. Demotsis*, (1949) 226 S.W. 2d. 673 (Texas).



specific circumstances,<sup>297</sup> is perfectly legal. The tug-boat's captain was at worst, in Fried's words 'a bad samaritan'.<sup>298</sup> The Court of Admiralty nonetheless rescinded the contract, ruling that the amount demanded was excessive. In its place, the Court substituted a requirement that a more reasonable price be paid for salvage.

In *The Medina*<sup>299</sup> the Court again refused to enforce an agreement demanding an 'inequitably' exorbitant fee for salvage. Here a ship carrying 550 passengers was wrecked on a rock in the middle of the Red Sea. While there was no imminent danger to the ship or its passengers, who took refuge on the rock, the captain feared that a change in the weather might jeopardise the lives of his passengers. The captain of another ship, *The Timor*, offered to take the latter on to their destination but only at a grossly exorbitant fee. *The Medina's* captain reluctantly agreed. He bore the responsibility, Brett J.A. noted, for 550 people, and if he refused there was a strong chance that their lives would be put in danger. "That is compulsion to the mind of an honest man".<sup>300</sup> The Court again however, interposed a reasonable fee for the services rendered on a *quantum meruit* basis, the salvor being entitled to reasonable remuneration for salvage.<sup>301</sup>

These cases may suggest some scope for the widening of 'illegitimacy' to include the exploitation of monopoly positions (whether circumstantial or general<sup>302</sup>) which do not amount to an unlawful act but which nevertheless strike one as unconscionable and unfair. While nowadays, such a situation might attract the provision of section 5 of the Competition Act, 1991, rendering a failure to supply on the part of a party

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<sup>297</sup> Upon the proposed enactment of the Equal Status Act, 2000 it will be illegal to refuse to contract with someone where certain inherent attributes and other characteristics of that person, such as race or religion, are a reason for this refusal.

<sup>298</sup> Fried in *Contract as Promise*, (Cambridge, Mass.: Harvard University Press, 1981) at pp. 109-111.

<sup>299</sup> (1876) 1 P.D. 272; 2 P.D. 5 (C.A.).

<sup>300</sup> 2 P.D. 5 at p. 8.

<sup>301</sup> See also *The Mark Lane* (1890) 15 P.D. 135.

<sup>302</sup> Although see Trebilcock, *The Limits of Freedom of Contract*, (Cambridge, Mass. & London: Harvard University Press, 1993), who argues that contract law should concern itself solely with situational or circumstantial monopolies of the type experienced in the Admiralty cases. More systemic examples of monopoly, he argues, are properly the remit of competition law and should be tackled by means of public law remedies and not in the sphere of private contract law.

holding a monopoly an abuse of that monopoly, there was no such legislation at the time in question proscribing the salvors' actions. At the time it could not be said that the threat emanating from the salver was unlawful. The salvor is not responsible for the situation in which a potential contractor finds itself and there is no general duty of rescue in law,<sup>303</sup> especially where such rescue involves danger to oneself.<sup>304</sup>

It is, however, widely accepted that the principle involved is confined to the special circumstances of the salvage cases.<sup>305</sup> Indeed in *The Mark Lane*,<sup>306</sup> Butt J. distinguishes between the type of duress that would invalidate an agreement at common law, on the one hand, and in the Court of Admiralty on the other. "In this Court the same amount of compulsion or duress - call it what you will - is not necessary to induce the Court to refuse to enforce an agreement".<sup>307</sup>

Indeed the origin of these doctrines seems to indicate that they amount to something of an aberration or at least a context-specific solution rather than generally applicable precedent. Keeping in mind the very extensive Court of Admiralty doctrines requiring fair rates of remuneration for salvors and allowing for the rectification of

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<sup>303</sup> Such a duty may arise, however, in specified circumstances, where in particular the parties are parent and child or where the rescue of persons in peril is part of the job description of the prospective rescuer. There is no general duty, however, to do so. As Pound observes "[i]n the absence of a relation that calls for action, the duty to be a good Samaritan is moral only". Pound "The End of Law in Juristic Thought" (II) 30 *Harv. L. Rev.* 201 at p. 214. He cites a series of cases as support for this proposition; See *Allen v. Hixson*, 36 S.E. 810 (Ga. 1900), *Union Ry. Co. v. Cappier*, 66 Kan. 649 (Kan. 1903), *Griswold v. Boston Ry. Co.*, 67 N.E. 354 (Mass. 1903), *Stager v. Laundry Co.*, 63 Pac. 645 (1901), *Ollett v. Ry. Co.*, 50 Atl. 1011 (1902), *King v. Interstate Ry. Co.*, 51 Atl. 301 (1902). French criminal law, however, does impose a general duty, by means of Article 63 of the *Code Pénal*, 88<sup>th</sup> ed. (Paris: Dalloz, 1990-91.) as amended by Loi No. 54-411, April 13, 1954. Any person who, being able to give assistance to or obtain assistance for a person in peril, without risk to himself or others, voluntarily abstains from doing so will be guilty of a crime punishable between 3 months and 5 years in prison. In the aftermath of the death of the Princess of Wales, prosecutions were commenced (although ultimately not pursued) against members of the press who arrived at the scene of the fatal crash, having, it was alleged, failed to give reasonable aid to the victims.

<sup>304</sup> Though even where it does not, there is no such duty. Pound, *op. cit.*, at p. 214 gives the example of a person (B) with a rope watching another person (A) drown and doing nothing. Legally B "may smoke his cigarette and see A drown".

<sup>305</sup> See *Chitty on Contracts*, 28<sup>th</sup> ed. (London: Sweet and Maxwell, 1999) at §7-032 at p. 427: "these cases may rest on the principle of maritime law that a duty to rescue human life is imposed on putative rescuers so that the threat not to rescue may be unlawful".

<sup>306</sup> (1890) 15 P.D. 135.

<sup>307</sup> *Ibid.* at p. 137.

unfair bargains it is more likely "...that the real ground for these decisions was not so much the exploitation of an effective monopoly position but rather the unfairness of the terms concluded".<sup>308</sup>

**Morality and Public Policy.** Perhaps the most extensive statement of the boundaries of the duress doctrine lie in the Court of Appeal's judgment in *Kaufman v. Gerson*.<sup>309</sup>

That case concerned a contract the proper law of which was French, which had been entered into in consequence of threats of criminal prosecution against the defendant's husband and the social stigma that would befall her family as a result. The case against the defendant's husband was well-founded and the contract was recognised as valid by the proper/applicable law which governed it. Nevertheless the English Court refused to enforce it. To do so would have been, according to Romer L.J., "...to contravene what by the law of...[England]...is deemed an essential moral interest".<sup>310</sup>

Where a contract, in the words of Mathew L.J.,<sup>311</sup> had been "obtained by means which the court regards as unjust and immoral", or in those of Collins M.R.,<sup>312</sup> where it "violated some moral principle" enforcement will not occur. Mathew L.J.'s comments are particularly of note. Could his reference to 'means which the court regards' as improper suggest that judges in other cases involving duress may refer to extra-legal concepts of wrong?

It is arguable that a contract, the proper law of which was English, but otherwise made in analogous circumstances would be invalid on the rather less startling ground that it implied the stifling of a prosecution<sup>313</sup> contrary to law, rendering it either void as being contrary to public policy or voidable as amounting to illegitimate pressure. The ground cited in *Kaufman* make it, according to Morris,<sup>314</sup> "...a much criticised decision". It is probably the case that it is confined in its application to the field of

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<sup>308</sup> Collins, *The Law of Contract*, 3<sup>rd</sup> ed., (London, Butterworth's, 1997) at p. 136.

<sup>309</sup> [1904] 1 K.B. 591.

<sup>310</sup> *Ibid.* at pp. 599-600.

<sup>311</sup> *Ibid.* at p. 600.

<sup>312</sup> *Ibid.* at p. 598.

<sup>313</sup> *Williams v. Bayley*, (1866) L.R. 1 H.L. 200; *Jones v. Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173

private international law. Indeed Collins M.R. cites only two authorities for the proposition he makes,<sup>315</sup> both being respected contemporary private international law texts of the time. There is, that said, some considerable double standard in applying to a contract the proper law of which is foreign a rule that it must comply with the forum's sense of morality where no such standard is applied to contracts the proper law of which is the *lex fori*. It is possibly even illegal to do so. While member States of the E.U. are given a wide berth in determining matters of public morality,<sup>316</sup> it is not possible to apply different standards of morality depending on the nationality of the parties. For instance in *Adoui and Cornaille v. Belgium*<sup>317</sup> the European Court of Justice noted that the free movement of two prostitutes into Belgium could not be restricted on grounds of public policy when the treatment of domestic prostitutes was substantially more lenient.<sup>318</sup>

*Kaufman* is cited by counsel in *Pao On*<sup>319</sup> as "...the first step towards an extension of the doctrine of duress to include economic duress..." although economic pressure, to the extent that it existed, was at best indirect;<sup>320</sup> but surely if the proposition contained in *Kaufman* is accepted as having an application beyond the confines of conflicts law, it goes a good deal further than even this.

*Kaufman* is alternatively cited, most notably again by counsel in *Pao On*,<sup>321</sup> for the proposition that a contract made under certain circumstances falling short of duress

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<sup>314</sup> Morris, *The Conflict of Laws*, 4<sup>th</sup> ed. (London: Sweet & Maxwell, 1993) at p. 43.

<sup>315</sup> [1904] 1 K.B. 591 at p. 598.

<sup>316</sup> Article 30 and 39(3) EC, for instance, allow the member states the power to restrict the entry of goods and persons respectively on the grounds that such entry would be prejudicial to the public morality of the State. See for instance *C-34/79 R. v. Henn and Darby* [1979] E.C.R. 3795.

<sup>317</sup> C-115 & 116/81 [1982] E.C.R. 1665.

<sup>318</sup> See also *C-121/85 Conegate v. Customs and Excise Commissioners* [1986] E.C.R. 1007 where the British customs authorities attempt to preclude the entry of pornographic goods into Britain. It was shown that goods similar to those being imported could legally be sold, subject to certain restrictions, in the U.K.

<sup>319</sup> *Pao On v Lau Yiu Long* [1980] A.C. 614.

<sup>320</sup> The case in fact concerned threats of criminal prosecution against the husband of the defendant. In consequence of these threats, the defendant agreed to pay the amount owed by her husband. She feared mainly the imprisonment of her husband and the prospect of social ruin and perhaps, as a corollary, but only just, her family's corresponding financial ruin.

<sup>321</sup> [1980] A.C. 614., at p. 621.

may be nevertheless void as being contrary to public policy. The fact that a contract is contrary to public policy is a separate basis of challenge which if successful will result in the contract being, not merely voidable, but void *ab initio*. One of the cases commonly pleaded as an example of public policy so invalidating a contract is *Harris v. Watson*.<sup>322</sup> Here, the plaintiff, a seaman, had been promised an extra five guineas for the performance of extra work. Lord Kenyon C.J. however non-suited him in his claim for payment thereof, asserting that if he did otherwise, it would "...materially affect the navigation of the kingdom"<sup>323</sup> by encouraging sailors to insist on extra payment in times of danger. However real this prospect, the case seemed to some to establish the principle that a contract involving extortion in a situation of monopoly would be void as being contrary to public policy. In fact the case is defensible on the much narrower ground of want of consideration. The plaintiff was already obliged by contract to do all he was asked to do in connection with the running of the ship.<sup>324</sup> In fact in *Pao On* Lord Scarman observed in a great many cases which are explained as being based on public policy in fact concern the absence of consideration and ought be placed on this surer footing.

In *Pao On* the Privy Council was asked to rule that even where duress is not established, "public policy may nevertheless invalidate the consideration if there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominant bargaining position".<sup>325</sup> This was, however, too wide a proposition for the Court to accept. It was "unnecessary for the achievement of justice and unhelpful in the development of the law. Where parties negotiated at arm's length, Lord Scarman remarked, they ought to be kept to their bargain save where there has been fraud, mistake or duress. The existence of the latter doctrines was sufficient to do justice and any expansion of the ground of public policy would render the law uncertain and anomalous. It would indeed be strange if a party who failed to make out a case of

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<sup>322</sup> (1791) Peake. 102.

<sup>323</sup> *Ibid.* at p. 103.

<sup>324</sup> In this regard the decision in *Stilk v. Myrick* (1809) 6 Esp. 129; 2 Camp 217 is instructive. An agreement entered into in similar circumstances was struck down for absence of consideration.

<sup>325</sup> *Pao On v Lau Yiu Long* [1980] A.C. 614 at pp. 633-4.

duress, (rendering a contract only voidable), could then successfully plead the same extortionate circumstances to render the contract void.

There is however some prospect of a role for public policy in determining the legitimacy of conduct for the purpose of the 'illegitimate pressure' test. In both *Universe Tankships of Monrovia v. International Transport Workers' Federation*<sup>326</sup> and *Dimskal S.A. v. International Transport Workers' Federation*<sup>327</sup> public policy played an integral role in ascertaining the legitimacy of the pressure there exerted. In each case a contract had been exacted by means of pressure which it was conceded was illegitimate unless legitimated by public policy considerations.

Those considerations were that trade union legislation granted immunity from suit to trade unions which conducted themselves in manner which would otherwise amount to a tort where the conduct was in furtherance of a trade dispute, being a dispute connected, *inter alia*, with the terms and conditions of employment. This did not extend to excusing duress at contract law, but the court in each case noted that it would be contrary to public policy "...to say of acts that are protected by statute that they nevertheless can amount to duress. Parliament having enacted that such acts are not actionable in tort, it would be inconsistent with legislative policy to say that when the remedy sought is not damages but recovery of money paid, they become unlawful". If the demand then was 'connected with the terms and conditions of employment' it would not, by analogy with statute, be illegitimate in nature.

This line of precedent seems to imply, however, that to the extent that public policy may be a determinant of legitimacy of pressure, it seems that it is confined to working by analogy with established legal rules. The suggestion that this heralds the birth of concept of legitimacy unshackled from legal concepts of wrong would be misleading. As Beatson observes "[d]espite the powerful *dicta*, the [*Universe Sentinel*] does not...take us very far. First, it was concerned with unlawful conduct. Secondly, the

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<sup>326</sup> [1983] A.C. 366.

<sup>327</sup> [1992] 2 A.C. 152

judges did not embrace and resolve disputed value judgments but applied a statutory policy".<sup>328</sup> It is hard to disagree with Beatson then that "the scope of lawful-act duress is...extremely limited".<sup>329</sup> Thus, it is suggested that it is likely that the wider proposition as stated in *Kaufman v. Gerson* will most likely be confined to its private international law origins.

### **Duress, Contract and Relational Theory**

Attempts then to look outside the confines of the law have, at best, produced little in the line of support for a general principle of 'lawful act duress'. If anything, the cases on ulterior purposes simply point out the need to avoid focussing on the threat *per se*. That the legitimacy of a threat, lawful in itself, may be coloured by the nature of the demand accompanying it is nothing new in legal terms. It is after all the foundation of what is commonly called 'blackmail'. As such, there is little scope for arguing that the presence of these cases represents a wider recognition of lawful act duress. By the same token, *Kaufman v. Gerson* and the Admiralty cases cited above seem to inhabit tightly confined categories that are *sui generis* and thus unlikely to support propositions of a wider application. The rejection in *Pao On* of an attempt to invoke the public policy plea in pressure cases seems, *a fortiori*, to preclude the extension of the 'morality' ground invoked in *Kaufman*.

As such, the criteria for illegitimacy continue largely to centre on concepts of legal wrong. In this regard the criteria are largely self-referential. This is not of course to suggest that the law is thus neutral in its approach to coercion. A formula based on criteria of legitimacy cannot depoliticise its content merely by shackling itself to legal concepts of wrong. These very boundaries are themselves ultimately predicated on a view of the commercial arena, one that is, as demonstrated above, ultimately predicated on the paradigm of the discrete contract. The prospects for a relational perspective on coercion then are slim. If, as argued above, these legal concepts are

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<sup>328</sup> Beatson, *op. cit.* (1991) at pp. 131-2

<sup>329</sup> *Ibid.* at p. 134.

themselves shackled to a discrete model of social-contractual relations then the construction of coercion for legal purposes will arguably be correspondingly based on discrete event-oriented models of behaviour.

The contractual concept of duress, even in its modern form, is indeed decidedly classical in its approach to coercion. It is, in particular, typically event-orientated in its approach. Take for instance the intriguing case of *Cumming v. Ince*.<sup>330</sup> There, the plaintiff had been incarcerated against her will in a lunatic asylum at the instance of the defendants, her daughters and their husbands. Having instituted a Commission of Lunacy against her, the defendants agreed to drop the proceedings on condition that the plaintiff make a settlement of property upon her daughters and their heirs. In an action for detinue the plaintiff recovered the title deeds to her property on the ground that the assignment had been made under duress. Notable by its absence is the curious lack of context in this case. Lord Denman C.J. makes no reference to the relationships between the parties. Obviously some species of disagreement led to the defendants taking such drastic measures. The purpose of the incarceration was (as evidenced by the arrangement entered into) clearly not the welfare of the plaintiff - if it was why would the defendants agree to her release by means of the arrangement? Yet, the report is almost entirely devoid of background information, which surely is relevant in determining the *animus* and *bona fides* of the defendants.

Few if any of the modern duress cases reveal a history of dealings, (which may be telling in itself). Most appear to involve once off transactions, although in some cases the idiosyncratic nature of the arrangements give rise to certain relational consequences.<sup>331</sup> One assumes for instance that the 'Atlantic Baron' was being built to certain individualised specifications, although for the most part the relational aspects in these cases are quite minimal. It may be tempting to suggest that this negates the contention made above that most contracts are forged in the context of an

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<sup>330</sup> (1847) 11 Q.B. 112, (1847) 116 E.R. 418.

<sup>331</sup> *The Siboen and Sibotre*, [1976] 1 Lloyd's Rep. 293, *The Atlantic Baron*, [1979] Q.B. 705, *Pao On*, [1980] A.C. 614, *The Universe Sentinel*, [1983] A.C. 366, *The Evia Luck*, [1992] 2 A.C. 152.



ongoing relationship. Attractive as this contention may be, it is arguable that these cases came to the fore precisely because they are exceptional rather than typical of modern contracting practices. Owing to the relatively discrete nature of their transactions, the various litigants were afforded an unusual liberty to challenge their fellow contractors. The prospect of a business challenging the actions of its most regular or sole client, for which it may have modified its business methods, is clearly less likely, involving as it does a radical reorganisation of business practices or alternatively the closure of its business.

The evident lack of relational-sensitive principles is most notable in the context of contractual modifications. The narrative of contract law is particularly telling in its approach to such modifications. It seems to suggest that such modification is unusual or exceptional, arising for instance, in cases of emergency or *in extremis*. The circumstance leading to the modifications in *North Ocean*, for instance, though perhaps not unforeseeable, was clearly atypical: the devaluation of a currency (especially one so sturdy as the US dollar) is clearly exceptional, a last-ditch reaction to a financial crisis rather than a standard economic solution. Other cases suggest that modifications are the product of poor foresight rather than altered circumstances. In *Pao On* and *Atlas v. Kafco*, for example, complications arose not because circumstances had changed but because the contractual arrangements (so far as the defendants were concerned) seemed not to reflect the true initial intentions of those proposing the changes.<sup>332</sup> In other words, the proposed modifications were intended to cure defects at the initial contracting stage.

Contract law does nonetheless, allow a previous history of dealings to imply the presence of terms not expressly included in the contract at issue. Such an approach however betrays leanings towards the discrete model of contracting. The dealings in

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<sup>332</sup> In *Atlas Express v. Kafco* [1989] 1 All E.R. 641, the plaintiffs had miscalculated the size of the items to be transported and thus overestimated the number that could be fitted in one vehicle. In *Pao On*, [1980] A.C. 614, the plaintiffs did not realise a potential pitfall in the bargain contracted that would, if left unrectified, have led to the loss of a profit to which they would otherwise have been entitled.

question though cumulative in nature, are notwithstanding the development of contractual relations, still treated as distinct events. Implicit in these arrangements is the requirement of a fresh contract on each occasion into which analogous terms are inserted rather than the presence of an overriding relation obviating the need for distinct contractual events. The question posed is whether the new contract should be treated the same as older contracts, not whether a contractual relation should be deemed to subsist subject to the alterations proposed.

## **Conclusion**

While there is some suggestion that 'lawful act duress' might be recognised in appropriate circumstances, the concept of 'illegitimacy' has worked in close parallel to established notions of legal wrong. Although certain demands backed up by threats of lawful action may nonetheless constitute duress, the analogy that is made with the offence of "demands with menaces" seems to indicate that what scope there is for development will be confined within, or at least closely mapped to, the existing boundaries of legality. Similarly, the role of public policy seems so far to have been limited to drawing analogy with statutory concepts of legitimacy where otherwise there would be inconsistency in the broad approach of the law.

This, however, has not prevented a significant degree of uncertainty from creeping onto the landscape. The recurring spectre of the 'overborne will' fallacy has undoubtedly not helped matters. But even with the seeming adoption of a more logical and coherent approach to causation supplemented by the "illegitimate pressure" test uncertainties still remain. Not least is the often fine distinction made between genuine compromise and circumstances of duress. Nor can it be said with confidence that a threatened breach of contract will amount to "illegitimate pressure" even where it forecloses all reasonable alternative avenues. Naturally the Courts are involved in a very delicate balance: too rigorous an intervention may discourage

commerce; too timid an approach will result in unfair exploitation going unchecked.<sup>333</sup>

The addition of this factor of legitimacy is in one sense an admission of a central premise in this thesis. The requirement clearly implies that it is neither feasible nor proper for the law to condemn every type of pressure, that some types of pressure are not only inevitable but also proper or at least acceptable. In this respect, its presence is an admission - if such is needed - that not all pressure is bad. Commercial pressure in particular is recognized as a naturally recurring feature of commercial life.<sup>334</sup> The problem lies in the fact that the criteria for legitimacy remain predominantly legal criteria of right and wrong. And if these criteria are, in turn, by and large based on the one-dimensional discrete model of contracting then it is arguably more than likely that the legitimacy of the pressure imposed will be judged by reference only to events rather than in the context of ongoing relationships, commercial or otherwise. Patterns of oppression then are ignored, patterns of co-operation likewise subsumed as the Court examines the legitimacy of the parties' actions by reference only to the contractual event and not the contractual history. This is where equity steps in. The foundation of the equitable doctrine of undue influence is arguably built on more relational foundations. It acknowledges in particular the manner in which the relation may itself create subtle yet pervasive pressures and influences that shape the conduct of the parties thereto. Whether it grapples with this adequately is an open question, a response to which is attempted in the next chapter.

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<sup>333</sup> As Wheeler and Shaw, remark “[i]n reality the courts tread a fine line between preventing unfairness and encouraging exchange. Consequently the reality of duress doctrine is a *compromise based on indeterminate distinctions between what is allowed and what is not*”. Wheeler and Shaw, *Contract Law, Cases and Materials*, (Oxford: Clarendon Press, 1994) at p. 503.

<sup>334</sup> See Lord Scarman in the *Universe Sentinel* [1983] A.C. 366 at pp. 400-401 and Lord Diplock at p. 384C and Lords Simon and Wilberforce in *Barton v. Armstrong* [1976] A.C. 104 at p. 121D.