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Earl of Oxford's Case (1615) *The Earl of Oxford's Case* (1615), which is reported on the first page of the first volume of the Chancery Reports, is the foundation stone of Equity in modern English law. The case is notable for Lord Chancellor Ellesmere's robust defence of the specialist equity court, the Court of Chancery, at a time when the head of the **common law** Courts, Sir Edward Coke, Chief Justice of the Court of King's Bench, was seeking to curtail its power. The essence of Coke's complaint was that the Chancellor's practice of granting injunctions in Chancery to prevent the enforcement of common law judgments was in breach of statutes designed to prevent appeals from the common law courts.

The case was hewn from the bedrock of modern England. It concerned land in London which Henry VIII had gifted to Thomas, Lord Audley, as a reward for such work as procuring the trial and execution of Anne Boleyn. By his will, Audley left the land to Magdalene College, Cambridge, but the college subsequently sold the land and some of it was acquired, indirectly, by the Earl of Oxford. Magdalene College challenged Oxford's title on the basis of a statute which prohibited the disposition of College lands; but against this was the fact that, as part of the original sale, Magdalene College had made an intermediate transfer to Queen Elizabeth with the deliberate intention of bypassing the statute. The battle lines were drawn. Coke was committed to upholding the wording of the statute and to denying exceptions based upon Royal **prerogative**. Ellesmere was committed to ensuring that the College did not take unconscionable advantage of the strict letter of the law by denying Oxford's right to proper compensation for loss of title; and he was committed to upholding Royal prerogatives, not least because the Court of Chancery had itself developed from the ancient Royal prerogative of mercy.

It is clear from Ellesmere's speech that Equity does not seek to overrule the common law, but only to prevent a party from enforcing a common law right where it would be unconscionable to do so in

the particular case. Equity does not act against the law, but against the party: 'The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstance. The Office of the Chancellor is to correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature so ever they be, and to soften and mollify the Extremity of the Law'.

In 1616, the jurisdictional dispute between Ellesmere and Coke was referred to King James I. Keen to preserve his Royal prerogatives in the face of Coke's campaign against them, the King determined the matter in favour of the Court of Chancery and thereby established the rule which maintains equity's preeminent status to the present day: *where equity and law conflict, equity shall prevail.* GARY WATT

See also: **common law; equity as a system of law**

early intervention Early intervention involves the organized provision of resources to individuals, families, schools, or **communities** to forestall the later development of crime or other problems. Doing something about crime early, preferably before the problem becomes entrenched, strikes most people as a logical approach to crime prevention.

There is a growing body of scientific evidence that supports this common sense view. Evidence comes from two kinds of studies: those that identify 'risk factors' for crime and related problems from longitudinal studies that measure samples of children and young people over many years; and studies that use the results about risk factors to implement and evaluate interventions. Strictly speaking 'early intervention' is focused on individuals who show the early signs of an identified problem. It is therefore a form of what is known as 'indicated prevention', in contrast to approaches designed for entire populations ('universal prevention') and approaches designed for those at risk but not yet exhibiting a problem ('selective prevention').

A famous study cited by proponents of early intervention or prevention is the Perry Preschool Project, which was designed in the USA in the early 1960s to enhance intellectual development and school achievement in about sixty disadvantaged three- and four-year-old children. A daily pre-school programme was provided in addition to weekly home visits by teachers. Although cognitive gains for children in the programme were not maintained, the programme participants' school achievement and behaviour were significantly better than those of control children, and they were more likely to graduate from high school and continue to further education. By ages twenty-seven and forty, they had higher incomes and were more likely to be home-owners, and by age forty the programme group had significantly fewer lifetime arrests than the no-programme group.

There have been dozens of more recent interventions using a variety of methods such as home visiting to young pregnant women and education of parents on how to deal with children's behaviour problems that yield results nearly as impressive as the Perry Preschool Project, although few have measured such a wide range of outcomes over such a long time period.

There is much debate in the field about how 'early' intervention should take place. On the basis of evidence on the development of aggression and other problems from longitudinal studies of infants, one influential group argues that if intervention does not take place in early childhood, before the age of five, it may be too late to repair damage caused by problems like **child abuse** or family **violence**. Others argue that not all problems have their genesis in early childhood and that in any case it is not too late to repair damage after the age of five. This group argues for interventions early in the developmental pathway that leads to problems, which may not necessarily mean early in life. For example, there is good evidence that intensive interventions with juvenile offenders and their families through what is known as 'multisystemic therapy' can change the directions of many offenders' pathways away from crime.

ROSS HOMEL

easement An easement generally takes the form of a right attached to one piece of land (the dominant land) to use another piece of land (the servient land) in a particular way. Examples include the right to walk or drive over the servient land, to lay drains across it, or to use it for storage. Occasionally, however, an easement will take the form of a right enjoyed by owners of the dominant land to restrict

the manner in which the servient land can be used. The prime example of this 'negative' type of easement is a right to light (which prevents the servient owner allowing their land to obstruct the flow of light to the dominant land).

Easements may be created between neighbours at any time. They are often created when the owner of a piece of land sells off part of it and retains the rest. In such circumstances, even if the easement is not explicitly mentioned in the relevant documentation, the law may imply it if this appears to be what the parties intended. An easement may also come into being if the particular right has in practice been exercised by the dominant owner over the servient land for a period of twenty years.

If an easement exists, it generally runs with the land. This means that it will benefit future owners of the dominant land, the value of which may consequently be increased. It will also burden future owners of the servient land and therefore potentially reduce its value. The courts have been particularly mindful of the need to avoid imposing excessive burdens on the servient land in developing rules as to the types of rights which may give rise to easements. Agreements may be made between neighbouring land owners to create other types of right but (unless they amount to a different type of substantive property right such as a lease or a restrictive covenant) these are likely to be mere contractual arrangements which will bind only the people making the agreement.

A right will be capable of amounting to an easement (and thereby running with the land) only if it benefits the dominant land. This means that it must be of benefit to any owner of that land, present or future, as opposed to being of benefit only to the current owner. It must therefore be connected in some way with the normal enjoyment of land and not simply relate to the interests or lifestyle of a particular individual.

Before a right can give rise to an easement it must also be similar in nature to rights already accepted as easements. It must therefore generally not impose expense on the servient owner. Neither must it confer exclusive use of the servient land and thereby prevent the servient owner from using it. Thus, although rights to park or to store goods may amount to easements, they will not do so if they would effectively prevent the servient owner from using their own property.

ANNA LAWSON

EC competition law, modernization of In the period from 1999 to 2004 EC competition law went through a process of reform which became better

known as the modernization process. The modernization process focused on the role played by the **European Commission** in the enforcement of EC competition law. In the **competition law** regime which existed from 1962 until May 2004 the **Directorate General for Competition** within the European Commission played a central role in enforcement of competition law by developing policy, taking enforcement action against those who violated the prohibitions, and issuing exemptions from the prohibition of anti-competitive agreements under Article 81(3) EC. In the early years of the system the central role of the Commission was useful in developing policy, but the Commission's workload quickly became unmanageable. The Commission's workload issues would have no doubt also been exacerbated by the imminent enlargement of the European Union.

The modernization process began in 1999 with the publication of the Commission *White Paper on the Modernization of the Rules Implementing Articles 85 and 86 of the EC Treaty*. The White Paper highlighted the problems with the existing regime and suggested a number of options for reform, which became the focus of a lengthy consultation process. In the process that followed the Commission's preferred option became a 'directly applicable system. Under such a system the Commission would give up its exclusive power to grant exemptions from the prohibition of anti-competitive agreements under Article 81(3) EC. The main effect would be to increase the power and effectiveness of the National Competition Authorities (the competition enforcement agencies in each Member State) and the domestic legal systems. As the national authorities would be able to fully apply both prohibitions in the EC Treaty, Article 81 EC prohibiting anti-competitive agreements and Article 82 EC prohibiting **abuse of a dominant position**, the European Commission would be in a position to focus its efforts on policy development and particularly important cases with a 'Community interest'.

The political negotiations leading up to the adoption of the new competition enforcement regulation were difficult, but a new settlement between the Commission and the Member States was agreed in 2003. The most important innovation was the extension of the use of Article 81(3) EC to the National Competition Authorities and the domestic Courts. The Commission and the National Competition Authorities now form the **European Competition Network** which coordinates competition enforcement activity across the **European Union**. The Network has a case allocation system under which a single 'well-placed' authority leads each investigation. The European

Commission will only act where it is well-placed because the investigation spans three or more Member States, or raises novel legal issues which need to be settled at the Community level. The majority of day-to-day enforcement is now to be undertaken by the National Competition Authorities cooperating with each other to share information and evidence.

ANGUS MACCULLOCH

ecclesiastical courts *see* **civilian courts**

ecclesiastical law *see* **canon law**

ecological heritage *see* **biodiversity**

ecological law The law protecting wildlife distinguishes between the direct protection of individual animals, plants, and birds, and the protection of wildlife habitats. Under Part 1 of the Wildlife and Countryside Act 1981 it is a criminal offence to kill, injure, or take a wild animal or bird unless it is categorized as a 'pest', is a species of game bird or animal, or its killing or capture is licensed by the authorities. Legal protection is conferred on species of bird, animal, and plant listed in Schedules to the 1981 Act that give differing levels of protection. Endangered bird species are listed in Schedule 1 and are given enhanced protection. In these cases it is also an offence to disturb a member of the species when it is building or near its nest, or to intentionally disturb the young of the species. The Schedules to the Act are reviewed periodically, and species can be added to the list of endangered bird species in Schedule 1 if necessary, thus bringing them within the fullest protection offered by the law. Certain indiscriminate methods of killing wildlife are banned in all circumstances, even if the animals or birds killed are classified as pests—for example the use of gin traps and poison is absolutely prohibited.

Wildlife habitats are protected by designating protected areas in which damaging land use practices are legally controlled. The primary wildlife designation is the Site of Special Scientific Interest ('SSSI'). SSSIs are designated under Part 2 of the 1981 Act. On designation, the owner of an SSSI is given a list of operations likely to damage the conservation interest of the site. It is a criminal offence to carry out any of these operations without the written consent of Natural England, the Countryside Council for Wales, or Scottish Natural Heritage, otherwise than under a management agreement. Strict rules apply to planning permission for development in these sites, and in some circumstances permitted development rights are also withdrawn. Some important habitats

are also designated 'European Sites' under the Conservation (Natural Habitats & C) Regulations 1994. These host wildlife habitats or endangered species of European significance for which protection is required under the EC Wild Birds Directive of 1979 or the EC Habitats and Species Directive of 1992. All European Sites will also be SSSIs protected by Part 2 of the 1981 Act, but they are subject to additional—and more stringent—restrictions on land use. There is a presumption against granting planning permission for development in a European site. In the case of both planning permission, and operational consent from Natural England or SNH for other activities, the authorities can only give permission if there are overriding reasons of public interest for the development or operation. Under European law, if the site hosts a 'priority' habitat or species identified in the EC Habitats Directive these reasons cannot be economic or social in nature. CHRIS RODGERS

CT Reid, *Nature Conservation Law* (London: Sweet & Maxwell, 2nd edn, 2002)

C Rodgers, 'Planning and Nature Conservation: Law in the Service of Biodiversity?' in C Miller (ed), *Planning and Environmental Protection* (Oxford: Hart Publishing, 2001)

e-commerce 'E-commerce is a collective term for three forms of transaction: (i) the use of electronic media for information gathering and the electronic ordering of goods and services delivered in physical form (e-tailing); (ii) the electronic delivery of digital goods and services; and (iii) the trade in telecommunication and internet services.

Electronic commerce is a key plank of UK economic growth. Recent surveys of e-retailing show that in 2005 £80 billion of UK consumer spending was either on or influenced by the internet, accounting for 10 per cent of all retail sales for that year. Further, while retail spending grew by 1.5 per cent, spending online surged ahead by 28.9 per cent. Such economic development can only flourish where the necessary legal framework to provide certainty and efficiency in online transactions is in place. This means the law of e-commerce has had to develop rules on electronic contracting, consumer protection, and electronic payments similar to those found in the real world.

The foundation of any commercial transaction is the contract. Without the legal protections offered by **contract law** transactions would need to be formed on trust alone. Online contracts take two forms: informal or formal. Informal contracts may be concluded in writing or orally, electronically or physically. Such contracts, which are the vast majority of

all contracts, may safely be concluded by means of electronic communication. Formal contracts, such as contracts regulated by the Consumer Credit Act 1974 required to be in writing, and signed, both of which posed problems for electronic communications. The issue of contract formality has now been dealt with by the EC Electronic Commerce Directive 2000 and the Electronic Signatures Directive 1999 and subsequent national legislation (the Electronic Communications Act 2000 ('ECA') in the UK). These provisions make electronic communications effective in relation to all contractual agreements.

The (potential) anonymity of any counterparty to an electronic contract, and the difficulty of verifying their domicile, can undermine consumer confidence in the contract. To remedy this consumer protection is offered by the Distance Selling Directive 1997. This provides the consumer with a suite of rights including the right to be informed of the identity of the supplier and the characteristics of the goods or services; and a 'cooling-off period' during which time the consumer may withdraw from the contract. These provisions have both been implemented in the UK by the Consumer Protection (Distance Selling) Regulations 2000. A consumer will usually have a seven day cooling-off period, with a three-month period in exceptional circumstances.

Finally payment must be made. Although most online transactions are settled using credit or debit cards, the development of alternate payment systems has proven popular in relation to transactions between **consumers** where neither party has a pre-existing agreement with banking institutions. The most popular of these is eBay's PayPal system. PayPal is an account-based payment scheme which is recognized by the UK **Financial Services Authority** as an Electronic Money Institution ('EMI') under the Electronic Money Directive 2000 and the Electronic Money (Miscellaneous Amendments) Regulations 2002. This allows PayPal to issue Electronic Money, which is 'value stored on an electronic device, issued on receipt of funds accepted as a means of payment'. Although the value of treating account-based systems like PayPal as money issuers has been questioned, the recognition of PayPal as an EMI in a world where card-based electronic payment schemes are faltering towards extinction, while account-based schemes are the fastest growing sector of e-payments, perhaps points the way to the future of e-payments.

ANDREW MURRAY

L Edwards (ed), *The New Legal Framework for E-commerce in Europe* (Oxford: Hart Publishing, 2005)

J Dickie, *Producers and Consumers in EU E-Commerce Law* (Oxford: Hart Publishing, 2005)

economic analysis of law The use of economics to criticize law is as old as economics itself. Adam Smith criticized laws that impeded trade in his book *The Wealth of Nations*. But the beginning of sustained application of economic theory to legal topics dates from the 1960s, and occurred in the US, where today it is probably the dominant form of legal critique. Prior to that date, the use of economics to criticize law was limited to commercial and market-oriented laws. Thereafter, economic critique was progressively extended to all forms of law, including such apparently non-market topics as family, criminal, and constitutional law.

The beginnings of law and economics as a movement can conveniently be traced to the writings of Ronald Coase, who in 1960 wrote a seminal work on the interaction of the market and the distribution of legal rights. The particular problem that he addressed was the problem of social cost: the inefficiencies which result when, for example, enterprises pollute without paying compensation to parties who bear the costs of pollution. He challenged the conventional view, which informed the law of **nuisance**, that **pollution** involves one person causing cost to another. Instead, he argued that pollution arises where two persons compete for the use of a resource, such as clean air, or water. Thus it is not a question of imposing costs on one party or the other, but of designing rules of liability such that the shared use of resources occurs at an optimally efficient level. He provided a model that could be used to design such rules and pointed out that if one applied economic assumptions about the behaviour of individuals (that they act rationally to maximize their utility), and if one assumed that there were no impediments to trading (zero transaction costs), then from the standpoint of efficiency it does not matter how one allocates the right to pollute (or to be free from pollution). If the right were not allocated to the person who valued it the most, then that person would sell it to the person who did.

This model has lessons for those who wish to use economics to study the effectiveness of laws (alerting them in the dynamic manner in which individuals may alter their behaviour in response to laws) particularly through the formation of a market (black or otherwise) in legal entitlements. But it also forms the basis for economics to provide a normative critique of law, because where there are impediments to trading (transaction costs are not zero) the allocation of legal entitlements may lead to a less than optimal allocation of legal entitlements (resources would remain with persons who would prefer to exchange them for other things on which they place

a higher value). Much of economic analysis of law can be understood as attempts to reduce transaction costs (so that any initial misallocation of legal entitlements can be corrected through markets); or allocating resources to the party who would have ended up with them, if trading (with zero transaction costs) had been possible.

Normative economic analysis of law ('EAL') is based on the assumption that it is better to give people more of what they desire or prefer than less. As such it has much in common with utilitarianism: increasing utility is good, and actions are assessed in terms of their contribution to this good (so goodness is based on the consequences of actions, not their inherent quality). But whereas utilitarianism has no method for measuring an individual's utility, or what might increase it, EAL looks to market behaviour to provide indices. Individuals demonstrate what they desire, and how much, in terms of what they are willing to pay in order to acquire or keep any particular item. 'Pay' here has a wide meaning, which covers everything that an individual might receive or forgo (time, opportunity, possessions, etc) in order to acquire or keep any particular entitlement. Where exchange is possible, individuals can actually demonstrate their preferences amongst alternative entitlements by (not) exchanging what they have, for alternatives. Where exchange is not possible, preferences can only be measured by extrapolating from the evidence of value provided from situations (such as markets) where exchange is possible.

The assumption central to both positive (predictive) and normative economics, that the individual is a rational utility maximizer, has been questioned. If this assumption is taken to imply that the individual is concerned only with their own utility, then it fails to account for altruistic behaviour. In addition, it ignores the difficulties facing individuals in making choices, due to their limited access to information, the problems of processing such information, the psychological difficulties of choosing between alternatives, and the strategies adopted by individuals when confronting these difficulties. In response some versions of economics and economic analysis of law have incorporated more realistic assumptions of human behaviour (theories based on 'bounded rationality').

Another and more sustained critique of economic analysis of law has focused on the goal of normative economics: efficiency. There are actually two versions of efficiency used by economists. The first, Pareto efficiency, regards a change as an improvement if it makes no person worse off, and at least one person better off, in terms of their willingness to pay. In a

world without transaction costs, such improvements (Pareto superior moves) would occur through trading. (Anyone who had an entitlement that was worth less to them than what someone else would pay for it would exchange that entitlement for the offered alternative.) The second version of efficiency is maximum social wealth. This is a situation in which resources are owned by those who value them most in terms of willingness to pay. In a zero transaction cost world, the two operate together. Trading occurs until no-one can be made better off by exchanging what they have for something else. But in the real world, the two standards of efficiency diverge. Entitlements may be owned by people who value them far less than others, but the costs of achieving trades prevent re-allocation.

Pareto efficiency, especially where there are few impediments to exchange (low transaction costs), combines aspects of utilitarianism (Pareto superior moves will increase utility) with some of the features of liberalism, particularly anti-paternalism. Individuals are assumed to be capable of identifying what is good for them (what they desire). Where they act to achieve what they desire, and make no other person worse off (in terms of their respective desires) then there is no justification for interfering with their actions.

However, efficiency has been criticized as a normative standard on the basis that our willingness to pay is a function of our ability to pay. This is most obvious when purchasing items: the maximum that could be paid for any single item is all one's wealth. But this also operates if one considers what people need to be paid in order to forgo an entitlement. For example, poor people would be expected to be more willing to exchange medicines for alcohol than the rich. (But such exchanges still show that poor people value alcohol more than medicine, so that a law prohibiting such exchanges will make them worse off in terms of their own expressed preferences).

The response to this problem within EAL is to argue for redistribution of wealth as something separate from the pursuit of efficiency. If one starts with an equality of initial resources, it is even more illiberal to seek to prevent consensual Pareto superior behaviour. Redistribution of wealth also serves to strengthen the connection between EAL and utilitarianism, due to a phenomenon known as the diminishing marginal value of wealth. The utility that is derived from £1 by a poor person is generally accepted to be higher than that of a wealthy person. As such, if wealth were redistributed, the overall level of utility achievable through Pareto superior behaviour could be expected to be higher than that

possible if one started from an unequal distribution of wealth. (Though, this concession to the benefits of redistribution ignores any disincentives resulting from the experience or expectation of wealth redistribution.)

Whilst Pareto efficiency has a normative appeal based on its connection to utilitarianism and liberalism, it has little application as a basis for legal reform, tending on almost all occasions to favour the status quo. Few (if any) legislative programmes leave no person worse off (even reforms reducing transaction costs, such as the introduction or improvement of markets, are likely to make at least one person worse off). Adjudication which alters the law also produces losers, leaving only decisions which establish new law in situations where no party had a prior entitlement (hard cases) as candidates for resolution by reference to the pursuit of Pareto efficiency.

In the face of these difficulties, the standard of efficiency more commonly applied is maximum social wealth. Wealth is increased whenever resources are moved from persons who value them less, in terms of willingness to pay, to those who value them more. Those who lose out from such changes need not be compensated. (Such changes are known as 'potential' Pareto moves, on the basis that the winners gain enough to compensate the losers. Their other name is 'Kaldor-Hicks' moves.) Whilst this standard has more practical applications, it lacks the normative appeal of Pareto efficiency, being likely to produce changes that are neither utilitarian nor liberal. Changes that produce losers are unlikely to be consensual (the rational utility-maximizer would be expected to resist them) and if reforms are coerced, one cannot be sure that resources have been transferred to those who value them more in terms of willingness to pay (value can only be extrapolated from situations where consensual exchange does occur). Moreover, changes that increase social wealth do not necessarily increase utility, given the presence of diminishing marginal returns from wealth (transferring resources to a rich man who values them at £15 from a poor man who values them at £10 does not increase utility if £10 generates more utility for a poor man than £15 does for the rich man).

RICHARD NOBLES

A Leff, 'Economic Analysis of Law: Some Realism about Nominalism' (1974) 60 *Virginia Law Review* 451–492
R Posner, *Economic Analysis of Law* (Boston: Little Brown, 6th edn, 2002)

Economic and Monetary Union Economic and Monetary Union ('EMU') within the European

Union began on 1 January 1999, and as of 1 January 2008 comprises fifteen of the twenty-seven Member States of the Union: Germany, France, Italy, Spain, Portugal, The Netherlands, Belgium, Luxembourg, Ireland, Austria, Finland, Greece, Slovenia, Cyprus, and Malta. It is characterized by the use of a single currency, the euro, with a single monetary policy set by the **European Central Bank**. Its Member States remain free to set their own budgets, subject to Treaty rules about budgetary deficits and accumulated government debt, which have evolved into the **Stability and Growth Pact**, policed not by the European Central Bank but by the **European Commission** and Council. It is also the prime example of differentiated integration within the EU: Member States may only be admitted to EMU if they meet the convergence criteria set out in the Treaty; furthermore it will be seen that certain of these criteria are effectively voluntary, and in any event there are specific opt-outs for the UK and Denmark, who will only be considered for membership if they so request. It may therefore be suggested that membership of EMU is only for those Member States both able and willing to participate.

An understanding of EMU involves tracing three major elements: the antecedents of the euro and the legal consequences of its introduction; the political and legal evolution of the concept of EMU; and the application and continuing relevance of the convergence criteria. The euro can be linked back to the unit of account initially used under the European Coal and Steel Community Treaty. This unit of account happened to be the gold value of the US dollar, against which all Member States had official parities under the Bretton Woods system. The use of this unit of account continued after the entry into force of the EEC Treaty in 1958, and it was used for example, to fix common agricultural prices from 1962.

It was against this background that, in 1969, a committee was set up under the chairmanship of the Luxembourg Prime Minister, M Werner, to look at the question of economic and monetary union. The Werner Committee's Report in 1970 reached the fundamental conclusion that in such a union 'the Community currencies will be assured of total and irreversible mutual convertibility free from fluctuations in rates and with immutable parity rates, or preferably they will be replaced by a sole Community currency'. However, the Werner Report was drafted in a world of fixed exchange rates, and the assumptions underlying it were therefore destroyed when the US dollar was decoupled from gold, and world currencies began to float in 1971.

The fact that the US dollar had decoupled from gold meant that a gold-based unit of account ceased to provide uniformity, but it was not until 1975 that a new unit of account was created for the purposes of development aid in the context of the Lome Convention with African, Caribbean, and Pacific countries. This unit of account was a basket of fixed sums of the currency of each Member State, weighted so as to reflect economic performance, and its overall value was declared to be the same as that of the basket created by the International Monetary Fund in 1974 for the purposes of calculating its drawing rights—a value again derived from the dollar. This basket unit of account gradually became used for all Community financial purposes, and at the end of 1978 it was adopted as the criterion of value for the exchange-rate mechanism of the European Monetary System ('EMS'), being renamed the 'European currency unit', or ECU. With hindsight, the major feature of the EMS was that membership of its exchange rate mechanism was voluntary, but each participating currency had a central rate against the ECU, and participants undertook to maintain bilateral exchange rates against other participating currencies within a band of either ± 2.25 per cent or ± 6 per cent; and the central rate against the ECU enabled participants to determine whether their currency had increased or decreased in value.

The EMS brought relative currency stability, and a Committee chaired by Jacques Delors, then President of the Commission, was set up in June 1988, reporting back in April 1989. The Delors Committee took as a starting point the view that the development of the **single market** necessitated a more effective coordination of economic policy between national authorities, pointing out that with full freedom of capital movements and integrated financial markets, incompatible national policies would quickly translate into exchange rate tensions and put an increasing and undue burden on monetary policy—a prediction which was subsequently proved correct in 1992 and 1993. With regard to the mechanisms for achieving economic and monetary union, the Delors Committee recommended a three-stage process. The first stage did not require any Treaty amendments, and in fact the European Council meeting in June 1989 decided that it should start on 1 July 1990, which happened also to be the date by which the free movement of capital was due to be achieved. In that stage it was suggested that it would be important to include all Community currencies in the EMS exchange rate mechanism subject to the same rules; even the UK did in fact join the exchange rate mechanism in 1990, but unfortunately in 1992 both

the UK and Italy had to leave the system, although Italy rejoined in November 1996 during the second stage of economic and monetary union. In stage two, which the Maastricht Treaty defined as beginning on 1 January 1994, a fundamental recommendation was that the institutional structure should be established. However, perhaps its most important feature was the establishment of the criteria determining whether progress may be made towards the third stage. Finally, it was foreseen that in the third stage, which began, as required under the final deadline set by the Maastricht provisions, on 1 January 1999, the irrevocably locked exchange rates would begin, to be replaced by a single currency, and the relevant monetary and economic competences would be transferred to Community institutions.

The Maastricht Treaty largely followed the Delors recommendations, although the price of including provisions on EMU in the legally binding European Community pillar of the Union was that the UK and Denmark were given opt-outs. The Delors Committee and the Maastricht Treaty envisaged that the basket ECU would be transformed into the new single currency. However, there are obvious problems with printing or stamping 'European Currency Unit' in multiple languages on notes and coins, and at the Madrid European Council in December 1995 it was decided to use terms which could be the same in every language, subject to differences of alphabet: 'euro' instead of ECU, and 'cent' for the subdivisions of the euro. When EMU commenced in 1999, there were clearly no euro notes and coins, and it was agreed that they would be introduced in 2002. However, speculation between the participating currencies during that period was prevented by **legislation** which declared the euro to be the currency of the participant Member States, and the legacy currencies were declared legally to be subdivisions of the euro. They could only be exchanged at the rates set by EC legislation for each former currency against the euro; this meant the banks could not have differential buying and selling rates, and the only way they could profit was by openly charging commission. However, countries which have joined EMU after the introduction of euro notes and coins have all so far opted for their immediate use.

There are four convergence criteria which must be met in order to join EMU. The third and fourth of these criteria expressly relate to membership of the European Monetary System:

- the observance of the normal fluctuation margins provided for by the Exchange Rate Mechanism ('ERM') of the European Monetary System, for at

least two years, without devaluing against the currency of any other Member State;

- the durability of convergence achieved by the Member State and of its participation in the Exchange Rate Mechanism of the European Monetary System being reflected in the long-term interest rate levels.

Sweden, which joined the Community in 1995, had not participated at all in the ERM, and was known politically not to wish to participate in stage three of EMU, but did not have the benefit of a special protocol like the UK or Denmark. It was concluded that Sweden, by not participating in the ERM, did not fulfil the third criterion. While these criteria have not been interpreted literally, it would appear that a Member State which does not participate at all in the ERM will not be regarded as meeting the criterion, at least if it has suffered currency fluctuation (which is highly likely to be the case). The practical consequence therefore is that to the extent that membership of the ERM was and is voluntary, participation in the third stage of Economic and Monetary Union was and is also voluntary, even though no new Member State has been offered the special treatment given to the UK and Denmark.

The first of the convergence criteria requires the achievement of a high degree of price stability. This is stated to be apparent from a rate of inflation which is close to that of, at most, the three best performing Member States in terms of price stability. Closeness is defined in terms of not exceeding the rates of the best three states by more than 1.5 per cent. However, the second of the convergence criteria, relating to the sustainability of the government financial position, is not simply a hurdle to be passed in order to gain entry to the Eurozone but reflects a continuing obligation and requirement. Sustainability is stated to be apparent from having achieved a government budgetary position without a deficit that is excessive: government deficit must not exceed 3 per cent of GDP, and government debt must not exceed 60 per cent of GDP, although these criteria are not absolute. This requirement is the background to the Stability and Growth Pact.

All these criteria must still be met by any new states wishing to join EMU. However, since the basket ECU has evolved into the euro, a new version of the European Monetary System was created in 1997, under which participating currencies have a central rate against the euro, and must remain within a defined band of fluctuation in relation to that central rate. At the end of 2007, Denmark, Lithuania, Estonia, Latvia, and Slovakia were participating in

this exchange rate mechanism, and Greece, Slovenia, Cyprus, and Malta had graduated from this exchange rate mechanism to participation in EMU.

JOHN A USHER

economic and social rights Economic and social rights broadly include rights relating to participation in the economy, particularly the rights of workers such as the right to fair working conditions, and rights to social goods, notably food, water, health care, housing, and welfare. They are often considered to be a distinct category of **human rights**, different from **civil and political rights** such as **freedom of expression** or the **right to a fair trial**. Influenced by the political conflicts of the Cold War, early international **human rights** treaties tended to cover either civil and political rights or economic and social rights. However, more recent human rights treaties such as the **Convention on the Rights of the Child** contain both categories of rights. It is possible to argue, furthermore, that these supposedly distinct categories are nothing of the sort. Some rights may be found in treaties covering either type of rights. Examples of rights which have been included in both civil and political rights treaties and economic and social rights treaties are **freedom of association**, rights of families to protection, **property rights**, and the right to education. The **European Convention on Human Rights**, and, therefore, the **Human Rights Act**, includes versions of all four rights. In addition, since the 1990s, it is more common to talk about the indivisibility of human rights and to minimize the distinction between categories (sometimes called 'generations') of rights.

Some critics have gone so far as to argue that economic and social rights are not really human rights but merely represent social goals. They argue that civil and political rights merely require states not to interfere with their citizens, whereas economic and social rights require **positive action** by governments, usually through complex institutions and programmes. However, in counter-argument, the same can be said for the right to a fair trial, a typical civil and political right. States must maintain systems of investigation, **prosecution**, and adjudication in order to guarantee a fair trial, just as they have to maintain hospitals and a network of health care professionals in order to guarantee the right to health care.

A related argument is that economic and social rights are not justiciable, meaning that they cannot be the subject matter of a legal dispute before a **court**. This argument is justified on the ground that deciding whether or not a state has violated an economic or

social right involves deciding whether it has used its resources wisely, which is not an appropriate question for a court to answer. Despite these concerns about expanding the scope of **judicial review** of government action, some states do include economic and social rights in their **constitutions** and allow individuals to bring cases before courts concerning these rights. South Africa and India are notable examples amongst **common law** states. In addition, the **United Nations** is currently drafting a procedure which would allow individuals to bring complaints under the **International Covenant on Economic, Social and Cultural Rights**.

HOLLY CULLEN

D Beetham, *Democracy and Human Rights* (Cambridge: Polity Press, 1999), Chapter 6

A Eide, C Krause, and A Rosas, *Economic, Social and Cultural Rights: A Textbook* (Dordrecht: Martinus Nijhoff, 2001)

economic coercion *see use of force*

economic duress *see contract law*

economic refugees From an international law perspective, the phrase 'economic refugee' has long been out of favour, both among states and in the practice of the **United Nations High Commissioner for Refugees** ('UNHCR'). Insofar as they were ready to accept obligations towards refugees, states ensured that the range of beneficiaries was clearly delimited in favour of those outside their own country who no longer enjoyed its protection and/or who had a well-founded fear of persecution. Those who left 'voluntarily' for reasons of 'personal convenience' were therefore outside the refugee protection regime, and considered as economic migrants, not refugees. In common with other countries, the UK's Immigration Act makes no provision for 'economic refugees' and, unlike refugees strictly so-called or family members or skilled migrants, they are not identified in the Immigration Rules as a category either entitled or eligible to be admitted to the UK. In practice, for example in the process of determining refugee status and eligibility for **asylum**, the distinction between the voluntary migrant and the involuntary refugee from persecution, has never been that simple to apply. Its value is also now often called into question in certain forums, given that a certain level of economic deprivation can push people to move, just as more egregious examples of **human rights** violations or the effect of armed conflict. Internationally, the combined effects of globalization, demographic factors, and underdevelopment will likely see migratory flows continuing, and in the

search for solutions, the phrase ‘economic refugee’ may well come into its own.

GUY S GOODWIN-GILL

economic sanctions *see* **sanctions**

economic torts English law does not have a ‘general’ tort of unfair **competition**. Rather, an aggrieved party must identify a specific tort or torts that cover the harm done. The causes of action most appropriate where unfair competition is the gist of the complaint are the so-called ‘economic torts’. This term refers to the torts of simple conspiracy, unlawful conspiracy, inducing breach of contract, intimidation, unlawful interference with trade, and malicious falsehood. The list also includes the important tort of **passing off**. Passing off differs from all the other economic torts in that it can be committed without the intention of causing harm.

The economic torts are often divided into those that require a misrepresentation (passing off and **malicious falsehood**) and those that do not. The prime reason for the existence of the economic torts is the protection of economic interests, particularly in three-party settings where aggressive competition involves targeting the commercial partners or customers of the rival.

Most of these torts had their origins in the early **common law**, but their real development took place from the late Victorian era onwards. The agenda for these torts was set by the important decision of the **House of Lords** in *Allen v Flood* (1898). In this case, a ‘general’ tort of unjustifiable interference with trade was rejected and it was decided that the key ingredient for liability would be the use of unlawful means. However uncertainty has dogged the operation of the economic torts even into the twenty-first century, and key aspects, such as the meaning of ‘intention’ and ‘unlawful’, and the precise relationship between the various torts, are still being debated in the courts.

The two main economic torts are inducing breach of contract (dating from the decision in *Lumley v Gye* (1853)) and the ‘genus’ economic tort of unlawful interference with trade, which was acknowledged by the House of Lords in *Merkur Island Shipping Corp v Laughton* (1983)—although there had been earlier indications of its existence. The genus tort has been defined as interference with a person’s trade by unlawful means with the intention of injuring that person. In essence the tort enables a person (the claimant) to complain of harm intentionally done to them as the result of the use of unlawful means by a second person against a third person. This genus tort

encompasses the tort of unlawful conspiracy (conspiring to do something unlawful to harm the claimant) and intimidation (threatening to do something unlawful to harm the claimant).

By contrast with the tort of unlawful conspiracy, the tort of *simple* conspiracy can (anomalously) be committed by the concerted action of more than one person with the intention of injuring another, even though such action would not be unlawful if engaged in by a single individual.

The tort of inducing breach of contract requires an intentional procurement by one person of a breach of contract by another person’s co-contractor. In essence it enables the victim of the breach to sue in tort the party that procured the breach, as an alternative to suing the contract breaker. The tort may be committed by persuading the co-contractor to breach the contract or by engaging in unlawful action that precipitates the breach. The tort may also be committed by engaging in unlawful conduct that prevents the co-contractor performing the contract properly, even if such non-performance does not amount to a breach. Whereas the gist of the original (persuasion) version of the tort is the breach of contract itself, the gist of the various extensions is unlawful conduct. For this reason, the precise relationship between these varieties of the tort of inducing breach of contract and the genus tort is a matter of debate.

In addition there are economic torts of which the gist is misrepresentation: malicious falsehood and passing off. Malicious falsehood commonly involves a disparagement of a person’s trade or business. It is a tort of limited application, demanding as it does that the victim prove malice, defined as either spite or lies. The contrast with the tort of passing off could not be more stark. Here the standard case involves a trader misrepresenting to third parties that its own goods are the goods of the another—ie passing one’s own goods off as being those of another. A successful claim for passing off provides relief not to those confused as a result of the misrepresentation (the customers or consumers) but to the trader harmed by the misrepresentation. It has been a dynamic cause of action since late Victorian times, with judges acknowledging it should be developed ‘to meet changing conditions and practices in trade’. Though in theory the boundaries of the tort are clear, involving the ‘classic trinity’ of a misrepresentation, the existence of goodwill (or, in other words, a ‘customer base’), and harm to that goodwill, at present it stands at the edge of becoming a more general remedy against unfair competition, preventing a person reaping the benefit of the another’s reputation. HAZEL CARTY