

**THE HAMLYN LECTURES**

**Thirty-fourth Series**

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**THE QUEST FOR  
SECURITY: EMPLOYEES,  
TENANTS, WIVES**

*Tony Honoré*

**STEVENS**







THE HAMLYN LECTURES  
*THIRTY-FOURTH SERIES*

THE QUEST FOR SECURITY:  
EMPLOYEES, TENANTS, WIVES

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The Law Book Company Ltd.  
Sydney : Melbourne : Brisbane

CANADA AND U.S.A.

The Carswell Company Ltd.  
Agincourt, Ontario

INDIA

N. M. Tripathi Private Ltd.  
Bombay  
*and*  
Eastern Law House Private Ltd.  
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THE QUEST FOR SECURITY:  
EMPLOYEES, TENANTS, WIVES

BY

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*Published under the auspices of*  
THE HAMLYN TRUST

LONDON  
STEVENS & SONS  
1982

*Published in 1982 by  
Stevens & Sons Limited of  
11 New Fetter Lane, London  
Printed in Great Britain by  
Page Bros. (Norwich) Ltd.*

**British Library Cataloguing in Publication Data**

Honoré, Tony

The quest for security: employees, tenants, wives.—  
(The Hamlyn lectures)

1. Civil laws—Europe

I. Title II. Series

340'.094

ISBN 0-420-46410-7

ISBN 0-420-46420-4 Pbk

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1982



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## THE HAMLYN TRUST

THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of strong character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law and studied the subject. She also travelled frequently to the Continent and about the Mediterranean, and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

“The object of the charity is the furtherance by lectures otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.”

The Trustees are to include the Vice-Chancellor of the University of Exeter and representatives of the Universities of London, Leeds, Glasgow, Belfast and Wales.

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The Thirty-fourth series of Hamlyn Lectures was delivered at the Trent Polytechnic, Nottingham, in May 1982 by Professor A. M. Honoré

AUBREY L. DIAMOND

*Chairman of the Trustees*

*May 1982*

## PREFACE

It is an honour to be invited to lecture in the series founded under Miss Hamlyn's will. She seems to have been a lady of strong and straightforward views. These, as interpreted in the scheme of 1949, require the lecturer to explain to the common people of England the benefits which they enjoy by living under the laws of England in comparison with other European peoples. The lecturer is to do this by comparing the jurisprudence of England with that of its European neighbours, and he may take account of the ethnology of the countries which he compares. This perhaps means that he can draw attention to social, cultural and perhaps even genetic differences between England and, say, France or Germany, which might explain the privileged position of the English.

Miss Hamlyn died during the second world war, and her wishes, or what the Chancery scheme takes to have been her wishes, explicable in that context, seem a trifle simplistic now. Is it really the case that those who live under the laws of England are better off, happier, more privileged than those who are governed by German, Polish or French law? How could one find out? What criteria could be used in making the comparison? How can the effect of laws and the legal system be disentangled from that of tradition, custom, social convention, national character, and from the blessings or curses of climate, resource and geography? The pitfalls are such that one could easily be deterred from taking Miss Hamlyn seriously.

But a trust is a trust. Its terms should be meticulously observed. I shall do my best. The Hamlyn lecturer cannot, indeed, assume *a priori*, as did Miss Hamlyn herself, that it is better to live under English than neighbouring systems of law, for that is the very question to be investigated. Nor, in any case, does it admit of a simple, overall answer. But it is possible to select two or three points at which the legal system impinges on the central concerns of the citizen, and

examine these in England and in two of our European neighbours, France and Germany. Though the comparison will inevitably be summary and incomplete, because I know too little and because, for want of research, too little is known, the choice of systems is defensible. On the one hand apologies are due to the Scots, whose system is neither the same as the English nor sufficiently unlike it to make it a good candidate for comparison. France and Germany are chosen because these are the countries, along with our own, which have had the most profound influence on the laws of the rest of the world. French, German and English law are the three seminal systems, though not necessarily those that generate the greatest satisfactions for their citizens. It also happens that France and Germany are countries with whose law, language and society I have a modest acquaintance, so that the comparison is likely to be more telling than if other countries had been selected.

The points at which the legal system bears on the lives of citizens have been chosen for their centrality to the concerns of the "common people." We may smile at the phrase. Who are they? Not lawyers or intellectuals, surely, nor the rich. They are, perhaps, ordinary people who have a job or are looking for one; who live, many of them, in rented accommodation, a flat, a room, a house, or are looking for one; who are married, or looking for a husband, or hoping that their boyfriend will marry them. They are vulnerable. If they have the job, the flat or the husband now, they are worried about the possibility of losing him or it. What will happen if these relationships, central to their life, break up? Does society, through the law, do anything to give them greater security, to make it more difficult and costly to turn them out of work, home and domesticity? If they are looking for the job, the house or the husband, does society, through the law, increase or reduce their opportunities of getting them?

Society in England and its neighbours, primarily by legislation, but also partly through judge-made law, has done something towards increasing the security of employees, tenants and wives. These are conceived to be, and generally (not of course always) are the underdogs in the



three central relationships we are discussing. In this respect England, France and Germany have proceeded along lines which have a good deal in common, as one would expect from three modern industrial societies of roughly the same size; but they differ in detail. Which has done best from the point of view of giving greater security? To what extent is law effective when it seeks to regulate or impose costs on the dissolution of relationships which constitute the trunk rather than the branches or twigs of the tree of life? Is it the case that the citizen who is protected in these spheres is protected at the expense of his fellows? Is it correct to assert, as some do, that employment protection is employment prevention, that if it is more difficult to dismiss those who have jobs now, it is that much more difficult for others to get jobs later? That if existing tenants cannot be ejected, future tenants will not find accommodation to rent? That if divorced or separated wives are well maintained, fewer men will marry? Is it the case, again, that increased security within official relationships promotes unofficial relationships in which the security is less? Does job security, even a precarious security, encourage moonlighting and bogus self-employment? How far is it true that security for tenants leads to the development of an alternative—the licence instead of the lease? Does a relative security for wives lead to an increased development of the alternative, cohabitation? And if the unofficial institutions flourish, is this to be welcomed or deplored? Given these questions, the series of lectures begins to take shape. The first three lectures deal with the use of legal techniques in England, France and Germany to provide or increase security in the three chosen areas. The fourth tackles questions of cost, benefit and alternatives. How far is increased security a good thing? In the end, it will be for readers to say whether justice has been done to Miss Hamlyn's wishes.

There is an ethnological element in the enterprise. Observers of England often think of the English as a security-minded people. Given the history of the island of which it forms the major part, of the defensive triumphs against Philip II, Napoleon I and Hitler, of its long

tranquillity, its deep-rooted tenacity and endurance, it is easy to see why this might be so. If it is permissible for one to express an opinion, who is English by birth, French by ancestry and South African by education, the observers are not mistaken. The national style emerges even in sports, in the strategy of English football or cricket. So it seems that the *Quest for Security* is an appropriate theme not merely for comparing England with other European countries and for assessing the impact of law on ordinary people, but one which may afford, as the foundress wished, some insight into ethnic ways. Let her rest assured. I fervently hope that her judgment is and will forever be vindicated by English society and its laws.

Thanks are due and are gratefully rendered to a number of colleagues who have given me the benefit of their expertise without thereby incurring any responsibility for the use made of it: in particular, Guenther Treitel, Edward Burn, John Davies, Bernard Rudden, Mark Freedland and Paul Seabright. I dedicate these lectures to their generosity and that of other Oxford colleagues whose help over long years has made my stay among them fertile and fortunate.

Tony Honoré

October 1981

## Chapter 1

### DISMISSAL FROM WORK

*Work was his life.  
His life was work.\**

*Tombstone in a Black Forest Churchyard*

This lecture is concerned with dismissal from work, mainly in the private sector of the economy. How far can law protect employees by making it difficult, costly, or even impossible to dismiss them? The answer depends in part on the nature of employment in an industrial society.

This involves, in the usual case, two elements, a contract and a relationship. The *contract* of employment is the legal frame by which one person's labour is put, on agreed terms, at the disposal and under the authority of another.<sup>1</sup> The *relationship* of employment is that which exists between one who works and the person (taking this to include a firm or company) for whom he is working. The relationship may continue through a series of contracts. It may even exist without a contract. It is personal in that it involves day-to-day contact. Partly for that reason, and partly because, in a society which enjoys political freedom, employees cannot be forced to work,<sup>2</sup> laws seldom try to coerce an employer, for his part, into keeping on an ordinary employee, as opposed to a representative of the workforce, whom he wants to dismiss. Generally speaking,

\* Arbeit war sein Leben  
Sein Leben war Arbeit

<sup>1</sup> André Rouast, "Quelques réflexions sur l'originalité sociologique du contrat de travail": *Mélanges offerts à Jean Brethe de la Gressaye* (Bordeaux, 1969) 663.

<sup>2</sup> For the U.K. see Trade Union and Labour Relations act 1974, s. 16.

even if laws provide for reinstatement, an employee will have to be satisfied, in the last resort, with compensation.

In the nature of things the employer has large powers over the employee. One of these is the power to dismiss him. Dismissal is a juristic act (in some countries, though not in England, a formal act), by which the employer declares to his employee his wish to terminate the employment and bring the contract to an end, either immediately or after a period of notice.<sup>3</sup> If the employee reacts by staying away from, or not resuming work, the relationship of employer and employee ends.

Whether the contract also ends depends on the legal system we are considering. I shall begin with English law, and discuss how it has evolved over the last century or so, and what changes have been made in it by the legislation of the sixties and seventies of this century. Then I go on, more briefly, to say something of French and German law, before weighing up which system best protects the employee against dismissal.

### I. *The Evolution of English Law*

According to English common law, then, when an employer dismisses a worker, the contract between them ends if the dismissal is rightful (*e.g.* if the proper notice is given) but, if the dismissal is wrongful, it ends only when the employee accepts the employer's wish to terminate it. Until recently an employer in England had the right, unless the employment was for a fixed term, to dismiss the employee by giving the customary or agreed notice. This was often so short that in effect the employer could dismiss at will.<sup>4</sup>

<sup>3</sup> W. Zöllner, *Arbeitsrecht*<sup>2</sup> (1979) p. 180; J. Pélissier, *Le Nouveau Droit de Licenciement*<sup>2</sup> (1980) pp. 5 *et seq.*

<sup>4</sup> Hepple and O'Higgins, *Employment Law* (4th ed., 1981), para. 551, 541. If the contract expressly or impliedly laid down that it could be terminated only on certain grounds, it could not be terminated except on those grounds: *McClelland v. Northern Ireland General Health Services Board* [1957] 1 W.L.R. 594.

Indeed, until the Master and Servant Act 1876 a worker had by law, not just in fact, an inferior status. He was liable to up to three months in prison for any serious breach of the contract of employment. Thereafter, with unions strong enough to exert industrial power, the balance changed. The Employers and Workmen Act 1875<sup>5</sup> introduced new words. "Masters" became "employers," "servants" "workmen," and later, in a bureaucratic age, "employees."<sup>6</sup> The parties were now legally on a level; the contract was a bargain between equals, free to create and free to dissolve their relationship.

They remained, however, and remain, economically unequal; though collective bargaining brings them nearer equality. In the century which followed the legal changes of the 1860s and 1870s, judges treated employees in some matters as equal to employers, in others as needing protection against them. They distinguished between the contract of employment itself and matters between employer and employee which arose outside the contract. If the matter fell outside the contract - and the courts held that claims for injury at work fell outside it - they treated the employee from the late Victorian period onwards as needing protection. Earlier they had been much concerned not to hamper the expansion of business. This had led them to invent the doctrine of common employment, by which an employee's civil claim against his employer for injury suffered at work was defeated if the injury was the fault of a fellow worker.<sup>7</sup> In the late nineteenth century, however, they whittled down this discreditable doctrine. They also decided that a worker

<sup>5</sup> In the short title. The 1867 Act, s. 2 defined "employers" and "employed."

<sup>6</sup> Local Government Superannuation Act 1937, s. 35. Not in Index to Statutory Definitions (HMSO, 1923).

<sup>7</sup> *Priestley v. Fowler* (1837) 3 M. & W. 1; *Hutchinson v. York & Newcastle Railway* (1850) 5 Ex. 343, modified in *Groves v. Wimborne* [1898] 2 Q.B. 402. The doctrine was abolished by the Law Reform (Personal Injuries) Act 1948, s. 1 (1).

who takes a job does not automatically accept the risks inherent in it.<sup>8</sup> He is not really free, in most cases, to refuse it merely because it carries with it a risk of injury, even though, from the point of view of contract law, he is a free agent. Again, employers were held strictly liable for breaking statutes intended for the worker's health and safety. The employer's liability has even been called, with some exaggeration, absolute.<sup>9</sup> Employees who contributed to their injury by momentary inattention found that a lenient test was applied to them.<sup>10</sup> Only serious faults were held to amount to contributory negligence.

The same spirit did not, however, apply to the contract of employment itself. This was partly because there was not much litigation about these contracts. Indeed the sporadic incursions of judges into an area which they but dimly understood have been noted for their amateurish quality.<sup>11</sup> But the main lines of the law were clear. If the contract was for a fixed period neither party could end it within the period except for a serious breach by the other. If it was for an indefinite period, reasonable notice must be given. What was reasonable depended on custom, agreement and collective bargaining — if the latter was somehow incorporated in the contract.<sup>12</sup> Subject to this, an employer could dismiss as he chose. There was no

<sup>8</sup> *Smith v. Baker* [1891] A.C. 325; *Lochgelly Iron & Coal Co. v. M'Mullan* [1934] A.C. 1, 18; *Wilson & Clyde Coal Co. v. English* [1938] A.C. 57, 86 (Sc.).

<sup>9</sup> *Groves v. Wimborne* [1898] 2 Q.B. 402; *Carroll v. Barclay* [1948] A.C. 477, 487; *Wheeler v. New Merton Board Mills* [1933] 2 K.B. 669.

<sup>10</sup> *Carr v. Mercantile Produce Co.* [1949] 2 K.B. 601, 608 *per* Stable J., but contributory negligence by the employee was, and is, a (partial) defence to the employer, if sufficiently serious: *Caswell v. Powell Duffryn Collieries* [1940] A.C. 152.

<sup>11</sup> M. Freedland, "The Obligation to Work and to Pay for Work": *Current Legal Problems* 30 (1973), pp. 175, 180.

<sup>12</sup> M. Freedland, *The Contract of Employment* (1976), pp. 143 *et seq.*; O. Kahn Freund, *Labour Relations and the Law* (1965), pp. 28 *et seq.*

notion that he could be liable for abusing his right to dismiss.<sup>13</sup> And, even within an agreed term, or period of notice, an employer could dismiss summarily for disobedience to lawful orders.<sup>14</sup> The courts first cast doubt on this parade ground notion only in 1959.<sup>15</sup> It has since been confined to cases where the disobedience amounts to a total refusal to co-operate, or in some other way shows that the employee repudiates the contract.<sup>16</sup> The employer also set and judged the rules of industrial discipline. As late as 1964 a perceptive American observer noted that it was universally held, by both management and unions, that "discipline must remain strictly a matter of managerial prerogative."<sup>17</sup>

An employee who wanted to challenge or prevent his dismissal therefore had an uphill task. It is true that, as just mentioned, judges from about 1960 began to hold that summary dismissal for disobedience was wrongful unless the disobedience amounted to a really serious matter — the breach of an essential condition of the employment.<sup>18</sup> Even if the dismissal was wrongful, however, a court would and will not order a worker to be reinstated. His best hope of obtaining reinstatement was, and to some extent still is, to get his union and fellow workers to threaten or resort to "industrial action." This, which is just a euphemism for industrial fighting (*Arbeitskampf*), might succeed where recourse to law would not. And if the

<sup>13</sup> *Bradford Corporation v. Pickles* [1895] A.C. 587, though concerned with property rights, is a good example. There is no doctrine of abuse of contractual rights in English law.

<sup>14</sup> *Turner v. Mason* (1843) 14 M. & W. 112.

<sup>15</sup> *Laws v. London Chronicle* [1959] 1 W.L.R. 698.

<sup>16</sup> Heppell and O'Higgins *Employment Law* (4th ed.), para. 553; Freedland, *Employment* pp. 27 *et seq.*; *Secretary of State for Employment v. ASLEF (No. 2)* [1972] I.C.R. 19.

<sup>17</sup> F. Meyers, *Ownership of Jobs* (Los Angeles, 1964) p. 27.

<sup>18</sup> *Laws v. London Chronicle* [1959] 1 W.L.R. 698, 701 *per* Lord Evershed M.R. A series of minor instances of unsatisfactory behaviour may have a cumulative effect: *Pepper v. Webb* [1969] 1 W.L.R. 514.

dismissal was not legally wrongful, for instance because proper notice was given, but the worker thought it arbitrary or unreasonable, there was no way, short of industrial action, in which he could challenge the decision.

"It is curious," said an American observer "that Britain should be almost the only industrial country in the world where the sole means of challenging dismissals alleged to be unjust is to turn them into industrial disputes."<sup>19</sup> This was the odder, he thought, given the "deep-seated notion among workers that jobs belong to them and that they are not to be deprived of them arbitrarily, nor are the jobs themselves to be destroyed without regard to the established equities."<sup>20</sup>

In 1964, when Meyers wrote, English society and law were changing course. The change was soon manifest in employment law. In 1963 the Contracts of Employment Act had obliged employers to give their employees written notice of certain terms of the contract<sup>21</sup> and fixed minimum periods of notice.<sup>22</sup> In 1964 the Industrial Training Act set up Industrial Tribunals,<sup>23</sup> which, with a much expanded jurisdiction, have now become nation-wide labour courts.<sup>24</sup> In 1965 the Redundancy Payments Act introduced statutory redundancy payments,<sup>25</sup> an innovation in which Britain has gone rather further than her continental neighbours. In 1971 the Industrial Relations Act set up the new law of unfair dismissal.<sup>26</sup> This was retained in the Trade Union and Labour Relations Act

<sup>19</sup> Meyers, *Ownership of Jobs*, p. 30.

<sup>20</sup> *Ibid.* p. 42.

<sup>21</sup> Contracts of Employment Act (CEA) 1963, s. 4.

<sup>22</sup> CEA 1963, s. 1. The theory of equality was abandoned: the employee had to give not less than one week's notice, the employer, (if the employee had worked for him for five years or more) not less than four.

<sup>23</sup> Industrial Training Act 1964, s. 12.

<sup>24</sup> Heppell and O'Higgins, *Employment Law* (4th ed.), para. 774 lists the heads of jurisdiction.

<sup>25</sup> Redundancy Payments Act (RPA) 1965, s. 1.

<sup>26</sup> Industrial Relations Act (IRA) 1971, s. 22.



1974,<sup>27</sup> despite the general unpopularity of the 1971 Act with unions, employees and, indeed, some employers. The Employment Protection (Consolidation) Act 1978, following on the Employment Protection Act 1975,<sup>28</sup> consolidates large parts of the foregoing legislation, including those which concern dismissal.

These laws have injected into the contract of employment some of the paternalism which during the previous century informed the law of industrial health and injury. What explains this sudden intervention on the part of the legislator? Not, on the whole, union pressure. Organised labour has been lukewarm. After all, the new laws give more influence to lawyers. The political parties have for whatever motives sponsored or endorsed the changes in about equal measure. The impetus has come rather from public concern with labour unrest on the one hand and the protection of employees on the other. Moved by this concern, which the Donovan commission report of 1968 served to focus, Parliament has acted to encourage employers to think more than twice before resorting to dismissal. Minimum periods of notice provide, among other advantages, a compulsory period in which, if they want to, one or both may change their mind. Redundancy payments impose costs which may act as a deterrent and induce the employer to explore alternatives, such as redeployment. The law of unfair dismissal compels the employer to formulate his reasons for dismissing and to be prepared if necessary to defend them. These laws are not simply a protection to the employee. They are meant to stimulate thought about relations at work. The better known functions of law — to reinforce motives for obedience, to protect the weak — are not the only ones. Not

<sup>27</sup> Trade Union and Labour Relations Act (TULRA) 1974, Sched. 1, s. 4.

<sup>28</sup> Employment Protection Act (EPA) 1975, ss. 34-51, 70-80. The Employment Act (EA) 1980 swings the pendulum somewhat towards the employer, but without undermining the basic principles.

the least of its uses is to encourage people to exercise their rights thoughtfully and rationally. The law of unfair dismissal is a good example.

We can truthfully say that dismissal from work has been infused with law - in the absence of a better term, juridified. But the employer retains the right to dismiss if he is sure that he wants to and is prepared to face the consequences. The size of the workforce, the aptitude of the man for the job, remain in the last resort matters for management. Given this, have the new laws ensured, or even contributed to, job security? And what of job ownership?

In 1964 Meyers said that British workers thought of jobs as belonging to them. But is it really the job that they think of as theirs, or the firm, *i.e.* the employer's business? Parker and others found in 1969 that just about two-thirds of employees with firms having from 50 to 5,000 employees wanted to remain with their *employer* until they retired.<sup>29</sup> A third, even of employees aged 18 to 19, wanted to remain permanently with the same business.<sup>30</sup> These employees may be willing to move to a different job, with a different specification, within the business, but reluctant to move to another business. What they want is industrial marriage, a permanent relationship to the employer rather than the job. They look for a situation of mutual respect.<sup>31</sup> For while job security is a chimera, firm security is not, or at least not to the same extent. We could only preserve jobs as they now are by insulating ourselves from technical change and market forces, and that we can only do if our work is, like bureau-

<sup>29</sup> Of a sample of employees not made redundant 63 per cent. wanted to remain with their firms until retirement: S.R. Parker, C.G. Thomas, N.D. Ellis & W.E.J. McCarthy, *Effects of the Redundancy Payments Act* (1971) p. 116; *cf.* for redundant employees, p. 112.

<sup>30</sup> 32 per cent. of the sample: S.R. Parker and others, *Effects*, p. 116.

<sup>31</sup> *Wilson v. Racher* [1974] I.C.R. 428, 430 *per* Edmund-Davies L.J.

cratic paperasserie, self-generating. On the other hand the example of Japan shows that, given a deferential workforce willing to move sideways and downwards as well as upwards, firm security (to use a shorthand phrase) is within the range of possibilities.

Like job security, job ownership on a large scale is unattainable. An owner must be secure. His property cannot be at the mercy of private decision. Yet market and technical changes, through managers' decisions, destroy and create jobs. They cannot be owned. But an employee has a powerful interest in continuing to serve the same employer. This interest, once purely economic and social, is now legally recognised. It is a personal interest in the continuance of the employer-employee relationship. In England it entitles the employee to challenge the disruption of the relationship, and, unless he is to blame, obtain compensation.

## II. *The English Legislation : Redundancy and Unfair Dismissal*

So much for the social and conceptual background. I now turn to the technical details. The framework for the juridification of the work relationship consists in (a) a national system of labour courts and (b) a mechanism for setting out details of the contract of employment.

(a) The *labour courts* are the Industrial Tribunals set up originally by the Industrial Training Act 1964. They now have jurisdiction over 30 or more different sorts of complaint, reference and appeal,<sup>32</sup> including, what specially concerns us, unfair dismissal. They hear altogether 30 to 40,000 cases a year. They are relatively cheap, informal and quick - which means that a case will come up on average<sup>33</sup> in two to three months. The tribunal of three judges consists of a legally qualified chairman and two lay

<sup>32</sup> Heppell and O'Higgins, *Employment Law* (4th ed.), para. 774.

<sup>33</sup> *Ibid.* para. 772.

members, taken from lists drawn up by employers' organisations and trades councils respectively.<sup>34</sup> The court, which has been called an "industrial jury"<sup>35</sup>, has therefore a balance both between employers and employed, and between lawyers and laymen. If an employee makes a claim for unfair dismissal, an ACAS officer has the duty of trying to promote a settlement before the hearing.<sup>36</sup> Appeals on a point of law go to the Employment Appeal Tribunal,<sup>37</sup> which again is a mixed court, then, with leave, to the Court of Appeal and, with further leave, to the House of Lords.<sup>38</sup> Unfortunately the ordinary courts retain jurisdiction over the residue of the contract of employment not assigned to the Industrial Tribunals, until such time as the government in its wisdom decides and Parliament resolves to transfer the leftovers where they belong.<sup>39</sup>

(b) The system for specifying *details of the contract* of employment stemmed from the Contracts of Employment Act 1963.<sup>40</sup> This required an employer to give his employees certain details of their terms of employment in writing.<sup>41</sup> If he fails to do so, the contract remains valid, but the employee can apply to the Industrial Tribunal to decide what particulars should have been given<sup>42</sup> — a rather feeble remedy. The details to be provided have been

<sup>34</sup> *Ibid.* para. 777.

<sup>35</sup> *Bessenden Properties v. Corness* [1974] I.R.L.R. 338, 340.

<sup>36</sup> EPCA 1978, s. 133.; Heppell and O'Higgins, *Employment Law* (4th ed.), para. 787.

<sup>37</sup> EPCA 1978, ss. 135, 136 (previously established under EPA 1975, s. 87); Heppell and O'Higgins, *Employment Law* (4th ed.), para. 805.

<sup>38</sup> Heppell and O'Higgins, *Employment Law* (4th ed.), para. 808.

<sup>39</sup> EPCA 1978, s. 131; Heppell and O'Higgins, *Employment Law* (4th ed.), para. 809. The residue includes wrongful dismissal, which can easily overlap with unfair dismissal.

<sup>40</sup> Now CEA 1972, s. 4.

<sup>41</sup> EPCA 1978, s. 1(3) and (4). They are called "Written Particulars."

<sup>42</sup> *Ibid.* s. 11.

extended since 1972, and the minister can add more to the list. Already they include the pay scale, the intervals at which it is to be paid, hours of work, notice, the job title (but not the job specification), holidays, sickness, pensions, disciplinary rules and disciplinary procedure. If there are no express or implied terms (for example works rules or collective agreements) about one or more of these matters, this must be stated. It is true that the contract of employment itself does not have to be in writing. The particulars can be given up to 13 weeks after the employment began. They need not include details other than those specified. Nor are the details given conclusive. Both sides are free to show that they do not correctly reproduce what was agreed. But ordinarily the employer, since he has given the particulars, and the employee, if he does not object, will be barred as against one another - though not of course against third parties such as the minister - from going back on the terms set out.<sup>43</sup> In effect the law now requires the employer to set out the main terms of the contract. This is important, because it gives a court or tribunal which has to judge a dispute something to bite on. Indirectly it makes collective agreements more readily justiciable. Previously they might or might not be implied terms of an employee's contract. Now the employer, in giving written particulars, can refer the worker to a document which he has a reasonable opportunity of consulting<sup>44</sup> - for example, work rules or a collective agreement with a union. The terms of the agreement then become in effect express terms of the contract, and can be the subject of litigation.

Such is the open-ended framework of courts and written particulars. Within it three matters - notice, redundancy payments and unfair dismissal - call for special attention.

(a) The Contracts of Employment Act 1972 intro-

<sup>43</sup> *The Darlington Forge Ltd. v. Sutton* [1968] I.T.R. 198.

<sup>44</sup> EPCA 1978, s. 2 (3). For the effect see *Camden Exhibition and Display Ltd. v. Lynott* [1966] 1 Q.B. 555.

duced minimum periods of *notice* for those who have been in continuous employment for at least four weeks.<sup>45</sup> These have since been increased. They now vary from one to twelve weeks according to the length of the continuous employment.<sup>46</sup> A longer, but not a shorter period, can be specially laid down by express agreement, custom or collective bargaining.<sup>47</sup> But the statutory minimum notice is important not merely in giving all employees some time to make plans, but in providing a space in which, if both parties want it,<sup>48</sup> second thoughts are possible. If the employer dismisses without proper notice, and without a sufficient ground to justify summary dismissal, the employee is entitled to damages for wrongful dismissal. Despite some authority to the contrary,<sup>49</sup> a wrongful dismissal, unless accepted, does not end the contract of employment, though it usually ends the work relationship.<sup>50</sup> As Buckley L.J. has in a recent and lucid judgment explained,<sup>51</sup> the wrongfully dismissed worker may take his stand on the contract if he thinks it worth while doing so. Often, however, especially if there is no hope of reinstatement, it will not be worth while. In any case - and this is a separate rule - a worker who has not done the agreed work, because the employer does not want to give him any, cannot claim wages, but only damages for breach of

<sup>45</sup> CEA 1972, s. 1 (1).

<sup>46</sup> EPCA 1978, s. 49 (1).

<sup>47</sup> *Ibid.* s. 49 (3).

<sup>48</sup> Above, p. 7.

<sup>49</sup> *Vine v. National Dock Labour Board* [1956] 1 Q.B. 658, 674; [1959] A.C. 488, 500; *Taylor v. NUS* [1967] 1 W.L.R. 532, 551-553; *Denmark Productions v. Boscobel Productions* [1969] 1 Q.B. 699, 726, 737; *Sanders v. Neale* [1974] 3 All E.R. 327.

<sup>50</sup> Above, p. 2.

<sup>51</sup> *Gunton v. Richmond-upon-Thames L.B.C.* [1980] 3 W.L.R. 714; [1980] 3 All E.R. 577 (CA) at pp. 583 *et seq.* and *cf. Marshall v. Guinle* [1979] Ch. 227 (Megarry J.). Different principles apply to unfair dismissal, because of EPCA 1978, s. 55, which treats the unilateral act of dismissal as equivalent to the ending of the contract.

contract.<sup>52</sup> This is probably because the contract of employment contemplates that work is done at the employer's behest.<sup>53</sup>

(b) More important than the peremptory period of notice is the right to *redundancy payment*, which was created in 1965.<sup>54</sup> This gives an employee who has two or more years continuous service a right to a payment proportionate to his years of service up to a maximum of twenty.<sup>55</sup> The employer can obtain a rebate, at present 41 per cent., from the Redundancy Fund.<sup>56</sup> The dismissal must be wholly or mainly attributable to redundancy, not to the employee's shortcomings.<sup>57</sup> Redundancy is defined, in effect, as a change in the purpose or place of the business in which the employee was working or a fall in demand in the business for the sort of work he was doing, either generally or at his place of work.<sup>58</sup>

The theory of redundancy payments is a puzzle.<sup>59</sup> It has, I believe, two aspects. In part the payments are an inducement to encourage industry to adapt to technical change.<sup>60</sup> That is why the state pays part of the cost in the form of a rebate. The other purpose is to compensate the worker for the rupture, without his fault, of his relation to the business for which he has been working. Service with the same business or firm, though not property, is a social asset of which an employee is not to be deprived

<sup>52</sup> *Gunton v. Richmond-upon-Thames L.B.C.* [1980] 3 W.L.R. 714, 735-736 *per* Brightman L.J.

<sup>53</sup> See the definition above, p. 1. The conventional explanations (that doing the work is a condition precedent, that contracts of employment are not specifically enforceable), are inadequate.

<sup>54</sup> RPA 1965, s. 1; C. Grunfeld, *The Law of Redundancy* (2nd ed., 1980) — an outstanding treatise.

<sup>55</sup> EPCA 1978, s. 81 and Scheds. 4, 13, 14.

<sup>56</sup> *Ibid.* s. 104.

<sup>57</sup> *Ibid.* ss. 81 (2), 82 (2), 92 (3).

<sup>58</sup> *Ibid.* s. 81 (2).

<sup>59</sup> Grunfeld, *Redundancy* (2nd ed.), pp. 1-7.

<sup>60</sup> They were introduced at the time when the "white heat of the technological revolution" was a political slogan.

without compensation. The man who has long service with the same employer is more highly regarded, especially among working class people, than the man who changes employers. (Even among the middle classes where mobility is expected to be greater prestige attaches to long service). The law assumes that the worker is attached to his firm and contributes to it, and that the longer he stays the greater his attachment and his contribution. That is why a redundancy payment is proportional to length of service, up to the 20 year maximum. That is why a worker dismissed for misconduct can only exceptionally qualify for a redundancy payment. This is why a person who retires at the normal retiring age cannot claim a redundancy payment.<sup>61</sup> He suffers no dishonour. His relation to his employer is not ruptured, but follows its expected course until it comes to rest, with a state pension to boot.

The theory of redundancy payments I have set out is of course related to the notion, previously mentioned, of employment as a sort of industrial marriage.<sup>62</sup> This notion is deeply embedded, it seems, in the outlook of English workers. It presupposes that, given good behaviour and reasonable competence, employment with the same firm should normally continue until retiring age. Redundancy is therefore the breakdown of a relationship which is meant to be permanent, a species of industrial divorce, which ought to be compensated.

The legal minimum of redundancy pay is between half and one and a half week's pay per year of service, wages over a maximum, in 1980 £130 per week, being ignored.<sup>63</sup> Collective bargaining, which was seldom concerned with severance pay before 1965, has since then in many cases raised the statutory payment to three or even four weeks' pay per year. For management this represents a cost to be

<sup>61</sup> EPCA 1978, s. 82 (1). It is not "compensation for long service" as stated by Lord Denning, M.R. in *Lloyd v. Brassery* [1969] I.T.R. 100.

<sup>62</sup> Above, p. 8.

<sup>63</sup> EPCA 1978, Sched. 4 (2).



reckoned with in reaching decisions to cut the workforce, but in the long run it does not, as we daily observe, prevail against market constraints.

(c) The employer's right to dismiss on giving due notice or summarily is restricted by the law of *unfair dismissal*. Introduced by the Industrial Relations Act 1971, this came into force in 1972.<sup>64</sup> A full-time employee who has been continuously employed for a certain period (at present 52 weeks) has a right not to be unfairly dismissed.<sup>65</sup> A person employed for a fixed term has a right not to have the renewal of his employment unfairly refused when the term ends.<sup>66</sup> What counts as unfair? The legislation provides that a dismissal (or non-renewal after a fixed term) is unfair unless the employer dismisses the employee for a substantial reason.<sup>67</sup> Four sorts of reason are listed: (i) the employee's lack of capacity or qualifications for the work (ii) his conduct (iii) that it is unlawful for him to continue in the job (iv) redundancy. But other substantial reasons may also be relied on, and they need not be like the four listed.<sup>68</sup> For example, if the engagement is temporary, this may be a reason for not renewing it.<sup>69</sup> But it is not enough for an employer to have a substantial reason for dismissing a worker. He must also have acted reasonably in the circumstances in *treating* it as a sufficient reason for dismissal.<sup>70</sup> If, then, the

<sup>64</sup> IRA 1971, s. 22; TULRA 1974, Sched. 1; now EPCA 1978, Pt. V, derived from ILO recommendation 119, approved at Geneva 1963 (Cmnd. 2159, 1963).

<sup>65</sup> EPCA 1978, s. 54 (1); Unfair Dismissal (Variation of Qualifying Period) Order 1979. If the number of employees does not exceed 20, the right accrues after two years: EA 1980, s. 8, inserting EPCA 1978, s. 64A.

<sup>66</sup> *Ibid.* ss. 54 (1), 55 (2) (b).

<sup>67</sup> *Ibid.* s. 57 (2).

<sup>68</sup> *RS Components Ltd. v. Irwin* [1974] 1 All E.R. 41; [1973] I.C.R. 535.

<sup>69</sup> *Terry v. East Sussex County Council* [1977] 1 All E.R. 567.

<sup>70</sup> EPCA 1978, s. 57 (3).

employer's reason is not substantial (for example, mere irritation), or if, though substantial, it is not reasonable to treat it as sufficient for dismissal, (e.g. because he at first condoned the misconduct, or there has been a serious defect of procedure) the dismissal is unfair. Certain reasons for dismissal are always unfair: a woman employee's pregnancy, spent convictions, and certain reasons connected with trade union membership or activities.<sup>71</sup> The latter make the dismissal unfair even if the employee does not have 52 weeks continuous service.

According to the first president of the Employment Appeals Tribunal, unfair dismissal is not a common sense notion.<sup>72</sup> This is an overstatement. To treat non-renewal as dismissal is indeed to adopt an artificial notion of dismissal, even if, sometimes, an employee can expect as a matter of course to be renewed. But, given this, and given that the legislator, consistently with his own terminology, might have spoken of "unreasonable" rather than "unfair" dismissal, it is hard to think of cases in which the ordinary man would say that the dismissal was unfair when the law, correctly applied, makes it fair. For the tribunal, as stated, has to decide whether, in dismissing for a substantial reason, the employer acted reasonably in the circumstances. The circumstances to be considered include "equity and the substantial merits of the case," not to mention "the size and administrative resources of the employer's undertaking."<sup>73</sup> Is anything left out which, on a proper view of fairness, ought to be in? One thing at least is treated as irrelevant in law, though it can be important to the worker. If he is dismissed for refusing to belong to a closed shop,

<sup>71</sup> *Ibid.* ss. 56, 58, 60; Rehabilitation of Offenders Act 1974, s. 4 (3).

<sup>72</sup> *Devis & Sons Ltd. v. Atkins* [1976] I.T.R. 15, 22 (Phillips, J.) affirmed [1977] A.C. 931 but EPA 1975, ss. 73-76 may have altered the law.

<sup>73</sup> EPCA 1978, s. 57 (3) as amended by Employment Act 1980, s. 6.

when a closed shop agreement is in force, this counts as a fair dismissal, unless his objection is conscientious.<sup>74</sup>

The onus of proving whether or not the employer acted reasonably has been contentious. One can justify putting it on the employer, as did the law before 1980.<sup>75</sup> He best knows his own mind and can justify his own conduct. One can justify putting it on the employee, since he makes the complaint. The 1980 Act, however, opts for a neutral, or, to speak more accurately, a non-existent onus of proof.<sup>76</sup> This is more readily comprehensible in a system, like the French, in which courts commonly have an inquisitorial role. Even in such a system, a court may in the end have to fall back on some presumption of its own — for example, that, if there was a substantial reason for dismissal, the employer probably acted reasonably in dismissing. The 1980 legislator can hardly lay claim to courage.

In order to make it easier for an employee to discover his employer's reasons for dismissing or not renewing him, the employer is bound within 14 days of receiving a request to provide him with a written statement of them.<sup>77</sup> If the employer does not comply with the request, the tribunal can, on complaint, declare what the reason for dismissal was.<sup>78</sup> It must then award the employee a penalty of two weeks pay.<sup>79</sup>

A complaint of unfair dismissal must normally be brought within three months of the effective termination

<sup>74</sup> *Ibid.* s. 58 (3)-(3C), as inserted by EA 1980, s. 7; *Saggers v. British Railways Board* [1978] 2 All E.R. 20.

<sup>75</sup> The employee must prove the dismissal: EPCA 1978, s. 55. The employer must prove the reason or reasons for dismissal: EPCA 1978, s. 57 (1) (a). He also had to show that he acted reasonably in dismissing: EPCA 1978, s. 57 (3).

<sup>76</sup> EA 1980, s. 6.

<sup>77</sup> EPCA 1978, s. 53. Failure to comply or inadequate compliance can lead to a penalty of two weeks pay.

<sup>78</sup> *Ibid.* s. 53 (4) (a).

<sup>79</sup> *Ibid.* s. 53 (4) (b).

of the employment.<sup>80</sup> If it is upheld, the tribunal may order the reinstatement or re-engagement of the worker, provided that he wants it, that reinstatement is practicable and, that, given the employee's contribution, if any, to his own dismissal, it is just to take him back.<sup>81</sup> Reinstatement differs from re-engagement in that a reinstated employee must be treated in all respects as if he had not been dismissed,<sup>82</sup> whereas a re-engaged one need not be. Though the 1975 Act made reinstatement the primary remedy, it is ordered in very few cases (0.8 per cent. in 1979) and in the last resort a recalcitrant employer may choose, instead of taking the man back, to pay a penalty of between three months' and a year's wages.<sup>83</sup> Rather more, but still (in 1979) only 1.8 per cent. of employees are reinstated as a result of the conciliation which ACAS officers are bound to attempt before the hearing. As in the case of conciliation before divorce, if matters have come to the pass of a hearing before the Industrial Tribunal, they are unlikely to be mended afterwards.

If a dismissal is found to be unfair, the usual remedy is therefore compensation. Since 1975 this consists of two elements, a basic award and a compensatory award.<sup>84</sup> The terms are confusing, because the basic award, though it does not depend on proof of loss, is itself, from one point of view, a form of compensation for the rupture of the employment relationship. It is indeed similar to a redundancy payment, and is reduced by the amount of any redundancy payment actually made.<sup>85</sup> Like the latter it amounts to between half and one and a half week's pay per year of continuous service up to 20 years. There is a

<sup>80</sup> *Ibid.* s. 67 (2).

<sup>81</sup> *Ibid.* s. 69 (1), (2).

<sup>82</sup> *Ibid.* s. 69 (2), (4).

<sup>83</sup> Now EPCA 1978, s. 69 (5). In 1978 orders for reinstatement were made in 0.9 per cent. of cases heard and in 2.1 per cent. reinstatement was agreed without a hearing.

<sup>84</sup> *Ibid.* ss. 68 (2), 72.

<sup>85</sup> *Ibid.* s. 73 (9).

reduction if the dismissal was wholly or partly caused by the employee's conduct.<sup>86</sup> This basic award, which at present (1980) goes up to a maximum of £3,900, is therefore intended to compensate the employee for the rupture of a relationship which is assumed to be important to him in proportion to his years of service and to which he is assumed to have contributed in like proportion. But in this case, unlike one of pure redundancy, there is the additional consideration that the rupture is normally the employer's fault.<sup>87</sup> The employee is therefore also entitled to what is called a compensatory award. This gives the employee, subject to an upper limit (in 1979 £6,250)<sup>88</sup> the amount which the tribunal considers just and equitable in the light of what he has lost by the dismissal, and of the extent to which his own behaviour contributed to it.<sup>89</sup> The assessment to some extent follows a common law model. Thus, the employee must take steps to mitigate his loss.<sup>90</sup> The total amount recovered for unfair dismissal in 1977 averaged about £400.<sup>91</sup> If a redundancy payment has been made for the same dismissal, and it amounts to more than the basic award, it goes to reduce the compensatory award.<sup>92</sup> This shows that redundancy payments and basic awards are both forms of compensation for dismissal. It also shows that there can be some overlap between compensation for the rupture of the relationship of employer and employee as such, and for the fault of the employer in dismissing unfairly.

This outline of the protective legislation needs to be

<sup>86</sup> *Ibid.* s. 73.

<sup>87</sup> The employer is not always at fault: EPCA 1978, s. 63 (industrial pressure does not make dismissal "fair").

<sup>88</sup> EPCA 1978, s. 75 (1) as modified by Unfair Dismissal (Increase of Compensation) Order 1978.

<sup>89</sup> *Ibid.* s. 74 (1), (6).

<sup>90</sup> *Ibid.* s. 74 (4); *Bessenden Properties v. Corness* [1974] I.R.L.R. 338 (CA).

<sup>91</sup> *The Times*, March 1, 1978.

<sup>92</sup> EPCA 1978, s. 74 (7).

supplemented in certain respects. The most obvious is that collective bargaining often adds to an employee's rights. Thus, disciplinary procedures are mainly to be found in works rules or collective agreements. The legislation takes account of them in that, if an agreement for the procedure on dismissal gives the worker rights equal to or better than those given him by the general law of unfair dismissal, the two sides can apply to register the agreement and thereby exclude the general law. So, too, if such procedures exist, the written particulars which an employer has to give an employee must refer to them. These procedures often give a right of appeal within a firm, or to an outside body. An employee can then resort to these before falling back on the industrial tribunal. But he is not bound to exhaust his internal remedies first. The ACAS code of industrial practice<sup>93</sup> recommends that for minor industrial offences the employer should, before resorting to dismissal, first give an informal warning. Then he should give a warning in writing, and finally a written warning in which the possibility of dismissal is mentioned. The employee should also be given a chance to put his case at an interview, accompanied by a friend if he wants. But the ACAS code, like the highway code, is a set of guides rather than commands. It remains open to an employer to show that these procedures would have been pointless in the particular case.<sup>94</sup> In any evaluation of the English law of dismissal, these materials derived from collective agreement or recommended practice have to be considered alongside the statutes and the common law.

### III. *French Law : Real and Serious Cause*

The law of both France and Germany about dismissals is rather like our own. All three are influenced by similar

<sup>93</sup> Code of Disciplinary Practice and Procedures in Employment, paras. 10 (j), (k), 12, 16, 17.

<sup>94</sup> S.D. Anderman, *The Law of Unfair Dismissal* (1978), p. 256.

industrial conditions and by Directives of the EEC. French law, like English, replaced the subordination of the worker by formal equality about 1870; then, a century later, replaced formal equality by protection of the employee as the weaker party. It differs from English law mainly in that it requires more in the way of formalities, and relies to a greater extent on legislation as opposed to collective bargaining. The legislation gives French judges a freer hand than the English in deciding whether dismissal is justified. Thus, under recent French legislation, dismissal is a formal act; the procedures leading up to it are laid down in detail by statute; and judges decide what amounts to a real and serious cause for dismissal without further guidance from the legislature.

By article 1780 of the Code Civil of 1804 both employer and employee could end the contract at will, unless it was for a fixed term. Despite the appearance of equality, the worker's subordination was clear from article 1781, which laid down that in matters of salary the employer's evidence was to be accepted by the court. The rule making the employer's evidence conclusive was abolished in 1868.<sup>95</sup> Henceforth, as in England from about the same period, master and servant were in law on an equal footing. In the later nineteenth century there was uncertainty about the employer's right to dismiss at will. The Paris Court of Appeal decided in 1858 that an employer who dismissed without good reason was liable to pay compensation.<sup>96</sup> In 1872, however, the Court of Cassation restricted this to cases where the employer was in breach of contract or otherwise at fault<sup>97</sup> and quashed certain decisions awarding damages to railwaymen with long service who had been dismissed for what seemed flimsy reasons. Finally in 1890 the legislature intervened.<sup>98</sup> The new law confirmed that

<sup>95</sup> Law of August 2, 1868.

<sup>96</sup> Paris, February 12, 1858, March 16, 1858, *Dalloz P.*, 1858.2.215.

<sup>97</sup> Cass. February 5, 1872, *Dalloz P.*, 1873.1.63.

<sup>98</sup> Act of December 27, 1890, amending Cod. Civ., art. 1780.

the termination by employer or employee of a contract of service for an indefinite term might give rise to an action for compensation. In this action account was to be taken of custom, the type of work, the length of the employee's service, any payments he had made towards a retirement pension and other circumstances bearing on his loss. This law was taken to endorse the opinion put forward by some writers that an employer was liable for abusing his right to dismiss. In 1928 a statute<sup>99</sup> obliged both employer and employee to observe the period of notice fixed by custom or collective bargaining.

From about 1870 to the 1950s French law treated employer and employee as equals. An Act of February 19, 1958 first adopted the point of view that the worker might need special protection. An employee for an indefinite term, with at least six months service, was to be entitled to at least one month's notice of dismissal, though he himself had only to give the customary notice, which might be less.<sup>1</sup> Later laws, particularly from 1966, which form part of the labour code (Code du Travail) of 1973,<sup>2</sup> have improved the employee's position, along lines not very different from the English. I shall mention briefly (a) the labour courts, which correspond to English Industrial Tribunals (b) the requirement of written contracts (c) dismissal without real and serious cause, which corresponds to the English unfair dismissal and (d) redundancy.

(a) The *labour courts* (*conseils de prud'hommes*) are composed of an equal number of workers and employers.<sup>3</sup> They are lay bodies. Unlike the English Industrial Tribunal, none of their members need be legally qualified. The

<sup>99</sup> Act of July 19, 1928, amending art. 23 of the then Code du Travail.

<sup>1</sup> Act of February 19, 1958 art. 1, 2: *Gaz.Pal.*, 1958, II. 178.

<sup>2</sup> Act of June 2, 1973, *Dalloz*, 1973, p. 63, and later amendments; especially Acts of September 19, 1974, December 31, 1975, January 3, 1979.

<sup>3</sup> Code du Travail L. 512-1, inserted by Act of January 19, 1979, art. 1.



chairman is in alternate years a workers' or an employers' representative.<sup>4</sup> They have recently been reformed, with what effect it is too early to say.

(b) Contracts of employment for a fixed term must by a law of 1979 be in *writing*.<sup>5</sup> Otherwise they are presumed to be for an indefinite period. Collective agreements are automatically embodied in individual contracts of employment, if the employer has signed the collective agreement, or belongs to an employers' organisation which has signed it, or if a ministerial order has extended the agreement to the industry and area in which the employment takes place.<sup>6</sup>

(c) An Act of 1973<sup>7</sup> makes dismissal a juristic act which can be challenged for want of form and which, if not backed by adequate reasons, subjects the employer to a claim for compensation (*indemnité*). Dismissal now requires a *real and serious cause* (*cause réelle et sérieuse*)<sup>8</sup> and, in consequence, the old law about abuse of the right to dismiss, like the English law of wrongful dismissal, now plays a subordinate role.<sup>9</sup> An employee who, after two years continuous service, is dismissed without real and serious cause, can bring a claim before the labour court.<sup>10</sup> The court can propose reinstatement, but only with the consent of both employer and worker.<sup>11</sup> In the absence of reinstatement the employee is entitled to a payment

<sup>4</sup> *Ibid.* L. 512-8, 9, inserted by Act of January 19, 1979, art. 1.

<sup>5</sup> Act of January 3, 1979, *Dalloz*, 1979, p. 50.

<sup>6</sup> Code du Travail L. 132-10, 133-1, 133-10.

<sup>7</sup> Act of July 13, 1973.

<sup>8</sup> This is implicit, though not stated in so many words, in Code du Travail, L. 122-14-2 and 122-14-3. It is required for all dismissal except where the contract is for a trial period.

<sup>9</sup> *Jurisclasseur Travail*, 111 30.3-B Licenciement individuel ss. 131 *et seq.* (G. Courturier).

<sup>10</sup> Code du Travail L. 122-14.3. *Cf.* for England EA 1980, s. 8 (two years service instead of one needed if there have been less than 20 employees throughout).

<sup>11</sup> Code du Travail, L. 122-14.4.

(*indemnité*) for improper dismissal which must not be less than his salary for the last six months.<sup>12</sup> Since the employee does not have to prove financial loss, he is in effect compensated, and the employer penalised, for the improper rupture of the relationship as such. The legislation does not apply to small businesses, *i.e.* those which normally have less than 11 employees.<sup>13</sup> (Note that in England a lesser form of relief was given in 1980 to businesses with under 20 employees. Unfair dismissal applies to them only after two years' service instead of the normal one).

The attitude of the French Court of Cassation to the statute is worth noting. On a literal reading of the text, the six-month minimum indemnity is due only to an employee dismissed by an improper *procedure* and then only if the labour court proposed reinstatement. On both points the court has firmly rejected the literal interpretation of the Act.<sup>14</sup>

Under the old law it was for the employee to prove that the employer had abused his right to dismiss him. So far as proof of real and serious cause is concerned, the onus is neutral.<sup>15</sup> This has also been true in England, since 1980, of the onus of proving that a dismissal is fair or unfair.

In order to discover the reasons which the employer alleges for the dismissal, the French worker may within 10 days of the employment ending demand a statement of them in writing.<sup>16</sup> If the employer fails to reply this shows conclusively that he had no real and serious cause

<sup>12</sup> *Ibid.* L. 122-14.4.

<sup>13</sup> Code du Travail, L. 122-14.6. EA 1980, s. 8.

<sup>14</sup> J. Pélissier, *Le Nouveau droit de licenciement* (2nd ed.), (1980) pp. 321 *et seq.*; Cass. soc. December 18, 1975, *Dalloz*, 1976, 410 (note Pélissier), Cass. soc. October 4, 1978, *Dalloz*, 1979 I.R. 227.

<sup>15</sup> Code du Travail L. 122-14.3 (inquisitorial: the judge decides if need be after taking all measures to inform himself that he judges useful).

<sup>16</sup> *Ibid.* R. 122-3, L. 122-14.2: Pélissier, *Le Nouveau Droit de Licenciement* pp. 84 *et seq.*

for dismissing the employee.<sup>17</sup> In England, on the other hand, failure to give reasons is not taken to show that there are no adequate reasons, but, as mentioned, entitles the employee to an award of two weeks' pay.<sup>18</sup>

In France formal procedures must be complied with before and at the time of dismissal. The employer must give the employee written notice of his intention to dismiss him, and a chance to state his case at an interview, accompanied by a friend, if he wishes.<sup>19</sup> The formal dismissal must be notified by registered letter, which must be sent not less than a clear day after the interview.<sup>20</sup>

(d) Neither the formalities nor the right to a six-month indemnity in case of dismissal without real and serious cause apply to collective *redundancies*.<sup>21</sup> In such cases consultation with representatives of the workforce is required and so is the authorisation of the ministry of labour.<sup>22</sup> As laid down in an Act of 1975<sup>23</sup> the employer must consult the works council<sup>24</sup> (if the business has at least 50 employees) or, if less, the workforce representative (*délégué du personnel* : not quite a shop steward, since he need not be a union man). Then application must be made to the local labour office for authority to discharge the redundant employees.<sup>25</sup> Only when this is given can

<sup>17</sup> Cass. soc. October 26, 1976, *Dalloz*, 1977, p. 544 (note Jeammaud).

<sup>18</sup> EPCA 1978, s. 53 (4).

<sup>19</sup> Code du Travail, L. 122-14.

<sup>20</sup> *Ibid.* L. 122-14.1.

<sup>21</sup> *Ibid.* L. 122-14.5.

<sup>22</sup> Act of January 3, 1975 giving effect to the national inter-professional agreement of February 10, 1969 on security of employment and to the supplementary agreement of November 21, 1974. For a description of the system see Pélissier, *Licenciement* pp. 119 *et seq.*

<sup>23</sup> Now Code du Travail L. 420-3, 432-4. Consultation with the works council was first required by a law of June 18, 1966.

<sup>24</sup> *Comité d'entreprise*: first introduced by an Ordinance of February 22, 1945.

<sup>25</sup> Code du Travail, L. 321, 322-11.

letters of dismissal be sent to them.<sup>26</sup> These procedures give an opportunity for negotiation, but in the end it is not the function of the director of the labour office to substitute his business judgment for that of the employer. An employer who dismisses for redundancy without authority or consultation<sup>27</sup> is subject to a penalty for each employee so dismissed, and the employee can sue him for damages.<sup>28</sup>

An employee with two or more years service who is made redundant, or discharged for any other reason, apart from his own serious fault (*faute grave*), is entitled to a dismissal payment (*indemnité de licenciement*).<sup>29</sup> This corresponds to the English redundancy payment or the basic award for unfair dismissal, as the case may be. If there is an award for dismissal without real and serious cause, this is added to the dismissal payment.<sup>30</sup> The amount of the dismissal payment is low by English standards — one tenth of a month's pay for each year of service<sup>31</sup> — and though, as in England, collective bargaining can set higher amounts, there is no doubt that in France compensation for dismissal without cause is more generously compensated than is dismissal as such. This may reflect a less feudal attitude towards the relationship of employer and employee than in England, or perhaps just the fact that until 1981 the Fifth Republic had never had a socialist government.

#### IV. *German Law : Social Justification*

Though not radically different from English or French law, German legislation is more socially oriented. This shows itself in the terms used, for example "socially unjustified

<sup>26</sup> *Ibid.* L. 321-7.

<sup>27</sup> *Ibid.* L. 321-11.

<sup>28</sup> *Ibid.* L. 321-12.

<sup>29</sup> *Ibid.* L. 122-9.

<sup>30</sup> *Ibid.* L. 122-14-4.

<sup>31</sup> *Ibid.* R. 122-1.

dismissal,"<sup>32</sup> in the role given to the works council (*Betriebsrat*) in relation to dismissals,<sup>33</sup> and in the greater emphasis on redeployment and retraining.<sup>34</sup>

I shall mention briefly (a) the labour courts (b) the form of contracts of employment (c) notice and (d) socially unjustified dismissal, which corresponds to the unfair dismissal of English law.

(a) A comprehensive system of *labour courts* was introduced by an Act of 1926. These have sole jurisdiction over the contract of employment.<sup>35</sup>

(b) There is no need for a contract of employment to be in writing or in any particular *form*. The parties are also free to fix what terms they please.<sup>36</sup>

(c) Under the civil code of 1896 a contract of service other than one for a fixed period or limited purpose can be ended by either party on *notice*.<sup>37</sup> The period of notice is determined by the intervals at which the employee is paid. The statutory minimum runs from a day to six weeks for ordinary workers.<sup>38</sup> For superior, salaried employees (*Angestellten*) there are, by a law of 1926,<sup>39</sup> longer periods of notice, which run up to six months in the case of employees with 12 or more years service. At this point Germany brings in the socially important distinction between salary and wage earners, which English and French law ignore. But the distinction is now regarded as an anachronism.

<sup>32</sup> Dismissal Protection Act (*Kündigungsschutzgesetz*) of August 25, 1969, *BGBI.* I. 1317; Zöllner, above n. 3, pp. 176 *et seq.*

<sup>33</sup> Works Constitutions Act (*Betriebsverfassungsgesetz*) of January 15, 1972, *BGBI.* I. 861, which replaced the Works Constitution Act of October 11, 1952.

<sup>34</sup> Below nn. 46-48.

<sup>35</sup> A comprehensive system of labour courts was introduced by an Act of December 23, 1926, *RGBl.* I. 507.

<sup>36</sup> A. Söllner, *Arbeitsrecht* (5th ed.), (1976), p. 205.

<sup>37</sup> *BGB*, paras. 620-623.

<sup>38</sup> *Ibid.* para. 621.

<sup>39</sup> *Ibid.* para. 622, deriving from Act Concerning Notice of Dismissal of Salaried Employees of July 9, 1926; *BGBI.* I. 399.

Summary dismissal without notice is permissible if there is weighty reason for it (*wichtiger Grund*).<sup>40</sup>

(d) The law laid down in the code was changed by a statute of 1969 which requires a dismissal to be *socially justified*. This Dismissal Protection Act, as it may be called — though the *Kündigung* of German law refers to termination by either party — lays down that a socially unjustified dismissal is ineffective.<sup>41</sup> Such a dismissal does not end the relation of employer and employee unless the court, at the instance of one or the other, decides that in the circumstances continued employment is undesirable.<sup>42</sup> This is in contrast with English law, where the unfair dismissal is effective, though the industrial tribunal will sometimes order reinstatement. In Germany the remedies for unjustified dismissal are available to those employees who have six months service or more and who work in businesses with at least five employees<sup>43</sup> (France requires eleven). Employees with less service or in very small businesses can obtain compensation only if the employer dismissed them in bad faith.<sup>44</sup>

When is a dismissal socially unjustified? First (rather like the unfair dismissal of English law) if the grounds for it do not relate to the person or conduct of the worker or to urgent business requirements that are inconsistent with continuing to employ him.<sup>45</sup> In the private sector a dismissal is also socially unjustified if it runs contrary to a guideline agreed with the works council (for instance a guideline about redundancy),<sup>46</sup> or if the employee can be redeployed in another place of work or another part of the

<sup>40</sup> *BGB*, para. 626.

<sup>41</sup> Dismissal Protection Act (*KSchG*), para. 1 (1).

<sup>42</sup> *KSchG*, para. 9.

<sup>43</sup> *Ibid.* para. 23.

<sup>44</sup> *BGB*, para. 826.

<sup>45</sup> *KSchG*, para. 1 (2).

<sup>46</sup> Works Constitution Act (*BertrVG*), paras. 91, 102, III 2; *KSchG*, para. 1. II 1(a).

same business.<sup>47</sup> In these last two cases the dismissal is treated as unjustified only if the works council objects in writing within a week.<sup>48</sup> The dismissal is also unjustified if the worker can be redeployed after retraining, and agrees to be retrained,<sup>49</sup> or if he is willing to and can be employed in the business under different conditions, for example in a lower grade.<sup>50</sup>

If the court finds a dismissal socially unjustified, and so ineffective, it will normally so declare. In that case the worker must be kept on. But the court may conclude, at the behest of either party, that it is not desirable for the worker to continue in the same employment.<sup>51</sup> In that case it dissolves the relationship. It must then order compensation. This amounts to up to 12 months salary in the ordinary case. Older workers with longer service get more.<sup>52</sup>

In the case of redundancy the employer must, if asked, explain to the worker the social reasons which have led to his being chosen for redundancy rather than someone else.<sup>53</sup> In the case of summary dismissal the employer must give a statement of his reasons in writing.<sup>54</sup> In other cases (ordinary dismissal, not for redundancy) the law does not prescribe a duty to give reasons. But in effect reasons have to be given. This is because, for both summary and ordinary dismissals, the employer must consult the works council before dismissing, and give it an opportunity to comment or object in writing.<sup>55</sup> If the dismissal is summary the council has three days to give its view. For an ordinary dismissal it has a week.<sup>56</sup> The employer must provide

<sup>47</sup> *KSchG*, para. 1. II 1(b); *BetrVG*, para. 102. III 3.

<sup>48</sup> *BetrVG*, para. 102 II.

<sup>49</sup> *KSchG*, para. 1. II 2; cf. *BetrVG*, para. 102. III 4.

<sup>50</sup> *Ibid.* para. 1. II 2; cf. *BetrVG*, para. 102. III 5.

<sup>51</sup> *KSchG*, para. 8, 9 (1).

<sup>52</sup> *Ibid.* para. 10. 1, 11.

<sup>53</sup> *Ibid.* para. 1. II ("unsocial selection").

<sup>54</sup> *BGB*, para. 626 1 1; Palandt *BGB* (ed. 38, 1979) p. 587.

<sup>55</sup> *BetrVG*, para. 102. I.

<sup>56</sup> *Ibid.* para. 102. II.

sufficient information for the works council to form a judgment.<sup>57</sup> If possible, the works council must hear the employee before deciding.<sup>58</sup> If the works council is not properly consulted, the dismissal is inoperative.<sup>59</sup> In practice this means that the employer must always give reasons for dismissal, on pain of the dismissal being ineffective, but in certain cases only to the works council, not directly to the employee.

In some cases the dismissal counts as unjustified only if the works council objects. These include dismissals which are in violation of agreed guidelines, and where redeployment is possible.<sup>60</sup>

In other cases, though the works council can object, its objection is not essential to the worker's case. Thus, it can object that the worker threatened with dismissal could be retrained or employed on different terms.<sup>61</sup> It can argue that social considerations (*e.g.* that the man dismissed has a large family to support) have been overlooked or not sufficiently taken into account.<sup>62</sup> Exactly what weight objections of this sort by the works council have in law is uncertain. At least they add something to the employee's own objections.

If the works council opposes the dismissal and the employee brings a complaint before the labour court under the Dismissal Protection Act, the employer must keep the employee on until the court has decided the issue,<sup>63</sup> but, because of long delays in hearing cases, only about five per cent. of employees whose cases go to the labour court are reinstated. In any case the employer need not keep the worker on when the court is satisfied that the complaint has little chance of success, or that the objection is ground-

<sup>57</sup> *Ibid.* para. 102. I.

<sup>58</sup> *Ibid.* para. 102. II.

<sup>59</sup> *Ibid.* para. 102. I.

<sup>60</sup> *Ibid.* para. 102. III 2, 3; *KSchG*, 1. II 1(b).

<sup>61</sup> *BetrVG*, para. 102. III 4, 5.

<sup>62</sup> *Ibid.* para. 102. III 1.

<sup>63</sup> *Ibid.* para. 102. V.



less, or that to keep him on would impose an undue burden on the employer.<sup>64</sup> The duty to keep the employee on does not apply to summary dismissal.<sup>65</sup> Sometimes collective bargaining reinforces the position of the works council, so that no dismissal can take place without its consent, or without referring the matter to some agreed referee.<sup>66</sup>

#### V. *A Comparison*

Who is the best protected employee? Presumably not the one who gets the largest sum of money if he is dismissed without good reason, but the one who has the best chance of not being arbitrarily dismissed. If this is so, it seems that, at least from point of view of legal protection, the German employee is best off. The German legislation is both better designed and more coherent than the English and the French. In Germany the works council has to be consulted before dismissal and can make justiciable objections. In France it has indeed to be consulted in cases of redundancy, but its objections do not have the same weight. In England any consultation or hearing before dismissal depends on internal rules or collective bargaining, and so varies from business to business. Under the German scheme the employer has to explore the possibility of retraining or redeployment, because the employee or works council can raise these by way of objection. In England and France, on the other hand, these possibilities go merely to the general issue of whether there is a real and serious cause for the dismissal, or whether it is fair. England, however, gives the most generous compensation in cases of redundancy. In Germany this is a matter of collective bargaining, not statute law.

<sup>64</sup> *Ibid.* para. 102. V.

<sup>65</sup> *Ibid.* para. 102. I 1.

<sup>66</sup> *Ibid.* para. 102. VI.

The other important difference is that in England, despite the unfair dismissal legislation, industrial action remains the main means of securing reinstatement, indeed often the first resort. This is because a dispute about dismissal is a "trade dispute," and action taken in pursuit of it attracts legal immunity within the wide limits first laid down in the Trade Disputes Act of 1906.<sup>67</sup> In my opinion it would be better for both employees and employers if industrial action had to wait until an industrial tribunal decided the issue of unfair dismissal. It would be better if, as in Germany, the employer had ordinarily to keep the employee on until then, so that reinstatement was more often a real possibility than it is now. It would be better if England had provisions like those of German law about retraining and redeployment (*Weiterbeschäftigungspflicht*). It would be no bad thing if a body such as a works council or consultative committee (which in many businesses would need to be created) had to be consulted before anyone was dismissed.

Are these pipe dreams? Though recent history seems to say so, I do not accept that they are. It was a great advance when employers were compelled by law to give reasons, if challenged, for dismissing employees and to defend these reasons. But the law does not go far enough, and it is too one-sided. In due course, its civilising mission will penetrate more deeply. For the moment I doubt if we can say that the English worker is better off than his German counterpart as regards dismissal, though he may have the edge over the French worker if he belongs to a unionised industry. Does that imply that the English employer is better off? Hardly. He is exposed to outbursts of industrial action designed to stop dismissals before a tribunal has had a chance to rule on them.

Whatever we may in general think about the juridification of industrial relations, is there not a good case, in the

<sup>67</sup> Trade Disputes Act 1906, ss. 3, 4; IRA 1971, ss. 131, 132; TULRA 1974, ss. 13, 14.

narrow but important area of dismissal, for building on the foundations that the recent legislation has laid down, and forcing the parties to argue the matter out before they come to blows?

## Chapter 2

### HOMES AND SECURITY OF TENURE

*This is my proper ground  
Here I shall stay*

Philip Larkin, *Places,  
Loved Ones.*

This lecture is concerned with the use of law to give tenants security of occupation in their homes. In England security of occupation (*maintien dans les lieux*, *Bestand-schutz*), is generally called "security of tenure." The persons entitled to it are called "tenants," contractual or statutory. Technically, and indeed socially, there are some objections to these expressions. Technically the protected householder may not strictly speaking be a tenant. Socially, what matters to him is not tenure but continued occupation. The French and German terms are therefore more accurate. However, out of deference to established usage, I shall adopt the English "security of tenure."

Those who own their own homes — about 55 per cent. of the population of England — will not be discussed, though it is of course important for them to be protected against summary eviction by a mortgagee. Nor will the lecture cover security of tenure for those who rent premises for professional, industrial, commercial or agricultural purposes. This leaves a large group of people who live in rented accommodation. In England the figure is about 45 per cent. Of these seven tenths live in council houses and other publicly provided accommodation, the rest in privately rented houses, flats or rooms.<sup>1</sup> The proportion of private tenants in many European countries is higher.

<sup>1</sup> *Social Trends* (HMSO 1982), p. 146 estimates 11.9 million owner occupied houses, 6.8 rented from local authorities and New Towns, 2.8 rented from private owners or tied.

*I. The Interests of Tenants*

Those who want to rent accommodation to live in have an interest in there being a stock of suitable housing available for them and their families (if any) at a rent within their means. Those who are already living in rented housing have interests which may be slightly different, and which can even conflict with the interests of those who are looking for somewhere to live. It is with actual tenants or occupiers that we are presently concerned; the interests of potential tenants will be discussed in the last lecture.

Those who are already tenants living in housing rented from landlords may have interests of various sorts, of which I shall mention three; two sorts of economic interest and one sort of psychological interest. The first is the purely economic interest of the tenant who, in a free housing market is capable of renting what he and his family need, provided that the market operates normally. If it does not, if, for example, there is a housing shortage as a result of war, such a tenant needs protection. He needs protection against rent increases imposed on him by a landlord who is now in a quasi-monopolistic position, and can exploit the shortage. But in that situation rent control is not enough. If rents are controlled but the landlord is free to give the tenant notice and ultimately evict him, the landlord will be able to use the threat of eviction to exact more than the controlled rent and to prevent the tenant taking legal action against him. The landlord may also see an advantage in selling the accommodation for owner-occupation, in order to get a better return on his capital. During a housing shortage, therefore, a tenant of this sort (let us call him a "competitive tenant") has an interest in security of tenure. Once the shortage ends, however, he no longer, by definition, needs this sort of protection. In a free, efficient, market he can fend for himself.

The second sort of economic interest is that of the tenant who is poor or, as the French put it, economically weak, in other words the uncompetitive tenant. His

interest differs from that of the competitive tenant. The economically weak tenant cannot, generally speaking, pay for housing suitable to his needs even in a free and efficient market. He needs to be helped by way of subsidy or by special housing schemes, in short by social services of an appropriate sort. If, by chance, he has found and rented suitable accommodation within his means, he needs to be protected against rent increases which would take the housing out of his range, and therefore against eviction, which would put him in a position where he could afford no suitable substitute housing.

The two interests so far described are both economic. In regard to them rent control is primary, security of tenure secondary. It is a matter of definition that the *economic* interests of tenants can be satisfied by suitable alternative accommodation -- suitable, that is, from the point of view of all the relevant factors, such as situation, rent, quality, accessibility to work and school. This is not true of the third type of interest, which is psychological. Many tenants and their families become attached to their home, even if it is rented from someone else. They do not want to move even if economically equivalent housing is provided elsewhere. They prefer to stay where they are. They are attached to their home just as some employees are attached to their employer or their job. These tenants have a primary interest in security of tenure. For them rent control is only an adjunct. This is because, if the rent were put up beyond a certain figure - the maximum they could afford - they would have to quit. Their claim to security is like that which supports the long leaseholder's claim to leasehold enfranchisement, and the council house tenant's claim to buy the council house. Indeed, when security of tenure is granted to a tenant for psychological reasons, it may be thought of as a (limited) expropriation of the landlord's interest rather than a measure to meet an emergency or a social need. The policy supporting it gives preference for a limited but extensive period, usually the duration of one, two or three lives, to the

interest of the tenant who wants to remain in his home, rather than to that of the landlord or owner.

Obviously there is an overlap between the psychological and economic interests of tenants. A tenant will often have both. But we need to keep these interests distinct in our minds, because the appropriate policy depends on which of them is taken as primary. A policy which can loosely be described as aiming at security of tenure can have one of three objectives: it can try to protect those who are at risk during a housing shortage until such time as the market again operates normally. It can aim to protect the economically weak. Lastly, it can try to provide those who cannot afford to buy their own homes with a substitute for home ownership, a right to remain in occupation for at least one lifetime and often more. The choice of objects and the balance of emphasis between them will determine the character of the legislation.

For this reason a different method of exposition will be followed from that employed in the first lecture. I shall begin with the French, go on to the German and end with the English legislation. For while French law has so far aimed mainly at satisfying the first interest, German has sought a compromise; and in England the third interest has come to predominate.

## II. *French Law : Back to the Market*

The main aim of French law, then, up to 1982 was to provide security of tenure (*maintien dans les lieux*) as a temporary measure during a period of housing shortage. The legislation providing for this began during the First World War and is, in a modified form, still in force, but it is designed ultimately to wither away. During the last 15 years, the range of its application has been much reduced. Hence it will provide a good model against which to judge legislation which is aimed, at least to some extent, at different objectives, social or psychological.

Under the French civil code of 1804 the lessor could terminate an "unwritten" lease, *viz.* one for an indeterminate period by giving notice. The length of notice required depended on agreement, custom or the interval at which rent was payable.<sup>2</sup> This right of the lessor was not at first curtailed in August 1914, but a moratorium was imposed on rent increases.<sup>3</sup> The legislation covered both residential and professional accommodation (*e.g.* a doctor's surgery), as it still does: but professional leases will be left out of account.

The moratorium of 1914 was gradually transformed, from 1918, into a system by which leases were prolonged (*prorogation*) at gradually increasing rents.<sup>4</sup> These were based on the historic rent at or before August 1914 plus a percentage increase according to the period which had since elapsed. This system was conceived as provisional and did not apply to new building. It was to have been phased out by 1943. In a period of renewed war and occupation that proved impossible. Indeed in 1944 a complete rent freeze was imposed.<sup>5</sup>

After the war there was an opportunity to take stock. For old houses the disproportion between the permissible rent increase over the 1914 figure and the actual rise in costs had become startling. In Paris, for example, costs had risen (nominally) to 130 times the 1914 figure, while the permissible rent was 6 times the 1914 amount.<sup>6</sup> Besides, in the existing state of the law there was virtually no incentive to build for renting.

<sup>2</sup> Code Civil (C.C.) arts. 1736, 1759: *Encyclopedia Dalloz* s.v. bail, ss. 502 *et seq.*

<sup>3</sup> See in general R. Désiry, *Le Bail d'Habitation* (1967) & *Jurisqueur Civil Arts.* 1752-1762 C.C.; M. Ferid, *Das französische Zivilrecht* (Frankfurt-am-Main, 1971), paras. 1. 701 *et seq.*

<sup>4</sup> Act of March 1918, art. 10. The first code of housing lease law was that of April 1, 1926, amended by Acts of June 29, 1929, December 31, 1937 and May 30, 1943.

<sup>5</sup> Act. no. 50 of February 1, 1944, art. 2.

<sup>6</sup> Désiry (above, n. 3) *H.* 10, no. 10.



A fresh start had to be made. The new legislation took over some of the principles of the old but tried to avoid its mistakes. The Act of September 1, 1948 on *Leases for Housing and Professional Purposes* (Housing Leases Act)<sup>7</sup> was concerned to encourage the building of houses and flats to let but at the same time to protect tenants of existing housing so long as there is a housing shortage. To encourage building it freed from rent control and protected occupation (*i.e.* security of tenure) any residential premises built or rebuilt after the promulgation of the 1948 Act.<sup>8</sup> On the other hand housing built before that date — older housing — remains in principle controlled as regards both rent and security of tenure. In the case of older housing, the tenant, subtenant or assignee<sup>9</sup> of a lease is protected in the following way. If his lease comes to an end, for instance by expiry of the term or notice, he automatically becomes an occupier as opposed to a tenant.<sup>10</sup> If he is in good faith, he is a *protected occupier*. He can remain in occupation for life provided that he continues to occupy in good faith. His right is personal and unassignable but is valid against third parties<sup>11</sup>: as in England it is not an interest in property. On his death his spouse, ascendants, descendants and anyone whom he has been supporting on the premises (*personne à charge*, such as a woman cohabiting with a male tenant) can continue the protected occupation, provided they have been living in the premises for at least a year.<sup>12</sup> The same right of succession accrues if the occupier abandons his occupation: this refers to his sudden, unexpected departure.<sup>13</sup> To complete the picture so far as

<sup>7</sup> *Baux d'habitation ou à usage professionnel*.

<sup>8</sup> Act of September 1, 1948, art. 3.

<sup>9</sup> *Ibid.* art. 4 (2).

<sup>10</sup> *Ibid.* art. 4 (1).

<sup>11</sup> *Ibid.* art. 17.

<sup>12</sup> *Ibid.* art. 5 (1) as inserted by Act of July 9, 1970. Previously, as in England, any member of the family residing with the tenant or occupier could succeed.

<sup>13</sup> Act of September 1, 1948, art. 5 (1).

succession to protected occupation is concerned, if the premises are used as a matrimonial home, a law of 1962 automatically vests the lease in both spouses, even if the tenant was married after the original lease had come into force.<sup>14</sup> Hence the right to protected occupation vests in both spouses. On separation or divorce the court can decide on social and family grounds which spouse is to have the right to continue in occupation.<sup>15</sup>

The right to remain in occupation presupposes a valid lease, sub-lease or assignment. If the arrangement is purely precarious - a mere licence - the 1948 legislation does not apply.<sup>16</sup> The fact that the parties describe the occupation as temporary or precarious does not of course bind the court. For example, the parties describe the occupation as "temporary until such time as the owner finds a purchaser of the property." The landlord takes no steps to find a purchaser for several months. The court may find that the arrangement amounts to a lease and that the 1948 Act applies.<sup>17</sup> *A fortiori* if the occupier pays more than what would be the permissible rent, since this suggests a fraud on the 1948 Act.<sup>18</sup>

To have protection the occupier must be in good faith. He is in good faith if he fulfils his obligations.<sup>19</sup> These obligations are primarily those contained in the lease, so far as they are consistent with the legislation. Thus, it is proper to find want of good faith when the occupier is persistently late in paying rent, when he uses the premises for business purposes, sublets them improperly, directs grave insults against the landlord, or creates a nuisance, for example by having 100 cats on the premises.<sup>20</sup> (Those who are sceptical of the French fondness for pets may care

<sup>14</sup> *C.C.*, art. 1751 (1).

<sup>15</sup> *Ibid.* art. 1751 (2); Act of September 1, 1948, art. 5 (3).

<sup>16</sup> Désiry, *E.* 10, nos. 95-99.

<sup>17</sup> Cass. soc. June 21, 1966; *Bull. civ.* IV, no. 630, p. 534.

<sup>18</sup> *Ibid.*

<sup>19</sup> Act of September 1, 1948, art. 4 (2).

<sup>20</sup> Cass. soc. May 9, 1967; *Bull. civ.* IV, no. 385, p. 320.

to note that by a law of 1970 any tenant or occupier may, notwithstanding the terms of the lease, keep a domestic animal (*animal familier*) provided it is well-behaved.)<sup>21</sup>

The basic obligation of good faith is to pay the rent. This is fixed by a complicated formula and is in the last resort settled by the court. The 1948 Act switched from a historic to what is called a "scientific" basis of calculation.<sup>22</sup> Instead of taking the 1914 or 1948 rent as a starting point, the rentable value (*valeur locative*) is fixed by multiplying the adjusted floor-space (adjusted for amenities such as central heating) by the standard rent per square metre for the class of property in question.<sup>23</sup> There are seven such classes.<sup>24</sup> The actual rent, however, is not necessarily the rentable value. The permissible rent was fixed in 1948 at four per cent. of a standard income, and was thereafter progressively increased until it reached, or will reach, the rentable value.<sup>25</sup> The latter is adjusted from time to time to take account of inflation. The fixing of rents by this formula does not depend on the grant of security of tenure.

A movement towards decontrol began in 1958 and acquired momentum in the 1960s. The higher classes of property have thus been decontrolled as to rent, and, more slowly, as to security of tenure.<sup>26</sup> Besides, communes with under 4,000 people have never been subject to control<sup>27</sup>; and those between 4,000 and 10,000 were partially exempted in 1959.<sup>28</sup> The government, if satisfied that the housing supply has improved sufficiently, can exempt any

<sup>21</sup> Act of July 9, 1970, art. 10.

<sup>22</sup> Désiry, *H.* 10, no. 26.

<sup>23</sup> Act of September 1, 1948, arts. 27 (1), 28 (1).

<sup>24</sup> *Ibid.* art. 30, with relevant decrees, beginning with that of December 10, 1948, art. 2 (*Dalloz* 1948, p. 450).

<sup>25</sup> Act of September 1, 1948, arts. 31, 34, *bis*; Désiry, *H.* 10, no. 20.

<sup>26</sup> *e.g.* decrees of June 30, 1969, June 28, 1973, June 27, 1975,

<sup>27</sup> Act of September 1, 1948, art. 1 (2).

<sup>28</sup> *Ibid.* art. 3 *bis*, inserted by Ord. of December 27, 1958.

commune even over these limits from the Act.<sup>29</sup> About 14,000 communes have been exempted. Still, old houses in Paris and its environs, and in other urban centres, remain subject to control. The 1948 scheme has still more than a historic interest.

The Act is peremptory, a matter of *ordre public*. Hence the tenant cannot contract out of his right to become a protected occupier, nor the landlord out of his right to retake the property (*droit de reprise*).<sup>30</sup> By way of exception, however, a tenant in occupation who thereafter takes a lease of six years or more can contract out of the Act.<sup>31</sup> Apart from this, the owner or landlord (let us call him "owner" for short) can, if a French citizen, retake the premises in two eventualities. First, he can retake it if he offers to and can rehouse the occupier.<sup>32</sup> He can do so in order to live in the premises himself or use them as accommodation for his wife, his ascendant or descendant. But he must provide alternative accommodation in a good state of habitation; and the alternative must be suited to the personal and family needs of his tenant. These depend in part on the tenant's family and social status. To exercise his right to retake, the owner need not have owned the property for any particular length of time. He may have acquired it just before exercising his right to retake. Nor need he show that he has no other suitable accommodation for himself and or his family to live in.<sup>33</sup> What is offered in exchange need not be of the same quality as the premises retaken, though it must be suitable for the occupier's needs. Thus, the rent of the new premises, though it must be within the former occupier's means, may be greater than that of the old. The occupier can of course contest

<sup>29</sup> Act of September 1, 1948 art. 1 (5).

<sup>30</sup> *Ibid.* Chap. 2.

<sup>31</sup> *Ibid.* art. 6 *ter* as inserted by Act 62-902 of August 6, 1962.

<sup>32</sup> Act of September 1, 1948, art. 18 (1). The right to retake goes back to the Act of March 9, 1918, art. 10. It was excluded from the wartime Act of February 1, 1944, art. 2 (above, n. 5).

<sup>33</sup> Cass. soc. March 12, 1964; *Bull. civ.* IV, no. 241, p. 200.

the suitability of the new accommodation. Before deciding that it is unsuitable the court must take an expert opinion; but it is not bound by the opinion.

The owner may also have the right to retake the occupied premises without rehousing the occupier.<sup>34</sup> To exercise this right, however, he must have acquired the property at least 10 years previously to the retaking, or, if he acquired it with a view to housing himself or his family, and without any idea of speculation, four years previously.<sup>35</sup> (Note how the French legislator does not hesitate to ask the courts to assess the landlord's motives: the courts take "speculation" to mean the prospect of an abnormal and rapid profit). The landlord must also show that he or his spouse, ascendant or descendant does not have at their disposal housing suitable for their normal needs and those of members of family living with them. In assessing normal needs French courts have taken the view that it is normal for an unmarried child of full age to live away from his or her parents' home, even normal for an old lady of 93 to decide that she wants from now on to live on her own, normal for a cohabitant living with her lover to want her own place.<sup>36</sup> Indeed, normal needs are broadly interpreted. The owner can retake, for example, if his present accommodation is too big and expensive, or too far from work or school, or if he has been evicted because his own landlord has exercised a right to retake.

The landlord must give notice of his intention to exercise the right to retake; at least three months on rehousing, six if there is no rehousing. If the landlord invokes the right to retake not in order to protect a legitimate interest but to harm the occupier or evade the legislation — note again that the courts are called on to investigate motives —

<sup>34</sup> Act of September 1, 1948, art. 19 (1).

<sup>35</sup> *Ibid.* art. 19 (2).

<sup>36</sup> Cass. civ. 111 December 4, 1969, *Bull. civ.* 111, no. 787; Paris May 11, 1974, *Gaz. Pal.* 1975, 2 somm. 239; Désiry *F.* 12, nos. 26-53.

he cannot exercise the right to retake.<sup>37</sup> Abuse of right destroys the right to retake.

The scheme described followed a consistent pattern. It tried to protect the economic interests of those who might be exploited during a temporary housing shortage and to penalise those who attempt to evade the statutory protection. Little in it was designed to help the poor as such. It is true that when a commune is decontrolled, security of occupation continues to be given to those tenants or occupiers who are entitled to certain social security benefits<sup>38</sup> - the poorest section of the community - and to those whom the landlord has exploited or attempted to exploit by imposing on them a rent above the permitted maximum.<sup>39</sup> It is true, also, that the owner's right to retake residential property cannot be exercised against an elderly occupier of modest income.<sup>40</sup> Finally, those who live in *HLM* (*habitations à loyers modérés*), subsidised housing for lower income groups, are protected by a special set of regulations outside the 1948 Act. But the guiding theory was that of a free market temporarily distorted. Thus, the right to retake on offering to rehouse cannot be defeated, the *Cour de Cassation* has decided, simply because of the age of the occupier, her attachment to the flat where she has lived for 50 years, or the change in habits that a move would entail.<sup>41</sup> These are matters of personal convenience, not economic need.

### III. *German Law : the Social Limits of Property*

West German law differs from French mainly in its greater

<sup>37</sup> Act of September 1, 1948, art. 21.

<sup>38</sup> *Ibid.* art. 7, referring to those entitled to benefits under *Code de la Famille*, arts. 161, 184.

<sup>39</sup> *Ibid.* art. 7.

<sup>40</sup> *Ibid.* art. 22 *bis*, inserted by Act of July 11, 1966 (tenant must be over 70, landlord under 65, tenant's income must be less than one and a half times the minimum wage).

<sup>41</sup> Cass. soc. June 15, 1960; *Bull. civ.* IV, no. 622, p. 484.

emphasis on social considerations.

Three protective institutions (compulsory tenancies,<sup>42</sup> rent control<sup>43</sup> and security of tenure<sup>44</sup>) had their origins in the German experience of the First World War and were developed in the early years of the Weimar Republic.<sup>45</sup> They were to be phased out on April 1, 1934 and 1936,<sup>46</sup> but at the same time the German civil code (*BGB*) was to be amended in order to improve the law of leases from a social point of view. At the end of 1931 the decontrol plan was abandoned<sup>47</sup> and, under the Third Reich, it was put into reverse, so that there was virtually total rent control.<sup>48</sup> The standard form lease of 1934,<sup>49</sup> agreed by representatives of landlords and tenants, and intended to eliminate "disapproved," *i.e.* oppressive clauses, was widely used.

In the Second World War many houses were destroyed. Legislation of June 21, 1948, which was designed to encourage rebuilding, freed from rent control and security of tenure buildings completed after that date. Statisticians calculated that in 1965 the supply of housing would equal the demand. Hence it would be possible to decontrol rent, to allow landlords to give notice in the ordinary way and, consequently, to end security of tenure. But this reversion to the market freedom of before 1914 was, once again, to

<sup>42</sup> Wohnraumbewirtschaftungsgesetz. See generally *Münchener Kommentar zum BGB*, III.1 (1980, ed. R. Voelskow) pp. 535-597.

<sup>43</sup> Proclamation for the Protection of Tenants of July 26, 1917 (*RGBl* 659); legitimised by Act of May 11, 1920 (*RGBl* I. 949).

<sup>44</sup> *Kündigungsschutz* (protection against notice) leading to *Bestandsschutz* (security of occupation).

<sup>45</sup> Staudinger *BGB* (12 ed.), para. 640-1. In particular the Rent Act of March 24, 1922 (*RGBl* I. 273), the Tenant Protection Act of June 1, 1923 (*RGBl* I. 353) and the Act of July 26, 1923 (*RGBl* I. 751).

<sup>46</sup> By an Ordinance of December 1, 1930 (*RGBl* I. 517, 598).

<sup>47</sup> Ordinance of December 8, 1931 (*RGBl* I. 699, 709).

<sup>48</sup> Act of April 18, 1936 (*RGBl* I. 371), ord. of December 15, 1942 (*RGBl* I. 709).

<sup>49</sup> Palandt *BGB* (38 ed., 1979), p. 481.

be conditional on the strengthening of the law of residential leases so as to give the tenant better protection against arbitrary eviction.

Enacted under the so-called Lücke plan, the Decontrol Act (*Abbaugesetz*) of June 23, 1960<sup>50</sup> provided for the decontrol of rents and the ending of security of tenure in any area in which the housing deficit - the shortfall of supply in relation to demand - fell under 3 per cent. At the same time the Act introduced a social clause (*Sozialklausel*) into the law of domestic leases. According to this clause,<sup>51</sup> a tenant could prevent the termination of a lease if its ending would cause hardship for himself or his family which could not be justified by the interest of the landlord in terminating it.

As initially drafted this social clause was taken by the courts to refer only to cases of *exceptional* hardship. But its more serious defect from a practical point of view was that the court was required to weigh the tenant's hardship against the landlord's property interest in each case. Since there was no appeal to the Federal Supreme Court, no coherent body of principles could be built up to guide the lower courts, the parties and their advisers, as to the cases in which the tenant's hardship would be held to outweigh the landlord's property interest. In addition certain federal provinces (*Länder*), such as Berlin and North Rhine Westphalia, refused to apply the Decontrol Act in spite of the fact that their housing stock was less than 3 per cent. in deficit.<sup>52</sup> They pointed out that though a housing market may not be in deficit as a whole certain segments or pockets in it may be. The federal government decided not to coerce the dissident *Länder*, but in the first instance to amend the social clause, which has since been reformulated several times.

<sup>50</sup> *BGBI.* I. 389.

<sup>51</sup> Decontrol Act (above, n. 50), as amended by Acts of July 29, 1963 (*BGBI.* 1. 505), July 14, 1964 (*BGBI.* 1. 457), and December 21, 1967 (*RGBl.* 1. 1251).

<sup>52</sup> Voelskow (above, n. 44) p. 606.



In its present form, in which it has become part of the civil code,<sup>53</sup> and hence permanent law (*Dauerrecht*), the tenant's hardship need not be exceptional. Hardship is taken to exist if appropriate alternative accommodation is not available on acceptable conditions: the tenant must prove this. But the social clause, though of value to tenants, does not ensure security of tenure. It only entitles the tenant whose hardship outweighs the landlord's property interest to continue the lease for such period as appears to the court appropriate in all the circumstances.<sup>54</sup> This may in certain cases be a term of unlimited duration,<sup>55</sup> in which case the tenant will have what in fact amounts to security of tenure. But that is contingent. And though the lessee may ask for a second prolongation of the lease after the first has expired, this must be founded on circumstances which have changed since the first prolongation. The social clause does not apply to temporary accommodation.

By itself, therefore, the social clause is not an adequate instrument for protecting tenants against unjustified rent increases or arbitrary eviction. It has therefore been supplemented by legislation which is meant to fill in the details and to formulate a balance between the property interests of the landlord and the social claims of the tenant. Both of these have, indeed, a constitutional basis, since the West Germany constitution contains a guarantee of private property<sup>56</sup> but also, as interpreted by the constitutional court, limits property rights in the social interest (*Sozialbindung des Eigentums*).<sup>57</sup> The court, however, considers it to be a matter for the legislature to decide on the *intensity* with which it gives effect to the

<sup>53</sup> *BGB*, para. 556a.

<sup>54</sup> *Ibid.* 556a (2).

<sup>55</sup> *Ibid.* 556a (3).

<sup>56</sup> *Grundgesetz (GG)* para. 14 (1).

<sup>57</sup> *Ibid.* para. 14 (2) - "property creates duties; its use must serve the wellbeing of the community" and 20 (1) - "Germany is a democratic and social state."

requirement that property rights be exercised in a manner consistent with the social interest. In an important decision of April 23, 1974 the constitutional court decided that a statute which forbade landlords to give notice in order to raise rent, and which limited rent increases to the level customary in the locality for that type of property, was constitutional, given the value which individuals and families attach to the place where they live. It was, however, not constitutional for lower courts to interpret the legislation so as to make it virtually impossible for the landlord to secure the permissible rent increase, as they had in effect done by requiring the landlord to provide details of the furnishing, age, repairs, etc., of comparable houses which were not within his power to discover.<sup>5 8</sup>

Such is the constitutional background. Attempting a compromise between the interests of landlords and those of tenants in the field of security of tenure the legislature enacted, first, the (temporary) Housing Notice Protection Act of November 25, 1971<sup>5 9</sup> and then the second, permanent, Act of December 18, 1974.<sup>6 0</sup> The main provisions of the latter have been incorporated in the civil code. The landlord still retains the right to terminate the lease without notice in certain cases of non-payment of rent and other serious breaches of the terms of the lease. Whenever notice is required, however, the landlord can now only give a legally effective notice when he has a *justified interest* in doing so. If the lease is for a fixed term and, two months or more before its expiry, the tenant gives notice that he wants it to continue, the landlord can only fail to renew it if he has a justified interest in doing so.

Three sorts of justified interest are recognised. The first arises when the tenant is at fault in committing a not inconsiderable violation of his duties under the lease (*e.g.* non-payment of rent, serious insults to the landlord,

<sup>5 8</sup> *BVerfG*, para. 37.132 (April 23, 1974).

<sup>5 9</sup> *BGBI.* I. 1839 (*WKSchG*), to run for four years.

<sup>6 0</sup> *BGBI.* I. 3603.

painting the furniture in pop colours: not just organising complaints and protests by other tenants).<sup>6 1</sup> The second comes into play if the landlord needs the premises for himself, his household or his family to live in (*Eigenbedarf*).<sup>6 2</sup> If, however, he acquires the property after the lease has begun, he must wait three years from acquisition before his interest takes effect. Finally, the landlord may be able to show that if the lease continues it will cause him a *considerable disadvantage* from the point of view of his exploitation of the property.<sup>6 3</sup> For example, he may need more money for his old age, the premises may need to be rebuilt, he may be unable to sell the property at a reasonable price with a sitting tenant. The impossibility of securing an increased rent while the tenancy lasts, however, is not treated as a "considerable disadvantage."<sup>6 4</sup>

The landlord must give the tenant notice in writing and mention the ground or grounds on which he claims to have a justified interest. He cannot thereafter rely on other grounds unless they have arisen subsequently to the notice.<sup>6 5</sup> A landlord who lives on the premises, if there are not more than two dwellings on it, need not prove an interest but must give three months notice.<sup>6 6</sup> The legislation does not apply to lettings for merely temporary use - a notion which depends not merely on the agreed period but on the purpose of the letting. Nor does it apply to premises which form part of the landlord's dwelling, which are within his "glass door," other than those let to another family as their home.<sup>6 7</sup>

The protection given by the Housing Notice Protection Act is additional to that afforded by the social clause. Hence a tenant who is not within the Act can fall back on

<sup>6 1</sup> *BGB*, para. 564b (2), (1).

<sup>6 2</sup> *Ibid.* 564b (2), (2).

<sup>6 3</sup> *Ibid.* 564b (2), (3); Palandt (above, no. 49) p. 518.

<sup>6 4</sup> *Erhebliche Nachteile*.

<sup>6 5</sup> *BGB*, para. 564b (3).

<sup>6 6</sup> *Ibid.* para. 564b (4).

<sup>6 7</sup> *Ibid.* para. 564b (7); Voelskow 803.

the social clause, which now has a supplementary role. Thus, an elderly person to whom a move from familiar surroundings would be a hardship can resist the landlord's notice even if the landlord has a justified interest.

Residential leases which are subject to Notice Protection are also subject to a form of rent limitation which in its present form came into force in 1975.<sup>68</sup> By this the landlord is forbidden to give notice with a view to raising the rent. The rent can however be raised by agreement, provided that the parties do not agree on an automatic scale of increase. In default of agreement the landlord can demand an increase when at least a year has elapsed at the old rent. He must not ask for more than the usual uncontrolled rent for comparable housing in the same or similar areas. The landlord must demand the increase in writing, and give reasons. In practice it is generally enough to mention three houses or flats which are similar to the one in question. The landlord may instead rely on an expert opinion as to the rent of comparable houses (*Vergleichsmiete*).

A different, and stricter system of rent control applies to publicly financed housing.

If we look back on the way in which the German law of tenancies has developed, we can note three differences from the pre-1982 French law. The German view of the housing market is more sophisticated, so that the economic interests of competitive tenants are rather better protected. For uncompetitive tenants there is some public housing in both countries, but it does not have the same extension as it does in England. In addition, their interests are given some weight via the notion of "hardship" in the social clause. Finally, the attachment of tenants to their homes is a value recognised by the constitutional court<sup>69</sup>

<sup>68</sup> Rent Regulation Act (*MHG*), which constitutes art. 3 of the second Housing Notice Protection Act (*WKSchG*) of December 18, 1974 (*BGBI.* I. 3604-6).

<sup>69</sup> *BVerfG.* 37.132, 141 (April 23, 1974).

and to some extent embodied in the supplementary legislation, which is meant to ensure that a lease is not terminated by the landlord without some legitimate ground.

#### IV. *English Law : An Englishman's Home*

With this background it is relatively easy to see in what ways the English law concerning security of tenure for housing tenants ("protected tenancies") differs from the French and German. The course of English housing policy has been winding and erratic, partly because it has often roused party political passions.<sup>70</sup> The first Rent Restriction Act of 1915 applied only to houses with a low rateable value — below £35 in London and £26 elsewhere.<sup>71</sup> It was intended to help poor or poorish tenants. After the First World War the limits were raised, until in 1920 only the largest older houses, and houses built after 1919, remained outside rent control.<sup>72</sup> The remainder were controlled and their tenants had security of tenure. In 1923<sup>73</sup> the principle of decontrol on vacant possession was introduced. This was however, partly reversed in 1933.<sup>74</sup> On the outbreak of the Second World War about 4 million houses were still controlled, 4.5 million had been built since 1919, and 4.5 million were of too high a rateable value to attract control.<sup>75</sup> In 1939 control was applied to all houses other

<sup>70</sup> See Partington (above, n. 1) p. 153; Burnett (below, n. 75) *passim*; H.L. Wolman, *Housing and Housing Policy in the U.S. and the U.K.* (Lexington Mass., 1975).

<sup>71</sup> Increase of Rent and Mortgage Interest (War Restrictions) Act 1915, security of tenure being granted by s. 1 (3).

<sup>72</sup> Increase of Rent and Mortgage Interest (Restrictions) Act 1920, s. 12 (2).

<sup>73</sup> Rent and Mortgage Interest Restrictions Act 1923, s. 2 (1).

<sup>74</sup> Rent and Mortgage Interest Restriction (Amendment) Act 1933, s. 2.

<sup>75</sup> J.B. Cullingworth, *Essays on Housing Policy* (London, 1979) p. 62. J. Burnett, *A Social History of Housing 1815-1870* (Newton Abbot 1975); Partington (above, n. 1) p. 153.

than those with the highest rateable values.<sup>76</sup> By 1953 about 90 per cent. of unfurnished tenancies were protected tenancies. Policy then went into reverse. In 1954<sup>77</sup> houses built after that date were exempted from control, and in 1957<sup>78</sup> the principle of decontrol on vacant possession was once again brought in for houses and flats above a rather low rateable value. Under these and similar liberal policies there was a spurt in building for sale, and a decline in the number of protected tenancies; but it became clear, as in Germany, that the rental housing market is divided and imperfect. In 1965, with another political change of course, the Crossman Rent Act<sup>79</sup> reintroduced control except for the most expensive houses; and in 1974<sup>80</sup> rent control and security of tenure were extended to furnished tenancies (so-called "restricted contracts") except when the landlord lived on the premises. In 1980<sup>81</sup> security of tenure was given to tenants of public housing, notably council houses: and at the same time provision was made for shorter forms of tenancy (shorthold tenancies, assured tenancies) which are meant to cater for landlords who want to let property but to be sure of being able to recover possession from the tenant at the end of a limited period.

The turnabout of control and decontrol may sound in summary like the to-and-fro of the desert war. But during its course the geography has changed.<sup>82</sup> In the 67 years from 1914 to 1981 owner occupation has increased from 10 per cent. of the population of England and Wales to about 55 per cent. Most families now live in their own houses. Council tenancies and other forms of public housing, next to non-existent in 1914, have risen to over

<sup>76</sup> Rent and Mortgage Interest Restrictions Act 1939, s. 3 (1).

<sup>77</sup> Housing Repairs and Rents Act 1954, s. 35.

<sup>78</sup> Rent Act 1957, s. 11.

<sup>79</sup> Rent Act 1965, s. 1 (1).

<sup>80</sup> Rent Act 1974, s. 1 (1).

<sup>81</sup> Housing Act 1980, ss. 28-34.

<sup>82</sup> Figures in Burnett (above, n. 75). 295; Wolman (above, n. 70) pp. 13, 47.

30 per cent. of the total. The dramatic decline has been in the area with which we are specially concerned, private renting. This housed 90 per cent. of the people in 1914. It now covers not much more than 10 per cent.

English law has, indeed, followed a distinctive course in two respects, neither of which is political in the party sense. The first is that the provision of housing, or housing concessions, has come to be treated as analogous to a social service available, in principle, to all. In France and Germany housing is not a social service. A French journal like *Droit Social* has little to say about housing, though there, as in Germany, subsidised houses and flats are built for poorer people and rent allowances are given, by way of social security, to those below a certain income limit. In England the position is very different. In 1919, at the time of the Addison Act,<sup>83</sup> the idea took root that, in the interests of industrial peace, it was the state's responsibility to see that houses were available not merely for the poor but for the whole working class, *i.e.* the bulk of the population.<sup>84</sup> Council housing, the main instrument of this policy, has in consequence been provided on a very large scale. Though it still serves mainly manual workers and their families, about a third of council tenants now have above average incomes and, though worse off on average than owner occupiers, tend to be better off than private tenants.<sup>85</sup> In 1949 the legislative requirement that council housing should be intended for the working classes was deleted.<sup>86</sup> This showed that housing benefits were no

<sup>83</sup> Housing (Additional Powers) Act 1919.

<sup>84</sup> Addison, *The Times*, April 8, 1919 "if some instrument could be invented, which should measure the effect of systematic overcrowding in producing industrial unrest, its revelations would appal even the most thoughtless of the fortunate classes." By 1938 the Ridely Report (*Cmd. 5667*) said "The housing of the working classes is now quite definitely a public health service."

<sup>85</sup> H.L. Wolman (above, n. 70) p. 34, Partington, *Landlord and Tenant* (2nd ed., 1980), p. 22; A. Nevitt, *Housing, Taxation and Subsidies* (London, 1966), p. 48.

<sup>86</sup> Housing Act 1949, s. 1.

longer meant only for the poor.

Thus, owner-occupiers, if they have a mortgage, can deduct the mortgage interest from their income.<sup>87</sup> If they have no mortgage, they still benefit by not being taxed on their rent-free occupation.<sup>88</sup> The rents of those who live in council houses are subsidised, and private tenants, even if they pay what are called "fair"<sup>89</sup> or "reasonable" rents,<sup>90</sup> escape the full rigours of the market because in fixing them no account is taken of scarcity value. This is still truer of the diminishing number who pay "controlled,"<sup>91</sup> *i.e.* adjusted historic rents. Though in the case of private tenancies it is in effect the landlord who pays the subsidy, there is no blinking the fact that directly or, through legislation, indirectly the state confers housing benefits on the great majority of its citizens - which is not to say that their living conditions are always happy ones.

Why does England treat the provision of housing and housing benefits as a general social service? Perhaps English people are specially attached to their homes, and specially keen to be allowed to remain in them. However this may be, legislation has favoured home security, even when this tends to frustrate other policies (promoting private enterprise, helping the poor) to which political rhetoric would assign priority. This is the second important respect in which English law differs from that of France and Germany. In England the great majority of people can only be turned out of their homes with great difficulty. The 60 per cent. who own their own homes are virtually secure, and, even if they default on a mortgage, recent legislation puts obstacles in the way of the mortgagee who wants to obtain possession of the premises.<sup>92</sup> Private tenants now

<sup>87</sup> Income and Corporation Taxes Act 1970, s. 87 (1).

<sup>88</sup> Finance Act 1963, s. 14.

<sup>89</sup> Rent Act 1977, s. 70.

<sup>90</sup> *Ibid.* s. 78.

<sup>91</sup> *Ibid.* s. 27.

<sup>92</sup> Administration of Justice Act 1970, s. 36; 1973, s. 5; Matrimonial Homes and Property Act 1981, s. 2 (2), (3).



have security of tenure whether they live in furnished or unfurnished accommodation, as do council tenants.<sup>93</sup> It is true that there is a difference in the length of security in the public and private sectors. If the tenancy is private there may be two successors to the original tenant, each protected in his occupation.<sup>94</sup> Thus, if the original tenant was a married man his widow may succeed to his tenancy and another member of his family to her in turn. In the public sector, however, there can be only one transmission of the secured tenancy, within the circle of spouse and resident members of the original tenant's family.<sup>95</sup>

It is true, also, that there are exceptions to the general principle — for so it may justly be termed — of home security. Licences granted by private houseowners do not count as tenancies and so do not give rise to security of tenure.<sup>96</sup> A licence differs from a lease principally in that a lessee must have exclusive occupation of the premises. If the occupier can be forced to share occupation with the landlord or someone else not of the occupier's choosing, the arrangement cannot be a lease. Accommodation which one can be forced to share can hardly count as a home, and so it seems right that the legislation should not apply to arrangements of this sort. Some landlords have in recent years taken to granting licences with a sharing clause instead of leases. The Court of Appeal has held that con-

<sup>93</sup> Rent Act 1977, ss. 98-107; Housing Act 1980, ss. 28-34.

<sup>94</sup> Rent Act 1977, Sched. 1, Pt. 1.

<sup>95</sup> Housing Act 1980, ss. 30, 31.

<sup>96</sup> *Greene v. Chelsea B.C.* [1954] 2 Q.B. 127; *Re Solomon* [1967] Ch. 573; *Marchant v. Charters* [1977] 3 All E.R. 918. Exceptionally a licence may give rise, if not to security of tenure, to an enforceable right to remain in a house until a certain event occurs (*Tanner v. Tanner* [1975] 1 W.L.R. 1346; cf. *Verrall v. Great Yarmouth B.C.* [1981] Q.B. 202) or, by way of estoppel, to a conveyance of the house (*Pascoe v. Turner* [1979] 1 W.L.R. 451). In both instances the licensee was a woman cohabiting with the licensor. A licensee who is a mistress but does not cohabit with the licensor has greater difficulties in establishing an irrevocable licence: *Horrocks v. Forray* [1976] 1 W.L.R. 320.

tracts of this sort do exclude security of tenure provided that they are not shams.<sup>97</sup> The written contract is taken as evidence of the parties' intention to create a licence, which it is for the occupier to rebut.

To do justice to the legislation, one must surely ask whether the intention was to provide the occupier with a home, especially a "family home," or merely to make a temporary or precarious arrangement (as with the "precarious" occupation of French and the "temporary" occupation of German law). A forced sharing, if genuinely intended, can only be temporary. If, then, what was meant was a home, the legislation should apply, even if the parties do not want it to. They cannot contract out of the law. If what was meant was accommodation for a holiday, for student lodgings, for the duration of a building contract, or for a friend who is looking for something more permanent, there is no reason why it should carry with it security of tenure if the parties do not choose to adopt the form of a lease.

Holiday lettings and lettings to students by educational bodies do not in any event give rise to protected tenancies, since the Rent Act specifically excludes them.<sup>98</sup> Apart from these temporary arrangements, the main exception in the English legislation concerns resident landlords, for whom, as we saw, France and Germany also make special provision. To be outside the Act, the landlord must live in the same building as the tenant at the time when he grants the tenancy<sup>99</sup>: this will cover cases where the connection between landlord and tenant is rather looser than the corresponding German legislation requires.

Symbolic of unease, but perhaps only of transitory importance, is the exception introduced by the 1980

<sup>97</sup> *Somma v. Hazelhurst* [1978] 2 All E.R. 1011, 1020 (C.A.). Contrast *Walsh v. Griffith-Jones* [1978] 2 All E.R. 1002 (sham).

<sup>98</sup> Rent Act 1977, ss. 8, 9; *Buchmann v. May* [1978] 2 All E.R. 993 (when lease states that letting is holiday letting, tenant must prove it is not).

<sup>99</sup> Rent Act 1977, s. 12 (1).

Housing Act,<sup>1</sup> in order to encourage landlords to let existing property. What is called a shorthold tenancy must be for between one and five years, the landlord must give the tenant notice that it is to be a shorthold tenancy before he grants it, and the rent must be a fair rent registered before or within 28 days of the grant of the tenancy. Given these conditions, the landlord can obtain possession when the agreed term of the lease ends, provided he gives notice to the tenant of his wish to do so and thereafter takes proceedings promptly.

Despite this innovation it cannot be said that the exceptions to the principle of security of tenure for private lettings are at the moment of great importance. Given that a tenancy is protected, the landlord's right to retake, to obtain possession, is predicated on grounds many of which correspond to those of French and Germany law. The landlord may reclaim possession if the tenant fails to perform his principal obligations under the lease — if he fails to pay the rent,<sup>2</sup> creates a nuisance,<sup>3</sup> is guilty of waste<sup>4</sup> or dilapidation.<sup>5</sup> So too if the tenant evinces bad faith by sub-letting at a profit.<sup>6</sup> Again, the landlord may claim possession in two eventualities which correspond fairly closely with those set out in French law. The first is if he can provide suitable alternative accommodation for the tenant, or can point to alternative housing which someone else is willing to let the tenant have.<sup>7</sup> Whether the alternative is suitable depends on the tenant's circumstances, for example whether what is proposed will take his furniture,<sup>8</sup> or whether there is a garden for his children.<sup>9</sup>

<sup>1</sup> Housing Act 1980, ss. 51-55. The Labour party has said it will repeal these provisions.

<sup>2</sup> Rent Act 1977, Sched. 15, case 1.

<sup>3</sup> *Ibid.* case 2.

<sup>4</sup> *Ibid.* case 3.

<sup>5</sup> *Ibid.* case 4.

<sup>6</sup> *Ibid.* case 10.

<sup>7</sup> Rent Act 1977, s. 98 (1) (a).

<sup>8</sup> *McIntyre v. Hardcastle* [1948] 2 K.B. 82.

<sup>9</sup> *DeMarkozoff v. Craig* (1949) 93 S.J. 693 (C.A.).

Secondly, the landlord may claim possession when he reasonably requires the house for himself to live in, or for his major child, parent, full-time employee, or, in certain cases, parent-in-law.<sup>10</sup> But, apart from the case of housing for a full-time employee, he must not have bought the premises after the tenancy had begun.<sup>11</sup> If he does that he does not, even after the three of four years of German and French law, acquire a title to retake.

Even when there is a title to retake, the court may not make an order for possession unless it considers it reasonable to do so.<sup>12</sup> In effect, something analogous to the social clause of German law applies to the grant of an order for possession, though the notion of reasonableness is perhaps even broader than the notion of what is socially justified. The English judge has to weigh up all the pros and cons, the hardship to the tenant, if any, the conduct of both parties, and must reach his decision "in a broad, commonsense way as a man of the world . . . giving such weight as he thinks fit to the various factors in the situation."<sup>13</sup>

There are also a number of situations, none of great importance, in which a court *must* order possession to be given to the landlord without considering whether it is reasonable to do so<sup>14</sup>: for instance, when the landlord has bought the property for retirement, and actually requires it when he comes to retire.

How, in the end, are we to assess the protection given by English law to housing tenants so far as security in their home is concerned? It seems to me that English law gives a distinctly higher preference to the interest of tenants in remaining in their homes than does French and even

<sup>10</sup> Rent Act 1977, Sched. 15, cases 8, 9.

<sup>11</sup> *Ibid.* case 9. The landlord who bought with a sitting tenant can recover the premises for his own or his relatives' residence if he bought before certain dates. *Ibid.*

<sup>12</sup> Rent Act 1977, s. 98 (1).

<sup>13</sup> *Cumming v. Danson* [1942] 2 All E.R. 653, 655 (C.A.).

<sup>14</sup> Rent Act 1977, Sched. 15, Pt. 11, cases 11-18.

German law. Scrutton L.J. was not wrong, indeed he was both accurate and prophetic, when in 1930 he said "The principal object of the [Rent Acts] is to protect a person residing in a dwelling-house from being turned out of his home."<sup>15</sup> Security of tenure, once an adjunct of rent control, has become the tail that wags the dog. French law, on the other hand, has up to now aimed at restoring progressively an efficient market in houses, in which landlord and tenant are both free to end the arrangement, unless it is for a fixed term, on giving a reasonable period of notice. German law has introduced the socially important principle that a landlord (like an employer) must have an interest which justifies him in ending a tenancy. But the justifying interest may be economic, and it is mandatory under German law that the landlord's property right is not in the long run to be emptied of content. English law, while it resembles the German in some details, really rests on a different principle, *viz.* that the landlord's interest in his property (and the public authority's interest in providing for the homeless) is to take second place to the householder's interest in remaining in his home. The law therefore gives greater security to English tenants in the possession of their homes than to French and German. This will remain true even if, as is now proposed (1982), French law is reformed so as to make it closer to German, by allowing a tenant to insist on the renewal of a lease unless the landlord has a good reason for refusing, such as a desire to sell or to live in the premises himself.

The middle class ideal of owning your own home and garden has in fact so infused English thinking that those who cannot afford to buy their homes are given the next best things; security for one, two or three lives. Of course this is not equivalent to home ownership: if it were, there would be no point in giving council tenants the right to buy their own homes. But it is such a serious inroad on the right of the landlord that it runs close to expropriation, at least

<sup>15</sup> *Haskins v. Lewis* [1931] 2 K.B. 1.

of the present owner's effective interest. In the end we can, despite this, justly, perhaps proudly, say that English law provides conditions in which most people and families own the homes they live in, and those who do not mostly enjoy the tranquillity of mind that comes from knowing that they cannot easily be forced out. Whether this benefit is achieved at too great a cost we shall have to consider in the last lecture.

## Chapter 3

### DIVORCED WIVES

*The morn was dreary; must the eve  
Be also desolate?*

Charlotte Brontë

#### I. *Introduction*

How effective can law be in preserving the relationships with which we are concerned, or compensating those who suffer from their rupture? Can legal procedures keep in being a bond which one party is intent on ending? Sometimes it can. When the tenant of a house has security of tenure he has the right to remain in his home and, generally speaking, can ensure that he actually remains in it. In England wrongful eviction and the harassment of tenants are crimes.<sup>1</sup> Some landlords indeed manage to evade legal restrictions. But to most tenants legal security of tenure carries with it actual security in the home.

An employee, on the other hand, whose employer is intent on dismissing him, can seldom be sure of remaining on as an employee. Industrial action may, it is true, sometimes prevent dismissal or secure reinstatement. Occasionally, in less than two per cent. of the cases before them, English Industrial Tribunals order reinstatement,<sup>2</sup> but nearly always with the employer's consent or acquiescence. "Security" in relation to dismissal therefore normally takes the form of deterrents against wrongful or

<sup>1</sup> Protection from Eviction Act 1977, s. 1 (2), (3).

<sup>2</sup> S. Anderman, *The Law of Unfair Dismissal* (1978), p. 203.

unfair dismissal and compensation for those who are dismissed. This is true even in countries like Germany and the United States where orders for reinstatement are more common than they are in England.

What can the law's intervention achieve as regards marriage, the concern of this chapter? So far as the living bonds between married people are concerned, little or nothing. Though they did so in the past, nowadays courts do not order couples to live together, even as a preliminary to legal separation or divorce. If they did, their orders would be flouted. All that law can do is to manipulate the legal bond between husband and wife. It can to some extent deter the husband who wants to dissolve the bond by requiring, as a condition of divorce, the transfer of property or the imposition of maintenance payments. If that does not deter him it may provide a modicum of financial security to a divorced wife, though ex-husbands, who generally remarry, are mostly unable to support two households and unwilling, in the long run, to make much effort to do so.

How *should* society, via law, intervene? This depends on the view we take of marriage and its break-up. For present purposes I concentrate on marriage as a relationship between husband and wife, to which the nurture of children is relevant because it provides a reason why their father should support their mother. So restricted, there are three main ways of viewing marriage. Some see it as a partnership. On a traditional view, it is a partnership, come what may, for life. In that case, after divorce the partnership notionally continues, and the wife is entitled to the support she would have received had the marriage not broken up, or at any rate to a standard of living which continues to be the equal of her husband's. That is, on paper, the point of view of English law.<sup>3</sup> More often,

<sup>3</sup> "To place the parties . . . in the financial position in which they would have been if the marriage had not broken down and each had properly discharged his or her financial responsibilities towards the other." Below, p. 90, n. 58.



marriage is now seen as an equal partnership which lasts, like other partnerships, until it is dissolved. On that view there must on divorce be a fair division of the profits of the partnership, including property acquired during the marriage. The division may go beyond property rights. Recently German law, by a bold innovation, has required spouses on divorce to divide up equally the expectancies of pension rights which they have acquired during marriage.<sup>4</sup> These too are profits of the partnership.

Another conception of marriage is that of an arrangement (a collateral contract?) by which a husband induces his wife to change her career. Had it not been for the marriage she might, for example, have had good earning prospects. She gives these up to marry. On divorce she must now retrain, sometimes late in life, with diminished prospects. If so, her husband must compensate her by keeping her, during a transitional period, while she brings up the children, if she wants to, and redeploys. If, after a long time together, she has become emotionally attached to her status as a wife, her husband may also be required to compensate her for the wrench.

Yet another conception views marriage not as a contract but as an arrangement by which a husband assumes the role of providing for his wife's needs and those of their children. This idea, more ancient and deeply rooted in genetics than the contractual ones, makes the husband to some extent the wife's insurer. If she is in need, it is to him, rather than the state, that she turns in the first instance. It is he who must see to her subsistence, and perhaps more, in ill-health, old age or disablement. It is only in this framework of anticipated security that childbearing and childrearing can flourish. But how far does the husband's responsibility extend? How far, in modern conditions, does that of the state or community?

These three conceptions of marriage in its economic aspect, as a partnership (lifelong or until break-up), as a

<sup>4</sup> Below, nn. 53-64.

change of career by the wife at the husband's behest, and as the assumption by the husband of the role of protector and provider, are not mutually exclusive. But they point towards distinct effects on the wife's financial position in the event of divorce. These effects are also influenced by the view one takes of the break-up of marriage. Break-up, also, can be looked at in three ways, all of which have analogies with the termination of a contract. Is the break-up to be thought of as due to the fault of one or both of the spouses? Or is it a misfortune which befalls them: a frustrating event, like a shipwreck, which calls for rescue and a transition to a new voyage? Or is it a matter of agreement between the spouses, of mutual consent? Whichever view is taken, conceptions of marriage and its break-up criss-cross. Fault can be seen as a breach of contract, as barring compensation or as forfeiting a wife's claim to look to her husband as an insurer. It can be seen as irrelevant, in modern conditions, to all three. Or it can be treated as irrelevant to a wife's claim for a share in the partnership assets, and to compensation for taking up the conjugal career, but as relieving the husband of his protective role.

The idea of marriage as a contract can be misleading. It suggests a bargain struck at arms' length. This accounts for some of the mythology of modern divorce law. Thus, statutes about divorce are drafted in a sexually neutral style, as if wives supported husbands (financially) to the same extent as husbands support wives.<sup>5</sup> A Martian would go sadly astray if he relied on terrestrial legislation to get his doctorate in comparative family law. In this discussion I shall assume, contrary to statutory language in all three countries, that the spouse who has, or may have to pay maintenance, compensation, etc., is the husband. Another myth of divorce law, which is also influenced by contractual analogies, is that divorce dissolves marriage. If it ever did, it is rapidly ceasing to do so. Divorce has become

<sup>5</sup> Carbonnier, *op. cit.* p. 212 (*par un hommage creux à l'égalité des sexes*).

easier, but its effects have become less radical as the claims of ex-wives have steadily been recognised. To pay maintenance on divorce is not just to pay damages for breach of contract but to recognise, in some measure, that a contractual or protective relationship continues. In English law an ex-wife can claim, though without much prospect of success, a reasonable provision from her former husband's estate when he dies.<sup>6</sup> In French law an ex-wife has in certain cases pension rights like those of a widow.<sup>7</sup> In German law an earlier wife, like an earlier mortgagee, has priority over a later wife.<sup>8</sup>

All this shows that modern divorce dissolves a marriage less than completely. It does so in part, and to an extent that can often be fixed only long after the event which is supposed to have brought the marriage to an end.

## II. German Law : The Transition to Self-Support

My discussion begins with German law, the most thorough and consistent of the three, then goes on to French law, in which fault remains prominent, and to English law in which, unable to decide on a policy of his own, the legislator has given almost unlimited discretion to the courts.

Article 6 of the West German constitution protects the institution of marriage.<sup>9</sup> This is not taken to imply that divorce is forbidden, or granted only in case of fault, or based solely on breakdown, or some other criterion; or that the legislator must see to it that divorce is exceptional. About 20 per cent. of Germans married in 1970 will, it is predicted, in fact be divorced.<sup>10</sup>

<sup>6</sup> England : Inheritance (Provision for Family and Dependents) Act 1975, s. 1 (1) (b); *Re Fullard* [1981] 2 All E.R. 796.

<sup>7</sup> French law : below, p. 85, n. 25.

<sup>8</sup> Below, nn. 49-50.

<sup>9</sup> GG, art. 6 (1) ("marriage and the family fall under the special protection of the state order").

<sup>10</sup> *Münchener Kommentar zum BGB V.* (ed., K. Rebmann, 1978) p. 603 (Wolf).

Before the new legislation, the First Marriage Reform Act of June 14, 1976,<sup>11</sup> about 95 per cent. of all divorces were for fault, only 3 per cent. for breakdown.<sup>12</sup> The 1976 Act turned this state of affairs, at least nominally, upside down. All divorces are now based on the failure of the marriage, its disruption (*Zerrüttung*).<sup>13</sup> If there has been less than one year's separation, divorce can be granted only if to refuse it would cause unacceptable hardship.<sup>14</sup> After one year's separation it is available by mutual consent or by demand and acceptance<sup>15</sup> (the latter designed for Catholics who would find it unconscionable positively to ask for a divorce). After three years separation there is an irrebuttable presumption of breakdown, but divorce can nevertheless be refused if to grant it would cause severe hardship.<sup>16</sup> After five years separation no amount of hardship avails the spouse who wants to resist a petition for divorce.<sup>17</sup>

It is therefore relatively easy to obtain a divorce. The periods of separation are shorter than in England: one year against two for divorce by agreement, three (normally speaking) against five for unilateral divorce. What of the effects of divorce? The guiding principle is to ensure that the ex-wife is able as soon as possible to support herself, and to charge the husband with the cost of making this transition to self-support. For clarity, however, one must distinguish the effects as regards (a) the matrimonial home (b) other property of the spouses at the time of divorce (c) the wife's right to maintenance after divorce and

<sup>11</sup> *BGB*, 1. 1421.

<sup>12</sup> *Münchener Kommentar*, above, n. 10, V. 610. There were 106, 829 divorces in 1975, i.e. 17.3 per 10,000 population. 71 per cent. were at the wife's instance.

<sup>13</sup> *BGB*, para. 1565; *Münchener Kommentar* V. 603.

<sup>14</sup> *BGB*, para. 1565 (2).

<sup>15</sup> *Ibid.* para. 1566 (1).

<sup>16</sup> *Ibid.* para. 1566 (2), 1568 (1).

<sup>17</sup> *Ibid.* para. 1568 (2).

(d) expectancies of old age and disability pensions, which are regulated separately.

(a) Rights in the *matrimonial home* were not changed by the 1976 legislation. They come under an Ordinance of October 21, 1944,<sup>18</sup> which put into effect the principles of the Marriage Act of 1938.<sup>19</sup> If the parties to a divorce cannot agree on who is to live in the matrimonial home and use the household effects, the family court decides on equitable principles (*nach billigen Ermessen*).<sup>20</sup> If the spouses lived in rented accommodation the judge can allocate a lease made by both to the wife alone. He can transfer a lease made by the husband to the wife. If he does so he can require the husband to give security for the rent. If the husband owns the matrimonial home the judge can again order him to lease it to the wife. If both spouses own it it is more usual to give the wife a right of use, without creating a lease. This right of use must however be paid for: the payment will normally amount to half what the rent would be.<sup>21</sup> Similar principles apply to furniture and household effects.<sup>22</sup> Here too the court may create contracts of hire.<sup>23</sup>

It is important to be clear that the Matrimonial Homes Ordinance of 1944 is solely concerned with use, not at all with property rights. The court cannot transfer the property in the home from one spouse to another. Only they can agree to do so. Since the German constitution contains a guarantee of private property, neither spouse can be expropriated. There is, of course, no such guarantee in the United Kingdom.

<sup>18</sup> Ordinance concerning the disposal of the matrimonial home and household effects, October 21, 1944 (Household Effects Ordinance), *RGBl.* 1. 256, *BGBl.* 111 404-3.

<sup>19</sup> Marriage Act July 6, 1938 *RGBl.* 1.807.

<sup>20</sup> Household Effects Ordinance, para. 2.

<sup>21</sup> *Ibid.* para. 5; *Münchener Kommentar V.* 218 (Müller-Gindullis).

<sup>22</sup> Household Effects Ordinance, paras. 8-9.

<sup>23</sup> *Ibid.* para. 9 (2).

(b) The right to use the matrimonial home after divorce is independent of the *marriage contract*.<sup>24</sup> This contract will have provided either (for 60 per cent. of couples) that their property shall be separate, as in England, or that there shall be some form of community or participation in acquisitions made during marriage. Whatever the contract provides will be applied on divorce to the spouses' *property* as opposed to the *use* of the matrimonial home and the household effects. Neither spouse forfeits the advantages which the marriage contract has given him or her.<sup>25</sup>

(c) Rights of *maintenance (Unterhalt)* are a different matter. They are regulated under the 1976 Act in an intricate, indeed a typically thorough way. The guiding principles are however relatively easy to follow. In Germany rights of support are a modern development. They did not exist in Roman or German common law. In 1883 the Reichsgericht denied an innocent divorced wife the right to maintenance from a guilty husband.<sup>26</sup> The consequences of divorce were at that time confined to forfeiture of property rights. But the civil code of 1896 (*BGB*) gave an innocent divorced wife a right to maintenance from her guilty husband.<sup>27</sup> The 1976 Act goes further and sets out to create rights to maintenance which are independent of fault, at any rate of fault so far as it has caused the breakdown of the marriage.

The basic principle is that a divorced wife must support herself if she can reasonably be expected to do so.<sup>28</sup> If she cannot support herself from her own property or earnings (and she is not bound to realise assets which it would be uneconomic to sell in order to do so), she can claim maintenance from her ex-husband. This continues

<sup>24</sup> *Ibid.* para. 1 (2).

<sup>25</sup> *BGB*, paras. 1373 *et seq.*, 1384.

<sup>26</sup> *RG* March 13, 1883, *RGZ*, 8.144.

<sup>27</sup> *BGB*, para. 1578, version of 1896 ("maintenance suitable to her position" - *standesmäßiger Unterhalt*); Marriage Act, July 6, 1938 66 ("appropriate maintenance" - *angemessener Unterhalt*).

<sup>28</sup> *BGB*, para. 1569, Palandt *BGB* (38 ed., 1979), p. 1355.

until such time, if ever, as she can find suitable gainful employment. The legislation sets out the typical cases in which a wife cannot properly be expected to support herself. Thus, she may be busy bringing up the child or children of the marriage.<sup>29</sup> Again, at the time of divorce, or when she has finished bringing up the children, she may be too old to earn her own living,<sup>30</sup> or may be disabled or mentally unfitted to do so.<sup>31</sup> On the other hand she may be fit, young enough and free of child care, but unable to find suitable employment.<sup>32</sup> Or she may be able to earn something but not enough to maintain herself at the standard—full maintenance—to which she is legally entitled.<sup>33</sup> Again, if a wife's education, training or retraining was interrupted by the marriage, or she did not pursue it, or has fallen behind in it because of the marriage, she can pursue a course of training or retaining for the normal period and, provided she is likely to be successful in completing it, claim maintenance while she is doing so.<sup>34</sup> Even if she is over 35, the age limit for the statutory further training programme, she can embark on a course suited to her needs (the average age of divorced women on 1970 was 34).<sup>35</sup> Finally, by a residuary clause, called the "positive unfairness clause," she can claim maintenance on the ground that it would be grossly unfair not to grant it to her, for some "weighty reason," other than those listed, which prevents her earning her own living.<sup>36</sup> The fact that the husband's conduct led to the breakdown of the marriage does not as such count as a weighty reason for this purpose.<sup>37</sup> Fault as a cause of

<sup>29</sup> *BGB*, para. 1570.

<sup>30</sup> *Ibid.* para. 1571.

<sup>31</sup> *Ibid.* para. 1572.

<sup>32</sup> *Ibid.* para. 1573 (1).

<sup>33</sup> *Ibid.* para. 1573 (2), (4).

<sup>34</sup> *Ibid.* para. 1575.

<sup>35</sup> *Münchener Kommentar V.* pp. 738, 757.

<sup>36</sup> *BGB*, para. 1576.

<sup>37</sup> *Ibid.* para. 1576.

divorce is not to be reintroduced by the backdoor. The sort of ground the legislator has in mind is rather that the wife was, with the husband's consent, bringing up a child which was not his (for example, her own child by a previous entanglement), and that she continues to do so after divorce.

This positive unfairness clause is not a general clause.<sup>38</sup> So the specific listed grounds (bringing up children, old age, etc.) are not to be thought of as instances of the principle of gross unfairness. In those cases a wife need not show that it would be grossly unfair not to maintain her. The positive unfairness clause is, rather, a clause aimed at exceptional cases. Conversely there is a negative unfairness clause. This exonerates a husband in an appropriate case from maintaining his divorced wife even though she cannot be expected to support herself.<sup>39</sup> For this clause to apply, it must be "grossly unfair" to put the burden of maintenance on the husband, given, for example, that the marriage lasted only a short time, that the wife's need is the result of her own heedlessness, or other equally serious reasons. But this negative unfairness clause does not apply so long as the wife is bringing up the children of the marriage.<sup>40</sup>

A central concept, on which much hinges, is that of suitable gainful employment (*angemessene Erwerbstätigkeit*).<sup>41</sup> For it is this that a divorced wife is bound to seek in order to support herself. What occupation is suitable depends on various factors, such as her education, health and age. It also depends on the mode of life of the spouses during the marriage (*eheliche Lebensverhältnisse*). The wife is bound, if need be, to take a training or conversion course in order to equip herself for suitable employment. The amount of support she is entitled to is said to

<sup>38</sup> *Münchener Kommentar V.* p. 759.

<sup>39</sup> *BGB*, para. 1579 (1).

<sup>40</sup> *Ibid.* para. 1579 (2).

<sup>41</sup> *Ibid.* para. 1574.



depend on need (*Lebensbedarf*),<sup>42</sup> but this does not imply poverty or dire necessity. It includes, for instance, suitable medical, old age and disability insurance, if this is not provided in another way, and the cost of retraining or further education where that is to be recommended. The family court generally takes as a starting point in fixing maintenance a fraction of the joint income of the spouses at the time of divorce, though account is taken of future changes in income if they are certain, not merely likely, to occur.<sup>43</sup> In practice use is made of conventional fractions and tables in order to fix the level of maintenance. These have no statutory or case law basis; but it is generally thought that the maximum a divorced wife should be allotted is 40 per cent. of the joint income.<sup>44</sup> Children's maintenance is separately assessed. The award must not be index-linked (in France it must be).<sup>45</sup> But it can properly vary with the husband's earnings. Save in exceptional circumstances, it takes the form of periodical payments, not a capital transfer.<sup>46</sup> The duty of maintenance ends with the wife's remarriage or death, though it can revive on a second divorce, if she is still bringing up a child of the original marriage.<sup>47</sup>

A husband does not have to provide "full maintenance" when to do so would threaten his ability to support himself. In this case his obligation is confined to what is considered equitable in the light of the needs and capacities of both spouses.<sup>48</sup> But a divorced husband is not entitled to give a new wife priority over his divorced wife. On the contrary, the divorced wife has priority if she is still bringing up children of the former marriage, if her claim is

<sup>42</sup> *Ibid.* para. 1578.

<sup>43</sup> *Münchener Kommentar V.* p. 766 (Richter).

<sup>44</sup> *Ibid.* 769; Palandt *BGB* (ed. 38), p. 1368. Formulae for the split husband/wife/child include 4/2/1, 4/3/1 and 8/5/3.

<sup>45</sup> *Münchener Kommentar V.* p. 719.

<sup>46</sup> *BGB*, para. 1585 (1).

<sup>47</sup> *Ibid.* paras. 1586, 1586 a.

<sup>48</sup> *Ibid.* para. 1581.

grounded on gross unfairness, or if the new wife can support herself.<sup>49</sup> Otherwise their claims are concurrent. The court has no power to modify the priorities between the wives on grounds of equity. Since about 84 per cent. of divorced German men remarry,<sup>50</sup> and are no doubt inclined to give first place to their new wives, this is an ambitious piece of legislation.

The scheme outlined rests mainly on the idea that, by marrying, a husband assumes responsibility for what happens to his wife *during* or *as a result of* the marriage.<sup>51</sup> If the husband is to pay maintenance, there must be a temporal or a causal link.<sup>52</sup> If at the time of divorce a wife is unable through ill-health, old age, disability or economic recession to earn her living properly, she is entitled to maintenance from her husband until these troubles singly and collectively disappear, if they ever do. The same is true if, when she has finished bringing up the children of the marriage, she is suffering in one of these ways; for the need to bring up the children is itself a result of the marriage. But if at the time of divorce, or when the wife has finished bringing up the children, she is able to earn her own living, but later falls on evil days, the husband is not then responsible for maintenance. The time link has been broken, and her troubles are not the result of the marriage.

The husband's responsibility towards his divorced wife, then, though extensive, is not unlimited. He takes certain risks on himself. From one point of view we may look on him as a private insurer. He is to keep his wife from burdening the social services, so far as concerns risks connected by time or cause with the marriage.

(d) *Expectancies under pension schemes.* The 1976 legislation introduced a bold and original scheme for what

<sup>49</sup> *Ibid.* para. 1582 (1).

<sup>50</sup> *Münchener Kommentar V.* p. 780. But 70 per cent. of divorced women also remarry.

<sup>51</sup> *Ibid.* V. p. 725 ("ehebedingt").

<sup>52</sup> *Le Nouveau Droit du Divorce en Allemagne et en France:* Ann. fac. dr. Strasbourg (1979) 89 (Müller-Freienfels).

we may call the equalisation of expectancies under pension schemes (*Versorgungsausgleich*).<sup>53</sup> Planken in 1961 first expounded the idea.<sup>54</sup> He argued that wives who are not gainfully employed—two-thirds of all wives in 1971<sup>55</sup>—should have social security rights of their own. Planken wanted this to operate both during and after marriage. For the present, however, the resulting legislation applies only on divorce, but it extends to all sorts of old age and disability insurance, including the three statutory social security schemes and also public service, professional, agricultural and private pension schemes.<sup>56</sup> The guiding principle is simple, its application vexing in the extreme. On divorce the expectancies which the spouses have accumulated during marriage from the old age, professional and disability pension schemes to which they belong must be added up and divided between them equally. If marriage is a partnership, it follows that these expectancies are part of the potential profits of the partnership and must be divided fifty-fifty between the partners. Indeed, one can argue that it is implicit in matrimonial regimes such as community of acquests or participation in acquests that the pension expectations should be equalised. The statutory scheme is, however, quite independent of matrimonial property law.<sup>57</sup>

How does equalisation work? Suppose that both husband and wife have been earning and, by contributing to the statutory insurance fund, building up the expectation of an old age, professional or disability pension. Suppose that the husband has contributed more than the wife. On divorce, by order of the family court, which is self-

<sup>53</sup> BGB, para. 1587; *Münchener Kommentar V.* pp. 817 *et seq.* (K Meier and others).

<sup>54</sup> Planken, *Die soziale Sicherung der nicht-erwerbstätigen Frau* (1961), p. 89.

<sup>55</sup> *Münchener Kommentar V.* p. 819.

<sup>56</sup> BGB, para. 1587 (a); *Münchener Kommentar V.* p. 825.

<sup>57</sup> *Ibid.* para. 1587 (3).

executing, those who run the insurance fund add up the spouses' credits, so far as they are attributable to the period of the marriage, divide by two, and transfer the appropriate credit from his to her account. This is called splitting.<sup>58</sup> Suppose, again, that only the husband has been earning and contributing. In that case the husband's credits, so far as they are attributable to the period of the marriage, are added up and divided by two. Half is then placed to the credit of the wife in an account newly opened in her name.<sup>59</sup> Thirdly, suppose the husband has contributed to a different scheme, run by a firm or professional association. The value of his expectancy is calculated and he is ordered to pay half the estimated value into the statutory insurance fund, which will open a corresponding credit in favour of his wife.<sup>60</sup> There are other possibilities, too. The complexities arise from the fact that expectancies under all the different insurance schemes have to be converted into common units of value (*Werteinheiten*),<sup>61</sup> and this is the more difficult because some schemes are dynamised, so that contributions and entitlements depend on a variable factor, such as the average earnings of contributors in the year in question.

Since two-thirds of divorced German couples have been married less than 10 years<sup>62</sup> this scheme, which does not apply when it would involve "gross unfairness,"<sup>63</sup> is not the complete answer to the problem of providing pensions for divorced housewives. But at least it gives them, on divorce, something to build on. It is central to the scheme that, with a few exceptions, the divorced wife acquires the expectancy of a pension in her own right. She is not dependent on future payments by her ex-husband. This is a powerful affirmation of her independent status. One

<sup>58</sup> *Ibid.* para. 1587b (1); *Münchener Kommentar V.* p. 826.

<sup>59</sup> *BGB*, para. 1587b (2); *Münchener Kommentar, ibid.*

<sup>60</sup> *BGB*, para. 1587b (3) (*Beitragsentrichtung*).

<sup>61</sup> *Münchener Kommentar V.* p. 826.

<sup>62</sup> *Ibid.* p. 834.

<sup>63</sup> *BGB*, para. 1587c (1) and *cf.* para. 1587 h.

consequence is that, if she fails to attain pensionable age, her lost expectancy does not revert to her ex-husband. It remains lost.<sup>64</sup>

The complexities of the scheme are however such as to slow down markedly the process of obtaining a divorce. Indeed, given the tangles of the law regarding both maintenance and pension rights, it is advisable for German divorcing couples, if possible, to bypass the statutory provisions for both by making their own agreement on divorce, as they are entitled to. Pension insurance equalisation can be excluded by an express clause in the marriage contract itself, though there are notaries who refuse to insert such a clause.<sup>65</sup> If, however, the spouses do not exclude it in the contract, but come to an agreement about it at the time of divorce, the agreement requires the approval of the family court, which will, in exceptional cases, refuse to confirm it if it does not seem to provide proper security for old age or disability, or to equalise pension expectancies in an appropriate way.<sup>66</sup>

As regards maintenance, on the other hand, the court is not entitled to refuse its assent to an agreement reached by the spouses, if the other conditions of divorce are present.<sup>67</sup> In practice divorcing spouses often exclude claims for maintenance, either absolutely ("even in case of need"), or in a qualified way ("except in case of need").<sup>68</sup>

The law about both maintenance and pensions is complex. This makes it almost indispensable for spouses contemplating divorce to agree on these matters. It is on these agreements that the new ideas are likely to make a strong impact.

<sup>64</sup> *Ibid.* para. 1587e (2); *Le Nouveau Droit du Divorce*, above, n. 52, p. 97.

<sup>65</sup> *BGB*, para. 1408 (2), inoperative if divorce takes place within a year.

<sup>66</sup> *Ibid.* para. 1587o. But refusal to approve is exceptional: *Münchener Kommentar V.* p. 1057.

<sup>67</sup> *BGB*, para. 1585c; *Münchener Kommentar V.* p. 804.

<sup>68</sup> *Münchener Kommentar V.* 804.

The new German legislation has been variously judged. To some it is obnoxious. It will discourage bachelors from marrying and encourage divorced wives to buy mink coats and dabble in pottery at their ex-husbands' expense.<sup>69</sup> To me the aims seem ambitious enough, but in essence no more than amplifications of familiar themes. First, the idea of partnership is extended to cover pensions. Secondly, a husband must compensate his wife for what she has taken on, and what she has given up, by embarking on the marriage. He has also to bear the risk of certain misfortunes which befall her during or as a result of marriage. All three conceptions of marriage which we distinguished earlier (partnership, career inducement, protection) play some part in this scheme. The law of divorce being based on breakdown, fault plays only a minor role in settling its effects. The dominant aim is to make it as easy as possible, at the husband's expense rather than the state's, for ex-wives to support themselves.

### III. *French Law : The Tenacity of Fault*

The German law about security for divorced wives possesses a certain unity, since, as stated, it has a dominant aim, self-support, which precludes any close attention to the spouses' respective faults. This is not true of French law, which is confessedly a patching together of divergent notions. Among these, fault retains an important place. Though the reforms of 1975 introduced divorce by mutual consent and, after six years' separation, for breakdown, fault remains the ground on which most petitions for divorce are presented.<sup>70</sup> In itself this is not specially

<sup>69</sup> *Le Nouveau Droit du Divorce*, above, n. 52, pp. 91-92 (Müller-Freienfels); Lynker, *Das neue Scheidungsrecht* (1977) p. 96.

<sup>70</sup> *Le Nouveau Droit du Divorce*, above, n. 52, p. 110 (50 per cent. in 1978). In 1978 there were 355,000 marriages in France, 74,000 divorces: Carbonnier, *Droit Civil 2* (1979), p. 603, though of course the crude figures mean little.

significant. Six years is a long time and divorce for breakdown imposes burdens on the husband under French law which are heavier than those entailed by other grounds of divorce. But fault also plays more than a minor role in settling the effects of divorce. A spouse for whose sole fault a divorce is granted suffers penalties. A spouse who is partly at fault, or who gets a divorce for breakdown without the consent of the other spouse, is also penalised, though to a lesser extent. There is no one uniform set of effects of a divorce. The effects differ according to the grounds. The law is therefore complicated,<sup>71</sup> even if the details are not spelled out with the intricacy of German law.

It is simplest to begin with divorce for fault, though after the changes made by the Act of July 11, 1975 this is listed last in the Code Civil.<sup>72</sup> The fault must be a serious or repeated breach of the obligations of marriage and make its continuance intolerable<sup>73</sup> - but in practice fairly minor faults suffice. If there is a counterclaim, or if the facts which emerge show faults on both sides, the court may grant a divorce on the ground of shared fault.<sup>74</sup> The consequences differ according as the divorce is for sole or shared fault. If it is for the sole fault of one of them, he or she automatically loses the benefit of all gifts made to him or her and all advantages conferred on the guilty by the innocent spouse during or after marriage, for example under the marriage contract.<sup>75</sup> The innocent spouse keeps all such gifts and advantages. The sole guilty spouse also forfeits all those rights to which he or she would be entitled under statute or by contract with a third party<sup>76</sup>;

<sup>71</sup> D. Huet-Weiller in *Le Nouveau Droit du Divorce*, above, p. 52, p. 68.

<sup>72</sup> Code Civil, art. 242-6.

<sup>73</sup> *Ibid.* art. 242.

<sup>74</sup> *Ibid.* art. 245.

<sup>75</sup> *Ibid.* art. 267 (1).

<sup>76</sup> *Ibid.* art. 265 (2).

for example, the pension rights to which divorced wives are sometimes entitled, or rights under insurance contracts taken out by husbands in favour of their wives. Again, a sole guilty spouse can be sued, though only at the time of divorce, for damages for material or moral loss, other than loss of support, caused by the divorce.<sup>77</sup> This might consist in such things as loss of social status, pension rights or even companionship. Apart from this special action for damage caused by the divorce itself, the innocent spouse can at any time sue the guilty one in an ordinary tort action for loss caused by things other than the divorce itself<sup>78</sup>: for example, a wife can sue a husband for parading his affair with another woman or introducing her into the matrimonial home.

Finally, the sole guilty spouse, unlike an ordinary divorced spouse, has no right to a compensatory provision (*prestation compensatoire*), which, we shall see, is a settlement intended to make good the difference in the standard of living of the former spouses after divorce.<sup>79</sup> The innocent spouse may claim one. All that the guilty spouse is entitled to, when she has lived with her husband a long time and helped him in his profession, is a sum of money sufficient to obviate the manifest inequity of denying compensation altogether.<sup>80</sup>

When divorce is granted, then, for the sole fault of husband or wife, that fault is underlined by the effects of the divorce, both retrospective and future. Only the

<sup>77</sup> *Ibid.* art. 266; Paris February 16, 1979, *Dalloz*, 1979, p. 590 (loneliness in old age after long marriage, 80,000 francs. Note Massip).

<sup>78</sup> The award is not limited by the husband's resources: Cass. civ.<sup>2</sup> December 8, 1976, *Dalloz*, 1977 I.R. 124; and is available even if the divorce is for breakdown: Paris April 25, 1978, *Dalloz*, 1979, 35 (adultery, desertion, 20,000 francs). Cf. for German law *BGB*, para. 823; Palandt *BGB* (38 ed., 1979), p. 1353.

<sup>79</sup> Code Civil, art. 270.

<sup>80</sup> *Ibid.* art. 280-1 (2).

<sup>81</sup> *Ibid.* art. 285-1.



use of the matrimonial home is unaffected by the fault.<sup>81</sup> But, of course, any property in the matrimonial home, as opposed to its use, which one spouse has acquired from the other by gift or under the marriage contract is forfeited if divorce supervenes through his or her sole fault.

The effects of divorce for shared fault are less dramatic. Neither spouse has a right to sue for loss resulting from the divorce itself. The wife, whom I assume to be the worse off, can claim, despite her share of the fault, a compensatory provision.<sup>82</sup> On the other hand, both spouses can, if they wish, revoke gifts made to the other and advantages conferred under the marriage contract.<sup>83</sup>

A divorce for breakdown (*rupture*) can be given after six years' mental illness with no present prospect of cure, or after six years' separation.<sup>84</sup> It is only if the spouses are not agreed on divorce that one of them is likely to seek divorce for breakdown. If they were agreed, they would ask for divorce by mutual consent, for which the waiting period is only three months.<sup>85</sup> But though it is not wrongful to petition unilaterally for divorce on the ground of breakdown, the French legislator has shown his reluctance to countenance repudiation of a marriage by the safeguards with which he has hedged it about. The divorce can be refused, despite the six years' separation, if it would cause exceptional hardship.<sup>86</sup> If the divorce for breakdown is granted, the petitioner, who will normally be the husband, must take on himself all the burdens attaching to it.<sup>87</sup> The main burden is that his duty to support his ex-wife and, of course, his children, persists.<sup>88</sup> This duty of support (*devoir de secours*) which during marriage takes the form of a contribution to the expenses

<sup>82</sup> *Ibid.* arts. 270 *et seq.*

<sup>83</sup> *Ibid.* art. 267-1.

<sup>84</sup> *Ibid.* art. 237-8.

<sup>85</sup> *Ibid.* art. 231 (2).

<sup>86</sup> *Ibid.* art. 240 and *cf.* 238 (2).

<sup>87</sup> *Ibid.* art. 239.

<sup>88</sup> *Ibid.* arts. 281-285.

of the marriage (*contribution aux charges du mariage*) is converted on divorce into periodical maintenance payments, (*pension alimentaire*)<sup>89</sup> or, if the position of the husband allows it, a capital transfer.<sup>90</sup> The periodical payments must be indexed and can at any later time be revised in the light of the needs and resources of the former spouses.<sup>91</sup> The capital transfer, if there has been one, can be supplemented by periodical payments if it later turns out to be inadequate for the need of the ex-wife.<sup>92</sup>

What is the idea underlying this grudging legislation? It seems to be that divorce is available to the separated husband without his wife's consent only if he is prepared to treat her financially as if she were still his wife, *i.e.*<sup>93</sup> as if marriage were a partnership which continued notionally after divorce. In practice courts are apt to adopt as a guide, as in England and Germany, something more concrete: an informal one-third rule.<sup>94</sup> This means that the starting point for assessing maintenance payments is that a wife or ex-wife is entitled to one-third of the joint incomes of herself and her husband. The strength of the wife's position in France is that, by a simplified procedure, she can make her husband's employer or bank pay her the maintenance payments direct. Also, the garnishment of a wage or salary extends to that part of it which is in general unassignable.<sup>95</sup> Husbands, understandably, have not tumbled over one another in the rush to seek divorce for breakdown. Only about 3 per cent. of divorces are granted on this ground.<sup>96</sup>

<sup>89</sup> *Ibid.* art. 282; Carbonnier, *op. cit.* 222.

<sup>90</sup> *Ibid.* art. 285 (1).

<sup>91</sup> *Ibid.* art. 282.

<sup>92</sup> *Ibid.* art. 285 (2).

<sup>93</sup> *Jurisclasseur Civil*, arts. 229-387 F. 15 (2), no. 5 (R. Lindon).

<sup>94</sup> Carbonnier, *op. cit.* p. 222.

<sup>95</sup> Code Civil, art. 214 (2), inserted by Act of July 13, 1965. An Act of January 2, 1973, art. 1 provides for direct payment by the employer, etc. Carbonnier, *op. cit.* pp. 117-118, 493-194.

<sup>96</sup> Carbonnier, *op. cit.* p. 192.

Furthermore, if a husband does sue successfully for divorce for breakdown it is not he who obtains the divorce. On the contrary, the divorce is a divorce *against him*.<sup>97</sup> As a result he automatically forfeits the gifts and other advantages which his wife has conferred under the marriage contract or outside it.<sup>98</sup> She, on the other hand, retains hers. Hence, though divorce for breakdown does not have quite all the penal effects of a divorce for the sole fault of one spouse, it comes rather close to it.

The only sort of divorce which can truly be called non-penal is divorce by mutual consent, which accounted for about 38 per cent. of divorces in 1978.<sup>99</sup> Even in this case, only one of the two forms of divorce is entirely free from penal elements. This is divorce by joint petition.<sup>1</sup> Such a petition, which can be brought after six months of marriage, an unusually short period, must be renewed after a further three to six months. The court, if satisfied that the spouses really want it, can then grant them a divorce. The petition must be accompanied by a draft agreement in which they set out the terms of the proposed divorce, including its effects on the matrimonial home, the property of the spouses (liquidation of the matrimonial regime) and the compensatory provision to which the wife, assuming her to be worse off, is entitled.<sup>2</sup> The court, and in practice the judge for matrimonial affairs (*juge aux affaires matrimoniales*) who is deputed for the purpose by each Court of Major Jurisdiction (*tribunal de grande instance*),<sup>3</sup> must confirm the agreement. He can refuse to do so if the agreement does not properly safeguard the wife's interest,<sup>4</sup>

<sup>97</sup> Code Civil, art. 265.

<sup>98</sup> *Ibid.* art. 269.

<sup>99</sup> Carbonnier, *op. cit.* p. 180.

<sup>1</sup> Code Civil, art. 230.

<sup>2</sup> *Ibid.* art. 230 (1); *Jurisclasseur Civil*, pp. 229-397 F.10 no. 103 (G. Thomas-Debenest).

<sup>3</sup> Code Civil, art. 247.

<sup>4</sup> *Ibid.* art. 232 (2); Trib. gr. inst. La Rochelle October 19, 1977, *Dalloz*, 1978, I.R. 435.

and he can bring pressure on the spouses to alter it, but he cannot vary it himself.

The other sort of divorce by mutual consent takes the form of demand by one spouse and acceptance by the other, sometimes called double admission (*double aveu*).<sup>5</sup> This, as in Germany, is meant to make it easier for a Catholic, who would not wish to join in a positive petition for divorce, to accept that a breakdown has occurred. The spouse who makes the demand must prepare a synopsis of the marriage, setting out the factors (not faults) which have made life together intolerable.<sup>6</sup> If the other spouse accepts the synopsis as accurate, a divorce can be granted.<sup>7</sup> But it counts as divorce for shared fault (*aux torts partagés*),<sup>8</sup> and each spouse can therefore revoke gifts and advantages accorded to the other. It, too, therefore, has a penal element, albeit muted.

So far I have concentrated on the way in which in French law the effects of divorce on the wife's security depend on the degree of responsibility which the legislator attaches to the spouse whose fault has caused the marriage to fail or who has taken the initiative in seeking a divorce. There are also some effects which attach in a more uniform way to at least the great bulk of divorces.

(a) An area in which fault is relatively unimportant is the use of the *matrimonial home*. If the husband is sole owner of the house, he can be ordered to lease it to his wife if she has custody of the children or if he has successfully petitioned for divorce on the ground of breakdown.<sup>9</sup> In the first case the lease can last until the youngest child reaches 18, in the second for 9 years in the first instance, or until the wife remarries. The court can terminate the lease it has created if circumstances change.

<sup>5</sup> *Ibid.* art. 233-6; Carbonnier, *op. cit.* 182.

<sup>6</sup> *Ibid.* art. 233.

<sup>7</sup> *Ibid.* art. 234.

<sup>8</sup> *Ibid.* art. 234.

<sup>9</sup> *Ibid.* art. 285-1 (1). For the division of the matrimonial community see art. 1476 (2), which gives the judge some discretion.

If the spouses live in rented accommodation, the lease vests automatically in both of them and, on divorce, can be allotted to one of them in the light of the family and social interests in issue, but subject to compensating the other.<sup>10</sup>

(b) Also relatively independent of fault is the right to a *compensatory provision*. This is available to any divorced wife (assuming that she is financially weaker), other than one divorced on the ground of her sole fault (who is entitled to be indemnified only in exceptional circumstances) or a wife divorced for breakdown (who can claim maintenance anyhow).<sup>11</sup>

A compensatory provision is meant to compensate, so far as possible, for the disparity which the break-up of the marriage creates in the standard of living of the former spouses.<sup>12</sup> This implies that the court should aim at equalising their standard of living after divorce. But, somewhat incoherently, the code goes on to provide that the compensatory provision depends on the needs of the wife and the resources of the husband, looked at, on a long term view, at the time of divorce.<sup>13</sup> Various factors are listed as relevant. They are rather like those of German maintenance law : the wife's age and health, whether she is bringing up children, her professional qualifications, whether she will lose pension rights on divorce, what resources she has in income and capital.<sup>14</sup>

The compensatory provision must take the form of a capital allocation if the husband can provide it. The husband may make a money payment, transfer a life or shorter interest (not the ownership) in immovables or

<sup>10</sup> *Ibid.* art. 1751, inserted by Act of August 4, 1962.

<sup>11</sup> *Ibid.* art. 270, *Cf.* arts. 239, 280-1 (1), 281-5. That no compensatory provision can be given in divorce for breakdown was controverted, but see now Cass. civ.<sup>2</sup> April 18, 1980, *Gaz. Pal.* 1980.2.491.

<sup>12</sup> Code Civil, art. 270 (*disparité que la rupture du mariage crée dans les conditions de vie respectives*).

<sup>13</sup> *Ibid.* art. 271.

<sup>14</sup> *Ibid.* art. 272.

chattels, such as the matrimonial home, or deposit income-producing assets such as shares with a banker, notary, etc., who will pay the income to the wife.<sup>15</sup> The court can echelon the capital provision over three years.<sup>16</sup> Generally, however, the husband will not have, or be able to raise, enough capital. In that case the compensatory provision takes the form of a periodical payment,<sup>17</sup> which is in effect rather like a maintenance payment, though based on a different theory. Like a maintenance payment, it must be indexed.<sup>18</sup> But, unlike it, it can be revised only when otherwise "consequences of exceptional gravity" would occur.<sup>19</sup> The payment can however vary in successive periods according to the foreseeable needs and resources of the ex-spouses. It need not be for life, but does not automatically cease on remarriage or open concubinage, since in theory it is not a maintenance payment, but compensation for having a lower standard of living than the husband after divorce. In practice compensatory provisions usually take the form of periodical payments.

The theory of the compensatory payment is that a clean break is preferable, and that, in the joy of recovering his freedom,<sup>20</sup> a husband will be willing to make a substantial transfer, for example of a life interest in the matrimonial home. But, since a compensatory provision cannot ordinarily be revised, even in the event of unforeseen changes,<sup>21</sup> it is difficult to calculate. Thus, account must be taken of the chances of the wife's remarrying.<sup>22</sup> On the other hand the fact that revision is possible in cases

<sup>15</sup> *Ibid.* art. 275.

<sup>16</sup> *Ibid.* art. 275-1.

<sup>17</sup> *Ibid.* art. 276.

<sup>18</sup> *Ibid.* art. 276-1 (2). The index of consumer prices for urban households is often used.

<sup>19</sup> *Ibid.* art. 273.

<sup>20</sup> Carbonnier, *op. cit.* p. 213 (*euphorie de la liberté*).

<sup>21</sup> Code Civil, art. 273 (unless not taking them into account would produce "circumstances of exceptional gravity").

<sup>22</sup> *Jurisclasseur Civil*, 229-387 F61, no. 162 (Bénabent).

of exceptional gravity is an inroad on the clean break principle.

In the case of a joint petition for divorce by mutual consent, the spouses of course fix the amount of the compensatory provision, but the judge can refuse his approval if the agreement does not sufficiently protect the wife's interests.<sup>23</sup> The spouses can vary their agreement only by submitting a new agreement for approval. But in the original agreement they may provide for the court to review the compensatory provision in the light of changes in their needs and resources. Some courts insist on the insertion of a clause providing for this when the divorce is by joint petition.<sup>24</sup>

(c) A divorced French wife is, unlike her German equivalent, not entitled to a half share in the expectancies of pension rights accumulated during marriage. She counts as a wife, however, for purposes of civil and military pensions, and, if the divorce was for breakdown and she was the defendant, for social security pensions. In these cases if her ex-husband dies and she has not remarried during his lifetime she can claim a share of the reversionary pension proportionate to her years of marriage to him.<sup>25</sup> If she was his only wife, she gets the whole; if she was married to him for 20 years and a later wife for 10, she gets two-thirds. On paper this is not as good a deal as that which the German wife is entitled to, but the scheme is simpler to operate.

The loss of reversionary pension rights (*e.g.* under a private scheme which makes no provision for divorced wives) can amount to exceptional hardship and justify the refusal of a divorce for breakdown.<sup>26</sup>

The 1975 reforms, like other reforms of French family

<sup>23</sup> Code Civil, art. 232 (2).

<sup>24</sup> *Le Nouveau Droit du Divorce*, above, n. 52, p. 122.

<sup>25</sup> Act of July 11, 1975, arts. 11 (1), 13, inserting in Code de la Sécurité Sociale, art. 351-2; Act of July 17, 1978, art. 43.

<sup>26</sup> Trib. gr. inst. Paris, March 11, 1977, *Gaz. Pal.* 1977.2 somm. 339.

law, owe much to Carbonnier<sup>27</sup>, whose draft formed the basis of the legislation. They represent a compromise between those who think that, as a matter of justice, fault should have a bearing on the financial consequences of divorce, and those who find the quest for fault in this context elusive, if not pointless since "it takes three to commit adultery."<sup>28</sup> Apart from this unresolved issue, the legislation rejects the notion, prominent in German law, that the responsibility of the husband is to tide the wife over, by a retraining grant (*bourse de recyclage*)<sup>29</sup> until she can support herself. To the French legislator this seems too prosaic an approach. The guiding theme is rather than the matrimonial partnership should continue in a changed form after divorce, so that the wife is entitled either to the support she could previously claim (divorce for breakdown) or to an equal standard of living with her ex-husband (compensatory provision). In practice, of course, this aim is seldom attained unless the wife has independent means, or the husband is himself well off.

#### IV. *English Law : Flexibility and Rule of Thumb*

In England the Divorce Reform Act of 1969 laid down that divorce was available only on the ground of the irretrievable breakdown of the marriage. But breakdown must be established in one of five ways, of which three (adultery, intolerable behaviour, desertion) involve fault.<sup>30</sup> The other two (two years separation plus consent to the divorce; five years separation irrespective of consent), do not depend on fault.<sup>31</sup> Divorce on the ground of five years separation can be opposed on the ground that it will result

<sup>27</sup> *Jurisclesseur Civil*, 229-387, F.5, no. 32 (Weill).

<sup>28</sup> Attributed to Vaisey J.

<sup>29</sup> Carbonnier, *op. cit.* p. 128, on the German Jahn project of 1970.

<sup>30</sup> Matrimonial Causes Act (MCA) 1973, s. 1 (2) (a) - (c).

<sup>31</sup> MCA 1973, s. 1 (2) (d), (e).



in grave hardship, financial or other, to the respondent, whom I will assume to be the wife.<sup>32</sup> But even if the court finds that there will be grave hardship, it may dissolve the marriage all the same, if it comes to the conclusion that in all the circumstances it would be right to do so, for example in the light of the wife's bad conduct.<sup>33</sup> In practice refusal is confined to cases where the loss of pension or insurance rights will cause hardship, and even these are not regarded as "grave" in the case of a young wife.<sup>34</sup> No petition for divorce can be presented within three years of marriage unless the petitioner can prove exceptional hardship on his part or exceptional depravity on his wife's.<sup>35</sup>

Divorce by consent is therefore, given the three year minimum, more difficult than in France (six months marriage)<sup>36</sup> or Germany (one year's separation).<sup>37</sup> But, once the marriage has lasted three years, divorce by consent can be virtually instantaneous, provided that one of the spouses does not mind being labelled an adulterer, or as having behaved unreasonably. For in that case a special procedure for undefended divorces is available, which effectively turns divorce into an administrative act.<sup>38</sup> Divorce without the consent of one spouse — unilateral repudiation — is different. It can be obtained sooner in England than in France (five years' separation as opposed to six)<sup>39</sup> but entails more delay than in Germany (normally three years' separation, with hardship no bar after five).<sup>40</sup>

<sup>32</sup> *Ibid.* s. 5 (1).

<sup>33</sup> *Brickell v. Brickell* [1974] Fam. 31; Eekelaar, *Family Law and Social Policy* (1978), p. 141.

<sup>34</sup> *Matthias v. Matthias* [1972] Fam. 287.

<sup>35</sup> MCA 1973, s. 3 (1), (2). Law Commission Working Paper 76 floats the idea of abolishing this rule.

<sup>36</sup> Above, n. 1.

<sup>37</sup> Above, n. 15.

<sup>38</sup> Cretney, below, n. 49, pp. 159-163.

<sup>39</sup> Above, n. 84.

<sup>40</sup> Above, nn. 16-17.

Following the 1969 Act, courts were given very wide powers by the Matrimonial Proceedings and Property Act 1970 to settle the effects of divorce.<sup>41</sup> The jurisdiction falls in practice mainly to the registrars of the County Courts.<sup>42</sup> The Act made the law on this subject more unified, more flexible and more discretionary than the corresponding laws in France and Germany. It is unitary in a number of respects. First, the right to use the matrimonial home after divorce is not separately regulated, as it is in France and Germany.<sup>43</sup> Secondly, the property of the spouses at the time of divorce, including, if they or one of them owns it, their matrimonial home, is not distributed according to their matrimonial property regime, as it is in Germany, and, subject to forfeiture or revocation for fault, in France.<sup>44</sup> This is not because there is no matrimonial property regime in England. On the contrary, separation of property is the English regime,<sup>45</sup> as it is, by choice, that of many couples in France and Germany. But the registrar or judge in England is not bound to respect the spouses' property rights in the event of divorce. Under the powers which were granted in 1970, he may redistribute the spouses' property as part of the divorce settlement, and, instead of treating this as a matter separate from maintenance, he may, and is indeed encouraged to, look on property and maintenance as part of the same operation.<sup>46</sup> In reallocating property rights he is the freer in that no constitutional principle forbids him to expro-

<sup>41</sup> Matrimonial Proceedings and Property Act 1970, ss. 2-5. It and the 1969 Act "revolutionised" the law: *Trippas v. Trippas* 1973 [Fam.] 134, 140.

<sup>42</sup> *Barrington Baker and others, The Matrimonial Jurisdiction of Registrars* (1977).

<sup>43</sup> Above, pp. 18-23, 9-10.

<sup>44</sup> Above, nn. 24-25, 75, 76, 83.

<sup>45</sup> Despite this, in 1970-1 74 per cent. of couples buying a home did so in their joint names.

<sup>46</sup> Reading MCA 1973, s. 25 (1) with ss. 23, 24; *Wachtel v. Wachtel* 1973 [Fam.] 72, 91.

priate without compensation,<sup>47</sup> as it does in France and Germany. Though courts do not wantonly disregard title to property, this adds an element of flexibility to their options.

Finally, the English system is unitary in that it makes no distinction between capital and income, except for the fact that periodical maintenance payments end on the wife's remarriage<sup>48</sup> (but on the husband's death only if unsecured) and can be varied at any time after divorce if the relevant circumstances change.<sup>49</sup> Capital, on the other hand, does not have to be repaid if the wife remarries or circumstances change, and conversely the court will not, it seems, order the husband to hand over more capital if she is in need,<sup>50</sup> though it has power under the Act to make capital or income orders at any time after divorce.<sup>51</sup> Capital, but not income orders are meant to be final.

Apart from this, and the fact that the Supplementary Benefits Commission takes account of a wife's income but not, generally speaking, of capital invested in a home,<sup>52</sup> it is a matter of justice and convenience whether the court orders the husband to transfer capital (in the form of a lump sum<sup>53</sup> or in kind) or to make periodical payments to his wife, or both. The court has a number of options if it wishes to transfer capital. It can order a settlement of the spouses' property,<sup>54</sup> a resettlement of property settled under a marriage contract,<sup>55</sup> or the extinction of an

<sup>47</sup> e.g. *S. v. S.* [1976] Fam. 18 (transfer of home to wife with no compensating charge). K.J. Gray, *The Reallocation of Property on Divorce* (1977), p. 324 finds this "inconsistent with the historic approach of English property law."

<sup>48</sup> MCA 1973, s. 28 (1).

<sup>49</sup> S.M. Cretney, *Principles of Family Law* (3rd ed., 1979), p. 277.

<sup>50</sup> MCA 1973, s. 31 (5); Cretney, *op. cit.* pp. 341-342.

<sup>51</sup> MCA 1973, s. 23 (1).

<sup>52</sup> Supplementary Benefits Act 1976, Sched. 1, Pt. 111, paras. 17, 19.

<sup>53</sup> MCA 1973, s. 23 (1) (c).

<sup>54</sup> *Ibid.* s. 24 (1) (b).

<sup>55</sup> *Ibid.* s. 24 (1) (c).

interest under such a settlement.<sup>56</sup> It is quite common to make use of trusts or charges to achieve a balance between the claims of the spouses.<sup>57</sup>

The English system, then, is unitary and flexible mainly because of the range of methods open to the court and of the property and interests on which it can operate. The court has also a wide discretion as to whether and how to exercise its powers. It is true that at first sight the statute seems to set a clear goal. The court is to aim to put the wife in the financial position in which she would have been had the marriage not broken down and had both spouses properly discharged their financial obligations and responsibilities towards one another.<sup>58</sup> This suggests that the husband must treat his ex-wife, financially, as if she were still married to him. But this is only to be done, says the statute, so far as is practicable and, having regard to the spouses' conduct, just.<sup>59</sup> The first is obvious. The husband, like his wife, is entitled in principle to the same standard of living as he would have had but for the breakdown, and, since separate households are generally more expensive than a joint household, the only practicable policy is normally to make the standards of wife and husband after divorce as equal as possible.<sup>60</sup> This aim is in effect the same as that of the French compensatory provision.<sup>61</sup>

The second limitation — about the spouses' conduct — has been interpreted narrowly, so that a wife's conduct, for example, is taken to reduce or bar her claim to be

<sup>56</sup> *Ibid.* s. 24 (1) (d).

<sup>57</sup> e.g. *Martin v. Martin* [1978] Fam. 12; *Hector v. Hector* [1973] 1 W.L.R. 1122.

<sup>58</sup> MCA 1973, s. 25 (1), final clause; *Trippas v. Trippas* [1973] Fam. 134; *O'D. v. O'D.* [1976] Fam. 83.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Trippas v. Trippas* [1973] Fam. 134, 146; *Scott v. Scott* [1978] 1 W.L.R. 523; cf. Cretney, p. 292 (equality at supplementary benefit level).

<sup>61</sup> Above, n. 12.

treated as if she were still a wife only when the injustice of granting it is "obvious and gross."<sup>62</sup> And, despite a wife's bad conduct, her contribution to the marriage should be recognised in the order made.<sup>63</sup>

This clarity of aim vanishes, however, when we look at the list of matters which the court must consider before deciding whether to exercise its powers. Some of these are indeed consistent with the idea that the marital partnership notionally continues. Thus, the court must take account of the standard of living the spouses enjoyed before the breakdown,<sup>64</sup> and any loss (such as the wife's loss of a pension expectancy) which is the effect of divorce.<sup>65</sup> But the court must also look at the contribution made by the wife to the welfare of the family, *e.g.* by looking after the home or caring for the family,<sup>66</sup> and to the duration of the marriage.<sup>67</sup> This suggests, contrary to the previous items, that the partnership is dissolved by divorce and that the wife is entitled to a share-out of the assets proportional to her contribution; whereas, had the marriage continued, she would not have got a share of the assets but rather a continuing standard of living in which the use of the assets was an element. Other items, again, point to the idea that the husband must provide for his ex-wife if she is in need. Thus, the court is directed to pay attention to her age,<sup>68</sup> financial needs, obligations and responsibilities,<sup>69</sup> her income, earning capacity, property and other resources,<sup>70</sup> and

<sup>62</sup> *Wachtel v. Wachtel* [1973] Fam. 72, 80, 90; *Harnett v. Harnett* [1974] 1 All E.R. 764; *Jones v. Jones* [1976] Fam. 8; *West v. West* [1978] Fam. 1.

<sup>63</sup> *Bateman v. Bateman* [1979] Fam. 25.

<sup>64</sup> MCA 1973, s. 25 (1) (c).

<sup>65</sup> *Ibid.* s. 25 (1) (g).

<sup>66</sup> *Ibid.* s. 25 (1) (f).

<sup>67</sup> *Ibid.* s. 25 (1) (d).

<sup>68</sup> *Ibid.* s. 25 (1) (d).

<sup>69</sup> *Ibid.* s. 25 (1) (b).

<sup>70</sup> *Ibid.* s. 25 (1) (a).

to any physical or mental disability she may suffer from.<sup>71</sup>

The various items to be taken into account are not placed in any order of priority, so that the scheme, taken as a whole, is incoherent. If the wife's contribution to the marriage, or her need, is relevant (and why not?) then the award to her, by way of capital or income, should reflect that contribution or need, not the aim of treating her as if the marriage had continued.

The statute points at one and the same time in opposite directions. The courts have therefore been forced to choose their own solution. In 1973 in *Wachtel v. Wachtel*<sup>72</sup> the Court of Appeal set a landmark. In a case where, after a long marriage, the capital available consisted of the matrimonial home, the income of the husband's earnings, it decided that the proper course was to award one-third of each to the wife. What Lord Denning's judgment shows is that there can be cases in which it makes little difference whether we treat marriage as a partnership dissolved by divorce or as one which continues afterwards and entitles the wife in principle to a standard of living equal to her ex-husband's. If the wife has made a substantial contribution to the marriage, and is therefore in justice entitled to a fair share of the assets, her claim can often be satisfied by one-third of both capital and income, which together are roughly equivalent to half the capital, though the actual payment is spaced out. Alternatively, given that the husband, if he is the main earner, normally has greater calls on his income,<sup>73</sup> to give the wife one-third of their total resources will more or less equalise their standard of living after divorce, and satisfy, to the extent that is practicable, the statutory aim of treating the spouses as if the marriage had not broken down.

<sup>71</sup> *Ibid.* s. 25 (1) (e). It is odd that the section does not mention as a matter of special importance the fact that the wife is looking after children of the marriage under age.

<sup>72</sup> [1973] Fam. 72.

<sup>73</sup> This assumes a traditional, but, as things stand, realistic view of sex-roles.

Two comments seem called for. The courts of all three countries tend to use a conventional fraction as the starting point of their thinking (one third in France,<sup>74</sup> various fractions up to 40 per cent. in Germany),<sup>75</sup> though only in England has the practice received judicial endorsement. But the fractions are not fully comparable, because in France and Germany the spouses' property rights and the use of the matrimonial home do not fall within whatever convention is adopted.<sup>76</sup> In those countries the conventional fractions apply, as in the old ecclesiastical courts, to income payments only. As regards these, it may well be convenient, even necessary to take some fraction as a guide, though a third of English registrars deny that they find it helpful to do so.<sup>77</sup>

Secondly, the line set by *Wachtel* holds only when the wife's contribution to the marriage and present needs point to her getting the same as she would have if the marriage had continued. When they point in different directions, the courts tend to let contribution or need prevail. Thus, a wife may get something for her contribution to the marriage, though she later remarries a rich man, and so will be better off than if the first marriage had continued.<sup>78</sup> A wife who was married only for a short time, and so made only a small contribution to building up her husband's assets and income, will not be awarded the full amount she would have enjoyed had the marriage continued.<sup>79</sup> Again, regard for the needs of both husband and wife<sup>80</sup> often leads courts and registrars to take it as a

<sup>74</sup> Above, n. 94.

<sup>75</sup> Above, n. 44.

<sup>76</sup> Above, nn. 18-25, 75, 83, 30-31.

<sup>77</sup> Barrington Baker, *op. cit.* para. 3.22-9.

<sup>78</sup> *H. v. H.* [1975] Fam. 9.

<sup>79</sup> *Krystman v. Krystman* [1973] 3 All E.R. 247 (separation); *Cumbers v. Cumbers* [1975] 1 All E.R. 1; *Brown v. Pritchard* [1975] 3 All E.R. 721.

<sup>80</sup> Thus, after *Wachtel v. Wachtel* [1973] Fam. 72, 90 had held the spouses' conduct to be irrelevant unless gross, 60 per cent. of registrars followed this guideline, but 32 per cent. said they took conduct into account: Barrington Baker, *op. cit.* para. 2.22-23.

dominant aim to see that, as soon as possible, two viable households replace the one that has broken up. But the system confers so much discretion that the practice of registrars is inevitably variable.<sup>81</sup> This variability makes the subject as controversial in England as it is in Germany.<sup>82</sup> Indeed it is now proposed (1982) to abandon the aim of putting the wife in the position in which she would have been had the marriage not broken up and to give priority to the interests of the children of the marriage.

### V. Conclusion

It is not easy to say which of the three systems better protects a divorced wife, or one threatened with divorce. We must remember that to married women fault is often more important than it is to legislators, and the ideal of a clean break is less dear to them than to husbands. It is probably French law that best protects the exemplary wife who does not want a divorce, and compensates her if it occurs. It is also an advantage to French ex-wives that maintenance awards must be index-linked. English law is the most flexible of the three. It has the great merit of treating the resources of the spouses, present and future, income and capital, as a unit to be distributed between them. It has the demerit of being highly discretionary. German law sets itself the sensible aim, in the long run much in the wife's interest, of making her self-supporting — at her husband's expense if necessary. If self-support is not possible, her husband must continue to support her, with a certain priority over a later wife. But this rational scheme is excessively complex in comparison with English law. In the end there is something to be said, from the wife's point of view, for each of the systems, depending on her outlook, time-scale and career prospects.

<sup>81</sup> *Brown v. Pritchard* [1975] 3 All E.R. 721, 725 (need of both for a home after divorce a dominant consideration).

<sup>82</sup> *The Financial Consequences of Divorce*: Law Commission 112 (1981).



## Chapter 4

### ACHIEVEMENTS AND COSTS

*Our wildest dreams have been fulfilled  
Now let us turn to the less wild ones*

Stanislas J. Lec

This final lecture begins by summarising what has gone before. What legal techniques are available and what can laws achieve in regard to the three relationships of employment, residential leases and marriage? How does the achievement of English law compare with that of French and German? It then goes on to ask a question which has so far been avoided. What is the cost of the achievement? Is it at the expense of making it more difficult for those who would like to find jobs, homes and husbands to find them?

#### I. *What Can Laws Do?*

To what extent can laws provide protection for employees, tenants and wives who do not want to lose their job, their home or their husband? Are they better off in the hands of the English, the French or the German legislator and judge? These are the questions that the previous three lectures put and sought to answer.

What conclusions emerged? We saw that what laws can achieve varies with the relationship that is being regulated. Sometimes laws can keep a relationship in being. If society is prepared to enact and enforce the appropriate laws, a tenant can be given security in his home. But, in countries which value personal freedom, laws cannot keep husband and wife together, and they can seldom coerce an employer into retaining an employee whom he wants to dismiss.

Laws about divorce and dismissal from employment have, for the most part, more modest aims and effects.

One such aim is that of forcing the stronger party in the relationship to make substitute provision for the weaker's party's *needs*. Legislation about protected housing often lays down that a landlord can retake a home for his own use or that of his family only if he provides a suitable alternative home for his tenant. It is as if by letting the residence originally he had taken on a continuing obligation to see that the tenant was housed, if not at the standard of the premises first let, at least at a level appropriate to his needs. German law requires an employer to provide suitable alternative work for a willing employee, if he can, rather than to dismiss him; and the possibility of doing this is also relevant to the justification of dismissal in French and English law. In the case of divorce there is assuredly no obligation to provide a replacement husband, but the original husband's duty to maintain his ex-wife disappears if the ex-wife remarries, or, in some systems, openly cohabits with another man. Apart from this, divorce laws generally compel a husband to maintain his wife if she is in need, the money being, as it were, a substitute for the home that he was or should have been previously providing. In all three relationships the stronger party is thought of, according to this notion, of having taken it on himself to provide, to some extent, for the needs of the weaker. The obligation may be stronger in some countries than others, and stronger in marriage and housing than in employment, but it is never entirely absent.

A still more ambitious aim is that of forcing the stronger party to satisfy not merely the needs of the weaker but his or her full *expectations*. It is only in divorce law that some systems try to give effect to this idea. English law is one of them. On paper it requires the husband to put his wife, from the point of view of her standard of living, in the position in which she would have been had the marriage continued. In practice it is likely to be only a wealthy husband who can do this, whether by settling property or

making periodical payments. In a somewhat less ambitious form, however, a similar aim has a part to play in all three systems of divorce law. In this whittled down form the husband must see to it that his wife's standard of living after divorce is no lower than his own, even though neither is as high as they could have expected had they stayed together.

The uses of law so far described rest on the idea that the obligation arising from the original relationship continues, in one form or another, to exist. Sometimes it is unrealistic to insist on this. It may be better to accept that if a breakdown occurs the stronger party has for the future no obligation to provide for the needs of the weaker or satisfy his or her expectations. That still leaves some important roles for laws to play. They can be used to deter the stronger party from ending the relationship, and to penalise him, or exact a price from him, should he do so. At the same time the penalty or price can serve to compensate the weaker party for the rupture of the relationship, or for having entered into it in the first place, or can simply assuage the weaker party's feelings.

The ingredients of deterrence, penalty (or price) and compensation (or solace) enter into the various legal provisions in different proportions. In practice they cannot easily be disentangled. Thus we have come across laws that are meant to have a deterrent effect, and set out to achieve this by prescribing a penalty. The penalty is a private one which, if due, goes to the weaker party. Thus, the French spouse through whose sole fault divorce is granted forfeits all advantages under the marriage contract - a clear example of a penalty. The innocent party can also sue him (or her) for damages for any loss suffered as a result of guilty conduct. In the case of forfeiture, the innocent party, who benefits by the forfeiture, is not exactly compensated, but something is done to soothe his or her wounded feelings. Damages, on the other hand, are plainly meant as compensation for a loss suffered.

Again, the payments which an employer has to make to

an employee who is judged to have been unjustifiably dismissed (unfairly, without real and serious cause, without social justification) are meant to deter employers from baseless dismissals, and to penalise those who resort to them. But they are also intended to compensate employees for the wrong they have suffered, and so the extent of their losses, and the character of their own conduct, are taken into account in settling the amount to be paid. In contrast the redundancy payments of English law are not penal. It is no wrong on the employer's part to make an employee redundant if there is genuinely no work for him. Nevertheless these payments are a deterrent, in that they are meant to make the employer pause to consider whether dismissal is strictly necessary, and to make him pay for exercising his managerial power, if he chooses to exercise it. From the standpoint of the redundant employee, I suggested, they amount to compensation for the loss of a connection which is presumably of value to him and to which he has made a contribution.

The *ending* of a relationship is not the only aspect of it which may call for compensation. Sometimes the stronger party must make up what the weaker has foregone by *entering into* it in the first place. Thus, in German law a husband must try to make up to his divorced wife what she has lost by marrying him rather than taking up some other career. He is not of course to blame for having married her. One cannot say that he is penalised for the breakdown of the marriage. But if it does break down, he must pay a price for his freedom. This consists in bringing his former wife to the stage at which she can support herself, and so restoring her as nearly as possible to the position of independence in which she might have been had she not married him.

There are therefore various legal techniques for making it difficult, costly or impossible to dissolve the relationships we are considering. If "cost" is used in a wide sense, they can all be thought of as imposing a cost on the dissolution of the relationship, and we can term the laws that do this cost-imposing laws.

## II. *Which Country Gives Most Security?*

Which of the three countries has made the best use of the techniques available to protect employees, tenants and wives? England, surely, does not come out badly. There is little doubt that a tenant who rents his home has a better chance in England than in France or Germany of remaining in it despite his landlord's wish to evict him. Virtually all residential tenants in England in both the private and the public sector have security of tenure. In the private sector, this security can continue for as many as three lives. The scope of the protection and its duration are alike greater than in France and Germany, and the cases in which the landlord can justify retaking the property are more restricted in England than in the other two countries.

If an employee in England is made redundant, he gets, on average, better compensation than his neighbour across the channel. It would be going too far to say that overall he is better protected than they against arbitrary dismissal. In England so much turns on union and plant bargaining that workers in a large firm or a well-unionised industry are much better off than those in a small, non-unionised firm. The French or German worker in the latter sort of firm or industry has, unlike the worker in England, the benefit of general legislation which lays down reasonable procedures for dismissal and requires employers to consult representatives of the workforce beforehand. In Germany a worker threatened with dismissal can by himself or through his works council see that the possibility of re-training or redeployment is properly explored. In England he is dependent for this, again, on the existence of a union or plant agreement which covers these contingencies. On the other hand a worker in England can get a quicker decision from his labour court, the industrial tribunal, than can his fellow worker on the continent.

It is difficult to generalise about the position of divorced wives in the three countries. The English system has the advantage of being extremely flexible. It treats the property

and income of the spouses as a single fund available for redistribution on divorce. On the other hand the English courts and registrars have so much discretion that their decisions are often unpredictable. The one-third rule (or guide) - that in a straightforward case a divorced wife is entitled to a third of the joint income and capital of the spouses - makes prediction easier, provided that the registrar who decides the case is one of those who makes use of it. In France one-third of joint income is also often taken as a starting point. But the French wife enjoys the great blessing that periodical payments to her are automatically indexed. French law also makes it easier for a wife who does not want divorce, and is not, or cannot be shown to be, even partly responsible for the breakdown of the marriage, to resist divorce and, if in the end she has to submit to it, obtain satisfaction. The German laws about maintenance on divorce are sensible and well designed, but too complex, so that they entail long delays. But the German wife has in her favour the fact that the conventional starting point tends to be rather more than one-third of joint income.

Comparison leaves an impression favourable to, or at least consistent with, Miss Hamlyn's point of view. Employees, tenants and wives in this country enjoy benefits by living under its laws which are, by and large, not inferior to those enjoyed in France and Germany, though, except in housing, they are not markedly superior. The weak point of the English system is the patchy character of its industrial legislation and the almost unlimited discretion which is given to courts to make property and maintenance orders on divorce. The result is that equal treatment is not guaranteed. Another weakness of the English system is that the laws are unnecessarily obscure, in contrast with the lucidity of the French legislation and the complex but logical presentation of the German. What is more, in divorce law at least, the social policy underlying the English legislation has not been thought through.\*

\* but this may be changing: see *The Financial Consequences of Divorce*: Law Commission 112 (1981).

Again, in both divorce and housing law one misses any real attempt in England to weigh the relative claims of property rights and social obligations. In both Germany and France, especially the former, on the other hand, there has been a conscious effort to settle what the guiding aims of the legislation should be. For example, German family and labour law have in common the goal of helping a wife or employee to stand on her or his own feet, at the expense, if need be, of the ex-husband or employer.

But English law also has its strong points. English courts, including industrial tribunals, move quickly in comparison with their neighbours on the continent. They possess powers which, if well used, can be instruments of justice. They have power on divorce, as stated, to treat the family resources as a unit. They have power to decide whether it is reasonable in all the circumstances to allow a landlord to retake a house which is subject to security of tenure, even if he is *prima facie* entitled to do so, *e.g.* to live in himself. They have power in a case of dismissal to decide whether it was reasonable for the employer to treat an apparently sound reason for dismissal as sufficient to justify it. The English courts *can* tailor their decisions in a flexible way to the vexed social situations they are called on to settle. It is difficult to assess the quality of their use of discretionary powers but, among a people inured to paternalism, these broad arbitrations are perhaps more acceptable than they would be in countries with a firmer, more Roman, tradition of knowing and standing on one's private rights.

### III. *The Cost-Benefit Question*

Before we can conclude, with complacency or surprise, that Miss Hamlyn was right, questions must be asked about the costs which in all systems accompany the laws that confer benefits on employees, tenants and wives. Is it the case that, the better employees are protected, the worse is

the chance of employment for those who seek work? That the more difficult it is to end residential tenancies, the smaller the chance that accommodation will be let to future tenants? Or even that the better we protect divorced wives the more men will opt for cohabitation rather than marriage? And, if that is the case, are the common people, who must include potential as well as actual employees, tenants and wives, really better off, or equally well off in England?

These questions are not easy to investigate, since there is no straightforward way of discovering the facts which could form the basis for an objective judgment. Laws which make it difficult and costly to dissolve a relationship can either have no effect, or can deter the party who would have to bear the cost from entering into it, or can make him careful about whom he chooses as a partner. If, at the time when he enters into the relationship, he does not think seriously about the possibility of its being dissolved, the cost-imposing laws are likely to have little or no effect on his decision to enter into it. Thus, it seems probable that a man who decides to get married seldom thinks (at least the first time he marries) about the cost of divorce and its financial consequences. He is apt to assume that his own prospects of a happy marriage are better than average.

If, however, the chance of later wanting to dissolve the relationship seems considerable, the stronger party, who would have to pay the cost of doing so, may be deterred by cost-imposing laws from entering into it altogether. Thus, a potential landlord may decide not to let his house at all rather than to expose himself to the difficulty of later trying to find a valid ground for evicting the tenant. Whether the stronger party reacts in this way is likely to depend to some extent on the costs and benefits of the alternative arrangements he can make. Can he, for example, if he is an employer, contract out the work instead of having it done by a fulltime employee? If a landlord, can he sell the house instead of letting it, or grant a licence



instead of a lease and so escape the legislative cost? Can he live with his girl friend instead of marrying her? The easier and less costly the alternative, the greater its attraction. But it may not be attractive enough. The high cost of dissolving the relationship may merely make the stronger party more careful to make sure that he does not make a choice he will later regret. Thus, an employer may, in view of the high cost of dismissing even an incompetent employee, try to make doubly sure that the person he takes on for his business is competent and reliable.

To discover which effect, if any, cost-imposing laws have, the obvious course is to put questions to employers, landlords and married or marriageable men about their reasons for taking or not taking on employees, letting houses or marrying. But what status do their answers have? Do they themselves know how much their decisions are influenced by the general climate of opinion rather than by this or that law about redundancy, security of tenure or the property of married couples? And, if it is the general climate that sets the context for individual decisions, what weight must we attach to the fact that legislation reflects this climate and, in the course of time, modifies it?

It does not make things easier that sometimes the factors to be investigated are negative; not employing workers, not letting houses, not marrying. These may not be real decisions, let alone reasoned decisions, but the outcome of simple thoughtlessness or inertia. Given, then, the difficulty of unearthing the facts and tracing causal connections, much inevitably turns on the theory we adopt as a framework. Market economists will tend to think of the "decisions," if that is not too grand a term, as taken in a market situation.<sup>1</sup> They will attribute them to rational calculation of competitive, including longterm, benefits and costs. Sometimes this is plausible, but at least decisions for or

<sup>1</sup> e.g. M. and R. Friedman, *Free to Choose* (Pelican, 1980). Chap. 8; C.V. Brown, *Taxation and the Incentive to Work* (Oxford, 1980).

against marrying seem often to be often taken without much regard for the distant future. Market economists also tend to think of benefits and costs in monetary terms or in terms which can, through the mechanism of a market, be converted into money. Others, including welfare economists, attach more weight to intangible benefits and costs. They think of the attachment of people to their spouses, employment or homes as benefits which are not in an ordinary sense convertible into money, though any individual may have to weigh them on his own scale of values against the prospect of financial gain. Again, welfare economists will tend to see a market (of a sort) as operating only at the point of entry into, say, employment or marriage, not at the point of exit.<sup>2</sup> On this view an employer, in deciding whether to take on an extra worker, does indeed calculate the likely benefits and costs. These include longterm costs, such as the cost of dismissal should the employee prove unsatisfactory. But once the employer has taken the worker on, he will not later dismiss him merely because he could replace him by a younger man who would be paid less, and would be equally efficient. There is a market at the point of entry to the business, but none operating between those who are employed in it and those outside. Instead, there is an "internal labour market."<sup>3</sup> Promotion takes place mainly within the firm. Only at higher managerial levels does outside competition become significant. This internal labour market serves economic as well as psychological ends. The costs of taking

<sup>2</sup> P.B. Doeringer and M.J. Piore, *Internal Labour Markets and Manpower Analysis* (Lexington, 1971); C. Kerr, "The Balkanization of the Labour Market": in E. Wight Bakke (ed.), *Labour Mobility and Economic Opportunity* (Cambridge, Mass., 1954); A.B. Atkinson, *The Economics of Inequality* (1975), pp. 104-105; L.C. Thurow, *Generating Inequality* (New York, 1975), pp. 66, 76.

<sup>3</sup> Thurow, above, n. 2, p. 81. This makes the last-in, first out rule on redundancy economically sensible in most cases. Cf. G.S. Becker, *Human Capital* (1964), p. 153; W. Oi, "Labour as a Quasi-Fixed Factor": *Journal of Political Economy* 70 (1962), p. 538.

on an employee are in part fixed costs which multiply with the turnover of labour. Many skills are learned by on-the-job training, and this has to be given by experienced employees, who therefore need to be kept on. Many skills are specific to a business, and therefore have to be taught anew to each recruit. Productivity tends to increase with experience and with motivation, which in turns improves if the employee, having a chance of internal promotion, has a stake in the structure of the business. It pays to build up human capital.

In somewhat the same way, there may be a marriage market, in the sense that, before deciding to marry, a man makes a calculation, not often directly financial, about the balance of benefit he may expect if he marries Jill rather than Jane or no one. Once the plunge is taken, however, and he marries Jill, he does not continue to make the same sort of calculation about the possibility of switching to the (in retrospect) more attractive and talented Jane. If a minority of married men do so, they are not admired. Unlike the housewife who gives up Briteshine for the cheaper and more iridescent Brillshine, they are not praised for having a shrewd eye to a bargain. Nor is it any wonder that there is no marriage market for the married. One of the pluses to be expected from getting married is precisely that one escapes from the market in sexual and economic attractiveness in which the unmarried perforce move. The married opt for a closed shop. For them the cost of making a change, the adjustment cost, is generally speaking too high. Only if the marriage has ceased to be viable does the cost of making a change become an important consideration. The mere fact that a better alternative appears to be available is not in itself enough to put the continuance of the marriage bond in issue.

Even residential leases often create something like a closed circle. Many landlords, though not compelled by law, prefer to continue to let their property to an existing tenant, when the lease expires, rather than to go in search of a new one at a higher rent. As in the case of employ-

ment, there may be an economic justification for the "internal market." If there is a change of tenant, the landlord incurs fixed costs, such as the cost of advertisement. He does not know whether the new tenant will maintain and repair the premises as well as a tenant who is committed to remaining in them for a long period. Unless, therefore, the landlord is on bad terms with the sitting tenant, or is letting residences as a business, the very idea of going into the external market may not cross his mind. Only then, if the landlord is prepared to incur the cost of changing tenants—the adjustment cost—will there be a genuine rental market in which potential tenants compete with one another.

One point, then, of the relationships set up by marriage, employment and renting a home is to exclude competition, save in exceptional circumstances, between the financially weaker party to the relationship and those outside it: between married women and other potential wives, hired employees and other potential employees, sitting tenants and other potential tenants. The aim of excluding competition is most clearly seen in marriage, and also often holds good in employment and as regards residential leases. The relationships in question are such that the cost of transferring to a relationship with another partner—the adjustment cost—is often high. It is generally higher for the weaker than for the stronger partner. Hence a tenant or employee is more likely than a landlord or employer to think of his tenure as exclusive, as being analogous to marriage. An employer may suffer an equal or greater cost if the employee leaves the firm, but he is less likely to think of his employee as permanently committed to him. Conversely, a husband may be more inclined than a wife to see marriage as an arrangement which is as much subject to change (when it suits him) as taking a job or a home. But the differences are only matters of degree.

IV. *The Evidence*

It is convenient to begin with the letting of *houses*, where one might expect economic motives to predominate. Even if renting a house often creates a bond between landlord and tenant, it is a serious matter for a landlord to have his capital tied up unprofitably for one or more lifetimes. There have been a number of studies by economists of the effects of rent control, both in the short and the longer run. These studies have not been, for the most part, directly concerned with security of tenure. But as rent control is seldom effective without security of tenure, and as the two are in consequence usually applied in tandem, these studies can be taken as relevant to our concerns.

In a study of short-term effects MacLennan investigated the housing rental market in Glasgow after the 1974 Rent Act.<sup>4</sup> This Act, it will be recalled, introduced rent control and security of tenure for furnished accommodation, which had previously been uncontrolled. The Act came into force after a six month rent freeze. MacLennan studied the experiences of 1200 Glasgow students who wanted accommodation in the years 1974-75 and their landlords. He made use of newspaper advertisements, the register of property conveyances (*saisines*) and the register of lodgings kept by the university of Glasgow for the convenience of prospective students and landlords.

The rent freeze imposed before the Act came into force was, he found, pretty ineffective. Despite it rents increased on the average 19 per cent. in 1974. But the number of advertisements in newspapers which offered furnished accommodation declined, in 1974 and 1975, to less than half what it had been on average between 1969 and 1973. The proportion of advertisements which sought transient tenants (students and professional people), increased significantly, from 15 to about 22 per cent. For the first

<sup>4</sup> D. MacLennan, "The 1974 Rent Act: Some Shortrun Supply Effects": *Economic Journal* 88 (1978), p. 331.

time in these years landlords in the group studied sold more houses than they bought. Vacancies notified to the university lodgings service declined by a statistically significant amount. These figures, Maclennan argued, justified the conclusion that the 1974 Act had an important and rapid effect in reducing the supply of furnished property to let, if one takes account of the fact that the thrust of its provisions was known for some months before it actually came into force. The Act, he concluded, also induced some landlords to avoid letting to longer term tenants and instead to sell their properties or let them to transient tenants, who would not want to take advantage of the provisions for security of tenure.

Maclennan's interpretation was challenged by Jones,<sup>5</sup> who pointed out that it was difficult to disentangle the effects of the rent freeze from those of the 1974 Act. The rent freeze may have induced tenants to stay where they were in the knowledge that if they changed lodgings they would have to pay a higher rent. While accepting that advertised vacancies fell after the Act came into force, as indeed another study in London confirmed, he felt this might be due to the fact that landlords looking for transient tenants preferred not to advertise and not to notify the university lodgings registry.

But, even if this explanation is accepted — and the university lodgings office does not exercise any control over rents — all it shows is that the reaction of landlords to the legislation (taking this to cover both the rent freeze and the 1974 Act) was to turn towards transient tenants rather than to give up renting their properties altogether. Maclennan further pointed out in reply<sup>6</sup> that on the basis of interviews with 60 of the “discouraged” landlords,

<sup>5</sup> C.A. Jones, “On the Interpretation of Vacancies in the Furnished Rental Sector of the Housing Market: *Economic Journal* 90 (1980), p. 157.

<sup>6</sup> D. Maclennan, “On the Interpretation of Vacancies in the Furnished Rental Sector of the Housing Market: a Reply”: *Economic Journal* 90 (1980), pp. 159-160.

security of tenure was what had influenced them in not advertising, not the rent freeze (sc. which was fairly easy to evade). Though not too much can be made of an isolated study of this sort, it certainly suggests that the legislation had a fairly quick "market" effect. It would be surprising if it had not.

Can one generalise from this experience? A number of market economists, including F.A. Hayek,<sup>7</sup> basing themselves on studies of rent control in countries ranging from Austria to France, at periods from the 1920s to the present day, have argued that in all the instances investigated rent control has led to excess demand for housing and so to a housing shortage. Though their arguments disregard non-economic factors such as the attachment of tenants to the places where they are living, they are cumulatively quite impressive. Olsen<sup>8</sup> in a separate study of rent control in New York City in 1968 tried to measure the effects of rent control in bringing about a transfer of income from landlord to tenant. He came to the conclusion that on certain assumptions rent control increased the real income of tenants by 3.4 per cent. and at the same time cost landlords about twice that amount. The net economic effect was therefore a loss of income. But the study does not take account of the benefit to landlords, admittedly not easy to evaluate, of having longterm tenants who take good care of the property.

Hallett has published an interesting study: *Housing and Land Policies in West Germany and Britain*.<sup>9</sup> He subtitles it "A Record of Success and Failure." The success is that of West Germany in moving from the destruction of 1948

<sup>7</sup> F.A. Hayek and Others, "Verdict on Rent Control": *Institute of Economic Affairs Reading No. 7* (1972).

<sup>8</sup> E.O. Olsen, "An Econometric Analysis of Rent Control": *Journal of Political Economy* 80 (1972), p. 1081. He assumes, unrealistically, that the only concern of tenants is with the rent they pay, but argues that this does not materially affect his conclusions.

<sup>9</sup> G. Hallett, *Housing and Land Policies in West Germany and Britain. A Record of Success and Failure* (London, 1977).

to a situation in 1975 where there was no, or a negligible housing shortage, no slums, no squatting and no long waiting lists for public housing. The failure is that of Britain in which, despite a far less destructive war, there is still a housing shortage, at least in the private rental sector, and also slums, squatting and long waiting lists. The explanation he offers is that rent control and security of tenure have, in fits and starts, been progressively introduced or extended in Britain, so squeezing the private rental sector. In West Germany, on the other hand, until the Housing Notice Protection Act of 1971, private enterprise was given its head.

Though some of the opinions voiced by market economists seem strident and exaggerated, I think their conclusions about the effect of rent control and security of tenure can broadly be accepted. The decline in privately rented homes in England from 90 per cent. in 1914 to 13 per cent. in 1982 has been to a considerable extent the result of legislation designed to protect private tenants. This legislation, and the uncertainty which has persisted throughout the period as to whether new legislation would be enacted, has discouraged private people from building homes to let and, if they were already built, from letting them in the ordinary way rather than selling them or finding some way to evade the effects of the legislation. That is not to deny that other factors have played their part in the changed distribution of houses. Part of the reduction in homes to rent would, because of the increased demand for home ownership, have occurred anyway. But the example of Germany, where about 40 per cent. of families own their own homes, suggests that in a free market (in which mortgages do not attract tax remission) the demand for home ownership would have been less. It is, however, possible that the desire to own one's own home is, for social reasons, stronger in England than in West Germany.

What this conclusion leaves open is whether the decline in the private renting of homes is desirable. According to



Harold Wilson "we do not consider the provision of rented accommodation to be an appropriate activity for private enterprise."<sup>10</sup> It is on this view better to phase out private tenancies in favour of home ownership and public housing. Non-profit making housing associations and co-operatives can be regarded as permissible exceptions. There is little doubt that to many the idea of a landlord continuing year after year to draw an income from letting a house is more repellant than if someone were to draw an income from shares or the copyright of a book or the exploitation of a patent. But, apart from the fact that they have to be replaced more often, what is the moral difference between hiring out cars and letting houses? In any case, the cost of squeezing, and often squeezing out, private landlords to the 3 million or so tenants and potential tenants who depend on them must not be blinked. These home and lodging seekers consist of people who cannot buy their own homes and cannot hope, in the near future, to obtain council houses. They are mainly poor, young, transient, single or inadequate. The policies that have consciously or unconsciously been pursued in this country discriminate against these classes. The housing market has become segmented; there is a large, stable market alongside a smaller, constantly shifting market. Whether it is an adequate reply to this criticism that those and other policies have created a society of owner occupiers on a greater scale than in the neighbouring countries, and have given a far larger percentage of the people than elsewhere security of tenure, is not for me to say. How is one to compare the better built and equipped residences of Germany with the more secure homes of England? How are we to trade off the security which the majority in England enjoy against the frustrating searches and often shabby finds of those who have to look to accommodation in the private sector? To these questions everyone must find his own answer. The facts, to my mind, are pretty clear.

<sup>10</sup> Speech of July 20, 1969.

As regards employment legislation there is a careful study by Daniel and Stilgoe, conducted in 1977.<sup>11</sup> They investigated the effect of employment protection legislation on manufacturing industry. They studied a sample of 300 firms - not a very large sample - 60 from each of the food, chemical, mechanical engineering, electrical engineering and textile industries. The firms selected were from those with between 50 and 5,000 employees, very small concerns being excluded. The researchers put questions to managers, mainly personnel managers, in these firms and followed them up with more detailed interviews with a subsample of 36 firms where market conditions fluctuated sharply during the period between 1974 and 1977.

It will be recalled that redundancy pay was introduced by legislation in 1964, compensation for unfair dismissal in 1971. Eighty-four per cent. of the managers consulted thought that the employment legislation had changed the procedures in their firm. Thirty-six per cent. specifically mentioned disciplinary and dismissal procedures.<sup>12</sup> Indeed, it was the unfair dismissal laws that had had the greatest impact on the firms in question. Managers told the authors that they had reacted to these provisions by tightening their recruitment methods. They were now more careful to make thorough inquiries before taking on a new employee. They kept more detailed records than before of his performance, in case it should be necessary to dismiss him and prove that the dismissal was fair. They made sure that unsatisfactory recruits were laid off before the six month qualifying period (now a year) had elapsed. In cases covered by the legislation the authors found that there were fewer dismissals after the unfair dismissal legislation came into force.<sup>13</sup>

Were fewer workers recruited as a result of the new

<sup>11</sup> W.W. Daniel and E. Stilgoe, "The Impact of Employment Protection Law": PSI 44 (1978), No. 577.

<sup>12</sup> Daniel and Stilgoe, p. 49.

<sup>13</sup> *Ibid.* pp. 60-61.

laws? It is difficult to be sure. Managers admitted that they had become more reluctant to take on new workers, but put this down to poor market conditions, and to some extent to the influence of trade unions. The new laws, they thought, had had only a marginal effect on recruitment. But they made it more difficult for the unskilled and semi-skilled to get jobs. Management, in its own estimation, benefitted from the legislation. Management practices became more systematic, explicit, precise and consistent. On the other hand, there were complaints that the new procedures took up too much time.<sup>14</sup>

A later study by Clifton and Tatton-Brown<sup>15</sup> of the impact of employment protection legislation in firms with less than 50 employees largely confirmed Daniel and Stilgoe's findings for bigger firms. About 6 per cent. of the 300 employers interviewed mentioned without prompting that the employment legislation had caused them difficulties. It was the unfair dismissal law which was seen as the main stumbling block. When questioned more specifically 8 per cent. thought the legislation had made it more difficult to dismiss bad workers, sixteen per cent. that it imposed extra costs and 7 per cent. that it wasted time. About 8 per cent. said they were more reluctant to take on new employees. Fifteen per cent. thought the legislation had made them more careful in recruitment.

In the upshot one may infer that the unfair dismissal law has caused only a small decline in recruitment but has made a substantial difference to the care with which employers choose whom to recruit. The position of the skilled and experienced worker has been improved, at the expense, to some extent, of the unskilled, inexperienced or inadequate, who now find it more difficult to obtain jobs. This is not unlike the impact which the English housing

<sup>14</sup> *Ibid.* pp. 36 *et seq.*

<sup>15</sup> R. Clifton and C. Tatton-Brown, "Impact of Employment Legislation on Small Firms": *Department of Employment Research Papers No. 6* (1979).

legislation seems to have had. The majority are better off, but the weakest worse off.

In both surveys the managers consulted attributed remarkably little impact to the redundancy legislation.<sup>16</sup> This is surprising since we know that it was only after the introduction of redundancy payments by the 1964 Act that voluntary redundancy began to take root as an industrial practice, and that unions began to bargain on a substantial scale to secure higher rates of redundancy pay. It is since then that managers have come to rely, if they can, on natural wastage, redeployment, early retirement or voluntary redundancy in order to avoid compulsory redundancy. But thirteen years after the legislation managers failed to mention its impact. Memories are short, and changes wrought by law, once absorbed into social practice, come to seem part of the natural order of things.

But if the redundancy legislation has led to changes in laying-off, it has not impeded recruitment to any significant extent. "If you want a body you have got to have a body."<sup>17</sup> Conversely, it seems, if you have no use for a body you must get rid of a body. This confirms the findings of an inquiry by Parker and others,<sup>18</sup> published in 1971, which found that 6 per cent. of the nearly 2,000 employers interviewed (a larger sample and a more significant figure than in the surveys by Daniel and Stilgoe and Clifton and Tatton-Brown) were less ready to engage additional employees because of the Redundancy Payments Act. Rather more employers (32 per cent.) thought that Act made it easier to discharge employees (*e.g.* because of redundancy pay), while 11 per cent. thought that the Act made discharge more difficult (*e.g.* because of the cost).<sup>19</sup> The effect of the legislation on recruit-

<sup>16</sup> Daniel and Stilgoe, Part 1 and p. 56; Clifton and Tatton-Brown, pp. 18-19.

<sup>17</sup> Daniel and Stilgoe, p. 70, citing a manager's comment.

<sup>18</sup> S.R. Parker, C.G. Thomas, N.D. Ellis and W.E.J. McCarthy: *Effects of the Redundancy Payments Act* (HMSO, 1971).

<sup>19</sup> Parker and others, pp. 62-63.

ment and discharge was not therefore very great. This leaves open whether it is wise to impose what may be heavy costs on firms which in the nature of things are likely to be in financial difficulties. These may be heavy either because the statutory redundancy pay has been raised through industrial agreement, or because the employer, miscalculating the seriousness of the economic downturn, has at first kept skilled workers on in the hope of a revival, then been obliged to make them redundant.<sup>20</sup>

It would not be easy to set up a study of the impact of legislation about property rights and maintenance on divorce on the willingness of men to marry in the first place and to resort or agree to divorce later. One would not expect the impact to be great, but, so far as the law has impact, it is probably to reinforce the disposition of some couples to cohabit rather than to marry and, if they are married, to make sure that they agree on maintenance and the division of property (especially the matrimonial home) before resorting to divorce.

### *V. Conclusion*

The laws we have been considering have the general effect of improving the bargaining position of the weaker party to the employment, rented accommodation and marriage relationships. This improved bargaining position is a help even to those who do not in fact resort to legal proceedings. Thus, a worker may find it useful to be able to threaten to complain of unfair dismissal even if it would not be advisable for him actually to pursue a claim before the tribunal, since to have done so might count as a bad mark in obtaining future employment.<sup>21</sup> From this point of view, at least, recent employment, housing and divorce

<sup>20</sup> *The Guardian*, March 23, 1981.

<sup>21</sup> L Dickens, "Unfair dismissal applications and the industrial tribunal system": *Industrial Relations Journal* 9 (1978-79), pp. 4, 17.

legislation has given most employees, tenants and wives a better status.

At whose expense? Not always and not necessarily at anyone's. Employers as well as employees gain by the fact that they have to formulate and, if necessary, give their reasons for wanting to dismiss. It makes them more careful in monitoring the performance of their employees. It improves a range of management practices. The fact that a court on divorce will take account of a wife's contributions to the marriage is an incentive to husbands to think about what their wives have been and are contributing to the marriage. Even the fact that a landlord must have a good reason for terminating or not renewing a lease is a positive gain in the sense that it forces him to think about the use that he intends to make of the property and the time at which it will be needed. To infuse reason and thoughtfulness into these relationships, so crucial to human happiness and fulfilment, is a good in itself, even though it may not be a good that can be measured in money.

Nevertheless, we must not overlook the economic costs, in money and time, that the legislation imposes. These fall primarily on the stronger party: the employer, landlord or husband. But they also fall, especially in the case of housing, on the weaker members of the community who are unable to find places to live or can find only poor quality accommodation. These weaker people are the poor, the single, the black and other underprivileged classes. While 90 per cent. of the people are reasonably well housed, and at any rate possess security, this is at the expenses of the 10 per cent. who, in the private rental sector, are badly housed. To a lesser but still not negligible extent the same is true in employment. Security of employment, or at least increased bargaining power for existing employees, is a benefit for the majority at the expense, to some extent, of the unskilled, the inexperienced and the less adequate, who find it more difficult to get jobs.

Only a ruthless utilitarian can regard this as satisfactory.

It is true that the weak can rely on social security. They are entitled to unemployment or housing benefits or supplementary benefit as the case may be. But the un-housed and unemployed need decent houses and jobs rather than shabby lodgings, and reasonably stable rather than casual jobs. The division of the housing and employment markets into segments, the one relatively stable and the other highly mobile, is a social evil. To overcome it social policy must also take account of the needs of landlords and employers. *They* must have the security that comes from the assurance that they can let houses on short leases, obtain a return similar to that on other forms of enterprise or investment, and retake the property when the lease comes to an end. *They* must be able to take on workers for temporary and probationary periods in the assurance that they can dismiss them if they do not turn out well. We must give up the attempt to fit everyone into the same mould, even if it is a good mould for the majority. Room must be made for short-term and informal arrangements alongside the bulk of more formal and longer term arrangements. Cohabitation, for example, should be seen for what it is, an experimental institution, at least for the first few years, not the analogue of marriage. Otherwise those on council house waiting lists who need accommodation, those whom it is a risk to employ, and those who are uncertain whether they are permanently committed to one another will find that society either fails to meet their needs or tries to fit them into an inappropriate structure. It is true that our laws make *some* provision for temporary and experimental relationships, but this provision itself needs to be better secured against the winds of change. In our pursuit of security for the weak we have overlooked the paradoxical fact that the interests of the weakest often depend on the security of the strong.

## Postscript

### AN ENGLISH LEGAL CULTURE?

*Gnaeus Flavius, son of a freed slave, stole the book\* and made it public. For that service the people were so grateful that he was made a tribune, a senator and an aedile.*

Sextus Pomponius

Generalisation is a dangerous necessity. We have studied only three of the many relations in which law impinges on otherwise self-regulating or unregulated behaviour, and those in bare outline, with many gaps and omissions. What have we learned? German law is better at protecting employees, on one view of their interests, than French or English. But English housing tenants have the best deal of the three. French wives, if free of fault, do best when marriage breaks down. These rankings are hardly surprising. Presumably Germany, the industrial giant of Europe, needs and cares about good industrial relations. Even its divorce arrangements are economically oriented. France, the traditional land of ardour and chivalry, remains unsentimental about fault and desert. It is in England that we cultivate home and garden, and try to muddle through without theory, *i.e.* without a clear sense of direction.

In a modest way the investigation lends some support to Savigny's view, now unfashionable, that law is the expression of popular feeling. To be sure, it is no longer the lawyer, if it ever was, who acts as the mouthpiece of the people. That role falls to the legislator, at least in a democracy, and to the groups and associations who exert pressure on him. Still, it looks as if, in one form or another, the opinions of the many seep through.

\* Describing Roman legal procedures.



Against Savigny, one can point out that, in the three areas we have visited, three industrial states, with much the same population and economic mix, show far more in common than divides them. As the Russians put it, the "permanently operating factors" preponderate. Still, elements of local and national culture, though they may not stand out much in the perspective of industrial society as a whole, can decide the happiness or misery of members of the local or national group. It is important that their sentiments should find channels by which they can percolate through to legislators. If sentiments diverge, as they generally do, it is for the legislator to articulate guidelines which take account of the divergences. Thus, when the West German Bundesrat was debating what became the First Marriage Reform Act of 1976, it was the politicians, not the experts, who insisted on putting in the positive and negative hardship clauses, so that maintenance can be awarded or refused simply because it would be grossly unfair to do otherwise. The pure milk of expert opinion, with its concentration on breakdown and self-support, was diluted by a dash of vulgar just desert.

But for ordinary people to bring their view to bear effectively and in detail on law-making requires a widespread legal culture. It may seem a harsh thing to say, but in my view, despite the excellence of many aspects of English law, England does not have a genuine legal culture. For that to exist law-makers and lawyers would have to accept it as their business to make the laws as clear, elegant and rational as they could. The legal profession would have to accept the role of intermediary between the people and the legislator. It must be ready not just to expound the law — though that is needed — but in each area where social pressure builds up, to explain the range of choices and the legal techniques available to implement them. Since the creation of the Law Commission in 1965 our lawyers have certainly been moving in the right direction. But no culture sprouts overnight.

Are our laws intelligible? Do they possess literary or

intellectual merit? The maintenance of divorced wives serves as a test of the difference in legal culture between the three countries. In the German civil code the part dealing with maintenance begins thus:

*Maintenance of Divorced Spouses*

*BGB*, para. 1569      If after divorce a spouse cannot maintain himself (herself), he (she) has a claim for maintenance against the other spouse, in accordance with the following provisions.

This sets the general principle on which the rest is based. A divorced wife must maintain herself if she reasonably can. Then follows the main case in which a wife cannot be expected to support herself:

*BGB*, para. 1570      A divorced spouse is entitled to maintenance from the other spouse so long as and to the extent that he (she) cannot be expected to earn a living because he (she) is bringing up their child.

Then follow the other cases in which a divorced wife cannot be expected to fend for herself. Whether one agrees with it or not, the guiding theme is stated, right at the outset of the legislation, with perfect clarity.

In France the different grounds of divorce have different effects. The relevant bit of the civil code begins with divorce for fault. It starts thus:

*Of the Effects Proper to Different Cases of Divorce*

C.C., art. 265      Divorce is taken to be granted against a spouse if it takes place through his

(her) sole fault. It is also taken to be granted against a spouse if, on his (her) initiative, it is granted for breakdown.

The spouse against whom divorce is granted loses the rights which a divorced spouse has by statute or by contracts with third persons.

These rights are not lost when divorce is granted for shared fault or by mutual consent.

Perhaps this is rather cryptic in detail, but the main thread is easy to follow. Other effects of divorce for fault follow, and then come the effects of divorce for breakdown and by mutual consent.

Now turn to the corresponding part of the English statute which codifies the law of maintenance on divorce, the Matrimonial Causes Act 1973. The relevant part is headed:

*Financial Relief for Parties to Marriage and  
Children of Family*

**S. 21 Financial provision and property adjustment orders**

- (1) The financial provision orders for the purposes of this Act are the orders for periodical or lump sum provisions available (subject to the provisions of this Act) under section 23 below for the purpose of adjusting the financial position of the parties to a marriage and any children of the family in connection with proceedings for divorce, nullity of marriage or judicial separation and under section 27 (6) below on proof of neglect by one

party to a marriage to provide, or make a proper contribution towards, reasonable maintenance for the other or a child of the family, that is to say-

- (a) any order for periodical payments in favour of a party to a marriage under section 23 (1) (a) or 27 (6) or in favour of a child of the family under section 23 (1) (d), (2) or (4) or 27 (6) (d);
- (b) any order for secured periodical payments in favour of a party to a marriage under section 23 (1) (b) or 27 (6) (b) or in favour of a child of the family under section 23 (1) (e), (2) or (4) or 27 (6) (e); and
- (c) any order for lump sum provision in favour of a party to a marriage under section 23 (1) (c) or 27 (6) or in favour of a child of the family under section 23 (1) (f), (2) or (4) or 27 (6) (f):

and references in this Act (except in paragraphs 17 (1) and 23 of Schedule 1 below) to periodical payment orders, secured periodical payment orders, and orders for the payment of a lump sum are references to all or some of the financial provision orders requiring the sort of financial provision in question according as the context of each reference may require.

This gets a little better later on — not much — but by now the damage has been done. The ordinary person has been seen off, convinced that he can make neither head nor tail of the law of maintenance. Indeed, the English man or woman, I do not mind betting, who has learned some French or German at school, can follow the French or German law of maintenance *in those languages* better than he can English law in English. That this should be the case two centuries after Bentham began to stir the stagnant pool is an astonishment, or would be, if we were not

aware of the constraints which in this country are imposed by inner circles who prefer to travel endlessly round themselves.

In truth, the legislation is not meant to be understood by ordinary people. The legislator despises people. All that counts for him is that experts, preferably experts alone, can understand the laws. Why should he take the trouble to express with as much lucidity and grace as he can muster the principles that govern our lives? To him the law is no cherished jewel of national life. It is a chore to be left to the parliamentary draftsman, who is allowed to foist on that dumb ox, the citizen, whatever jugged-up mystification he pleases. It is a boring tangle of technical detail, unlovable and unloved.

No wonder Miss Hamlyn saw that lectures were called for.

The delinquencies of the legislator are plain enough. What of the lawyers? The task of communication, of establishing links between legislator and people, falls, or should fall, largely to the scholarly branch of the profession, the academic lawyer. He alone is in a position to spend time expounding laws in as orderly and rational a pattern as he can, discovering the ways in which they work or fail to work, weighing alternative policies and, above all, providing the conceptual framework within which a profitable debate may take place. But the academic branch of the profession is, so far as English law is concerned, little more than a hundred years old, and, for various reasons, is neither well integrated with the other branches of the profession, nor entirely confident of its role. In the past it has often been a mere handmaid of practice. That is now changing. Great strides have been made. Still, it is not yet the case that our textbooks, like the German commentaries on the *BGB*, contain, as a standard practice, sections on the history, including the legislative history, of each provision, and on the purpose of each norm. Nor do they, like Carbonnier's *Droit Civil*, follow each section with notes on the historical, sociological, political and theo-

retical *as well as the judicial* aspects of the topic. There are isolated exceptions, but not yet a profession-wide discipline. It is for us who write about the law and teach it to do better. It is we, along with the legislator, who must see to it that law in England is understood, and, if it deserves it, loved.

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# INTOLERABLE INQUISITION? REFLECTIONS ON THE LAW OF TAX

by

H. H. MONROE, Q.C.

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